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Considering Pros and Cons of Arbitrating Class Actions

By Arthur F. Silbergeld

Introduction

In *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court concluded that compelling class arbitration permitted by the California Supreme Court in *Discover Bank v. Superior Court* deprives the parties to a bilateral arbitration agreement of their due process rights.[1] While management lawyers lauded the result, several key points supporting the majority opinion have limited validity, appear result-oriented and may cause one to jump to conclusions without careful consideration of alternatives. Whether each of these points applies to wage disputes in California is an open question. Whether *Concepcion* is the law in California and prohibits class arbitration waivers will be decided in the forthcoming California Supreme Court decision in *Iskanian v. CLS Transportation Los Angeles, LLC*.[2] This article explores the language of the Supreme Court's recent decisions analyzing class arbitration and presents strategic considerations for employment counsel.

An Overview of Key Cases Analyzing Class Arbitration

AT&T Mobility LLC v. Concepcion

Noting that the U.S. Supreme Court has had little occasion to examine class wide arbitration, the *Concepcion* Court first refers to its earlier holding in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* that an arbitration panel exceeded its power under section 10(a)(4) of the Federal Arbitration Act (FAA) when it imposed class procedures based on the panel's policy judgments rather than relying on the arbitration agreement itself or some background principle of contract law that would affect its interpretation.[3] In *Stolt-Nielsen*, the Court held that a party may not be compelled under the FAA to submit to class arbitration absent a contractual basis for concluding that the party agreed to do so. In that case, the agreement, which the parties conceded was silent on the question of class actions, could not be construed to permit class procedures because the "changes brought about by the shift from bilateral arbitration to class-action arbitration

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[1] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Discover Bank v. Superior Court, 36 Cal.4th 148 (2005).

[2] Iskanian v. CLS Transportation Los Angeles, LLC, 206 Cal. App.4th 949 (2012), petition for review granted, No. S204032, 2012 Cal. LEXIS 8925, (Cal. Sept.19, 2012).

[3] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S.Ct. 1758, 1773-76 (2010).

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Considering Pros and Cons of Arbitrating Class Actions
By Arthur F. Silbergeld

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are fundamental."[4] A year later, Justice Scalia wrote the majority opinion in *Concepcion* and, in support of the result, offered several truisms that might have been more carefully considered.

The majority opinion first states that class wide arbitration includes absent parties, necessitating additional and different procedures involving "higher stakes."[5] The opinion explores downsides to handling disputes in arbitration on an individual versus a class basis, but gives no credit to the upsides or simply ignores them.

The Court then suggests that "[c]onfidentiality becomes more difficult," ignoring the fact that parties in class cases may and often do enter into a protective order in accordance with California Code of Civil Procedure section 2025.420 and, even without such an order, the information likely to be considered "confidential" in a wage class action is very limited.[6] Further, since discovery in California, and most other jurisdictions, is wide-ranging, information about others who are similarly situated often is discovered even in an individual arbitration. It is up to counsel to protect the privacy of private information and often counsel for both parties stipulate that all or selected aspects of the proceeding (documents, testimony, etc.) remain private.

Next, the Court (erroneously) stated "while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties."[7] In fact, many arbitrators in California and elsewhere are former federal and state court judges or litigators in private practice who have handled class actions, are intimately familiar with class action procedures, including motions for class certification, and are equally familiar with protective orders. The conclusion that follows, that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA, may be true as to the FAA, but not necessarily with respect to arbitration procedures in California and other jurisdictions.

Other Flies in the Ointment

The majority in *Concepcion* suggests that the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration (its informality) and makes the process slower. The statement is supported by a study of cases before the AAA over a very brief period of time, but experience suggests that while the process may be a little slower, it's not by much in California, where a broad spectrum of discovery and class certification might attend. The majority also suggests, without evidence, that class arbitration is necessarily more costly. In fact, since the class shares the costs or the costs may be awarded against the defendant, the expenses of arbitration and third-party administration can be deducted from the award. Moreover, in many cases in California, the employer must pay virtually all of the arbitration costs in an employment litigation.[8] There is no evidence suggesting how much more, if at all, a class arbitration would cost than an individual one.

Then, the majority speculates that class arbitration is "more likely to generate a procedural morass than final judgment."[9] That is because "[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[10] What "procedural rigor" would be more compromised in class as opposed to individual arbitration is unclear. True, the rules of evidence may be less strictly adhered to, but that may also be the case in a bench trial. But before an arbitrator may decide the merits of a claim in class-wide procedures, he must first decide whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted. These factors may be present, but are not reasons that outweigh the discouragement of individual arbitration when individual damages are small and class-aggregated damages are high. Moreover, this observation could be made with respect to all class actions, which have historically streamlined litigation and relieved the courts of dealing with thousands of individual litigations when rights can be adjudicated in a single proceeding.

Next, the Court reasons that class arbitration requires procedural formality, suggesting that arbitrators might be procedurally sloppy in individual arbitrations (such as

[4] *Stolt-Nielsen S.A.*, 130 S. Ct. at 1750.
[5] *AT&T Mobility LLC*, 131 S. Ct. at 1750.
[6] *AT&T Mobility LLC*, 131 S. Ct. at 1750.
[7] *AT&T Mobility LLC*, 131 S. Ct. at 1750.
[8] Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83 (2000).
[9] *AT&T Mobility LLC*, 131 S. Ct. at 1751.
[10] *AT&T Mobility LLC*, 131 S. Ct. at 1751.

the one to which the Concepcions were relegated).[11] Not in California: *Armendariz* requires adequate discovery rights be available for an agreement to be enforceable and more than minimal discovery must be available in many cases.[12] California Code of Civil Procedure section 1283 permits the parties to agree to discovery procedures in their agreement, and many agreements incorporate rules of the American Arbitration Association. The rules of the major providers of arbitrators allow some discovery and give the arbitrator discretion to order discovery by deposition, interrogatories, or document production that is adequate to determine the issues in dispute. Informality therefore, is neither available nor a risk, and the concern that, ''[I]f procedures are too informal, absent class members would not be bound by the arbitration'' may be dispelled.[13] Furthermore, although the majority notes that "[f]or a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class,'' there is no sound reason that this cannot be followed.[14] The class representatives have the same interest in representing the class as they have in representing themselves in an individual arbitration. And, as the majority notes, "this amount of process would presumably be required for absent parties to be bound by the results of arbitration."[15]

The majority finds it "at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied."[16] If the forum providing the arbitrator requires its arbitrators to qualify and to follow its rules and/or the rules of the AAA, the very suggestion of arbitrator dereliction of duty or disregard of the rights of the parties is disrespectful and unwarranted. Additionally, putative class members are more than third parties, and if the class is certified, they become full parties to the litigation. Indeed, it would be odd to think that a qualified, experienced arbitrator would not be entrusted with ensuring protection of third-party rights.

The Court further reasons that class arbitration greatly increases risks to defendants insofar as informal procedures have a cost—the absence of multilayered review makes it more likely that errors will go uncorrected.[17] It is unclear, however, what errors the Court contemplates and in whose favor. The assumption appears to be that an arbitrator in a class action case will be more likely to commit errors than in an individual arbitration, and that those errors will thus be exponentially costly and will disfavor the defendant. Despite any basis for such an assumption, this same hypothetical risk would equally attend individual and class-wide arbitration, affect the petitioner and the respondent, and be just as great in court. The parties in either context should be willing to accept the costs of these potential errors in arbitration, regardless of whether their impact is limited to the size of individual disputes, and presumably the risks are outweighed by avoiding the courts. This observation fails to grasp the reason why most companies seek arbitration in the first instance, which is to avoid the risks of runaway juries.

Compounding the concern that an arbitrator will get it wrong, the majority speculates that "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."[18] However, Defendants settle questionable claims every day, not because a fact-finder might get it wrong, but because litigation—individual and class-wide, in court and in arbitration—is expensive or may risk an unwanted precedent.

Having worked up to this point, the majority states that "arbitration is poorly suited to the higher stakes of class litigation'', because in litigation, the full right of review is available, but appeal of an arbitrator's decision is limited to corruption, fraud or undue means, *i.e.*, misconduct rather than mistake.[19] But this is an argument against arbitration in the first instance, as both individual and class arbitration restrict appeal to the same limits. We could question why Congress and the Court are willing to relegate any parties to this risky, error-riddled process to which review is limited. The Court suggests ''it is hard to believe that defendants would bet the company with no effective means of review,'' but fails to acknowledge that all arbitration involves the same risks.[20] The majority notes that the parties could agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation, and adherence to the California Code of Civil Procedure is exactly what California decisions require.[21]

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[11] *AT&T Mobility LLC*, 131 S. Ct. at 1751.
[12] Fitz v. NCR Corp., 118 Cal. App. 4th 702 (2004).
[13] *AT&T Mobility LLC*, 131 S. Ct. at 1751.
[14] *AT&T Mobility LLC*, 131 S. Ct. at 1751.
[15] *AT&T Mobility LLC*, 131 S. Ct. at 1751.
[16] *AT&T Mobility LLC*, 131 S. Ct. at 1752.
[17] *AT&T Mobility LLC*, 131 S. Ct. at 1752.
[18] *AT&T Mobility LLC*, 131 S. Ct. at 1752.
[19] *AT&T Mobility LLC*, 131 S. Ct. at 1752.
[20] *AT&T Mobility LLC*, 131 S. Ct. at 1752.
[21] *AT&T Mobility LLC*, 131 S. Ct. at 1752.

In reaching a decision based on these assumptions, the majority opinion is clearly intended to protect the defendant from small dollar claims that no attorney would likely prosecute because of the paucity of the award in a best-case scenario.

Oxford Health Plans v. Sutter

The recent U.S. Supreme Court decision in *Oxford Health Plans LLC v. Sutter* confirms the right of an arbitrator to determine whether the parties have agreed to class action procedures.[22] In that case, the parties had simply agreed that no dispute arising under their agreement would be instituted before any court. The parties later asked the arbitrator to decide whether their agreement authorized class action, and despite the absence of the word "class" or term "class action" in the document, he reasoned that a class action was one possible form of civil action that could be brought. The arbitrator concluded that the parties thus intended that a class action could be maintained. Accordingly, if the issue is put to the arbitrator and she interprets the agreement to permit class arbitration, the determination is subject only to limited review under the FAA. Once a civil action is filed, neither *Concepcion* nor *Oxford Health Plans* prohibits parties from agreeing to arbitrate on a class basis, and the parties might agree to obtain approval of the trial court of any preliminary and final settlement.

American Express Co. v. Italian Colors Restaurant

Even more recently, the U.S. Supreme Court adhered to its view that an agreement to arbitrate disputes individually cannot be skirted even where the cost of arbitration would exceed the potential damage recovery. In *American Express Co. v. Italian Colors Restaurant*, the parties agreed to waive the right to arbitrate on a class basis. Justice Scalia, writing for the majority, determined that the agreement reflected "the overarching principle that arbitration is a matter of contract."[23] The decision considered and rejected the defendant's claim that the exception allowing courts to invalidate agreements that prevent "effective vindication" of a federal statutory right applied.[24] Nonetheless, in circumstances where a party's interests would be better served by resolving a dispute once and for all in a single, more efficient proceeding, consideration of class arbitration is warranted.

Defense Counsel's First Reaction to a Civil Action

Many management attorneys recommend including a class action waiver in employee arbitration agreements. And many defense attorneys have only one response to individual or class action complaints in court when the named plaintiff has signed such an agreement: move to compel individual arbitration of the dispute. As a practical matter, however, defense counsel often should give more thought to the risks and alternatives and discuss them with the client before implementing a strategy.

First, a smart plaintiff's attorney, knowing his client has signed an arbitration agreement with or without a class waiver, might not send a demand letter or file a complaint on behalf of a class without first learning from the client and other sources the names and contact information of many current and former persons who are similarly-situated. If the defendant's motion to compel individual arbitration is successful, the defendant may be faced with a barrage of dozens, even hundreds of individual demands for arbitration. Whether plaintiff's counsel (in an individual arbitration) would be able to compel disclosure of the names of other employees in the same circumstances as his client pursuant to *Belaire-West Landscape, Inc. v. Superior Court* is unknown.[25] That decision allows the named plaintiff(s) in a class action to learn the names and contact information of all putative class members in pre-certification discovery. Moreover, the first plaintiff's attorney might spread his own financial risk by associating in one or more other lawyers or law firms, adding depth to the capacity to prosecute numerous claims.

Second, arbitrator fees are expensive. One should anticipate that such fees alone may cost $50,000 or more to fully adjudicate an individual claim. The arbitrators' fees alone in 30 cases at that cost, for example, would be $1.5 million or more. What if the plaintiff's counsel filed 100 or more demands for arbitration? AT&T Mobility's arbitration agreement protected the consumer by agreeing to pay the costs of the arbitration, attorney's fees and up to $7,500 in damages. But what if 250,000 AT&T Mobility cell phone customers had demanded arbitrations making identical claims?

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[22] Oxford Health Plans LLC v. Sutter, 2013 U.S. LEXIS 4358 (June 10, 2013). To view Supreme Court briefs related to the *Oxford Health Plans LLC* case, go to 2012 U.S. Briefs 77237 on Lexis.com.

[23] American Express Co. v. Italian Colors Restaurant, 2013 U.S. LEXIS 4700 (June 21, 2013). To view Supreme Court briefs related to the *American Express* case, go to 2012 U.S. Briefs 133 on Lexis.com. To view oral argument transcripts, go to 2012 U.S. Trans. 3910.

[24] *American Express Co.*, 2013 U.S. LEXIS 4700.

