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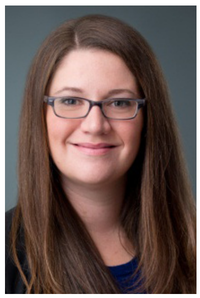
Class-Action Waivers in Employment Arbitration Agreements After *Concepcion*

By Molly Honoré and Robyn Ridler Aoyagi, Tonkon Torp LLP



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Two years ago, in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1750 (2011), the United States Supreme Court overturned the Ninth Circuit and held that class-action waivers in mandatory consumer arbitration agreements are enforceable. Since then, lower courts have not been consistent in their application of *Concepcion* in other contexts, particularly employment actions, and the Ninth Circuit has yet to weigh in.

AT&T Mobility LLC v. Concepcion

Concepcion involved a mandatory arbitration provision in an AT&T cell phone sales and servicing contract. The AT&T contract required customers to bring all claims individually and "not as a plaintiff or class member in any purported class or representative proceeding." When the Concepcions filed a class action against AT&T for false advertising and fraud, AT&T moved to compel arbitration.

The U.S. District Court for the Southern District of California denied the motion, holding the class-action waiver provision unconscionable and the entire arbitration contract unenforceable. As the district court explained, relying on a 2005 California Supreme Court case, class-action waivers in adhesive consumer contracts are unconscionable under California law because consumers cannot effectively prosecute low-dollar claims except through class actions. The Ninth Circuit agreed and affirmed.

The U.S. Supreme Court reversed. Recognizing the "liberal federal policy favoring arbitration," the Court held that the Federal Arbitration Act (FAA) preempts California law. State laws conditioning the enforceability of arbitration agreements on the availability of class-wide arbitration procedures are incompatible with the FAA and therefore preempted.

Applying *Concepcion* in Employment Cases

Since *Concepcion*, courts have disagreed about whether and how to apply *Concepcion* to employment claims. The main point of contention has been whether the FAA allows parties to waive pursuit of collective claims under federal employment laws, particularly when those laws arguably give employees a statutory right to bring a class action. Although *Concepcion* clarifies that the FAA preempts state laws prohibiting waiver of class actions, it is unclear whether the FAA overrides federal laws granting the right to bring class actions.

The NLRB and the SDNY – Unenforceable

In *In re D.R. Horton*, 357 NLRB No. 184 (2012), the National Labor

Relations Board (NLRB) held that a class-action waiver in an arbitration agreement did not bar employees from bringing collective claims under the National Labor Relations Act (NLRA). Distinguishing *Concepcion*, the NLRB reasoned that the NLRA is not automatically preempted by the FAA and that the Supreme Court has previously held that an arbitration agreement cannot require parties to waive substantive federal statutory rights. The NLRB concluded that the ability to bring a collective action under the NLRA was an implicit substantive right under the Act, and therefore not waivable in an arbitration agreement.

The U.S. District Court for the Southern District of New York reached a similar decision in *Sutherland v. Ernst & Young LLP*, 847 F.Supp.2d 528 (S.D.N.Y. 2012). In that case, an employee who had signed a mandatory arbitration agreement agreeing to bring only individual claims filed a class action against her employer under the Fair Labor Standards Act (FLSA). The employer moved to compel arbitration, and the SDNY court refused, applying similar reasoning as *D.R. Horton* and concluding that the prohibitive costs of proceeding individually would effectively deprive the employee of her substantive FLSA rights if the arbitration agreement were enforced.

The Third Circuit – Enforceable

The Third Circuit disagrees. In *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221 (3d Cir. 2012), the Third Circuit upheld mandatory arbitration of the FLSA and state law claims in an employment lawsuit. The court declined to address whether the particular arbitration agreement in that case allowed class arbitration, leaving that issue to the arbitrator to decide. However, even if the agreement did not allow class arbitration, the court concluded that it would not be unconscionable. Applying *Concepcion*, the court held that the FAA preempts Pennsylvania law on unconscionability. It did not discuss whether the FLSA gave employees any substantive right to bring a class action.

The Eighth Circuit and the EDNY – Enforceable, With a Twist

Most recently, the Eighth Circuit enforced a mandatory arbitration agreement with a class-action waiver in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). Disagreeing with *D.R. Horton* in particular, the court reasoned that the FLSA contains no express right to pursue class claims and that Congress reenacted the FAA *after* enacting the FLSA. The court also looked favorably upon the fact that the particular arbitration agreement in this case expressly reserved the employee's right to file a complaint with administrative agencies like the EEOC, which agencies the court noted could investigate and file claims on behalf of a class of employees if warranted.

The U.S. District Court for the Eastern District of New York has since adopted the reasoning from *Owen* and upheld a class-action waiver in a similar mandatory arbitration agreement that allowed employees to file complaints with administrative agencies. *Torres v. United Healthcare Servs., Inc.*, __ F.Supp.2d ___ (E.D.N.Y. Feb. 1, 2013).

The Ninth Circuit – Undecided

The Ninth Circuit has yet to consider whether and how to apply *Concepcion* in the employment arbitration context. *Concepcion* came out of the Ninth Circuit, which has historically rejected class-action waivers in consumer contracts. It is unclear how the Ninth Circuit will approach this issue in the employment arbitration context, especially after *Concepcion*.

Conclusion

Since *Concepcion*, federal courts appear inclined to enforce mandatory arbitration agreements with class-action waivers in employment lawsuits. However, the law is not settled in this area, and the Ninth Circuit has yet to weigh in. It therefore is important to research current law on this issue in the appropriate jurisdiction whenever your case involves an arbitration agreement with a class-action waiver.

Comments From the Editor

Avoid Predeposition Information Overload

By Dennis Rawlinson, Miller Nash LLP

Dennis Rawlinson

In recent years, revisions to Federal Rule of Civil Procedure 30(d) and state and local counterpart rules relating to depositions have substantially reduced the impact that an attorney defending at deposition can have on the deponent's testimony.

Objections made during deposition must now be made concisely and in a nonargumentative and nonsuggestive manner. The revised rules now discourage the lawyer who is defending the deposition from giving the deponent any "help" during the deposition.

These developments have made it all the more important that a deponent be properly prepared for the deposition. By the time the deposition starts, the deponent needs to be able to proceed independently and without lawyer assistance.

Realizing the foregoing, I continue to be puzzled why most of us tend to prepare our witnesses for deposition by overloading them with information that they cannot digest and cannot possibly remember and that is likely to cause them to perform less effectively than if they had been given no information from us at all. We would do better, I believe, in predeposition preparation to provide our witnesses with a limited number of simple principles rather than launching an avalanche of information and overloading them.

A. Information Overload.

Over the course of our careers, based on our reading and experience, we accumulate a list of principles on what a witness should do in a deposition. So far, so good. Typical principles might include the following:

- Tell the truth.
- Listen carefully to each question.
- Be brief.
- Do not give information that is not asked for.
- Do not guess if you are not certain.
- Make sure you understand the question.
- Take your time.
- Give an audible answer.
- Avoid testifying about the knowledge of others.
- Do not exaggerate.
- If you make a mistake, say so.
- Do not lose your temper.
- Avoid joking and making wisecracks.
- Select the words in your answer thoughtfully and carefully.
- Do not discuss conversations with your lawyer.
- Beware of questions involving distance and time.
- Give your lawyer time to raise objections to questions.
- If there is an objection, do not answer until told to do so.
- Do not let the adverse lawyer fool you with kindness.
- Give complete answers.

We invite our witness to a deposition preparation session on either the morning of or the night before the deposition. We then spend 45 minutes or more lecturing the person on how to be a good witness, covering these 20 principles and even more.

Inevitably, the witness feels like a worker caught behind a dump truck when the truck bed is lifted, the gate opened, and the contents dumped. The witness experiences information overload.

Moreover, if we look closely at our principles, many of them are inconsistent and in conflict with each other. For instance, I suspect that all of us have read, heard, or used the following predeposition instructions, which upon careful examination we see are inconsistent or confusing:

- Give complete answers/do not volunteer information.
- Be courteous/do not be overly friendly.
- Be "careful" in your answers/do not try to "outthink" the other lawyer.
- Take your time/do not take so long that you appear to be making up your answers.
- Allow time for objections to be raised/probably I will raise no or few objections.
- Listen carefully to each question/do not overanalyze the question.
- Do not guess if you are not certain/say with certainty what you know.
- Tell the complete truth/answer only what you are asked.
- Give a positive answer/do not exaggerate.
- Do not be afraid/the questioner will try to hurt you.

The result is that we too often end up with a deponent who is confused and becomes convinced that no matter what he or she does, it will be wrong. Such a witness is usually less effective in deposition than if the witness had never spoken with us.

B. Concentrate on Simplicity.

Instead of "dumping" 20 principles on your deponent before the next deposition, I suggest that you limit your instructions to three or four simple principles. Sure, you can cover a number of other suggestions, but I believe it is best to encourage the witness by saying that he or she will do an outstanding job if he or she simply remembers and practices the three or four principles. If your witness happens to remember some of the other things you discuss with him or her, then fine—but if not, it won't be a problem.

Your objective is to relax the witness, not place him or her like a deer at night on the highway, frozen in the headlights of an oncoming car.

Consider the following three or four principles. It may well be that others or similar principles stated differently will be more effective for you.

- Analyze the question.
- Make sure you understand the question.
- Pause.
- Answer briefly.

A brief explanation of each is set forth below.

1. Analyze the question.

The witness should realize that this is not everyday conversation. The witness should be focusing on the question just as if it were projected on a screen in a slide show. Each word should be analyzed. The witness should not assume or anticipate the context.

The witness should then determine whether the question is fair and understandable. Whether each word in the question is accurate. Whether the question uses language that the deponent might not use or be comfortable in using.

2. Make sure you understand the question.

The witness should understand that he or she has rights. If the question is not fair or understandable, the witness is entitled to have it restated or rephrased or to have the troublesome word or phrase explained or restated.

The witness should proceed with answering the question only when the witness is certain what has been asked.

3. Pause.

This may be the most powerful principle. Pausing allows the deponent to be analytical and consider his or her answer carefully before it is given. It allows the witness to take control in a setting in which the questioner normally has control. The witness can control the pace.

The transcript will not disclose the length of time taken to answer. The deponent should be deliberate in his or her choice of words. The deponent should think about what he or she wants to say and then carefully select the words that express the thought in the best way possible.

The witness should realize that the silence created by the pause before the answer is the witness's "friend." Although silence in everyday conversation is awkward, in deposition, it is the deponent's ally.

4. Answer briefly.

The longer the deponent's answer, the more questions the examiner will think of based on the answer. Moreover, by volunteering more information than was asked, the deponent runs the risk that he or she will be providing to the examiner information that will eventually be used against the deponent.

Often, a one-sentence or even a one-word answer will be sufficient. The witness can summarize, if necessary, to enable the witness to answer in one sentence or less.

C. Conclusion.

The next time you prepare a witness for deposition, instead of backing up a dump truck containing the 20 deposition principles that you have assembled over the course of your career and dumping them on the deponent, thus creating the risk of information overload, keep your instructions simple.

Provide the witness with simple, easily understood principles that the witness can remember easily and that will instill confidence.

This is not to suggest that practicing deposition testimony before deposition isn't essential. And this is not to suggest that dialogue is not more effective than lecturing during deposition preparation. But proper deposition preparation begins with simplicity and confidence-building, not information overload.

Try it.

Creative Fee Agreements – Blending Interests and Expenses

By David B. Markowitz and Joseph L. Franco, Markowitz, Herbold, Glade & Mehlhaf, PC

Dave Markowitz

Joseph Franco

What Are Creative Fee Agreements, and Why Do Clients Want Them?

Creative fee agreements depart from the typical all-hourly or all-contingent models. In the former, the client typically bears the financial risk of litigation, as the payment of legal fees is untethered to the ultimate outcome of the case. In the latter, the economic risk is shifted largely to the lawyer, as payment of fees is entirely contingent upon a successful outcome for the client. Creative fee agreements blend aspects of the hourly and contingent models to re-allocate the risk of litigation based upon client needs and goals, and the lawyer's tolerance for risk.

Commercial litigation clients increasingly desire creative fee agreements because they can be tailored to a client's particular financial reality. A client, for instance, may have a large complex case worth $20,000,000, which would take $100,000 in legal fees per month to properly fund, but a stream of only $20,000 per month to allocate toward legal expenses. A creative fee agreement under these circumstances might consist of an agreement to cap monthly fees at $20,000 per month, with a 15% contingent interest in the client's recovery. Such an arrangement would take into account the client's ongoing ability to pay legal expenses as well as align client and lawyer interests in achieving a significant recovery.

Formation of Creative Fee Agreements

In addition to potential benefits to the client's and lawyer's bottom line, the process of forming creative fee agreements will often lead to increased client satisfaction with the litigation process.

There are three steps that typically lead to the formation of a good creative fee agreement. First, the client establishes the goals of the litigation, including a quantification of the importance of each goal. Put another way, the client always decides what the win is, and how much the win is worth. Second, for each identified goal, the lawyer should evaluate the costs, risks and length of time to completion. As discussed more fully below, this step is why many firms are unwilling or unable to embrace creative fee agreements. After analysis of the client's goals, the third and final step is the creative process of merging the client's interests and lawyer's interests so that both parties are benefitted (or harmed) in similar ways based on the outcome of the matter – with the client's goals being the yardstick for measuring "outcome."

To give you an idea of how this looks in practice, we discuss seven examples of different types of creative fee agreements that the authors' firm has entered into with clients over the years.

Examples of Creative Fee Agreements

A. Standard Blended Fee Option with a Contingent Interest

A standard blended fee option with a contingent interest is the most prevalent creative fee agreement. Such an agreement allows the client to convert a standard hourly fee arrangement into a reduced fee arrangement, with a contingent interest to the firm based upon a successful recovery.

As an example, the client would have the option to convert a standard hourly arrangement into a blended fee deal whereby the client would receive a 33% discount off the firm's regular hourly rates in exchange for the firm receiving a contingent fee of 15% of any gross economic recovery. Accordingly, once the client invokes this option, the client would receive a 33% discount off the firm's hourly rates for the life of the case. If, for example, the client was awarded $4,500,000 in damages related to the dispute, the firm would be entitled to a contingent fee of 15% of $4,500,000 or $675,000 as part of the deal.

B. Modified Blended Fee Option with a Contingent Interest Containing a Floor

As a variation on the theme above, the blended fee option may also contain a floor – so that a certain gross recovery threshold would have to be met in order for the firm's contingent interest to be triggered. Using the numbers from the example above, the client and firm might agree that the client would receive a 50% discount off the firm's regular hourly rates in exchange for the firm earning a 25% contingent fee on any gross economic recovery above $500,000.

C. Modified Blended Fee Option with a Contingent Interest Containing a Carve Out for a Jurisdictional Issue

Creative fee agreements can also be structured to take into account the risk created by jurisdictional issues. For instance, a threshold jurisdictional issue may exist that could result in a matter being dismissed from a United States court and litigated in Japan or Europe. Accordingly, the client and firm might agree that the client would receive a 33% discount off the firm's regular hourly rates in exchange for the firm receiving a 15% contingent fee on the client's gross economic recovery. The parties might further agree, however, that if the case was dismissed in the U.S. and continued in Japan or Europe, then the firm would release its right to the contingent fee at the election of the client in exchange for a predetermined payment.

D. Standard Blended Fee Option with a Reverse Contingent Interest

Creative fee agreements are not only for the plaintiff's bar. The firm and client may agree that the firm will have a contingent interest based upon a successful defense verdict. Assume the client agrees to pay the firm 75% of its regular hourly rates. In exchange for the 25% discount off the firm's regular hourly rates, the client agrees to pay the firm a contingent fee of 25% on the amount a settlement or final judgment is below $1.1 million. So, under this agreement, if the parties settled and the plaintiff received $1 million, the firm would receive a contingent fee of $25,000 (25% of $100,000). Or, if the plaintiff obtained a final judgment of $500,000 then the firm would receive a contingent fee of $150,000 (25% of $600,000). If the plaintiff received no monetary award, then the firm would receive a contingent fee of $275,000 (25% of $1.1 million).

E. Modified Blended Fee Option with a Contingent Interest Containing Monthly Cap on Fees

A creative fee agreement that we can discuss in some detail – because it is public information – is the fee agreement that the authors' firm entered into with the City of Albany over litigation the City had with PepsiCo.

This fee agreement was unique in several ways. First, the parties agreed to cap the monthly fees paid by the City. Pursuant to the agreement, the City received a 50% discount on the firm's standard hourly rate. However, because it was important to the City's budget to have a fixed monthly amount in litigation costs, the parties agreed that the City's monthly fees would be capped at $20,000 each month, with any fees in excess of $20,000 per month rolled over to the following month until all the fees incurred were paid in full.

Second, in exchange for the discount to the City, the firm received a contingent fee of 15% of gross economic recovery in excess of $10 million. However, the firm agreed to deduct from the contingent fee all prior payments by the City to the firm (the $20,000 a month in fees).

Additionally, the firm included a "put our money where our mouth is" clause in the fee agreement. It was apparent that the City might have obtained a settlement with PepsiCo for $10 million pre-litigation. Accordingly, the firm agreed that if it tried the case and obtained a judgment for less than $10 million, then the firm would repay the City all of the discounted monthly fees the City had paid to the firm (the $20,000 a month in fees).

Happily, the case settled for $25 million, which also is a matter of public record.

F. Modified Blended Fee Option with a Contingent Interest based on Events

Creative fee agreements can also contain a contingent interest that is driven by events in the litigation – not just economic outcomes. For example, the client may have a main goal of defeating a request for a preliminary injunction. The parties may agree that the client would receive a 25% discount off the firm's standard hourly rates. The discounted money would then be placed into a bonus pool, with the firm's contingent fee based on the success or failure of certain events, with a multiplier applied to the amount of money contained in the bonus pool.