[25] Belaire-West Landscape, Inc. v. Superior Court, 149 Cal.App. 4th 554 (2007).

Third, the defendant's favorite, highly-skilled attorney may not be able to effectively and simultaneously represent the defendant in all of the proceedings. Consolidation of pending arbitration claims in different jurisdictions might be impossible or, at least, a nightmare. The defendant might be compelled to retain several attorneys, even multiple law firms, not only sending its legal fees soaring, but resulting in inconsistent advice, nonconforming strategic decisions, and more effective representation in some instances and less in others. The defendant's legal fees in individual employment litigation may run to $150,000 and up, and if the defendant is facing a class action, the cost could be three to five times higher. But even with efficiency and replication, fees in defending 30 individual arbitrations might run 10 or 20 times that, regardless of the merits.

Fourth, other uncertainties attend. While class litigation, regardless of forum, may take longer to resolve, when there is exposure to multiple claimants disputing the same issues before numerous arbitrators, the risk of inconsistent decisions is exponential. One arbitrator's award, moreover, is not a precedent that can be reliably cited in other arbitration proceedings. Inconsistent awards may leave some current employees enriched and others not, inviting unanticipated employee morale problems.

Fifth, the potential damages in employment cases are rarely limited to the $30.22 that the Concepcions sought. The opportunity for early settlement is likely greater in a class litigation than in an individual case, and a class claim is more likely to settle early. Class settlements however, typically include attorneys' fees, and a plaintiffs' attorney with a class of even a few hundred putative members may be more willing to accept a discount in early mediation than settling for a much smaller amount in one of a number of individual cases representing clients against the same defendant. Alternatively, an attorney representing claimants in numerous individual arbitrations over the same issues might use the fees earned in settling the first few cases to sustain himself through the hearings of the remaining ones.

Sixth, before a motion to compel individual arbitration is filed, there may be the opportunity to negotiate an agreement to resolve the dispute in a class arbitration, and to select a former class action litigator or retired judge who has requisite class action experience and can adeptly handle the procedural issues. A quick review of qualifications of former class action litigators and retired judges affiliated with the several dispute resolution organizations will illustrate that many have handled employment class actions and some are available to adjudicate class arbitration. While the matter is pending before the trial court, the agreement could include trial court review of the preliminary and final settlement agreements and, possibly, review by the appellate court or another qualified arbitrator.

Conclusion

Class arbitration may not be preferred in most circumstances. Merits of the claim, amount of damages involved, likelihood that other individuals will sue, loyalty of putative class members to the employer and whether they will opt out, and many other factors should be assessed. Assuming that there is no class waiver or that such a waiver is not enforceable, forgoing a motion to compel individual arbitration and proposing class arbitration might be unwise and unwarranted in many instances. In *Concepcion*, AT&T Mobility clearly evaluated all of these factors, and fought hard for and successfully obtained the decision it sought.

Nonetheless, in appropriate wage disputes, defense counsel should thoroughly explore with a client the risks of compelling individual arbitration and determine whether class arbitration is an available option or could result from negotiation with opposing counsel. In some instances, where the risk of liability is high and damages can be readily determined, clients may strongly favor wholesale resolution of an important or costly issue in a single proceeding. Simply filing a motion to compel individual arbitration without a strategic discussion of costs and benefits may be irresponsible or unethical and, at least, risk losing a good client.

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What 15th Century English Common Law Has to Say About President Obama's Recess Appointments

By Peder J. V. Thoreen

Introduction

The D.C. Circuit surprised many when, in January of this year, it issued its decision in *Noel Canning v. NLRB*,[1] holding invalid the recess appointments of three members of the National Labor Relations Board ("NLRB" or "Board"). In May, the Third Circuit followed suit in *NLRB v. New Vista Nursing & Rehabilitation*,[2] reaching similar conclusions and invaliding another Board member's recess appointment. The ramifications of these decisions, which effectively call into question the validity of hundreds of prior recess appointees and, along with them, the thousands of official acts those appointees undertook, are potentially wide-ranging.

For labor law practitioners, such fears are far from hypothetical. In 2010, the Supreme Court effectively invalidated nearly 600 NLRB decisions in a single blow when it held that two members of the Board could not exercise the Board's power to decide cases.[3] However, the resulting uncertainty was just a sliver of the potential disruption that may result from the recent recess appointment decisions, the impact of which could extend well beyond the Board.

That prospect may breathe new life into a nearly 600-year-old common law rule known as the *de facto* officer doctrine. Under it, the acts of those holding colorable title to office are not subject to collateral attack even if it is later determined that their title was invalid. This doctrine thus could potentially mitigate the effects of *Noel Canning* and *New Vista*, if those decisions otherwise stand.

[1] 705 F.3d 490 (D.C. Cir. 2013).

[2] No. 11-3440, 2013 U.S. App. LEXIS 9860 (3d Cir. May 16, 2013).

[3] *See* New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010); Note, *The New Meaning of New Process Steel, L.P. v. NLRB*, 46 Wake Forest L. Rev. 307, 307 (2011).

Discussion

Noel Canning, New Vista, and Their Implications

In *Noel Canning*, the D.C. Circuit was asked to review a decision of the NLRB that issued at a time when three of the five Board members had been appointed by President Obama pursuant to the Recess Appointments Clause of the Constitution, i.e., without the advice and consent of the Senate as would be required were the Senate not in recess.[4] Two of the three-member panel of the Board that issued the decision were recess appointees.[5] On appeal, the employer argued that the recess appointments were constitutionally invalid, leaving the Board with less than a quorum and, thus, without authority to act.[6]

Agreeing, the D.C. Circuit held that the President may appoint officers of the United States without the advice and consent of the Senate pursuant to the Recess Appointments Clause only when the Senate is between official "sessions," of which there are two or three per Congress.[7] The court held that a "recess" did not encompass other adjournments of the Senate - so-called *intra*session, as opposed to *inter*session, breaks.[8]

At the time of the recess appointments at issue, specifically January 4, 2012, the Senate was operating pursuant to a unanimous consent agreement whereby it held *pro forma* sessions every three business days between December 20, 2011, and January 22, 2012, at which " 'no business [would be] conducted.' "[9] However, the then-current

[4] *Compare* U.S. Constitution art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .") *with* art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

[5] *Noel Canning*, 705 F.3d at 498.

[6] 705 F.3d at 499.

[7] 705 F.3d at 500.

[8] 705 F.3d at 499-507. Although admittedly unnecessary to its outcome, the D.C. Circuit also went on to hold that under the Recess Appointments Clause, the vacancy being filled must also *arise* during an intersession break. 705 F.3d at 507-14.

[9] 705 F.3d at 498-99 (quoting 157 Cong. Rec. S8,783 (daily ed. Dec. 17, 2011) (alteration in original)).

session had officially begun on January 3, 2012.[10] Therefore, the D.C. Circuit concluded that the three recess appointments were invalid; the Board therefore lacked a quorum when it issued its decision in the case; and the decision must be vacated.[11] (On June 24, 2013, the Supreme Court granted *certiorari* in the case.)[12]

Although the Third Circuit in *New Vista* disagreed with some of the D.C. Circuit's reasoning in *Noel Canning*, it too ultimately concluded (over a vigorous dissent) that recess appointments may be made only between regular sessions of the Senate.[13] Because the Board decision in *New Vista* was issued by a three-member panel, one of whom was an intrasession recess appointee (who was not among the members at issue in *Noel Canning*), the Third Circuit concluded that the panel failed to meet the statutory requirement of a three-member panel[14] and, thus, lacked jurisdiction when it issued its order.[15]

While these cases both involved appointments to the NLRB, the Recess Appointments Clause issues raised extend to the appointment of any federal officials who would otherwise require Senate confirmation pursuant to the Appointments Clause. Soon after *Noel Canning* was issued, the Congressional Research Service issued a report analyzing the potential scope of that decision.[16] It concluded that since 1981, over half of recess appointments were intrasession appointments and, thus, would be invalid under *Noel Canning*.[17] These include appointments to federal agencies and bodies as diverse as Amtrak, the United Nations, the Treasury Department, the Federal Election Commission, and the armed services.[18]

Thus, while to date, this legal battle has played out in the context of challenges to acts of the NLRB, its potential ramifications are much broader. However, outright reversal of *Noel Canning* and *New Vista* is not necessary to mitigate their effects.

The History and Purposes of the *De Facto* Officer Doctrine

At least as early as 1431, English courts recognized that the acts of an officer who held colorable title to office may be immune from collateral attack, even though it may later be determined that the officer did not legitimately hold office.[19] The case in question involved a bond issued by the abbot of a convent who, at the time, unlawfully held the office.[20] In an action on the bond, his duly elected successor argued that it was invalid because the former abbot was not legitimately in office.[21] Although the resolution of that case is unclear, it appears that the bond was in fact considered valid, with a justice in the matter indicating that the deeds of those who wrongfully hold office are nevertheless to be given effect.[22]

Although this doctrine of old origins may be unfamiliar to many practitioners, it has had a significant presence in American law. As one author colorfully put it: "When the *de facto* doctrine was implanted in America it was, figuratively speaking, but a slender offshoot of the English common law, but through the fostering care of judges and courts ever alive to the necessities of the people, it has become a vigorous tree with luxuriant branches spreading in every direction, occasionally

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[10] 705 F.3d at 499.

[11] 705 F.3d at 506-07.

[12] NLRB v. Noel Canning, No. 12-1281, 2013 U.S. LEXIS 4876 (June 24, 2013).

[13] *See New Vista*, 2013 U.S. App. LEXIS 9860, at *2, *98.

[14] 29 U.S.C. § 153(b). As the Third Circuit explains, the three-member panel requirement is distinct from the Board's quorum requirement.

[15] *New Vista*, 2013 U.S. App. LEXIS 9860, at *116-17.

[16] Congressional Research Service, Memorandum, *The Noel Canning Decision & Recess Appointments Made From 1981-2013* (Feb. 4, 2013) (hereinafter "Cong. Res. Serv. Memo"), at 4, *available at* http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/Recess%20Appointments%201981-2013.pdf.

[17] Cong. Res. Serv. Memo, *supra* note 16, at 4.

[18] *See* Cong. Res. Serv. Memo, *supra* note 16, at 4-29.

[19] *See* Albert Constantineau, A Treatise on the De Facto Doctrine 8-9 (Law. Cooperative Pub. Co. 1910).

[20] Constantineau, *supra* note 19, at 9.

[21] Constantineau, *supra* note 19, at 9.

[22] Constantineau, *supra* note 19, at 9-10 (" 'In every case, if a man be made abbot or parson erroneously, and then is removed for precontract, or any like matter, yet a deed made by him and the convent, or by the parson and the patron and the ordinary, is good; as if an abbacy or church be vacant, and a man who had no right pretended to be patron, and preferred one A, by force whereof he is installed, and then he is ousted by legal process inasmuch as the patron had no right; yet a deed which was made before is good.' ").

serving to shelter national institutions from the blasts of political strife and excitement."[23]

The doctrine was applied by the United States Supreme Court at least as early as the 1860s and has been invoked many times since.[24] As articulated by the Court, the *de facto* officer doctrine provides "that where there is an office to be filled, and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer *de facto*, and binding upon the public" even if it is later determined that the individual did not validly hold the office.[25]

The doctrine is animated by "the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government."[26] The doctrine also protects against a party, aware of a defect of title, awaiting the outcome of a proceeding with the intention of challenging title in the event of an adverse result.[27] Additionally, the doctrine promotes administrative efficiency by avoiding the serious drain on governmental resources that would occur if *de jure* officers had to "retrace many of the steps" taken by *de facto* officers whose appointments are challenged after the fact.[28] For all of these reasons, the

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[23] Constantineau, *supra* note 19, at 14-15.

[24] Texas v. White, 74 U.S. 700, 733 (1868) (opining regarding acts of the insurrectionist Texas government that "acts necessary to peace and good order among citizens, . . . which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government"); *see also*, *e.g.*, Ryder v. United States, 515 U.S. 177 (1995) (discussing but declining to apply doctrine); United States v. Royer, 268 U.S. 394 (1925); Ex Parte Ward, 173 U.S. 452 (1899); Nofire v. United States, 164 U.S. 657, 661 (1897); Ball v. United States, 140 U.S. 118, 128-29 (1891). For more on the history of the doctrine, see State v. Carroll, 38 Conn. 449 (Sup. Ct. of Errors, Conn., 1871) (discussing history of doctrine); Note, *The De Facto Officer Doctrine: The Case For Continued Application*, 85 Colum. L. Rev. 1121, 1124 & n.31 (1985).

[25] McDowell v. U.S., 159 U.S. 596, 602 (1895); *see also Nofire*, 164 U.S. at 661 (*de facto* officer has "the same validity and the same presumptions attached to his actions as to those of an officer de jure"); *Ball*, 140 U.S. at 128-29 (acts of judge who held position "*de facto*, if not *de jure*, . . . are not open to collateral attack"); Norton v. Shelby County, 118 U.S. 425, 444-45 (1886) ("Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of the acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions.").

[26] *Ryder*, 515 U.S. at 180 (quoting 63A Am.Jur.2d, Public Officers and Employees § 578, at 1080-81 (1984)); EEOC v. Sears, Roebuck & Co., 650 F.2d 14, 17 (2d Cir. 1981) ("The *de facto* officer doctrine was developed to protect the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently occupying government offices could later be invalidated by exposing defects in the officials' titles." (citing Re Manning, 139 U.S. 504, 506 (1891); *Norton*, 118 U.S. at 441-42)); Constantineau, *supra* note 19, at 6 ("For good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question.").

[27] *See* Glidden Co. v. Zdanok, 370 U.S. 530, 535 (1962) (Harlan, J., plurality opinion).

[28] *The De Facto Officer Doctrine*, *supra* note 24, at 1132. Another commentator has summarized the policies supporting the doctrine as follows:

> First, the doctrine provides retrospective stability to the rule of law, enabling citizens to rely on the past acts of officers without having to worry about whether those acts might be swept into invalidity along with an officer's official status if his or her occupancy of an office should someday turn out to have been defective. Second, it makes current compliance with and administration of the laws more efficient and reliable by relieving citizens of the burden of continually verifying the technical validity of the positions of every official with whom they deal. Third, it reduces strategic behavior by litigants to either: (a) attempt to slow the wheels of justice with spurious challenges to office-holders; or (b) abide the outcome of a lawsuit and then overturn it if adverse upon a technicality of which they were previously aware.

Ross E. Davies, *William Cushing, Chief Justice of the United States*, 37 U. Tol.L.Rev. 597, 647 (2006) (footnotes, internal quotation marks, and alterations omitted) (collecting cases).

doctrine establishes a strong presumption in favor of recognizing as valid the acts of those who appeared to have properly been in office, even if they were not.

For present purposes, the implication of the *de facto* officer doctrine is that, even if the D.C. and Third Circuits were correct in *Noel Canning* and *New Vista* regarding the meaning of the Recess Appointments Clause, the relevant acts of the Board issued while it lacked a sufficient number of validly appointed members can and should nevertheless be given effect. The members in question held at least colorable title to office, even if their appointments were technically deficient.[29] Applying the *de facto* officer doctrine in this context would also protect the acts of the many other recess appointees whose right to office might be questioned under *Noel Canning* and *New Vista*.

Prospects for Application of the Doctrine

The courts in the *Noel Canning* and *New Vista* litigations will not be the only ones to weigh in on this issue. It has already been squarely presented to the Fifth Circuit in *D.R. Horton, Inc. v. NLRB*.[30] That closely watched case involves whether an employer's mandatory pre-dispute arbitration agreement with its employees, which precludes joint, collective, or class litigation of disputes, violates the National Labor Relations Act's[31] ("NLRA") guarantee of employees' right to "to engage in ... concerted activities for the purpose of ... other mutual aid or protection ...."[32]

Soon after the issuance of *Noel Canning*, the Fifth Circuit panel in *D.R. Horton* requested supplemental briefing on "whether the panel must consider, for jurisdictional or other reasons, whether the recess appointment of [NLRB recess appointee] Craig Becker was valid. The briefs should then discuss whether the validity of the appointment should be resolved by the panel even if there is no necessity of doing so."[33]

In an *amicus* brief filed in late February 2013, the Service Employees International Union argued that the *de facto* officer doctrine should insulate the relevant acts of the Board, even if the appointment of Member Becker were later deemed invalid under the logic of *Noel Canning*.[34] As of the date of this writing, the Fifth Circuit had not issued a decision, but may well do so in the near future.

Conclusion

The long-standing *de facto* officer doctrine provides a way for courts to avoid the potentially significant disruptions that could be caused if the Recess Appointments Clause analyses of *Noel Canning* and *New Vista* survive further litigation. Whether courts will embrace the doctrine in this context remains to be seen, but *D.R. Horton* presents an early test case.

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[29] *See* Waite v. City of Santa Cruz, 184 U.S. 302, 323-24 (1902) (" 'A de facto officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper.' " (quoting and endorsing lower court's opinion)).

[30] No. 12-60031, Fifth Circuit Court of Appeals (reviewing the Board's decision in D.R. Horton, 357 NLRB No. 184 (Jan. 3, 2012)).

[31] 29 U.S.C. § 151 et seq.

[32] 29 U.S.C. § 157.

[33] Dkt. No. 00512139985, D.R. Horton, Inc. v. NLRB, No. 12-60031, Fifth Circuit Court of Appeals (New Orleans).

[34] Amicus Letter Brief on behalf of SEIU, D.R. Horton, Inc. v. NLRB, No. 12-60031, Fifth Circuit Court of Appeals (Feb. 22, 2013).

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Ninth Circuit Upholds Hefty Damage Award Against ILWU

By Bryan O'Keefe

Introduction

Violent strikes and picketing have been largely eschewed by labor unions in recent years, replaced by more sophisticated "corporate campaign" techniques that pressure employers through the press and, now, social media. The change in tactics and shift away from illegal activity has helped labor unions in many ways. For instance, the public at large usually has little sympathy for a strike or picketing that turns violent. Moreover, strikes and violence are usually "Exhibit A" from an employer in an anti-union campaign and can dissuade prospective members from voting "Yes" in an organizing campaign. Perhaps most importantly, physical violence, destruction of property, and threatening behavior was usually met with judicial disapproval, frequently resulting in injunctions from federal courts, damages awards, and lengthy—as well as financially draining—legal battles over these decisions.

Ahearn v. International Longshore and Warehouse Locals 21 and 4 is another illustration that labor union violence and other unlawful behavior have hefty financial consequences.[1] In a 3-0 decision, the United States Court of Appeals for the Ninth Circuit upheld a District Court's award of over $180,000 in compensatory damages to the NLRB and the employer, Export Grain Terminal, resulting from the ILUW's violation of an injunction prohibiting unlawful behavior. The ILUW also won a minor victory in that a compensatory damage award that was given to law enforcement agencies was overturned because law enforcement was not a party to the action. Still, ILUW is on the hook for significant damages—a costly (and avoidable) outcome for the union.

Background

The underlying dispute between the ILUW and EGT centered around whether ILUW members would staff an EGT grain terminal on land leased from the Port of Washington. The Union argued that its collective bargaining agreement with the Port compelled EGT to hire Union labor. EGT refused. Starting in June 2011, ILUW began picketing at the job site, leading EGT to file unfair labor practice charges with the NLRB. The NLRB found the charges meritorious enough to petition under the NLRA §§ 10(l) and 10(j) for a temporary restraining order and preliminary injunction.[2]

According to the Labor Board, the ILUW engaged in a variety of violent and unlawful behaviors including, but not limited to, breaking and/or stealing signs; tearing down gates; pushing rail cars out of their respective rail sheds; verbally and physically assaulting EGT employees and contractors; impeding ingress and egress to and from the EGT facility; harassing and threatening bodily harm and/or death to EGT employees and other individuals who crossed the picket lines; blocking the rail lines so that railway cars were unable to make scheduled deliveries to EGT; damaging vehicles, including throwing eggs at, pushing, spitting on, and keying vehicles driven by EGT employees; placing plastic bags filled with feces outside of the EGT administration building; following EGT employees and contractors as they left the facility; dropping a black trash bag filled with manure from an aircraft onto EGT property; and dropping nails on the road leading to the entrances to the facility.[3]

In September 2011, the district court entered a temporary restraining order prohibiting the Union from engaging in violence, threats, property damages, mass picketing, the blocking of ingress and egress at the EGT facility, and from "restraining or coercing employees of EGT . . . or any other person doing business in relation to the EGT facility."[4]

The temporary restraining order had little impact on the Union's behavior. Less than a week later, "several hundred people acting in concert with the Unions" picketed on railroad tracks for seven hours and prevented a BSNF train with a corn delivery from reaching the EGT facility.[5] Even after these first protestors cleared the way, the train was met again by Union demonstrators outside another port and was ultimately refused entrance to the EGT facility. Only after several police departments arrested the protestors was the train finally able to make its much belated delivery.

The violent behavior continued into the next day when at about 4 a.m., "over 100 cars converged on EGT's

[1] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652 (July 5, 2013).

[2] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *4.

[3] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *6-7.

[4] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *7.

[5] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *7.

facility," and picketers "armed with gardening shears, baseball bats, broken broom sticks, and metal pipes" approached EGT's facility.[6] The picketers proceeded to break windows, threaten the on-duty security guards, and throw rocks at them. One security guard was pulled from his car by the protestors and threatened with a metal pipe. His car was then driven into a drainage ditch. At some point during this demonstration, the picketers dumped the corn load from the train that was delayed the previous day onto the railroad tracks, cut the air hoses and broke the metal couplings that connected the train cars, knocked down a portion of the fence surrounding the EGT facility, and damaged the lights on the EGT conveyor system.

Given these circumstances, the district court granted the NLRB's preliminary injunction that same day. At an oral hearing four days later, the district court found the Union in contempt of its temporary restraining order.[7]

Even that finding didn't dissuade the Union from stopping its conduct. While the court was determining the remedy for this contempt, on September 21, 2011, several Union officers and members again blocked the railroad tracks leading to the EGT facility, forcing nearly 100 law enforcement officers to the scene.

On the initial contempt issue, the District Court found that the Union was responsible for compensatory damages totaling $250,000, apportioned between the NLRB, EGT, BNSF (the company that was trying to deliver the corn), and the various police departments that were forced to intervene in the mayhem. The damages were apportioned in the following way: NLRB: $56,601.06; BNSF: $11,189.02; EGT: $117,112.70; Longview Police: $17,024.65; Kelso Police: $3,022.39; Cowlitz County Sheriff: $34,520.74; Washington State Patrol: $10,529.44.[8] The district court also set a prospective fine schedule for future violations. In a subsequent award concerning the September 21 action, the district court awarded the NLRB an additional $64, 764.38 in compensatory damages.

Ninth Circuit Decision

On appeal, the first issue that confronted the Ninth Circuit was whether the district court even had the authority to award damages in the first place. Citing to a Second Circuit decision which declined to award damages when the employer failed to bring an underlying Section 303 claim, the ILUW argued that Section 303 of the Labor Management Relations Act is the sole remedy for obtaining damages resulting from unlawful labor activities.[9] Section 303 allows employers to recover damages resulting from illegal secondary picketing. While the NLRB and EGT initially alleged that the Union was engaged in such unlawful picketing on the basis that the Union was picketing ETF (the secondary employer) to cease doing business with the Port (the primary employer), the district court declined to enjoin secondary picketing and did not award the compensatory damages on this basis. Indeed, the district court did not cite Section 303 of the LMRA or Section 8(b)(4) of the NLRA in its decision.[10]

The Ninth Circuit rejected the argument that Section 303 was the only avenue for relief by way of damages for several reasons. First, the court found that one purpose of civil contempt proceedings is to compensate a prevailing party and that "EGT is a prevailing party for purposes of the NLRA, and therefore is entitled to compensation for actual damages."[11] Beyond that, the court cited to language of the LMRA which states that a private employer "*may* sue" for damages under that Section—"not that they must do so."[12] The court concluded that "Nothing in the LMRA or NLRA suggests otherwise."[13] Finally, the court held that the Second Circuit decision did not stand for the "broad proposition that employers who are eligible to seek remedies under Section 303 are *never* entitled to civil contempt damages for injuries related to secondary protest activities."[14]

After finding that compensatory damages were an appropriate remedy, the court turned to the amount of damages awarded to EGT and the Labor Board. The Union argued that the district court should have applied a "clear and convincing standard" and that under that standard, there "was insufficient proof of the injured parties' alleged

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[6] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *8.

[7] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *9.

[8] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *9-10.

[9] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *10.

[10] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *12.

[11] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *13.

[12] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *11 (emphasis added).

[13] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *14.

[14] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *13-14 (emphasis original).

damages to support the amount of the compensatory damages."[15] The court found that it didn't need to resolve which standard—clear and convincing or preponderance of the evidence (as urged by the NLRB)—applied because the "district court's award meets both."[16] The court held that the Union was given a fair opportunity to cross-examine witnesses and introduce evidence and that the district court clearly took these arguments into account because it lowered the damages award by approximately $50,000 from what the NLRB initially requested. The court also found that the compensatory damages were "civil" in nature, not criminal, and thus did not require a "jury trial or heightened burden of proof."[17]

Another minor procedural issue addressed by the court was whether ETG's role in the proceedings exceeded those "given to a charging party under the NLRA."[18] The Union hinged this argument on EGT's statement of attorneys' fees which included legal research and analysis. The court dismissed this claim, finding that ETG did not "petition the Court independently" and instead "merely supported the original petition for injunctive relief by presenting evidence of contumacious behavior and the resulting damages."[19]

The final issue addressed by the court was whether the damages given to BNSF and the various law enforcement agencies were proper. Here, the Union won a small victory with the court overturning this part of the award. The court held that compensatory damages can only be awarded to the "*prevailing party in the litigation*."[20] Because "neither the law enforcement agencies who responded to the picketers nor BNSF were parties to the litigation," compensatory damages were not appropriate.[21] The court noted that compensatory damages are also available when "doing so [is] directly necessary to enforce an injunction."[22] But the court concluded that this test was not met either, holding that, "The district court's compensatory damages awards to the law enforcement agencies who responded to the picketers and to BNSF did not and could not help enforce this injunction. Rather, those awards were entirely retrospective and compensatory."[23] The NLRB also argued that "contempt sanctions may be awarded to non-parties where a statute expressly permits it" and that the award to BNSF and law enforcement was "consistent with NLRA's purpose to deter violations of its provisions."[24] The court, however, found "no authority" for this argument and rejected it too.[25]

Still, the major compensatory damage award to ETG and the NLRB stood and, short of a very unlikely reprieve from the Supreme Court, the ILUW must now pay a substantial amount of money to the NLRB and EGT for its unlawful conduct.

Conclusion

While once common, labor unions have largely abandoned violence as a means to achieve their ends. *Ahearn* is an important reminder that when unions revert to such tactics, the Courts rarely approve—and will take necessary steps to ensure that the conduct ends, including hefty compensatory damages awards.