Accordingly, if the firm obtained victory at the preliminary injunction hearing (i.e., if no injunction entered), then the firm would receive 200% of the bonus pool money. If no victory was obtained at the preliminary injunction hearing, then the bonus pool reset (i.e., the client kept the discount) and the timing and amount of settlement would determine the contingent fee. If no settlement was achieved, then the contingent fee would be based upon the final result.

G. Modified Blended Fee Option with a Contingent Interest based on Multiple Issues

As a final example, one of the earliest and arguably best contingent fee agreements entered into by the authors' firm was one in which the firm's contingent interest depended upon multiple issues – but primarily, the speed of resolution of the case. The parties agreed the client would pay a monthly flat fee in exchange for the firm having a contingent interest. However, the firm's contingent interest was reduced monthly by the amount of the flat fee paid by the client. The longer it took the firm to resolve the case, the less money it could make as a contingent fee. This creative fee agreement aligned the client's primary goal of speed of resolution with the firm's goal of obtaining a contingent fee upon resolution of the case.

Given Their Benefits, Why Do Many Firms Avoid Creative Fee Agreements?

The benefits of creative fee agreements extend beyond simply providing some potential upside for a firm in the event of a successful outcome. The real benefit is that they lead to an individualized approach to client needs and goals that help the creative firm to land the client in the first place, and increases overall satisfaction with the litigation experience. This increased client satisfaction will often lead to repeat business and additional referrals.

Given these benefits, most firms would probably want to utilize creative fee agreements but for the one thing most lawyers seem genetically programmed to avoid: risk. Analyzing the litigation costs and fees, risks of success or failure, and expected length of time to achieve goals not only requires experience – it also requires the firm to be willing to take on risk. Many firms are risk averse when it comes to putting their own skin in the game because they do not have the experience necessary to accurately assess costs, risks and length of time for completion of complex goals and cases. To the extent practitioners can get over their aversion to risk, and take steps to mitigate it by informed analysis and preparation, then a world of work that is currently out of reach could become available.

Conclusion

As hourly legal fees continue to rise, clients – even large institutional clients – are increasingly looking for ways to minimize costs and risk. Naturally, firms that are in a position to offer creative fee agreements that align the expense and timing of litigation with client goals will be at a competitive advantage in obtaining and retaining clients. If a firm is good at analyzing litigation timing, cost and probable outcomes, then creative fee agreements are worth the risk.

The Role of the Corporate Attorney in a Closely Held Corporate Derivative Suit

By Christopher J. Kayser, Partner, Larkins Vacura LLP


Christopher Kayser

It's a common scenario. As the economy collapsed, a closely held thriving company's profits dwindle. The once happy passive investor begins to wonder where the money went and begins to ask questions, review financials, and demand corporate records. The shareholder dispute is set in motion. In the middle of this business divorce of often heated emotions and dollars large and small is the "Corporation," an inanimate entity lacking any malintent or emotional baggage and usually holding all the assets and cash. An ideal client some might think. But do not be fooled by the Corporation's detached neutrality or lured by its financial stability. In a shareholder dispute, the Corporation is the worst of all possible clients.

Who is the Corporation?

The reason why closely held corporations do not make good clients in shareholder disputes finds its origins in ORPC 1.13. That rule explains that a corporate attorney "represents the organization acting through its duly authorized constituents." Those "duly authorized constituents," according to the ABA's comment on the identical model rule, include officers, directors, employees, and *shareholders*. Under this construction of the corporate attorney-client relationship, commonly known as the entity theory, the corporate attorney only represents the constituents in their "representative" capacity; the attorney in no way represents the constituents personally. *Meehan v. Hopps*, 301 P.2d 10,14 (Cal.Dist. Ct. App. 1956). In other words, the corporate attorney can take on the detached neutrality of the corporate client, act in the best interests of the Corporation, avoid taking sides in a shareholder dispute, and still maintain the privilege in communications between the divergent interests. That, however, is easier said than done.

Take for example, the following hypothetical. Passive investor Jones, one of two 50% shareholders, has asked to inspect the corporate books and records because he suspects the company's president and shareholder, Smith, has been stealing from the company. Smith tells you, the Corporation's longtime attorney, to refuse to provide the records because she thinks Jones intends to share them with a competitor. Smith wants you to represent the Corporation in any action Jones may file to obtain the company's records. Ordinarily, under the entity theory of corporate representation, an attorney has no ethical conflict in representing the corporation even when doing so might be contrary to interests of one of its shareholders.[1] The answer may, however, change if the corporation is closely held.

In re Banks, 283 Or 459, 584 P2d 284 (1978) muddied the clarity of entity representation for closely held corporations. That case involved a company that had four principal shareholders – husband, wife, and two daughters. The attorney represented the corporation in drafting an employment agreement with the husband who was also the president of the company. After a change in control of the corporation, the same firm later sought to enforce the agreement against the president. The court concluded that those facts provided a "logical exception" to the entity theory reasoning that at the time the contract was prepared the shareholder "was the corporation" and that the corporate entity should be ignored.[2]

In re Brownstein, 288 Or 83 (1979) similarly confirmed the blurry boundaries of corporate representation in a closely held context. The Oregon Supreme Court reprimanded an attorney who represented a third party with interests adverse to shareholders of the closely held company he represented. It did not matter whether the attorney ever represented the shareholder individually because "in a small, closely held corporation the rights of the individual stockholders who control the corporation and of the corporation are virtually identical and inseparable." *Id.* at 86. The only out to this ethical conundrum is advance planning: an attorney must reach "a clear understanding with the corporate owners [at the outset of the representation] that the attorney represents solely the corporation and not their individual interests." *Id.* at 87. Absent a clear understanding, a corporate attorney risks inadvertently entering into an attorney-client relationship with both the closely held corporation and its shareholders.

What are the Company's Best Interests? The Case of the Corporate Deadlock

Returning to the hypothetical and assuming Jones and Smith were properly advised of the nuances of corporate representation, how then does the corporate attorney decide whether producing the corporate records would be in the best interests of the company when both shareholders claim that the other is breaching their fiduciary duties? On that issue, there is little guidance. An ethics opinion from the Washington D.C. bar advises that the attorney should follow the direction of the corporate executive who is authorized to engage the attorney even if it requires taking action adverse to one of the two shareholders "unless the lawyer becomes convinced that [one shareholder's] decisions are clearly in violation of [the] fiduciary duties [owed] to the corporation." In that case, "the lawyer may be forced to seek guidance from the courts as to who is in control of the corporation, there being no higher authority within the corporation to whom the lawyer can turn." DC Ethics Opinion 216 (1991). That, however, is unsatisfying. How does an attorney go about obtaining an advisory ethics opinion from the court and on whose behalf? There is no easy answer.

Under the facts of our hypothetical, what if the refusal to disclose the records aids in Smith's ability to cover up her misdeeds? Under one Oregon Supreme Court decision, that may result in liability for aiding and abetting a breach of fiduciary duties. *See Granewich v. Harding*, 329 Or 47 (1999). In *Granewich*, corporate attorneys who, at the direction of majority shareholders and officers, assisted in calling special meetings of the board and amending by-laws in an effort to squeeze out the minority shareholder could be liable for aiding the majority shareholders' breach of fiduciary duties. The court has since modified the breadth of *Granewich* by providing attorneys with a privilege from tort liability for assisting breaches of fiduciary duties when the attorney is acting on behalf of the client and within the scope of the attorney-client relationship. *Reynolds v. Schrock*, 341 Or 338 (2006).

But *Reynolds* only provides a limited privilege from tort liability. The *Reynolds* court explained that it was not overruling *Granewich*. The attorneys in *Granewich* would not have qualified for the privilege because while they purported to act on behalf of the corporation they were in fact acting for the majority shareholder. Because they were therefore acting outside the scope of a lawyer-client relationship, they were not entitled to the protection of the privilege against joint liability. In our hypothetical, by refusing to provide corporate records a shareholder is entitled to, the corporate attorney is arguably acting beyond the scope of the corporate attorney-client relationship and instead is acting solely to advance the interests of one of the two shareholders. Beware.

Corporate Attorney or Investigator?

Returning again to our hypothetical, before deciding to follow Smith's directive not to produce records to Jones, do you need to investigate Jones' allegation that Smith is stealing from the company? Under ORPC 1.13(b), there is a duty to "report up" to a higher corporate authority if the lawyer "knows" an officer is engaged in wrongdoing that could harm the company. ORPC 1.0(h) defines "knows" as actual knowledge of the fact in question. But does that mean a lawyer can ignore allegations of wrongdoing by one of the corporate constituents? On that issue, there is little guidance. The ABA Comment on Model Rule 1.13(b) clarifies that "knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious." The Maine Board of Overseers of the Bar goes even further, explaining that "[A] lawyer may not stay willfully uninformed. Lawyers have a duty to investigate potential wrongdoing, if they have the concern that such wrongdoing may harm the client." That type of duty to investigate potential wrongdoing in a closely held corporate context raises numerous problems for the corporate attorney.