Labor relations can be a rough and tumble field and nobody expects unions and management to always have perfect manners in the heat of a tough labor dispute. Yet, the Court still expects that the rule of law will be respected by both labor unions and employers. Failing to maintain the rule of law will likely result in damages awarded to the prevailing party. The lesson in *Ahearn* is clear: both labor unions and employers should strive not to break the law in the first place.

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[15] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *14-15.

[16] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *15.

[17] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *16.

[18] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *19.

[19] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *19-20.

[20] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *20 (emphasis original).

[21] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *21.

[22] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *21.

[23] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *24.

[24] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *24.

[25] Ahearn v. Int'l Longshore & Warehouse Union, Local 21, 2013 U.S. App. LEXIS 13652, at *25.

Private Equity Firm Held Liable for Portfolio Company's Withdrawal Liability

By N. Peter Lareau

Introduction

In *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*,[1] the First Circuit held, in a case of first impression, that a private equity firm may be jointly liable with a portfolio company for the portfolio company's withdrawal liability under the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA").[2] This article examines the court's opinion and reasoning in some detail.

Facts and Case Below

Scott Brass, Inc. ("SBI"), at the time a leading producer of high quality brass, copper, and other metals, shipped 40.2 million pounds of metal in 2006.[3] In December of that year, SBI was purchased by two private equity firms, Sun Capital Partners III (''Sun Fund III'')and Sun Capital Partners IV ("Sund Fund IV"),[4] limited partnerships formed by Sun Capital Advisors, Inc. ("SCAI"),[5] a firm founded and wholly-owned by its two shareholders, Marc Leder and Rodger Krouse.[6] At the time of the acquisition, SBI, pursuant to the terms of a collective bargaining agreement, had contributed, and was obligated to continue contributing, to the New England Teamsters and Trucking Industry Pension Fund ("TPF"), a multiemployer pension plan.[7]

As an operating entity, SCAI performs many functions. It seeks out investors and creates limited partnerships (such as the two Sun Funds mentioned above) in which the investor money is pooled. The partnerships then make investments in opportunities recommended by SCAI, which negotiates, structures, and finalizes investment deals. SCAI also provides management services to its portfolio companies (such as SBI), and employs about 123 professionals to provide these services.[8]

Sun Funds III and IV are overseen by general partners: Sun Fund III by Sun Capital Advisors III, LP; Sun Fund IV by Sun Capital Advisors IV, LP.[9] Leder and Krouse are each limited partners in the Sun Funds' general partners and, together with their spouses, are entitled to 64.74% of the aggregate profits of Sun Capital Advisors III, LP and 61.04% of such profits from Sun Capital Advisors IV, LP.[10] The Sun Funds' limited partnership agreements vest their respective general partners with exclusive authority to manage the partnership.[11]

Each general partner receives an annual fee, paid by the limited partnership, of two percent of the aggregate cash committed as capital to the Fund, and a percentage of the Funds' profits from investments.[12] The general partners also have a limited partnership agreement, which provides that, for each general partner, a limited partner committee makes all material partnership decisions, including decisions and determinations relating to "hiring, terminating and establishing the compensation of employees and agents of the [Sun] Fund or Portfolio Companies." Leder and Krouse are the sole members of the limited partner committees.[13]

SCAI controls many private equity funds other than Sun Funds III and IV. The stated purpose of each of the funds is to invest in underperforming companies at below intrinsic value, with the aim of turning them around and selling them for a profit. The Sun Funds' controlling stakes in portfolio companies are used to implement restructuring and operational plans, build management teams, become intimately involved in company operations, and otherwise cause growth in the portfolio companies in which the Sun Funds invest. The intention of the Sun Funds is to then sell the hopefully successful portfolio company within two to five years.

In purchasing SBI, the Sun Funds formed Sun Scott Brass, LLC ("SSB-LLC") to which Sun Fund III contributed $900,000 and Sun Fund IV contributed $2,100,000 (30% and 70%, respectively). SSB-LLC then formed a wholly-owned subsidiary, Scott Brass Holding Corp. ("SBHC"). SSB-LLC transferred the $3 million the Sun Funds invested in it to SBHC as $1 million in equity and $2 million in debt. SBHC then purchased all of SBI's stock

[1] 2013 U.S. App. LEXIS 15190 (1st Cir. July 24, 2013).
[2] 29 U.S.C. § 1381 *et seq*.
[3] 2013 U.S. App. LEXIS 15190, at *11-12.
[4] 2013 U.S. App. LEXIS 15190, at *12.
[5] 2013 U.S. App. LEXIS 15190, at *6.
[6] 2013 U.S. App. LEXIS 15190, at *5.
[7] 2013 U.S. App. LEXIS 15190, at *12.
[8] 2013 U.S. App. LEXIS 15190, at *6.
[9] 2013 U.S. App. LEXIS 15190, at *9.
[10] 2013 U.S. App. LEXIS 15190, at *9.
[11] 2013 U.S. App. LEXIS 15190, at *9.
[12] 2013 U.S. App. LEXIS 15190, at *9-10.
[13] 2013 U.S. App. LEXIS 15190, at *10.

with the $3 million of cash on hand and $4.8 million in additional borrowed money.[14]

Shortly thereafter, SBHC signed an agreement with a subsidiary of Sun Capital Advisors IV, LP, the general partner of Sun Fund IV, to provide management services to SBHC and SBI. In 2001, that subsidiary contracted with SCAI to provide it with advisory services, thus acting as a middle-man, providing SBI with employees and consultants from SCAI.[15]

In the fall of 2008, declining copper prices reduced the value of SBI's inventory, resulting in a breach of its loan covenants. Unable to get its lender to waive the violation of the covenants, SBI lost its ability to access credit and was unable to pay its bills.[16]

In October 2008, SBI stopped making contributions to the TPF. In November 2008, an involuntary Chapter 11 bankruptcy proceeding was brought against SBI. The Sun Funds assert that they lost the entire value of their investment in SBI as a result of the bankruptcy.[17]

On December 19, 2008, pursuant to the provisions of the MPPAA, the TPF demanded payment from SBI and the Sun Funds of approximately 4.5 million dollars, representing SBI's proportionate share of the TPF's vested but unfunded benefit (commonly referred to as "withdrawal liability"). In its demand, the TPF asserted that the Sun Funds had entered into a partnership or joint venture in common control with SBI and were therefore jointly and severally liable with SBI.[18]

On June 4, 2010, the Sun Funds filed a declaratory judgment action in federal district court in Massachusetts seeking a declaration that they were not subject to withdrawal liability because: (1) they were not part of a joint venture or partnership and therefore did not meet the common control requirement; and (2) neither of the Funds was a "trade or business."[19]

The TPF counterclaimed that the Funds were jointly and severally liable for SBI's withdrawal liability and also that the Sun Funds had engaged in a transaction to evade or avoid liability. The district court granted summary judgment to the funds holding that the Funds were not a trade or business and had not engaged in a transaction to "evade or avoid" liability. It did not address the common control issue.[20] The TPF appealed to the First Circuit.

The First Circuit's Decision

The Statute's Provision Regarding Withdrawal Liability

The appellate court first addressed the statutory language, noting that the MPPAA provides that when an employer ceases to have an obligation to contribute to a multiemployer pension plan, or ceases the operations for which the plan provides coverage to employees, the employer must pay its share of the plan's vested but unfunded benefit.[21] Section 1301(b)(1)[22] of the statute also provides that:

> under regulations prescribed by the [PBGC], all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer.

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[14] 2013 U.S. App. LEXIS 15190, at *12.

[15] 2013 U.S. App. LEXIS 15190, at *13.

The First Circuit's opinion recites that:

> Numerous individuals with affiliations to various Sun Capital entities, including Krouse and Leder, exerted substantial operational and managerial control over SBI, which at the time of the acquisition had 208 employees and continued as a trade or business manufacturing metal products. For instance, minutes of a March 5, 2007 meeting show that seven individuals from "SCP" attended a "Jumpstart Meeting" at which the hiring of three SBI salesmen was approved, as was the hiring of a consultant to analyze a computer system upgrade project at a cost of $25,000. Other items discussed included possible acquisitions, capital expenditures, and the management of SBI's working capital. Further, Leder, Krouse, and Steven Liff, an SCAI employee, were involved in email chains discussing liquidity, possible mergers, dividend payouts, and concerns about how to drive revenue growth at SBI. Leder, Krouse, and other employees of SCAI received weekly flash reports from SBI that contained detailed information about SBI's revenue, key financial data, market activity, sales opportunities, meeting notes, and action items. According to the Sun Funds, SBI continued to meet its pension obligations to the TPF for more than a year and a half after the acquisition.

[16] 2013 U.S. App. LEXIS 15190, at *14.

[17] 2013 U.S. App. LEXIS 15190, at *14-15.

[18] 2013 U.S. App. LEXIS 15190, at *15.

[19] 2013 U.S. App. LEXIS 15190, at *16.

[20] 2013 U.S. App. LEXIS 15190, at *16.

[21] 2013 U.S. App. LEXIS 15190, at *19-20.

[22] 29 U.S.C. § 1301(b)(1).

Therefore, said the court:

> "[t]o impose withdrawal liability on an organization other than the one obligated to the [pension] Fund, two conditions must be satisfied: 1) the organization must be under 'common control' with the obligated organization, and 2) the organization must be a trade or business."[23]

The court next observed that, although authorized by the statute to do so, the Pension Benefit Guaranty Corporation has not issued regulations defining a "trade or business" and the Supreme Court has not opined on the meaning of the terms in the context of the MPPAA.[24]

Deference Owed to PBGC Appeals Letter Interpretation of Trade or Business

In a September 2007 appeal letter, the PBGC applied a two-prong test (commonly referred to as the "investment plus" standard) to determine if a private equity fund was a "trade or business" for purposes of withdrawal liability: (1) whether the fund was engaged in an activity with the primary purpose of income or profit and (2) whether it conducted that activity with continuity and regularity.[25] The court rejected PBGC's contention that its interpretation in the appeal letter was entitled to deference under *Auer v. Robbins*,[26] and was to be followed by the court unless plainly erroneous or inconsistent with the PBGC's own regulations. Instead, the court accorded the PBGC interpretation deference under *Skidmore v. Swift & Co.*,[27] pursuant to which the weight accorded an agency interpretation takes into account the thoroughness of the agency's interpretation, "the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[28]

The Appropriate Test for Determining What Constitutes a "Trade or Business"

The court concluded that, with or without deference to the PBGC interpretation, that "some form of an 'investment plus' approach is appropriate" when determining whether withdrawal liability may be imposed on an entity other than the entity directly obligated to contribute.[29] The court declined "to set forth general guidelines for what the 'plus' is," noting, also, that the PBGC has provided no guidance on the issue.[30] The court recognized that "mere passive" investment would be insufficient to impose withdrawal liability;[31] i.e., to treat the investor as a "trade or business," but concluded that "on the undisputed facts of this case, Sun Fund IV is a 'trade or business' for purposes of § 1301(b)(1).[32]

Facts Supporting "Trade or Business" Conclusion

Determining whether an entity is a trade or business within the meaning of § 1301(b)(1), said the court, involves "a very fact-specific approach ... tak[ing] account of a number of factors .... It "caution[ed] that none is dispositive in and of itself.[33]

The court looked to the Funds' organizational documents, which state that management and supervision of the Funds' investment is a principal purpose of the partnerships and give the general partner exclusive and wide-ranging management authority, including making "decisions about hiring, terminating, and compensating agents and employees ... of portfolio companies"[34] and "can encompass even small details, including signing of all checks for its new portfolio companies and the holding of frequent meetings with senior staff to discuss operations, competition, new products and personnel."[35] It noted that the Funds had appointed two of SBI's three directors.[36]

Particular attention was paid by the court to the fact that, at least Sun Fund IV, received a direct economic benefit from its involvement in SBI's management:

> Moreover, the Sun Funds' active involvement in management under the agreements provided a direct economic benefit to at least Sun Fund IV that an ordinary, passive investor would not derive: an offset against the management fees it otherwise would have paid its general partner for managing the investment in SBI. Here, SBI made payments of

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[23] 2013 U.S. App. LEXIS 15190, at *20 (quoting McDougall v. Pioneer Ranch Ltd. P'ship, 494 F.3d 571, 577 (7th Cir. 2007).

[24] 2013 U.S. App. LEXIS 15190, at *22.

[25] 2013 U.S. App. LEXIS 15190, at *22-23.

[26] 519 U.S. 452 (1997).

[27] 323 U.S. 134 (1944).

[28] 2013 U.S. App. LEXIS 15190, at *28 (quoting *Skidmore*, 323 U.S. at 140).

[29] 2013 U.S. App. LEXIS 15190, at *28.

[30] 2013 U.S. App. LEXIS 15190, at *29.

[31] *See* 2013 U.S. App. LEXIS 15190, at *28 ("Where the MPPAA issue is one of whether there is mere passive investment to defeat pension withdrawal liability ...").

[32] 2013 U.S. App. LEXIS 15190, at *29.

[33] 2013 U.S. App. LEXIS 15190, at *29.

[34] 2013 U.S. App. LEXIS 15190, at *30.

[35] 2013 U.S. App. LEXIS 15190, at *31.

[36] 2013 U.S. App. LEXIS 15190, at *32.

> more than $186,368.44 to Sun Fund IV's general partner, which were offset against the fees Sun Fund IV had to pay to its general partner. This offset was not from an ordinary investment activity, which in the Sun Funds' words "results solely in investment returns."[37]

Based on these facts, the court concluded that Sun Fund IV was a "trade or business."[38] It made no determination with respect to the trade or business status of Sun Fund III; instead, it remanded to the district court "to resolve whether Sun Fund III received any benefit from an offset from fees paid by SBI and for the district court to decide the issue of common control."[39]

Comment

As the First Circuit stated, its decision is one of first impression and the conclusion it reached appears to extend the "trade or business" concept further than has been previously recognized. For private equity firms in the First Circuit, the decision is binding to the extent that it held that a private equity fund's holding in a portfolio company may be sufficient to convert the fund from that status of passive investment holder to a "trade or business" liable for the portfolio company's MPPAA withdrawal liability.

Moreover, the "investment plus" standard adopted by the court provides no straightforward test to guide private equity funds for future acquisitions. Instead, the court embraced a "very fact-specific approach" and expressly declined to adopt even general guidelines. On the facts of the case, the court emphasized the direct economic benefit Sun Fund IV received from its involvement in SBI's management in the form of an offset of fees that it would otherwise have to pay. But there is nothing in the opinion that makes that factor determinative. Indeed, the court cautioned that a number of factors are relevant, no one of which is necessarily dispositive. What is left is an amorphous totality of circumstances test.

Reversal by the Supreme Court is unlikely for at least two reasons. First, even if review is sought, it is unlikely that the Court would grant certiorari given the factual orientation of the decision and the lack of a contrary ruling in another circuit. Second, there is no guarantee that a petition for certiorari will be a more attractive alternative to Sun Capital than settlement.[40]

Although binding only in the First Circuit, the decision clearly changes the game for private equity funds looking to invest in entities with potential withdrawal liability. While offering a glimmer of hope to multiemployer employer plans looking to fund their vested but unfunded liabilities, it will have the opposite impact on distressed businesses (with unfunded liability under MPPAA) that are seeking equity capital to stay afloat. Some of that equity money may simply vanish. In other cases, the amount that a fund may be willing to pay will have to take into account not only that the unfunded liability will make the portfolio company more difficult to peddle in the future but that the fund may have to directly absorb the withdrawal liability. Contrarily, it may be that the TPF's success in this case will result in the evaporation of equity capital flowing to businesses saddled with unfunded vested benefits under the MPPAA — the very businesses that such plans need to have succeed and, indeed, thrive.

Pete Lareau writes from his office in Paso Robles, California.

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[37] 2013 U.S. App. LEXIS 15190, at *33 (footnotes omitted).

[38] 2013 U.S. App. LEXIS 15190, at *51.

[39] 2013 U.S. App. LEXIS 15190, at *51. The court also rejected an argument propounded by the Funds that the court's conclusion was inconsistent with the Supreme Court's interpretation of the phrase "trade or business" for purposes of the Internal Revenue Code. It distinguished the cases cited by the Funds because they arose in a different context. The court also disagreed with the Funds' contention that, as a matter of agency law, none of the relevant activities by agents and different business entities could be attributed to the Sun Funds themselves and, therefore, that withdrawal liability could not be imposed. It found, under Delaware law that the general partner was acting within its actual authority granted by the partnership agreements. Finally, the court rejected the TPF's argument based on § 1392(c) of the MPPAA, which "instructs courts to apply withdrawal liability 'without regard' to any transaction the principal purpose of which is to evade or avoid such liability."

[40] The court reported that Sun Fund IV had total investment income of $17,353,533 in 2007, $57,072,025 in 2008, and $70,010,235 in 2009. Therefore, the 4.5 million dollar withdrawal liability it faces may not be an insurmountable obstacle to settlement, particularly because the common control issue (the second condition that must be satisfied for liability to attach) remains undecided.

SUPREME COURT REVIEW

Arbitration Agreement's Class Action Ban Enforceable Even if it Effectively Prevents Vindication of Federal Statutory Right

American Express Co. v. Italian Colors Restaurant, __ U.S. __, 133 S.Ct. 2304, 2013 U.S. LEXIS 4700 (2013)

Merchants who accept American Express cards brought a class action for violations of federal antitrust laws. They alleged that American Express used its monopoly power to force merchants to accept credit cards at rates approximately 30% higher than competing cards. American Express and its wholly-owned subsidiary co-defendant moved to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("FAA"), pursuant to a provision in their agreements with merchants requiring that all disputes be resolved by arbitration. Those agreements also provided that no claims could be arbitrated on a class action basis.

In response, the merchants presented expert evidence that proving the antitrust claims would cost at least several hundred thousand dollars, and might exceed $1 million, while the maximum recovery for an individual plaintiff would be $38,549. The district court granted the motion to compel, but the Second Circuit reversed. It reasoned that the class action waiver was unenforceable because it would require merchants to incur prohibitive costs, and that the arbitration could not proceed. After the Supreme Court vacated and remanded for further considerations in light of its decision in *Stolt-Neilsen S.A. v. AnimalFees Int'l Corp.*, 559 U.S. 662 (2010), the Second Circuit stood by its earlier decision. Next, that court *sua sponte* reconsidered in light of *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S.Ct. 1740, 2011 U.S. LEXIS 3367 (2011), which held that the FAA preempts state unconscionability law holding a prohibition on class arbitration unenforceable, and again reversed. After a petition for rehearing *en banc* was denied, the Supreme Court granted certiorari.

To view Supreme Court briefs related to the *Stolt-Nielsen S.A.* case, go to 2008 U.S. Briefs 1198 on Lexis.com. To view oral argument transcripts, go to 2009 U.S. Trans. LEXIS 76. To view Supreme Court briefs related to the *AT&T Mobility LLC* case, go to 2009 U.S. Briefs 893 on Lexis.com. To view oral argument transcripts, go to 2010 U.S. Trans. LEXIS 64.

Writing for a five-justice majority, Justice Scalia began with the proposition recently emphasized in *CompuCredit Corp. v. Greenwood*, 565 U.S. __, 132 S.Ct. 665, 2012 U.S. LEXIS 575 (2012), that the FAA requires that arbitration agreements be enforced according to their terms, absent a contrary congressional command. The majority found no such congressional command as to class action prohibitions in the federal antitrust laws, even though such claims could potentially be pursued in court as class actions under Federal Rule of Civil Procedure 23. To view Supreme Court briefs related to the *Compucredit* case, go to 2010 U.S. Briefs 948 on Lexis.com. To view district court motions, go to 2008 U.S. Dist. Ct. Motions 4878. For pleadings, go to 2008 U.S. Dist. Ct. Pleadings 4878.

Further, the Court rejected the application of a judge-made exception to the FAA, which enables courts to invalidate arbitration agreements that prevent "effective vindication" of a federal statutory right. The Court held that this exception is designed to prevent prospective waiver of a party's right to pursue statutory remedies. That it is not worth the expense involved in proving a statutory remedy, Justice Scalia wrote, does not constitute the elimination of the right to pursue that remedy. The majority also stated that *AT&T Mobility* "all but resolves this case," as it held that the FAA preempts state law requiring class arbitration even where class arbitration may be necessary to ensure that certain claims will be prosecuted. The majority noted that requiring a preliminary determination by a court as to whether individual pursuit of a claim would be cost-prohibitive would undermine the prospect of speedy resolution that bilateral arbitration is intended to provide.

In a short concurring opinion, Justice Thomas noted his belief that the Court's result is required by the plain meaning of the FAA, which, he contends, permits a party to avoid its obligations under an arbitration agreement only where the party successfully challenges the formation of the agreement.

Writing for Justices Ginsberg and Breyer in dissent, Justice Kagan wrote that the effective vindication doctrine should be applied in cases like this, where an arbitration clause serves to "chok[e] off" a party's ability to enforce congressionally created rights. She argued that just as courts would clearly invalidate exculpatory clauses in arbitration agreements that expressly insulate a party from liability for certain claims, less direct means of obtaining immunity should also be prohibited.

Justice Sotomayor did not participate in the case.

To view Supreme Court briefs related to the *American Express* case, go to 2012 U.S. Briefs 133 on Lexis.com. To view oral argument transcripts, go to 2012 U.S. Trans. 3910.

Arbitrator does not Exceed Authority in Construing Agreement To Permit Class Arbitration

Oxford Health Plans LLC v. Sutter, __ U.S. __, 133 S.Ct. 2064, 2013 U.S. LEXIS 4358 (2013)

A pediatrician sued a health insurance company on behalf of himself and a statewide class of other physicians on contract with the company, alleging that the company failed to make full and prompt payments for medical services as required by their contracts and state law. The company successfully moved to compel arbitration pursuant to an arbitration clause in its contracts with physicians. In arbitration, the parties agreed that the arbitrator should decide whether the contract authorized class arbitration, and he determined that it did.

The company then moved in federal court to vacate this decision, invoking a provision of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*. ("FAA"), that permits courts to vacate awards ''where the arbitrators exceeded their powers.'' While that motion was being litigated and appealed, the Supreme Court issued its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corporation*, 559 U.S. 662 (2010), holding that a party cannot be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that they agreed to do so. The company immediately asked the arbitrator to reconsider his decision on class arbitration in light of *Stolt-Nielsen*. The arbitrator concluded that *Stolt-Nielsen* had no effect on the case because, under his construction of the arbitration clause, the agreement at issue evinced an intention to permit class arbitration.

The company returned to court, again claiming that the arbitrator had exceeded his powers. The district court and Third Circuit disagreed, and the Supreme Court granted certiorari.

Writing for a unanimous Court, Justice Kagan emphasized the limited scope provided by the FAA for court review of arbitrators' decisions. In order to demonstrate that an arbitrator exceeded her powers, a party must do more than show that the arbitrator committed an error, even a serious one. Rather, an arbitrator's decision may be overturned on this basis only where she acts outside of her contractually delegated authority. Because the arbitrator in this case had been delegated the authority to interpret the arbitration agreement to determine whether it permitted class arbitration, and because his decision was based on his resulting interpretation of the language of the contract, he did not exceed his powers.

The Court distinguished *Stolt-Nielsen* on the ground that, in that case, the parties had entered into an "unusual" stipulation that they never reached agreement on class arbitration. In that context, the arbitral decision permitting class arbitration came not from an interpretation of the agreement, but rather from the arbitration panel's conception of sound public policy. That decision was reversed not because the panel had misinterpreted the contract, but because it had gone beyond its interpretive role.

Writing for Justice Thomas in a concurring opinion, Justice Alito noted that, unlike the company in this case, absent class members never conceded that the contract authorizes the arbitrator to decide whether to conduct class arbitration, and they would likely not be bound by the arbitrator's ultimate resolution of the dispute. Absent class members thus may be able to claim the benefit of a favorable judgment without being bound by an unfavorable one. This possibility, he wrote, should give courts pause before determining that the availability of class arbitration is a question for the arbitrator. But because the company in this case conceded as much, Justice Alito joined in the opinion of the Court.

To view Supreme Court briefs related to the *Oxford Health Plans LLC* case, go to 2012 U.S. Briefs 77237 on Lexis.com.

RECENT DEVELOPMENTS

Arbitration

Retirees Required To Arbitrate Reduction of Health Benefits Established Under Collective Bargaining Agreement

VanPamel v. TRW Vehicle Safety Systems, Inc., 2013 U.S. App. LEXIS 14877 (6th Cir. July 23, 2013)

Two retirees from TRW Vehicle Safety Systems ("TRW") filed suit in the United States District Court for the Eastern District of Michigan under section 301 of the Labor Management Relations Act, alleging that TRW's reduction in health benefits available to retirees violated collective bargaining agreements that had established and continued those benefits. TRW responded by filing a motion to compel arbitration citing the arbitration provision in one of the collective bargaining agreements. The district court granted the motion.

On appeal, the retirees argued that they were not obligated to arbitrate. The Sixth Circuit stated at the outset of its analysis:

> When there is a general or broad arbitration clause, "the presumption of arbitrability [is] 'particularly applicable,' and only an express provision excluding a particular grievance from arbitration or 'the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.' " This presumption applies to disputes over retiree benefits if: (1) the parties have contracted for such benefits, and (2) there is nothing in the agreement that specifically excludes the dispute from arbitration.

The retirees, citing cases, argued that the presumption of arbitrability normally attendant upon a broad arbitration clause was not applicable to their complaint because, as retirees, they had a right, independent of the union that negotiated the benefit, to seek enforcement of the contract bestowing the benefit. The Sixth Circuit disagreed, noting that the cases cited by the retirees did not resolve the issue of:

> whether a retiree who brings an *independent* claim for contractual benefits conferred under a CBA, negotiated by a union during the retiree's employment, is bound by a dispute resolution provision.

The retirees also argued that they were not required to arbitrate their claims because they arose, in part, under ERISA and, therefore, were not subject to the arbitration provision because the arbitration provision did not specifically list ERISA claims as being subject to arbitration. The court again disagreed noting that "ERISA claims are derived, at least in part, on the rights a plaintiff may have under a collective bargaining agreement" and may:

> be the subject of arbitration pursuant to a CBA, even without an express listing of "ERISA claims" in the arbitration provision, because the genesis of the claim is the agreement, not a statute.

Having rejected the retirees' arguments that the presumption of arbitrability did not obtain, the Sixth Circuit affirmed.