Consider a duty to investigate under the facts of our hypothetical. It would require you to investigate alleged wrongdoing of Smith (i.e., the corporate president paying your invoice) and generate evidence that will be useful to Jones' claims. As you embark on your investigation of Jones' allegations, you are once again reminded of *In re Banks, In re Brownstein,* and *Granewich*. You begin to wonder who is your client, whose interest you are pursuing, and who will sue you first. But hopefully you never get there because you read this article and realized that life is too short to represent a corporation in a closely held shareholder dispute.

(Endnotes)

1 Under ORPC 1.13(f), "a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

2 *See also, Woods v. Superior Court,* 197 Cal. Rptr. 185 (Cal. Ct. App. 1983) (attorney who represented corporation owned by husband and wife could not represent husband in divorce proceeding because "in representing an ongoing family corporation, [counsel] in a very real sense continues to represent [the] wife"). *But see, Meehan v. Hopps,* 301 P.2d 10,14 (Cal.Dist. Ct. App. 1956).

Has Patent Reform Changed Texas?

By Brenna Legaard, Lane Powell PC*

**The author wishes to thank her assistant, Suzanne Lukas-Werner, for her able help in compiling the data used to produce this article.*

Brenna Legaard

"Patent Trolls"

Over the past decade, corporate America has found itself sued for patent infringement in the Eastern District of Texas, often by smaller entities which do not practice the technology disclosed in the asserted patents. The Eastern District of Texas has acquired a reputation for practices that are friendly to patent plaintiffs, and as a result has become a hot venue for patent cases.

All litigation is expensive, and obtaining a ruling on the merits in Federal Court is never easy. However, the technical issues and additional procedures involved in a patent case make the costs of judicial resolution especially high. The 2011 American Intellectual Property Law Association's Report on the Economic Survey reports that the median cost of a patent infringement suit with less than $1 million at risk is $350,000 at the end of discovery and $650,000 inclusive of all costs. A plaintiff asserting a patent against a large number of defendants can settle with each defendant for less than the cost of defense and still be handsomely compensated. If that plaintiff does not offer a product or service or compete with the defendants in the marketplace, it probably sustained no economic harm from the activities of the defendants, and those settlements look very much like free money.[1]

The term "patent troll" has been enthusiastically adopted as a derisive term for an abusive patent plaintiff. "Patent troll" activity is said to drag down the economy and suppress innovation by imposing a "tax" on technology companies when their innovations unwittingly stray into the claim scope of a "troll's" patent. "Patent trolls" are blamed for dragging down stock prices, slowing economic growth and technological advances, forcing companies out of business, and a host of other evils. Exactly what makes a plaintiff a "patent troll" is subject to considerable debate, however. Industry consensus was quick to reach the determination that some patent litigation is legitimate and some is illegitimate, but has struggled to define the difference. "Patent trolls" have few defenders. Small inventors, on the other hand, are regarded as a uniquely American source of invaluable innovation, not to mention sheer entrepreneurial pluck. Plucky entrepreneurs may not sue their bigger rivals in the Eastern District of Texas, but if they could not do so, the minute they invented something valuable it could be stolen by those bigger rivals.

Many anti-troll measures have been suggested, and those measures typically involve weakening the rights or remedies available to small or non-practicing entities in patent fights against big entities. Such measures would hamstring both plucky entrepreneurs and "patent trolls."

The Eastern District of Texas, the venue of choice for patent plaintiffs,[2] has remained the epicenter of the debate about "trolls" and what, if anything, should be done about them. One of the things that makes the Eastern District so attractive to patent plaintiffs is its permissive interpretation of joinder rules. Federal R. Civ. P. 20 permits a plaintiff to join multiple defendants in a single suit if (A) there is a commonality of "transaction, occurrence, or series of transactions or occurrences," and (B) "any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2)(B). In *MyMail, Ltd. v. AOL, Inc.,* 223 F.R.D. 455 (E.D. Tex. 2004), the plaintiff sued a host of defendants that had no commonality beyond the plaintiff's allegation that they infringed the same patent. When some defendants moved to sever and transfer, the court concluded that because the "legal question as to the '290 patent's scope" was common as to all defendants, both prongs were satisfied and Rule 20 permitted joinder. *Id.* at 457.

This liberal interpretation of the joinder rule is widely believed to tilt the playing field toward plaintiffs because it permits them to join a large number (dozens, even hundreds in some cases) of geographically diverse defendants in a single suit. This makes transfer of the case to a more convenient or less plaintiff-friendly venue difficult. Even if some of the defendants should not have been sued in Texas, if there is no single forum appropriate for all of the defendants, the case is more likely to stay in Texas. Judges in the Eastern District often require all defendants to coordinate. Defendants often must submit a single collective brief on issues such as claim construction and/or pool deposition time and written discovery such as interrogatories. This coordination can be burdensome, especially among a large number of defendants with different products, and is often imposed even when it is inappropriate. Mass suits create efficiencies for the plaintiff, especially where defendants are ordered to speak as one. The incremental cost of adding a defendant to a suit that already names dozens is low, which leads to the assertion of marginal causes of action which would not have been brought as stand-alone cases.

These mass suits facilitate some efficiencies for defendants, too. Over the years the software industry has consolidated and a single supplier is more often the source of all of the accused defendants' code. It is the author's anecdotal experience that indemnification and/or the assumption of the defense by the supplier of the accused code is far more common than it was five or ten years ago. In such cases, an indemnifying company may actually prefer that all suits against its otherwise unrelated customers be consolidated in a single venue. When "trolling" first became prominent, corporate defendants typically treated "troll" suits too much like they treated must-win patent battles between competitors. Defendants are more savvy now, and far more efficient, and big joint defense groups are often a key component of that efficiency.

Nevertheless, mass suits are obnoxious from a defendant's perspective simply because they remain a vehicle for a plaintiff to settle for nuisance value (over and over again), avoid testing the validity of the asserted patent, and still get rich. As long as it costs several million dollars to adjudicate the validity of a patent and a defendant can settle out for a fraction of that, mass patent suits will be a viable business model. On a visceral level, many simply find that unfair.

Patent Reform

On September 16, 2011, the America Invents Act was signed into law. The AIA constitutes the single most significant amendment in the patent law since the Patent Act of 1952. During the years in which Congress mulled over various patent reform proposals, observers either anticipated or feared a significant weakening of the patent system in order to combat "trolling." The AIA contains only one provision aimed at weakening patent plaintiffs' hands: a provision aimed squarely at the Eastern District of Texas' interpretation of the joinder rules.

Section 19(d) changes the permissive joinder rules that permit defendants to be named in the same suit even though they have nothing in common beyond being accused of infringing the same patent. Under the new law, defendants can only be joined in the suit or consolidated for trial if the parties are alleged to be jointly or severally liable, if the alleged infringements arose out of the same transaction or occurrence, or if there are common questions of fact.[3]

The provision was aimed squarely at the Eastern District of Texas. The House Report accompanying H.R. 1249 states that the new provision "clarifies that joinder will not be available if it [sic] based solely on allegations that a defendant has infringed the patent(s) in question." H.R. Rep. No. 112-98 at 54-55. In a footnote, the report explains that the section is intended to "abrogate the construction of Rule 20(a)" adopted in seven cases, five of which were from the Eastern District, "effectively conforming these courts' jurisprudence to that followed by a majority of jurisdictions." *Id.* at 55 n. 61.[4] Senator Kyl's comments were still more pointed: the provision "effectively codifies current law as it has been applied everywhere outside of the Eastern District of Texas." 157 Cong. Rec. S5429 (daily ed. Sept. 8, 2011) (statement of Sen. Kyl). The provision was also clearly and specifically intended to combat "troll" suits.[5]

The law got off to a promising start. The day before the AIA took effect, September 15, 2011, at least 54 patent cases were filed against more than 800 corporate entities by plaintiffs seeking to avoid the new law, the most patent suits ever filed on one day. The average complaint accused 16 defendants of infringement.[6] Clearly, a significant number of patent plaintiffs felt that the new law would complicate their plans. From January 1 through September 15, 2011, the average number of defendants per patent case (excluding false marking cases) in the Eastern District of Texas was 7.0. Between September 16 and December 31, 2011, the average number of defendants per patent case filed in the Eastern District of Texas fell to 1.9.[7]

Many commenters have predicted that the new provision will enable defendants to obtain transfers to other venues more easily because they will no longer be shackled to dozens of unrelated co-defendants, that defendants will be relieved of obligations to coordinate their actions with other parties, and that at least some marginal cases against small defendants will not be brought.[8] However, defendants sued alone would be denied the efficiencies of joint defense groups, and indemnifying suppliers will face adjudications of their products in multiple cases or even multiple jurisdictions when their customers are sued separately. Additionally, a number of avenues around the nonjoinder provision remain. Judges are free to consolidate cases for all pretrial matters, which is significant given the relatively low likelihood that an archetypal "troll" case will ever make it to trial. Also defendants can waive the new joinder limitations. Given all of that, one year and four months out, has anything changed in the Eastern District?

To find out, we looked at 60 cases filed in the Eastern District of Texas after the AIA took effect. We chose that subset of cases because a Pacer search indicated that they were patent cases with either "sever" or "consolidate" used in their dockets and because all related cases, if any, were filed after the implementation of the AIA.

"Single defendant" cases

Of the 60 cases examined,[9] 42 named single defendants or only defendants that appear to be closely related,[10] and appear to comply with the AIA's joinder provision.

Consolidation

Consolidation appears to be the rule. Of the 42 cases naming only single defendants or closely related defendants, 26 have been consolidated with at least one other case.[11] Another five cases have unresolved motions to consolidate.[12] Only one motion to consolidate has been denied.[13] Patent plaintiffs who file separately appear to have no trouble obtaining consolidation of their cases. In some instances, the court appears to have consolidated cases without a motion to consolidate.

These consolidated defendants cannot be tried together, but as trial is highly unlikely anyway, the only real effect that the AIA appears to have had is to require additional filing fees from the plaintiff.

Transfer

Six defendants have successfully obtained transfer out of Texas.[14] Four of those defendants were sued by Maxim Integrated Products in February of 2012, and plaintiff filed motions to consolidate and transfer to the Western District of Pennsylvania, suggesting that in the early months after the rule change, plaintiff secured defendants' agreement to be consolidated by coupling consolidation with a ticket out of Texas.

Another 17 defendants have filed motions seeking a change in venue, and those motions are still pending.[15] Most of those motions have been pending since May of 2012, and in the intervening seven months the cases have simply progressed in Texas, making transfer seem unlikely.[16] In fact, in a number of those cases the court has issued consolidation orders after the defendants had filed their motions to transfer.

Aside from the Maxim defendants, who got transferred out of Texas on plaintiff's motion, 19 defendants, all sued individually, have tried to transfer out of Texas, and two have succeeded. In many cases the court has simply ignored motions to transfer. This does not suggest that the AIA will facilitate transfer out of the Eastern District.

"Multi-defendant" cases filed post-AIA

Out of the 60 cases examined, 13 name defendants that are clearly unrelated, and seem to have been filed in violation of the AIA joinder rule.[17] Those 13 cases accuse 148 defendants of patent infringement.

Motions to dismiss

Only one of those 148 defendants appears to have filed a motion to dismiss for misjoinder. Vanativ, LLC, sued by Swipe Innovations, LLC, filed this motion on

July 17, 2012.[18] The court denied the motion to dismiss, severed Vanativ, required plaintiff to pay another filing fee, and then immediately consolidated the two cases.

Motions to transfer

At least six defendants have filed motions seeking transfer out of Texas as part of a remedy for misjoinder.[19] None of those defendants has been successful.

Motions to stay

Another four motions to sever and stay have been filed by mis-joined defendants.[20] None of those motions has been granted.

Motions to sever

A more successful strategy, albeit one of limited impact, is a motion to sever. In the Swipe Innovations case, following Vantiv's severance (then consolidation), a number of other defendants filed unopposed motions to sever.[21] The court granted the motions to sever and then promptly consolidated the new cases. The plaintiff paid some additional filing fees, and the severed defendants secured guarantees of individual trials should the litigation progress to trial.

Conclusions

Patent reform, it seems, has not changed much in the Eastern District of Texas. If a defendant has been named in violation of the AIA joinder provision, the best it can hope for is to be severed and then immediately consolidated, winning nothing more than its own trial, should the case progress that far. All of plaintiff's pretrial advantages have survived handily, and transfer out of Texas seems to be no more likely now than it was before the AIA was passed. Limited data suggests that defendants sued separately in compliance with the AIA do not stand a higher chance of transfer out of Texas than defendants sued in violation of the AIA. Finally, the Eastern District of Texas, pointedly ordered to change its ways by Congress, does not seem to be zealously enforcing this provision of the AIA.

One possible conclusion from this analysis is that the Eastern District of Texas is declining to enforce an act of Congress. Another, more nuanced conclusion can be inferred from the silence of the vast majority of the 148 defendants sued in violation of the AIA. Their ranks included the biggest and most often-sued defendants: companies such as Hewlett Packard, Motorola Mobility, Cisco Systems, and Google. It is possible that the collective judgment of those companies is that seeking remedy for misjoinder would be futile. The limited available data supports that conclusion. However, it is also possible that Congress granted these frequent "troll" targets a solution that they did not actually want. Mass litigation is a double-edged sword. It creates efficiencies for plaintiffs, and it also creates efficiencies for defendants, especially big defendants. It seems basically illegitimate for a plaintiff to rake in seven or eight figures in aggregate nuisance value settlements, getting rich without giving any one defendant enough incentive to truly test the validity of the patent. However, from the perspective of any given defendant, hanging together may be preferable to hanging separately, and writing that check may still be the most rational thing to do.

(Endnotes)

1 Most torts require some kind of interaction between the plaintiff and the defendant, but patent infringement does not require copying or even awareness of a patent by a defendant. If a plaintiff happens to own a patent which covers a common method of conducting e-commerce, for example, it may be entitled to royalties from dozens or hundreds of companies regardless of whether it has been economically damaged and regardless of whether those defendants even know about the patent.

2 In 2010, more patent cases were filed in the Eastern District of Texas than any other jurisdiction. More than a quarter of the absolute number of patent defendants were sued in the Eastern District in 2010. James Pistorino, *Concentration of Patent Cases in the Eastern District of Texas Increases in 2010,* 81 BNA Apt. Trademark & Copyright J. 803, 805 tbl.1 (2011).

3 Leahy-Smith America Invents Act, Pub. L. No. 112-29, sec. 19(d), §299, 125 Stat. 28 4, 332-33 (2011).

4 For further discussion, see Intellectual Property Owners Committee White Paper *Impact of the Misjoinder Provision of the America Invents Act*, Scott W. Burt, Barry F. Irwin, Jonathan B. Tropp, available at http://www.jonesday.com/files/Publication/9d86c405-3d78-429e-9f5f-48c2739c12a1/Presentation/PublicationAttachment/66a07a58-15e6-46f2-a981-509a0a0c8465/IPO_WhitePaper.pdf.

5 Tracie L. Bryant, *The America Invents Act: Slaying Trolls, Limiting Joinder*, Harvard Journal of Law and Technology, V. 25, no. 2, Spring, 2012 at 686-88.

6 Dennis Crouch & Jason Rantanen, *Rush to Judgment: New Dis-Joinder Rules and Non-Practicing Entities,* Patently-O (Sept. 20, 2011, 3:10 PM), http://www.patentlyo.com/patent/2011/09/rush-to-judgment-new-dis-joinder-rules-and-non-practicing-entities.html.

7 James C. Pistorino and Susan J. Crane, *2011 Trends in Patent Case Filings: Eastern District of Texas Continues to Lead Until America Invents Act is Signed*. http://www.perkinscoie.com/files/upload/PL_12_03PistorinoArticle.pdf.

8 Bryant, *supra*, at 689-90; Alison Frankel, *The fall and (possible) rise of east Texas as a patent venue*, March 28, 2012, http://newsandinsight.thomsonreuters.com/Legal/News/2012/03_-_March/The_fall_and_(possible)_rise_of_east_Texas_as_a_patent_venue/.

9 *Advanced Data Access LLC v. Fujitsu Ltd. et al.*, No. 6:11-cv-00614 (E.D. Tex., filed Nov. 14, 2011).

Advanced Data Access LLC v. Nanya Technology Corp. et al., No. 6:11-cv-00473 (E.D. Tex., filed Sept. 9, 2011) (order granting motion to consolidate).

Advanced Processor Technologies LLC v. Atmel Corp., No. 2:12-cv-00152 (E.D. Tex., filed March 23, 2012) (order granting motion to consolidate).

American Vehicular Sciences LLC v. Toyota Motor Corp. et al., No. 6:12-cv- 00404 (E.D. Tex., filed June 25, 2012) (consolidation order).

Consolidated Work Station Computing, LLC v. Acer America Corp. et al., No. 6:11-cv-00696 (E.D. Tex., filed Dec. 22, 2011).

Droplets, Inc. v. Nordstrom, Inc., No. 2:12-cv-00390 (E.D. Tex., filed July 2, 2012) (order granting motion to sever).

Droplets, Inc. v. Target Corp. et al., No. 2:12-cv- 00391 (E.D. Tex., filed July 2, 2012) (order granting motion to sever).

Droplets, Inc. v. Williams Sonoma, Inc., No. 2:12-cv-00389 (E.D. Tex., filed July 2, 2012) (order granting motion to sever).

Ganas, LLC, v. Dell Inc. et al., No. 2:12-cv-00324 (E.D. Tex., filed June 12, 2012).