Judicial Review of Arbitration Award Under Collective Bargaining Agreement does not Include Independent Due Process Standard

Lippert Tile Co. v. International Union of Bricklayers & Allied Craftsmen, District Council of Wisconsin & Its Local 5, 2013 U.S. App. LEXIS 15876 (7th Cir. Aug. 1, 2013)

Brothers Les and Jeffrey Lippert own a tile installation business, Lippert Tile Company, Inc. ("Lippert Tile") that employs union workers. In 2004, the brothers formed a new tile installation company that employed non-union workers in order to serve customers who preferred to deal with non-union contractors. The collective bargaining agreement between Lippert Tile and the Bricklayers Union ("Union") prohibited the company from:

> sublet[ting], assign[ing] or transfer[ring] any work covered by this Agreement to be performed at the site of a construction project to any person, firm or corporation except where the Employer signifies and agrees in writing to be bound by the full terms of this Agreement and complies with all of the terms and conditions of this Agreement.

After the formation of the non-union company, a Union representative, Jeffrey Leckwee, filed a grievance with the joint arbitration committee ("JAC") established under the collective bargaining agreement, seeking union benefits for the non-union tile installers working for the new company. After the JAC (which was composed of six members, three selected by management and three selected by the Union) granted this relief, the companies petitioned to vacate the award in federal district court, arguing that the new company should not have been bound by the arbitration award because it was not a party to the collective bargaining agreement. The district court disagreed and granted the Union's motion to enforce the award on summary judgment, concluding that the new company could be treated as one and the same with the old company for purposes of the agreement under the "single employer" doctrine. On appeal, the Seventh Circuit affirmed.

Before the appellate court, the companies first argued that the arbitration award was unenforceable because the National Labor Relations Board had never found that the non-union employees were in the same bargaining unit as the union employees. They further asserted that such a finding was required to determine whether disputes concerning the non-union workers were subject to arbitration under the collective bargaining agreement. The court did not address the issue finding that the argument had been waived because the companies had failed to pursue it before the JAC.

The court also rejected the companies' contention that there was insufficient evidence upon which the district court could conclude that the two entities constituted a single employer. In summary of that conclusion, the court stated:

> In sum, we agree with the district court's conclusion that, "for all practical purposes, the Companies function as a single entity." While the distinction between the "union" and "nonunion" market is useful, the bottom line reason [the non-union company was] created was to increase the Lippert brothers' share of the tile installation market in the four-county Greater Milwaukee area by providing

> the same service at lower prices, just as any single company might attempt to capture a greater share of the market by reducing prices. Of course, we express no opinion whatsoever on whether this type of double-breasting practice was a violation of the CBA, because that was a merits determination by the JAC. And we certainly express no opinion as to whether this practice is good or bad. But solely for purposes of deciding whether the JAC had the power to decide whether their double-breasting practice was a violation of the CBA and issue a binding arbitration award, we find, under the "single employer" doctrine, that it did.

Finally, the companies asserted that the JAC was tainted because the Union representative who filed the grievance, Leckwee, also sat on the JAC. In rejecting this argument, the court concluded that judicial review of arbitration awards under § 301 of the Labor Management Relations Act differed from the review of arbitration awards under the Federal Arbitration Act ("FAA"). Specifically, the court stated:

> Unlike in the FAA, ... "evident partiality" is not inherently built into the Section 301 review mechanism. We, of course, agree with the companies that labor arbitration awards are subject to Section 301 review .... The question is what that review includes, and Section 301 review simply does not include a free-floating procedural fairness standard absent a showing that some provision of the CBA was violated.

Reviewing the collective bargaining agreement in the case before it, the court stated:

> To the extent the CBA sought to deal with potential bias, all it required was that the panel consist of three employer representatives and three union representatives. So long as this equal representation requirement is met, nothing in the CBA prohibited the filer of a grievance from sitting on the JAC. *See, e.g., Merryman*, 639 F.3d at 292 ("Merryman agreed that disputes would be resolved in the first instance not by a neutral arbitrator but by a committee composed of an equal number of employer and union representatives. The agreement does not require the representatives on the joint committee to act like detached magistrates or neutral arbitrators. Rather, we rely on the balanced voting membership of the joint committee to provide fairness to the interested parties."). It is undisputed that the JAC consisted of three employer representatives and three union representatives (one of which was Leckwee). That resolves any argument concerning representation.

Bankruptcy

Disagreeing With Sister Circuits, Ninth Circuit Adopts Broad Standard for Determining Whether Omission in Bankruptcy Filing Estops Unrelated Litigation

Ah Quin v. County of Kauai DOT, 2013 U.S. App. LEXIS 15076 (9th Cir. July 24, 2013)

On November 10, 2008, Kathleen M. Ah Quin ("Plaintiff") filed suit in the United States District Court for the District of Hawaii alleging that her employer, the County of Kauai (Hawaii) Department of Transportation, discriminated against her on account of her sex. On April 4, 2009, she filed for Chapter 7 bankruptcy. In doing so, she neglected to mention her discrimination suit against the County, checking the box "None" next to the item requesting that she: "List all suits and administrative proceedings" to which she was a party. At a bankruptcy hearing, Plaintiff testified that she had listed all of her assets and that the answers in her petition and schedules were "true and correct," again not mentioning her discrimination suit. On September 1, 2009, the bankruptcy court issued an order of discharge and closed the case.

At some point, Plaintiff's lawyer in the discrimination case, who was not her lawyer in the bankruptcy case, became aware of the potential effect of Plaintiff's bankruptcy proceeding. At a December 21, 2009, settlement conference in the discrimination suit, Plaintiff's lawyer informed the County of her bankruptcy filing. The County then sent a letter to the district court setting forth the County's position that it could move to dismiss the action under the doctrine of judicial estoppel. The next day, the district court vacated all dates and deadlines in the discrimination suit and scheduled a status conference for January 14, 2010.

On January 13, 2010, Plaintiff moved to reopen her bankruptcy case and to set aside the discharge. The motion, accompanied by declarations from her bankruptcy lawyer's staff and from Plaintiff, explained that Plaintiff had never disclosed the pending lawsuit to her bankruptcy lawyer or his staff and that Plaintiff's failure to list the lawsuit as an asset stemmed from Plaintiff's misunderstanding of what she was required to do. The bankruptcy court reopened the case the same day. Plaintiff amended her bankruptcy schedules to list this pending claim as an asset.

On February 10, 2010, the County filed a motion for summary judgment in the discrimination action, on the ground that judicial estoppel prohibited Plaintiff from proceeding. The district court agreed and granted summary judgment in an order dated April 1, 2010.

On June 20, 2010, the bankruptcy trustee filed a report that abandoned the trustee's interest in the pending discrimination action. Plaintiff's unsecured creditors did not object to that action by the trustee. On July 21, 2010, the bankruptcy court closed the reopened case.

Generally, if a plaintiff in a discrimination suit (or other suit) has filed a bankruptcy claim without disclosing the existence of the discrimination suit, judicial estoppel applies and the plaintiff is precluded from pursuing the discrimination suit. "The reason is that the plaintiff-debtor represented in the bankruptcy case that no claim existed, so he or she is estopped from representing in the lawsuit that a claim *does* exist." However, in *New Hampshire v. Maine*, 532 U.S. 742, 753 (2001), the Supreme Court stated that "it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake."

The circuit courts of appeal have narrowly interpreted "inadvertence or mistake" in this context, looking only to whether the debtor knew about the claim when he or she filed the bankruptcy schedules and whether the debtor had a motive to conceal the claim. The district court adopted that standard in granting the County's motion for summary judgment.

On appeal, a panel of the Ninth Circuit, split 2-1, reversed the district court's decision and remanded for further consideration. The panel majority, refusing "to glean the legal standard for what constitutes 'inadvertence or mistake' in a bankruptcy filing from cases that plainly did not concern that factor[,]" held that "the district court erred in applying the narrow interpretation of 'inadvertence' because, in the circumstances, that interpretation is too stringent."

In reaching its conclusion, the Ninth Circuit distinguished between cases in which a plaintiff-debtor reopens the bankruptcy proceeding to correct the filing omission and cases in which the bankruptcy proceeding is not reopened. Thus,

> When a plaintiff-debtor has not reopened bankruptcy proceedings, a narrow exception for good faith is consistent with *New Hampshire* and with the policies animating the doctrine of judicial estoppel. The three primary *New Hampshire* factors are still met (inconsistency, bankruptcy court accepted the contrary position, to the debtor's unfair advantage).

However:

> where . . . the plaintiff-debtor reopens bankruptcy proceedings, corrects her initial error, and allows the bankruptcy court to re-process the bankruptcy with the full and correct information, a *presumption* of deceit no longer comports with *New Hampshire*.

The court reasoned:

> once a plaintiff-debtor has amended his or her bankruptcy schedules and the bankruptcy court has processed or re-processed the bankruptcy with full information, two of the three primary *New Hampshire* factors are no longer met. Although the plaintiff-debtor initially took inconsistent positions, the bankruptcy court ultimately *did not accept* the initial position. . . .
>
> Moreover, the plaintiff-debtor *did not obtain an unfair advantage*. Indeed, the plaintiff-debtor obtained no advantage at all, because he or she did not obtain any benefit whatsoever in the bankruptcy proceedings.

Summarizing its conclusions, the court states:

> In these circumstances, rather than applying a *presumption* of deceit, judicial estoppel requires an inquiry into whether the plaintiff's bankruptcy filing was, in fact, inadvertent or mistaken, as those terms are commonly understood. Courts must determine whether the omission occurred by accident or was made without intent to conceal. The relevant inquiry is not limited to the plaintiff's knowledge of the pending claim and the universal motive to conceal a potential asset though those are certainly factors. The relevant inquiry is, more broadly, the plaintiff's subjective intent when filling out and signing the bankruptcy schedules.

Dodd-Frank Wall Street Reform and Consumer Protection Act Failure to Report Alleged Securities Violation to SEC Dooms Whistleblower's Claim

Asadi v. GE Energy (USA), L.L.C., 2013 U.S. App. LEXIS 14470 (5th Cir. July 17, 2013)

In 2006, Khaled Asadi accepted a position with GE Energy (USA), L.L.C. as its Iraq Country Executive and relocated to Amman, Jordan. At a meeting in 2010, Iraqi officials informed Asadi of their concern that GE Energy hired a woman closely associated with a senior Iraqi official to curry favor with that official in negotiating a lucrative joint venture agreement. Asadi, concerned that the alleged conduct violated the Foreign Corrupt Practices Act ("FCPA"), reported the issue to his supervisor and to the GE Energy ombudsperson for the region. Shortly following these internal reports, Asadi received a "surprisingly negative" performance review. GE Energy pressured him to step down from his role as Iraq Country Executive

and accept a reduced role in the region with minimal responsibility. Asadi refused and, approximately one year after he made the internal reports, GE Energy fired him.

Asadi sued GE Energy in the United States District Court for the Southern District of Texas alleging that GE Energy violated the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), 15 U.S.C. § 78u-6(h). GE Energy moved to dismiss Asadi's complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the basis that it failed to state a claim because, *inter alia*, (1) Asadi did not qualify as a "whistleblower" under the Dodd-Frank definition of that term, and (2) the whistleblower-protection provision does not apply extraterritorially. The district court granted GE Energy's motion, concluding that the whistleblower-protection provision "does not extend to or protect Asadi's extraterritorial whistleblowing activity." Having reached this conclusion, it declined to decide whether Asadi qualified as a "whistleblower" under the whistleblower-protection provision.

Section 78u-6(a) of Dodd-Frank defines the term "whistleblower" as:

> any individual who provides . . . information relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission."

On appeal to the Fifth Circuit, Asadi conceded that he was not a whistleblower within that definition of the term because he did not provide any information to the Commission.

However, § 78u-6(h)(1)(A)(iii) of Dodd-Frank prohibits an employer from discharging or otherwise discriminating against a "whistleblower" because of any conduct:

> in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002, the Securities Exchange Act of 1934 including section 10A(m) of such Act), section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Because this provision does not require disclosure of information to the Commission, Asadi argued that there was a conflict between it and the definitional section that should be resolved in his favor. He is supported in that position by a regulation promulgated by the Commission that "redefines" the term whistleblower to include an individual who has engaged in activity protected by Dodd-Frank even though no information has been reported to the Commission.

The Fifth Circuit rejected Asadi's argument that § 78u-6(h)(1)(A)(iii) creates a conflict with the definitional section. According to the court, the definitional section specifies who is protected while § 78u-6(h)(1)(A)(iii) specifies "what actions by protected individuals constitute protected activity." Such an interpretation does not render § 78u-6(h)(1)(A)(iii) superfluous, stated the court, because it protects whistleblowers from retaliation for reasons other than having made a report to the Commission. The court provides the following example:

> Assume a mid-level manager discovers a securities law violation. On the day he makes this discovery, he immediately reports this securities law violation (1) to his company's chief executive officer ("CEO") and (2) to the SEC. Unfortunately for the mid-level manager, the CEO, who is not yet aware of the disclosure to the SEC, immediately fires the mid-level manger. The mid-level manager, clearly a "whistleblower" as defined in Dodd-Frank because he provided information to the SEC relating to a securities law violation, would be unable to prove that he was retaliated against because of the report to the SEC. . . . [§ 78u-6(h)(1)(A)(iii)], however, protects the mid-level manager. In this scenario, the internal disclosure to the CEO, a person with supervisory authority over the mid-level manager, is protected under 18 U.S.C. § 1514A, the anti-retaliation provision enacted as part of the Sarbanes-Oxley Act of 2002 ("the SOX anti-retaliation provision"). Accordingly, even though the CEO was not aware of the report to the SEC at the time he terminated the mid-level manager, the mid-level manager can state a claim under the Dodd-Frank whistleblower-protection provision because he was a "whistleblower" and suffered retaliation based on his disclosure to the CEO, which was protected under SOX.