Garnet Digital, LLC v. Apple, Inc. et al., No. 6:11-cv-00647 (E.D. Tex., filed Dec. 2, 2011).

MacroSolve, Inc. v. United Airlines, Inc., No. 6:11-cv-00694 (E.D. Tex., filed Dec. 21, 2011) (order granting motion to consolidate).

Maxim Integrated Products, Inc. v. Capital One Financial Corp., No. 4:12-cv-00006 (E.D. Tex., filed Jan. 6, 2012) (order granting motion to transfer).

Maxim Integrated Products, Inc. v. Expedia et al., No. 4:12-cv-00007 (E.D. Tex., filed Jan. 6, 2012) (order granting motion to transfer).

Maxim Integrated Products, Inc. v. QVC, Inc., No. 4:12-cv-00106 (E.D. Tex., filed Feb. 22, 2012) (order granting motion to transfer).

Maxim Integrated Products, Inc. v. Southwest Airlines, Co., No. 4:12-cv-00104 (E.D. Tex., filed Feb. 22, 2012) (order granting motion to transfer).

Maxim Integrated Products, Inc. v. Starbucks Corp., No. 4:12-cv-00005 (E.D. Tex., filed Jan. 6, 2012) (order granting motion to transfer).

MiCash Inc. v. NetSpend Corp., No. 2:12-cv-00248 (E.D. Tex., filed April 23, 2012) (consolidation order).

NobelBiz, Inc. v. Five 9, Inc., No. 6:12-cv-00243 (E.D. Tex., filed April 3, 2012).

NobelBiz, Inc. v. Global Connect, LLC, No. 6:12-cv-00244 (E.D. Tex., filed April 3, 2012).

NobelBiz, Inc. v. LiveVox Inc., No. 6:12-cv-00246 (E.D. Tex., filed April 3, 2012).

NobelBiz, Inc. v. T C N, Inc., No. 6:12-cv-00247 (E.D. Tex., filed April 3, 2012).

Oasis Research, LLC v. Adrive, LLC et al., No. 4:10-cv-000435 (E.D. Tex., filed Aug. 30, 2010) (order denying motion to sever).

Parallel Networks, LLC v. Backstage Web Inc. et al., No. 6:12-cv-00374 (E.D. Tex., filed June 18, 2012).

Personal Web Technologies LLC v. Autonomy, Inc. et al., No. 6:11-cv-00683 (E.D. Tex., filed Dec. 19, 2011).

Roy-G-Biv Corp. v. ABB, Ltd. et al., No. 6:11-cv-00622 (E.D. Tex., filed Nov. 15, 2011) (order granting motion to consolidate).

Swipe Innovations, LLC v. Elavon, Inc. et al., No. 9:12-cv-00040 (E.D. Tex., filed March 7, 2012) (consolidation order).

TiVo Inc. v Cisco Systems, Inc. et al., No. 2:12-cv-00311 (E.D. Tex., filed June 4, 2012) (order granting motion to consolidate).

Ultimate Pointer, LLC v. Nintendo Co., et al., No. 6:11-cv-00571 (E.D. Tex., filed Nov. 1, 2011).

Unifi Scientific Batteries, LLC v. HTC Corp. et al., No. 6:12-cv-00221 (E.D. Tex., filed March 30, 2012).

10 *Advanced Data Access LLC v. Fujitsu Ltd. et al.*, No. 6:11-cv-00614 (E.D. Tex., filed Nov. 14, 2011).

Advanced Processor Technologies LLC v. Atmel Corp., No. 2:12-cv-00152 (E.D. Tex., filed March 23, 2012) (order granting motion to consolidate).

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Droplets, Inc. v. Williams Sonoma, Inc., No. 2:12-cv-00389 (E.D. Tex., filed July 2, 2012) (order granting motion to sever).

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Maxim Integrated Products, Inc. v. Capital One Financial Corp., No. 4:12-cv-00006 (E.D. Tex., filed Jan. 6, 2012) (order granting motion to transfer).

Maxim Integrated Products, Inc. v. QVC, Inc., No. 4:12-cv-00106 (E.D. Tex., filed Feb. 22, 2012) (order granting motion to transfer).

Maxim Integrated Products, Inc. v. Southwest Airlines, Co., No. 4:12-cv-00104 (E.D. Tex., filed Feb. 22, 2012) (order granting motion to transfer).

Maxim Integrated Products, Inc. v. Starbucks Corp., No. 4:12-cv-00005 (E.D. Tex., filed Jan. 6, 2012) (order granting motion to transfer).

MiCash Inc. v. NetSpend Corp., No. 2:12-cv-00248 (E.D. Tex., filed April 23, 2012) (consolidation order).

NobelBiz, Inc. v. Five 9, Inc., No. 6:12-cv-00243 (E.D. Tex., filed April 3, 2012).

NobelBiz, Inc. v. Global Connect, LLC, No. 6:12-cv-00244 (E.D. Tex., filed April 3, 2012).

NobelBiz, Inc. v. LiveVox Inc., No. 6:12-cv-00246 (E.D. Tex., filed April 3, 2012).

NobelBiz, Inc. v. T C N, Inc., No. 6:12-cv-00247 (E.D. Tex., filed April 3, 2012).

SFA Systems, LLC v. Drugstore.com, Inc., No. 6:11-cv-00635 (E.D. Tex., filed Nov. 23, 2011) (order denying motion to consolidate).

SmartPhone Technologies LLC v. Apple, Inc. et al., No. 6:11-cv-00604 (E.D. Tex., filed Nov. 9, 2011).

11 *Advanced Processor Technologies LLC v. Atmel Corp.*, No. 2:12-cv-00152 (E.D. Tex., filed March 23, 2012) (order granting motion to consolidate).

American Vehicular Sciences LLC v. Toyota Motor Corp. et al., No. 6:12-cv- 00404 (E.D. Tex., filed June 25, 2012) (consolidation order).

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Maxim Integrated Products, Inc. v. Starbucks Corp., No. 4:12-cv-00005 (E.D. Tex., filed Jan. 6, 2012) (order granting motion to transfer).

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12 *Advanced Data Access LLC v. Fujitsu Ltd. et al.*, No. 6:11-cv-00614 (E.D. Tex., filed Nov. 14, 2011).

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13 *SFA Systems, LLC v. Drugstore.com, Inc.*, No. 6:11-cv-00635 (E.D. Tex., filed Nov. 23, 2011) (order denying motion to consolidate).

14 *Droplets, Inc. v. Nordstrom, Inc.*, No. 2:12-cv-00390 (E.D. Tex., filed July 2, 2012) (order granting motion to sever).

Droplets, Inc. v. Williams Sonoma, Inc., No. 2:12-cv-00389 (E.D. Tex., filed July 2, 2012) (order granting motion to sever).

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Maxim Integrated Products, Inc. v. QVC, Inc., No. 4:12-cv-00106 (E.D. Tex., filed Feb. 22, 2012) (order granting motion to transfer).

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15 *Advanced Processor Technologies LLC v. Atmel Corp.*, No. 2:12-cv-00152 (E.D. Tex., filed March 23, 2012) (order granting motion to consolidate).

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NobelBiz, Inc. v. LiveVox Inc., No. 6:12-cv-00246 (E.D. Tex., filed April 3, 2012).

NobelBiz, Inc. v. T C N, Inc., No. 6:12-cv-00247 (E.D. Tex., filed April 3, 2012).

SmartPhone Technologies LLC v. Apple, Inc. et al., No. 6:11-cv-00604 (E.D. Tex., filed Nov. 9, 2011).

16 *Advanced Processor Technologies LLC v. Atmel Corp.*, No. 2:12-cv-00152 (E.D. Tex., filed March 23, 2012) (order granting motion to consolidate).

NobelBiz, Inc. v. Five 9, Inc., No. 6:12-cv-00243 (E.D. Tex., filed April 3, 2012).

NobelBiz, Inc. v. Global Connect, LLC, No. 6:12-cv-00244 (E.D. Tex., filed April 3, 2012).

NobelBiz, Inc. v. LiveVox Inc., No. 6:12-cv-00246 (E.D. Tex., filed April 3, 2012).

NobelBiz, Inc. v. T C N, Inc., No. 6:12-cv-00247 (E.D. Tex., filed April 3, 2012).

SmartPhone Technologies LLC v. Apple, Inc. et al., No. 6:11-cv-00604 (E.D. Tex., filed Nov. 9, 2011).

17 *Advanced Data Access LLC v. Nanya Technology Corp. et al.*, No. 6:11-cv-00473 (E.D. Tex., filed Sept. 9, 2011) (order granting motion to consolidate).

Consolidated Work Station Computing, LLC v. Acer America Corp. et al., No. 6:11-cv-00696 (E.D. Tex., filed Dec. 22, 2011).

Ganas, LLC, v. Dell Inc. et al., No. 2:12-cv-00324 (E.D. Tex., filed June 12, 2012).

Garnet Digital, LLC v. Apple, Inc. et al., No. 6:11-cv-00647 (E.D. Tex., filed Dec. 2, 2011).

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Personal Web Technologies LLC v. Autonomy, Inc. et al., No. 6:11-cv-00683 (E.D. Tex., filed Dec. 19, 2011).

Roy-G-Biv Corp. v. ABB, Ltd. et al., No. 6:11-cv-00622 (E.D. Tex., filed Nov. 15, 2011) (order granting motion to consolidate).

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TiVo Inc. v Cisco Systems, Inc. et al., No. 2:12-cv-00311 (E.D. Tex., filed June 4, 2012) (order granting motion to consolidate).

Ultimate Pointer, LLC v. Nintendo Co., et al., No. 6:11-cv-00571 (E.D. Tex., filed Nov. 1, 2011).

Unifi Scientific Batteries, LLC v. HTC Corp. et al., No. 6:12-cv-00221 (E.D. Tex., filed March 30, 2012).

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19 *Consolidated Work Station Computing, LLC v. Acer America Corp. et al.*, No. 6:11-cv-00696 (E.D. Tex., filed Dec. 22, 2011).

Ganas, LLC, v. Dell Inc. et al., No. 2:12-cv-00324 (E.D. Tex., filed June 12, 2012).

Parallel Networks, LLC v. Backstage Web Inc. et al., No. 6:12-cv-00374 (E.D. Tex., filed June 18, 2012).

Personal Web Technologies LLC v. Autonomy, Inc. et al., No. 6:11-cv-00683 (E.D. Tex., filed Dec. 19, 2011).

Ultimate Pointer, LLC v. Nintendo Co., et al. No. 6:11-cv-00571 (E.D. Tex., filed Nov. 1, 2011).

20 *Consolidated Work Station Computing, LLC v. Acer America Corp. et al.*, No. 6:11-cv-00696 (E.D. Tex., filed Dec. 22, 2011).

Garnet Digital, LLC v. Apple, Inc. et al., No. 6:11-cv-00647 (E.D. Tex., filed Dec. 2, 2011).

Ultimate Pointer, LLC v. Nintendo Co., et al., No. 6:11-cv-00571 (E.D. Tex., filed Nov. 1, 2011).

Unifi Scientific Batteries, LLC v. HTC Corp. et al., No. 6:12-cv-00221 (E.D. Tex., filed March 30, 2012).

21 *Swipe Innovations, LLC v. Elavon, Inc. et al.*, No. 9:12-cv-00040 (E.D. Tex., filed March 7, 2012) (consolidation order).

Recent Significant Oregon Cases

Judge Stephen K. Bushong,
Multnomah County Circuit Court

Honorable Steven K. Bushong

Claims and Defenses

State Treasurer v. Marsh & McLennan Companies, Inc., 353 Or 1 (2012)

After state pension funds lost approximately $10 million on investments in Marsh stock, the state sued, alleging that the price of the stock was artificially inflated because of Marsh's misrepresentations. The trial court granted summary judgment in Marsh's favor, holding that (1) securities fraud claims under ORS 59.135 and ORS 59.137 require proof of reliance; (2) the state had no evidence to establish actual reliance; and (3) the state could not establish reliance by means of a presumption of reliance based on the "fraud-on-the market" doctrine. The Court of Appeals affirmed, but the Supreme Court reversed. The Supreme Court agreed that ORS 59.137 requires a stock purchaser asserting a securities fraud claim to establish reliance, but held that "the reliance element required by that statute may be established by a plaintiff who purchases stock on an efficient, open market by means of the presumption available under the 'fraud-on-the-market' doctrine." 353 Or at 5. The court explained that "in recognizing claims by open market stock purchasers, the Oregon legislature also provided the means of proving such claims when the stock purchases were made in non-face-to-face transactions on the open market—and…the Oregon legislature intended to adopt as one of the available means the fraud-on-the-market doctrine that the federal courts had provided under federal securities law since 1988." *Id.* at 21.

Hope Presbyterian v. Presbyterian Church (USA), 352 Or 668 (2012)

The issue in *Hope Presbyterian* was "whether a local church or the national church from which it seeks to separate owns certain church property." 352 Or at 670. Resolving that issue consistent with the First Amendment required the Supreme Court to determine whether to apply the "hierarchical deference" approach to church property disputes described in *Watson v. Jones,* 80 US 679 (1871), or the "neutral principles" approach described in *Jones v. Wolf,* 443 US 595 (1979). The first approach requires courts to defer to the determination of the highest governing body of a hierarchical church. Under the second approach, courts resolve a church property dispute by examining deeds, local church charters, statutes, and provisions in the constitution of the general church regarding ownership and control of church property "in the context of generally applicable neutral principles of law, such as trust and property law." *Id*. at 675. The Supreme Court adopted the "neutral principles" approach, but noted that courts "must take special care to scrutinize the church documents in purely secular terms, and not to rely on religious precepts in determining whether the documents indicate that the parties have intended to create a trust." *Id.* at 684. And "if the interpretation of church documents would involve the court in resolving a doctrinal controversy, then the court must defer to the resolution of that doctrinal issue by the church's governing authority." *Id.* The Supreme Court concluded that, "under the neutral principles approach to resolving church property disputes, Hope Presbyterian held its property in trust for the benefit of [the national church]." *Id.* at 696.

***Evergreen West Business Center, LLC v. Emmert,* 254 Or App 361 (2012)**

Plaintiff (Evergreen) purchased some property for development but fell behind in its loan payments. Defendant (Emmert), one of Evergreen's members, purchased the note and trust deed from the lending bank and eventually purchased the property for himself at the foreclosure sale. Evergreen then sued Emmert, contending that Emmert had paid $613,979.49 for property worth $1.39 million, thereby obtaining a benefit for himself in violation of his fiduciary duty to Evergreen. The jury found that Emmert had breached his fiduciary duty to Evergreen, and awarded $1 in economic damages and $600,000 in punitive damages. The trial court granted both parties' motions for JNOV in part, reducing the punitive damage award to $4 and imposing a constructive trust that required Evergreen to sell the property and retain the net proceeds of the sale after reimbursing Emmert for the $613,979.49 he had paid for the property. The Court of Appeals reversed. The court held that, "where the jury is presented with evidence of a damages claim that would wholly compensate the nonbreaching party[,] the equitable remedy of a constructive trust is not available simply because the jury returns a lesser verdict than requested." 254 Or App at 375. The court also held that the $600,000 punitive damage award was not unconstitutionally excessive under the circumstances. *Id.* at 386.

***Classen v. Arete NW, LLC,* 254 Or App 216 (2012)**

Plaintiff's doctor referred her to defendant for testing and monitoring to determine whether she had a sleep disorder. She scheduled an overnight study to be video recorded at defendant's facility. During the night "plaintiff awoke to find that her bra had been unclasped, her breasts were exposed, and one of defendant's employees was standing over her and staring at her." 254 Or App at 218. Plaintiff requested a copy of the video, but was ultimately told that defendant was unable to produce it. Plaintiff sued, alleging that the value of her potential claims for sexual battery, abuse of a vulnerable person, and intentional infliction of emotional distress were reduced as a result of defendant's intentional or negligent spoliation of the videotape evidence. The trial court granted defendant's motion to dismiss, concluding that Oregon law does not recognize an independent tort for spoliation. The trial court also denied leave to amend to assert a claim for negligent infliction of emotional distress. The Court of Appeals affirmed the dismissal of the original complaint, but reversed and remanded with instructions to allow filing of an amended complaint. The court found it unnecessary to "address the precise contours of a cognizable claim for spoliation under Oregon law" (*Id.* at 222) because (1) "[t]he jurisdictions that recognize an independent claim for spoliation of evidence require the plaintiff to have first brought the underlying claim and lost or suffered diminution in its value" (*Id.*); and (2) plaintiff "could not establish causation because she did not allege that she had filed an action on any of the underlying claims." *Id.* at 223. Leave to amend was improperly denied, the court explained, because plaintiff was "entitled to seek damages against defendant for negligently causing her emotional distress" based on a breach of defendant's duty under *former* ORS 192.518(1)(b) to disclose medical records. *Id.* at 234.