The appellate court also refused to defer to the Commission's regulation because the clear statutory language is to the contrary:

> The statute . . . clearly expresses Congress's intention to require individuals to report information to the SEC to qualify as a whistleblower under Dodd-Frank. Because Congress has directly addressed the precise question at issue, we must reject the SEC's expansive interpretation of the term "whistleblower" for purposes of the whistleblower-protection provision.

FLSA

Seventh Circuit Affirms Holding that Interstate School Bus Drivers Are Exempt from FLSA

Almy v. Kickert School Bus Line, Inc., 2013 U.S. App. LEXIS 14341 (7th Cir. July 16, 2013)

For a number of years, Robert Almy drove a school bus for Kikert School Bus Line, Inc. As part of his regular route, he picked up kids at private schools in Illinois and dropped them off at their homes, which were located in Indiana, just across the Illinois state border. In 2008, Almy filed suit against Kikert in the United States District Court for the Northern District of Illinois alleging various violations of the Fair Labor Standards Act ("FLSA"). The district court granted summary judgment for Kikert finding that Almy was covered by the FLSA's motor-carrier exemption, applicable to anyone paid to transport passengers across state lines.

Before the Seventh Circuit, Almy argued that 49 U.S.C. § 31502 (of the Motor Carrier Act) incorporated another statutory provision that deprives the Secretary of Transportation of "jurisdiction under [the Motor Carrier Act] over . . . a motor vehicle transporting only school children and teachers to or from school . . . ." But the appellate court, joining other circuit courts of appeals that have considered the issue, held that the provision upon which Almy relied deprived the Secretary of Transportation only of economic regulatory authority, not the authority to impose safety regulations. Because the authority to establish the maximum hours of drivers falls within the Secretary of Transportation's safety authority, the Department of Transportation retained the right to set maximum hours and Almy fell under that authority. As such, he was exempt from the provisions of the FLSA and the appellate court affirmed the ruling below.

FMLA

No FMLA Interference From Delay in Requesting Medical Certification

Kinds v. Ohio Bell Telephone Co., 2013 U.S. App. LEXIS 15324 (6th Cir. July 29, 2013)

Does a company's delay in requesting FMLA medical certification constitute interference with FMLA rights? It does not, according to the Sixth Circuit, which affirms a district court's entry of summary judgment on the employer's behalf.

Debra Kinds went to the emergency room after her live-in boyfriend assaulted her. Kinds told her supervisors about the mental and physical abuse and requested time off to look for a new place to live and get her affairs in order. Having not yet worked 1,250 hours during the previous 12 month period, she was not yet eligible for FMLA leave and had no available vacation time, but the company gave her one week of discretionary leave.

The next month, Kinds became eligible for FMLA leave. She immediately applied for and took FMLA leave to obtain mental health treatment. The company notified its short-term disability carrier and its FMLA Operations Department in Texas about Kinds' leave. The company told Kinds that it had submitted her claim, and sent her notice confirming her FMLA eligibility. The form stated Kinds was not required to submit an FMLA medical certification at the time.

The company's FMLA Operations Department sent Kinds a letter explaining that any FMLA leave would run concurrently with any approved STD benefits, but that, if her STD claim was denied, she would have to submit FMLA medical certification for a decision as to whether her absence was FMLA qualifying.

The STD carrier approved benefits for part of Kinds's absence, but denied benefits for a three week period. The result was the FMLA leave was approved for the first seven days of her absence, denied for the next three weeks, and then approved for four more weeks. Consistent with its prior communication, the company told Kinds the three weeks of non-approved FMLA leave would be approved if she submitted FMLA medical certification for the absence.

Kinds did not submit the certification in the time required nor during an extension that the company had granted at Kinds' request. As a result, Kinds was terminated for "unexcused absence" during the three weeks for which she was not on short term disability and did not have medical certification to support FMLA leave.

Kinds sued, alleging that her discharge constituted FMLA interference. The district court granted the company's motion for summary judgment. Kinds appealed, arguing that the "delayed request" for medical certification interfered with her FMLA rights. At issue was the language of DOL regulation 825.305(b), which provides that:

> In most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification.

Kinds argued that the regulation should be interpreted as mandating that the employer request certification within five days, unless FMLA fraud was a concern. The

appellate court did not find this narrow interpretation a proper reading of the regulation.

"Instead," said the court:

> we read the FMLA certification regulation according to its plain meaning and conclude that [the company's] request properly triggered Kinds's duty to provide a medical certification within 15 days to verify her need for leave. [The STD carrier's] denial of Kinds disability claim for the period in question, while not sufficient to deny outright her request for FMLA leave, provided an adequate "reason to question the appropriateness of the leave." *See* 29 C.F.R. § 825.305(b).

The employer, the court continued:

> was not required by either the FMLA statute or the regulations to promptly exercise its right to request a medical certification when Kinds first gave notice of her need for leave. It instead properly exercised that right upon having reason to question the appropriateness of her leave after [the STD carrier] denied short-term disability benefits for the full period requested by Kinds. The company's policy of deferring such requests is actually beneficial to its employees because only those employees taking extended leaves for medical issues who have been denied short-term disability benefits are required to provide medical certifications.

LHWCA

Drunken Longshoreman Denied Compensation Under Longshore and Harbor Workers' Compensation Act

Schwirse v. Director, OWCP, 2013 U.S. App. LEXIS 15283 (9th Cir. July 26, 2013)

At the end of his shift, during which he consumed 9-10 beers and a half-pint of whiskey (on top of the two beers he drank before reporting to work) longshoreman Gary Schwirse fell over a rail onto a concrete and steel ledge while relieving himself. He was taken by ambulance to the hospital where he was diagnosed with acute alcohol intoxication (.29 serum level or .25 blood alcohol level), cannabis ingestion, and a severe scalp laceration to his right temple.

The Benefits Review Board ("BRB") denied Schwirse's claim for compensation under the Longshore and Harbor Workers' Compensation Act ("LHWCA") concluding that he was ineligible for compensation arising out of the injury he suffered in the fall under 33 U.S.C. § 903(c), which precludes compensation to an injured employee if "the injury was occasioned solely by [his] intoxication."

When the case reached the Ninth Circuit, it turned on the correct interpretation of "occasioned solely by intoxication."

Notwithstanding the provisions of § 903(c), the LHWCA provides that, in a claim for compensation, it:

> shall be presumed, in the absence of substantial evidence to the contrary . . . [t]hat the injury was not occasioned solely by the intoxication of the injured employee.

Construing this provision, the Ninth Circuit looked to admiralty cases that determined proximate cause by:

> (1) looking at the act that caused the accident and (2) determining whether there were any superseding or intervening causes that contributed to the injury.

The court held that:

> an injury "occasioned solely by" intoxication means that the legal cause of the injury was intoxication, regardless of the surface material of the landing on which the intoxicated person fell. In other words, as aptly stated by the BRB, "[i]f intoxication was the sole cause of the claimant's fall, then intoxication also was the sole cause of the claimant's injury."

Schwirse argued that the standard applied by the court was too constricting. Under his interpretation, although his fall may have been occasioned by his intoxication, the proximate cause of his injury was that he fell on to a concrete ledge, as opposed to, say, a feather bed or body of water. The court rejected the argument, noting:

> Schwirse's interpretation of the term "injury" would read out the phrase "occasioned solely by" and preclude the application of § 903(c). Nearly every "harm" would not be "occasioned solely by the intoxication" but rather by some further cause, such as the ground.

NLRB

Fourth Circuit Agrees That Term "Recess" in Recess Appointments Clause Refers to Intersession Recesses

NLRB v. Enterprise Leasing Co. Southeast, LLC, 2013 U.S. App. LEXIS 14444 (4th Cir. July 17, 2013)

In an opinion issued in two consolidated cases, the Fourth Circuit refuses to enforce decisions issued by the National Labor Relations Board because the Board lacked a valid quorum owing to the fact that the Board's membership at the time the decisions issued included three sitting members who were "recess appointees" made by President Obama at a time that no recess existed. In reaching this conclusion, the Board joined the D.C. and Third

Circuits in holding that a "recess" for the purpose of the recess appointments clause occurs only during an intersession recess of the Senate:

> [W]e agree with the *Noel Canning* and *New Vista Nursing* courts that the term "the Recess," as used in the Recess Appointments Clause, refers to the legislative break that the Senate takes between its "Session[s]." That is to say "the Recess" occurs during an intersession break — the period of time between an adjournment sine die and the start of the Senate's next session. Such an interpretation adheres to the plain language of the Appointments and Recess Appointments Clauses, and is consistent with the structure of the Constitution, the history behind the enactment of these clauses, and the recess appointment practice of at least the first 132 years of our Nation.

[Editor's note: The Supreme Court has granted certiorari in *Noel Canning* and will, presumably, finally resolve the issue. *See NLRB v. Noel Canning*, 2013 U.S. LEXIS 4876 (U.S. June 24, 2013). For a discussion of *Noel Canning v. NLRB*, *see* NP Lareau, "D.C. Circuit Holds NLRB Has Lacked Constitutional Quorum Since Beginning of 2012," 13 Bender's Lab. & Empl. Bull. 85 (March 1, 2013). For a discussion of *NLRB v. New Vista Nursing & Rehabilitation*, *see* NP Lareau "Third Circuit Invalidates President Obama's Recess Appointment to NLRB," 13 Bender's Lab. & Empl. Bull. 261 (July 1, 2013).**]**

Senate Confirms Five Nominees for NLRB Posts

In a deal to end the stalemate over Senate Republican objections to President Obama's nominees to federal administrative agencies and to avert a threatened change in the filibuster rules by Senate Democrats, President Obama agreed to withdraw his nominations of Richard F. Griffin, Jr. and Sharon Block for confirmation by the Senate as members of the National Labor Relations Board. Griffin and Block are currently serving as recess appointees of the Board and incurred the particular wrath of the Republican Senators after they insisted on continuing to sit as members of the Board after the D.C. Circuit, and then the Third Circuit, held that their appointments were unlawful. *See* NP Lareau, "Circuit Holds NLRB Has Lacked Constitutional Quorum Since Beginning of 2012," 13 Bender's Lab. & Empl. Bull. 85 (March 1, 2013); NP Lareau, "Third Circuit Invalidates President Obama's Recess Appointment to NLRB," 13 Bender's Lab. & Empl. Bull. 261 (July 1, 2013).

In lieu of the nominations of Griffin and Block, President Obama nominated Kent Hirozawa, a Democrat currently serving as chief counsel to Board Chairman Mark Gaston Pearce, and Nancy Schiffer, also a Democrat and a former associate general counsel of the AFL-CIO.

Republicans Harry I. Johnson, III (currently a partner with Arent Fox LLP) and Philip A. Miscimarra (currently a partner with Morgan Lewis & Bockius LLP) had previously been nominated by President Obama on April 9, 2013, along with current Board Chairman Mark Gaston Pearce (to fill the vacancy that would have occurred when his appointment expired on August 27, 2013).

On July 31, the Senate confirmed all five nominees.

Former NLRB Recess Appointee Richard Griffin Nominated as Board's General Counsel

On August 1, 2013, shortly after pulling the nomination of Richard Griffin to serve as a member of the National Labor Relations Board (as a part of the deal to end the Senate stalemate over Board nominations), President Obama nominated Griffin for the Board's General Counsel spot. At the same time he withdrew the nomination of the current acting Board General Counsel, Lafe E. Solomon, to serve a four-year term in the position. It is understood that Solomon will remain in his acting role until Griffin is confirmed, at which time Solomon will retire.

Ninth Circuit Affirms Award of Damages against Two ILWU Locals for Violent Activities in Washington State

Ahearn v. ILWU, Locals 21 and 4, 2013 U.S. App. LEXIS 13652 (9th Cir. July 5, 2013)

In an attempt to force Export Grain Terminal, LLC ("EGT") to hire union members to operate EGT's grain terminal on land leased from the Port of Washington ("Port"), Locals 21 and 4 of the International Longshore and Warehouse Union ("Union") began picketing at the site. EGT filed charges against the Union with the National Labor Relations Board ("NLRB"), asserting that the Union's picketing and trespassing resulted in the destruction of EGT property and the harassment of its employees and contractors, including but not limited to: breaking and/or stealing signs; tearing down gates; pushing rail cars out of their respective rail sheds; verbally and physically assaulting EGT employees and contractors; impeding ingress and egress to and from the EGT facility; harassing and threatening bodily harm and/or death to

EGT employees and other individuals who crossed the picket lines; blocking the rail lines so that railway cars were unable to make scheduled deliveries to EGT; damaging vehicles, including throwing eggs at, pushing, spitting on, and keying vehicles driven by EGT employees; placing plastic bags filled with feces outside of the EGT administration building; following EGT employees and contractors as they left the facility; dropping a black trash bag filled with manure from an aircraft onto EGT property; and dropping nails on the road leading to the entrances to the facility.

At the behest of the NLRB, a federal district court issued a temporary restraining order (''TRO''), prohibiting the unions from engaging in ''picket line violence, threats and property damages, mass picketing and blocking of ingress and egress at the [EGT facility]'' and from ''restraining or coercing employees of EGT, General [Construction], or any other person doing business in relation to the EGT facility. . . .''

After the Union engaged in further similar conduct, the district court issued a preliminary injunction, enjoining the same conduct described in the TRO. When the Union persisted in its unlawful activities, the district court found it in contempt of the TRO and awarded the NLRB $250,000 to be apportioned pro rata between the NLRB, EGT, a railroad company that had been prevented from making deliveries to EGT by the Union's activities and various law enforcement agencies that were involved in attempting to maintain law and order in the face of the Union's violence. A week later, the Union having persisted in its violent conduct, the court held the Union in contempt of the preliminary injunction and awarded the NLRB an additional $65,000 in damages.