***Lucas v. Lake County,* 253 Or App 39 (2012)**

After the plaintiff was terminated from his job as a deputy sheriff, he sued Lake County in federal court, alleging that the county violated the Americans with Disabilities Act and asserting state law claims for unlawful employment practices and defamation. The federal court ultimately granted summary judgment in favor of the county on all claims. Ten days before that ruling, plaintiff sued the county in state court, alleging claims for blacklisting under ORS 659.805 and common-law wrongful discharge. The trial court granted the county's motion for summary judgment on the blacklisting claim on the grounds of claim preclusion, and then granted the county's motion for judgment on the pleadings on the wrongful discharge claim. The Court of Appeals reversed, concluding that (1) "claim preclusion did not bar either of plaintiff's claims"; and (2) the trial court erred in allowing judgment on the pleadings on the wrongful discharge claim because "plaintiff alleged circumstances sufficient to establish that he was terminated for fulfilling an important public duty[.]" 253 Or App at 52. The court explained that the blacklisting claim "was not part of the same factual transaction that had been litigated in federal court." *Id.* at 55. The wrongful discharge claim was not barred by claim preclusion under an exception identified in *Ram Technical Services, Inc. v. Koresko*, 346 Or 215 (2009), because "the federal court, having jurisdiction, 'clearly' declined to exercise supplemental jurisdiction over plaintiff's wrongful discharge claim." *Id.* at 59. And judgment on the pleadings was improperly granted on the wrongful discharge claim because "to the extent that plaintiff alleged that he was terminated for seeking to enforce the criminal laws by preventing, detecting, and investigating crime, he has adequately alleged that his termination contravened an important public duty." *Id.* at 62.

***Cornus Corp v. Geac Enterprise Solutions, Inc.*, 252 Or App 595 (2012)**

Plaintiff filed an action in state court arising out of a software sales contract. Defendants removed the case to federal court. The federal court ultimately dismissed the action for lack of prosecution and failure to file a pretrial order. Plaintiff then sued in state court, making similar factual allegations. Defendants again removed the case to federal court, but the court remanded the action to state court based on the forum-selection clause in the contract. Defendants then moved for summary judgment based on claim preclusion. The trial court granted the motion; the Court of Appeals reversed. The parties disputed "whether federal or Oregon state law ultimately provides the rule of decision for the claim-preclusive effect of a federal judgment dismissing a diversity action due to a party's negligent conduct." 252 Or App at 600. The court, applying *Semtek Int'l Inc. v. Lockhead Martin Corp.,* 531 US 497 (2001), concluded: "Because Oregon state law is not incompatible with federal interests, the claim-preclusive effect of the federal court's dismissal of plaintiff's claims for its negligent failure to prosecute or to comply with a court's order is governed by Oregon's claim preclusion law." *Id.* at 609-10. And under Oregon law, the claims were not barred by claim preclusion because "the federal judgment of dismissal was not the result of an adjudication on the merits of plaintiff's claims[.]" *Id.* at 610.

***Chou v. Farmers Ins. Exchange*, 253 Or App 552 (2012)**

Plaintiffs' home and personal property were damaged when a neighboring house and car slid down an embankment and collided with their home. Plaintiffs' homeowners' insurer denied coverage, citing a policy exclusion for damage caused by collapse. The trial court granted plaintiffs' motion for summary judgment, holding that the policy is ambiguous and construing it against the drafter. The Court of Appeals affirmed, concluding that the policy was ambiguous because "there are two reasonable interpretations of the policy: (1) that the losses are covered if they are directly caused by physical contact with the neighbor's vehicle and (2) that the losses are not covered because it resulted from collapse." 253 Or App at 557.

***SERA Architects, Inc., v. Klahowya Condominium, LLC*, 253 Or App 348 (2012)**

In *SERA*, two creditors of a developer of a failed property development disputed the priority of their respective liens. The plaintiff architects (SERA) contended that, under ORS 87.025(7), their lien related back to the date construction work commenced, giving it priority over trust deeds recorded by the defendant bank to secure its construction loans even though SERA's lien was recorded *after* the bank recorded its trust deeds. The trial court ruled that, under the doctrine of equitable subrogation, the bank's trust deed was substituted to the first priority position of a prior mortgagee whose loan had been paid off from the proceeds of the bank's loan, giving the bank priority over the SERA's lien. The Court of Appeals reversed. The court first concluded that the architects' lien "was created under ORS 87.010(5) when SERA began work on the project and, when it perfected its lien under ORS 87.035, the lien related back" to the date the contractor commenced work on the improvement. 253 Or App at 362. Equitable subrogation did not apply, the court explained, because the bank "had actual notice of the facts that led to the creation of SERA's lien" and any "ignorance" of the existence of the lien "was not induced by misrepresentations or negligence of others, but rather was due to [the bank's] misunderstanding of the law." *Id.* at 365.

***Hall v. ODOT*, 252 Or App 649 (2012)**

***Zabriskie v. Lowengart*, 252 Or App 543 (2012)**

***Hatkoff v. Portland Adventist Medical Center*, 252 Or App 210 (2012)**

In *Hall,* the Court of Appeals held that the trial court erred in not granting ODOT's motion for a directed verdict on an inverse condemnation claim. Evidence regarding ODOT's publicly announced plans regarding a highway interchange "lowered the value of plaintiff's property" but "did not establish a compensable taking" and "no inverse condemnation claim lies without proof of an intent to take property for public use." 252 Or App at 656. In *Zabriskie*—a medical malpractice case—the court held that the trial court erred in granting defendant's motion for summary judgment on statute of limitations grounds. "The grumblings of a person who has just undergone a painful medical procedure do not…conclusively demonstrate knowledge" of a distinct injury as required for limitations purposes. 252 Or App at 551. In *Hatkoff,* the court affirmed the dismissal of an age discrimination in employment action because plaintiff failed to follow the alternative dispute resolution procedure prescribed in his employee handbook. The court held that the employer did not waive its right to utilize the procedure as a defense to plaintiff's claims, and the procedure "is not unconscionable either substantively or procedurally[.]" 252 Or App at 211.

Evidence

***B.A. v. Webb*, 253 Or App 1 (2012)**

In *B.A.,* the Court of Appeals reversed a judgment in plaintiff's favor on tort claims of sexual battery of a child and intentional infliction of emotional distress, concluding that the trial court erred in (1) allowing plaintiff's expert witnesses to provide opinion testimony on plaintiff's credibility, and (2) admitting, in the absence of physical findings, the experts' diagnoses that plaintiff had been sexually abused, contrary to *State v. Southard,* 347 Or 127 (2009). The court rejected plaintiff's contention that the *Southard* rule should not apply in a civil case, finding "no principled reason why the court's OEC 403 balancing analysis in that criminal case should obtain different results in this civil case." 253 Or App at 15.

***Warren v. Imperia,* 252 Or App 272 (2012)**

The plaintiff brought a medical malpractice action against an ophthalmologist, alleging that defendant was negligent in screening and recommending eye surgery. The Court of Appeals affirmed a judgment in plaintiff's favor, concluding that the trial court did not err in excluding testimony about pre-surgical discussions, consent forms and other documents given to plaintiff before the surgery that described the procedure, the risks, and the availability of alternative treatments. The court noted that "cases from other jurisdictions suggest that evidence of informed consent is irrelevant and unfairly prejudicial where a plaintiff alleges only negligence" (252 Or App at 281), and concluded that evidence "of information conveyed to plaintiff concerning the nature of the procedure, its inherent risks, and available alternatives had no bearing on what the standard of care was or whether defendant deviated from that standard." *Id.* at 280.

Procedure

***Assoc. Unit Owners of Timbercrest Condo v. Warren,* 352 Or 583 (2012)**

***Foster v. Miramontes,* 352 Or 401 (2012)**

In *Timbercrest,* the Supreme Court, overruling *Carter v. U.S. National Bank,* 304 Or 538 (1987) and earlier decisions, concluded that plaintiff's "motion for reconsideration of a summary judgment does not constitute a motion for a new trial within the meaning of ORS 19.255(2) and ORCP 64[.]" 352 Or at 599. Thus, plaintiff's notice of appeal, filed while the motion for reconsideration was pending, was not a premature nullity. In *Foster,* the Supreme Court held that, "in an action under ORS 30.866 in which a plaintiff seeks both a stalking protective order and a judgment for compensatory money damages, the parties are entitled to a jury trial on the claim for money damages." 352 Or at 403.

***Jensen v. Duboff,* 253 Or App 517 (2012)**

***Ivers v. Salladay,* 253 Or App 195 (2012)**

***Johnson v. Sunriver Resort Limited Partnership,* 252 Or App 299 (2012)**

In *Jensen,* the Court of Appeals held: "Although plaintiffs are not permitted limitless opportunities to attempt to state a claim, in this case, given that plaintiff had acted to cure the defects in his pleading and that the *Ramsey* [*v. Thompson,* 162 Or App 139, 143 (1999)] considerations weighed in favor of allowing him to do so, we conclude that the trial court abused its discretion in dismissing defendant's second amended complaint with prejudice." 253 Or App at 526. In *Ivers,* the court held that "ORCP 68 C does not apply to custodial expenses [awarded under the Uniform Transfer to Minors Act (UTMA), ORS 126.805 to 126.886], even when a court reviews and approves the expenses and those expenses consist entirely of the custodian's attorney fees incurred because of litigation concerning the custodian's handling of the UTMA estate." 253 Or App at 203. In *Johnson*, the court held: "As long as the responsible person takes steps reasonably calculated to ensure that the defendant will timely respond to a complaint, a subordinate employee's later neglect of the matter does not amount to *in*excusable neglect that will defeat an ORCP 71 B(1)(a) motion to set aside a default judgment." 252 Or App at 312 (emphasis in original).

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