On appeal to the Ninth Circuit, the Union argued that section 303 of the Labor Management Relations Act (''Section 303'') is the exclusive vehicle available to EGT to obtain damages against the Union for the Union's conduct. The Union also contended that the railroad company and the law enforcement agencies were not entitled to compensatory damages because they were not parties to the underlying action brought by the NLRB.

Section 303 provides that a person ''injured in his business or property by reason'' of a union's secondary boycott may recover resulting damages. The NLRB had alleged before the district court that the Union's conduct constituted a secondary boycott, but the court declined to award relief with respect to that allegation and did not cite section 303 in its award of compensatory damages. The Ninth Circuit held EGT was not limited to section 303 as the only remedy affording it relief in the form of damages and affirmed the damage award below as it applied to EGT. In doing so, it rejected the Union's argument that the court should follow the Second Circuit's decision in *NLRB v. Local 3, Int'l Bhd. of Elec. Workers*, 471 F.3d 399, 402 (2d Cir. 2006) (''*Local 3*''), which declined to award civil contempt damages to third-party employers when the employers were not complainants in the underlying Section 303 action and had not brought their own Section 303 claims against the union.

The Ninth Circuit reasoned, first:

> [C]ivil contempt proceedings serve two purposes: (1) coercing compliance with a court order; and (2) compensating the prevailing party. As the charging party, EGT is a ''prevailing party'' for purposes of the NLRA and therefore is entitled to compensation for its actual damages.

(Citations omitted). Second, the Ninth Circuit was:

> not convinced that Local 3 stands for the broad proposition that employers who are eligible to seek remedies under Section 303 are never entitled to civil contempt damages for injuries related to secondary protest activities.

Third, the appellate court noted that while section 303 says that an employer ''may sue'' for damages, it does not say that it must do so. Finally, it was not clear that EGT even had a viable claim under section 303.

The Ninth Circuit did agree, however, with the Union's argument that the award of damages to the railroad company and law enforcement agencies was improper because they were not parties to the proceeding that resulted in the contempt findings.

Second Circuit Affirms no Backpay for Unauthorized Aliens, Leaves Door Open for Conditional Reinstatement

Palma v. NLRB, 2013 U.S. App. LEXIS 13911 (2d Cir. July 10, 2013)

On February 12, 2003, Mezonos Maven Bakery, Inc. (''Mezonos'') unlawfully discharged a number of its employees after they concertedly complained about the treatment they were receiving from a supervisor. The terminated employees all were undocumented workers who had worked for Mezonos for varying periods of time. None of them had ever presented work-authorization documents, and Mezonos had not requested such documentation when it hired them.

Unfair labor practice charges were filed, the parties settled, and the Board issued an unpublished Decision and Order pursuant to a formal settlement stipulation. Among other things, the Board ordered Mezonos to offer the discriminatees reinstatement and to make them whole for lost wages and benefits. It also provided, however,

that at compliance, Mezonos could seek to establish that terminated employees were not entitled to offers of reinstatement and could dispute the amount of backpay due, "if any." On March 15, 2005, the Board's consent Order was enforced by the United States Court of Appeals for the Second Circuit.

Thereafter, the General Counsel issued a compliance specification. In its answer to that specification, Mezonos asserted that, pursuant to the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, it could not offer the terminated employees reinstatement or pay them backpay because they were not legally authorized to work or be present in the United States. On November 1, 2006, an administrative law judge held that the terminated employees were entitled to backpay notwithstanding their undocumented status and implied, but did not affirmatively order, Mezonos to to offer them conditional reinstatement. The judge distinguished *Hoffman Plastic* noting that the employee in that case violated IRCA by proffering fraudulent work-authorization documents to obtain employment, whereas the terminated employees had not tendered fraudulent documents to obtain employment, but Mezonos had violated IRCA by hiring them knowing they were undocumented. Disagreeing with the administrative law judge, a three-member panel of the Board unanimously held that "*Hoffman* broadly precludes backpay awards to undocumented workers regardless of whether it is they or their employer who has violated IRCA."

On appeal, the Second Circuit affirmed the Board's backpay decision but remanded the matter to the Board for consideration of the administrative law judge's recommendation that Mezonos be ordered to offer conditional reinstatement to its former employees — i.e., reinstatement conditioned on the former employees providing valid documentation that they were authorized to work in the United States. As to the backpay award, the appellate court summarized its conclusion as follows:

> IRCA's purpose was "to control illegal immigration to the U.S.," both by deterring employers "from hiring unauthorized aliens" and by "deter[ring] aliens from entering illegally or violating their status in search of employment." As to aliens who did not present fraudulent documents but who in fact are in the United States illegally or are not authorized to work here, we see no reason to think that Congress nonetheless intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities[.] We conclude that the Board did not err by interpreting *Hoffman Plastic* to require the denial of backpay to petitioners.

(Citations omitted).

Turning to the issue of conditional reinstatement, the Board argued that the issue was not before the court because the administrative law judge had not affirmatively recommended such reinstatement and petitioners had not excepted to that omission. Alternatively, the Board requested that the issue be remanded to it for consideration if the court believed the issue should be addressed. The court adopted the latter course of action.

In doing so, however, it noted its skepticism regarding Mezonos's contention that conditional reinstatement is not an appropriate remedy after *Hoffman Plastic*. In this regard, the court stated:

> The *Hoffman Plastic* Court noted that *Sure-Tan* had held that
>
> > the Board was prohibited from effectively rewarding a violation of the immigration laws by reinstating workers not authorized to reenter the United States[, and that] . . . to avoid a potential conflict with the INA, *the Board's reinstatement order had to be conditioned upon proof of the employees' legal reentry.*

Hoffman Plastic, 535 U.S. at 145 (internal quotation marks omitted) (emphasis ours). And there apparently was no need for the *Hoffman Plastic* Court to consider whether the Board could order conditional reinstatement, given that "[w]hen the Board learned that [Castro] was an undocumented alien, it denied [him] reinstatement," *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639, 640, 345 U.S. App. D.C. 1 (D.C. Cir. 2001) (en banc), and the Supreme Court observed that

> [n]either Castro nor the Board's General Counsel offered any evidence that Castro had applied or intended to apply for legal authorization to work in the United States,

535 U.S. at 141. Thus, although the *Hoffman Plastic* Court did not directly deal with an issue of reinstatement, its discussion plainly did not foreclose relief in the nature of an order for reinstatement conditioned upon an employee's submission of documentation as required by IRCA.

To view Supreme Court briefs related to the *Hoffman Plastic Compounds, Inc.* case, go to 2000 U.S. Briefs 1595 on Lexis.com. To view oral argument transcripts, go to 2002 U.S. Trans. LEXIS 11.

Title VII

Employer's Failure to Provide Several Weeks Leave for Employee to Attend Funeral May Violate Title VII's Religious Accommodation Provision

Adeyeye v. Heartland Sweeteners, LLC, 2013 U.S. App. LEXIS 15610 (7th Cir. July 31, 2013)

Upon the death of his father, Sikiru Adeyeye, a native of Nigeria, requested several weeks of unpaid leave so he could travel from the United States to Nigeria to lead his father's burial rites. He explained the need for his absence in two written requests. The first stated:

> I hereby request for five weeks leave in order to attend funeral ceremony of my father. This is very important for me to be there in order to participate in the funeral rite according to our custom and tradition. The ceremony usually cover from three to four weeks and is two weeks after the burial, there is certain rite[s] that all of the children must participate. And after the third week, my mother will not come out until after one month when I have to be there to encourage her, and I have to [k]ill five goats, then she can now come out. This is done compulsory for the children so that the death will not come or take away any of the children's life. I will appreciate if this request is approved.

The second request rephrased the first:

> I hereby request for my one week vacation and three weeks leave in order to attend the funeral ceremony of my father in my country, Nigeria Africa, which is taking place by October next month. This is the second time I will inform you and request for this travelling trip from the company but no reply to this matter. Nevertheless, the burial will be taking place by October next month and I have to be there and involved totally in this burial ceremony being the first child and the only son of the family. I therefore request for this period stated above for this trip and back to my work by November 4th, 2010. Your help towards this matter will highly be appreciated.

Although Heartland denied his leave requests, Adeyeye traveled to Nigeria for his father's burial. He was terminated when he reported for work upon his return.

Adeyeye then filed suit in the United States District Court for the Southern District of Indiana, asserting that Heartland had violated Title VII of the Civil Rights Act by failing to provide a reasonable accommodation for his religious beliefs. The district court granted Heartland's motion for summary judgment, finding that Adeyeye's requests for leave did not present evidence sufficient for a reasonable jury to find that he had provided Heartland notice of the religious character of his request for unpaid leave. On appeal, the Seventh Circuit disagreed.

The appellate court concluded that Adeyeye's leave requests:

> would allow a reasonable jury to find that Adeyeye gave sufficient notice of the religious nature of his request for unpaid leave. His first request referred to a "funeral ceremony," a "funeral rite," and animal sacrifice. He explained that participation in the funeral ceremonies was "compulsory" and that the spiritual consequence of his absence would be his own and family members' deaths. A reasonable jury could certainly find that the letter's multiple references to spiritual activities and the potential consequences in the afterlife provided sufficient notice to Heartland that Adeyeye was making a religious request. The second request was not as specific as the first, but referred to a funeral ceremony and burial ceremony and the importance of his attendance as the first child and only son. At least when read with the first letter in mind, it also conveyed a religious request with sufficient clarity to preclude summary judgment on the issue.

Heartland also argued that it was entitled to summary judgment because Adeyeye did not participate in his father's funeral rites based on a sincere religious belief of his own but acted instead based on his perceived duties as a son, duties that are not protected by Title VII. The court noted that

> The difference is important because only *religious beliefs*, observances, and practices must be accommodated. And it is not enough for the belief to be religious in nature, it must also be the employee's own religious belief. As Heartland argues, therefore, if Adeyeye was observing his father's religious beliefs only to fulfill his own personal filial duty or to honor his father, Title VII would not require a religious accommodation because the request would not be driven by Adeyeye's own personal religious beliefs, observances, or practices.

To establish that his request for leave was based on his personal religious beliefs, Adeyeye had to present evidence sufficient to allow a jury to find that "(1) "the belief for which protection is sought [is] religious in [the] person's own scheme of things" and (2) that it is "sincerely held." Satisfying these requirements, said the court, turned on "whether or not Adeyeye's claim that his

religion compelled him to participate in the burial rites was in fact sincere." Making this determination, observed the court:

> does not require a deep analysis of [Adeyeye's] conscious and/or subconscious reasons or motives for holding his beliefs. . . . We are not and should not be in the business of deciding whether a person holds religious beliefs for the "proper" reasons. We thus restrict our inquiry to whether or not the religious belief system is sincerely held; we do not review the motives or reasons for holding the belief in the first place.

Adeyeye had given deposition testimony:

> that his family's religion is a blend of Christianity and customs, traditions, and ceremonial rites developed in his Nigerian village. As a part of this religion, the specific dictates of each family's religious practice are identified, determined, and required by the father or male head of the household. Thus, participating in the rites and traditions identified by his father is a necessary part of Adeyeye's religious observance.

Because Title VII intentionally avoids any attempt to define what constitutes a religion, the Seventh Circuit notes that is not the province of a court "to evaluate whether particular religious practices or observances are necessarily orthodox or even mandated by an organized religious hierarchy." It concluded that the evidence presented by Adeyeye was "sufficient for a jury to find that he was acting on the basis of his own, sincere, religious beliefs." As further support of that conclusion, the court observed:

> [W]e cannot help but note that Adeyeye's professed belief that his faith required him to follow his father's directions about matters of faith and ritual seems to fit very comfortably with the Judeo-Christian divine commandment to honor thy father and thy mother. Thus, we do not see the bright line between the father's faith and the son's faith that Heartland sees. Lastly, while not necessary given the other evidence, a jury may very well find it relevant evidence of sincerity that Adeyeye was willing to risk his job and put up his car as collateral for a loan to fund his trip to Nigeria to participate in these burial rites. The record provides sufficient evidence for a reasonable jury to find that Adeyeye was acting on the basis of his own sincere religious beliefs.

USERRA

MSPB Holds That USERRA Precludes an Employer from Taking Adverse Employment Action Based on Employee Conduct Required by Military Orders

McMillan v. DOJ, 2013 MSPB 53 (July 16, 2013)

As part of his two weeks annual training as an officer in the United States Army Reserves, Peter A. McMillan was called upon to draft a report for which background information was available as a result of his civilian employment as an agent of the Drug Enforcement Administration ("DEA"). Although McMillan initially received permission to access and use DEA information in the preparation of the report, that permission was obtained outside of DEA's regular chain of command. The report submitted by McMillan was well received by his military superiors and they requested that he participate in a secure video teleconference to be held in furtherance of the report's topic.

McMillan advised his superiors at DEA of this request and added that his "dual capacity as an MI Reservist and 'working' agent permits [him] to be a proponent for DEA's viewpoint" on the topic under consideration by the military. At this point, the DEA became concerned and directed McMillan to delete all references to DEA material from the report and ordered him not to participate in the teleconference. McMillan objected to the DEA's position and the subject became a matter of controversy between McMillan and his superiors at DEA.

At the time, McMillan was on temporary assignment in the Lima, Peru office of the DEA. Concurrent with these events, McMillan had applied for an extension of his tour of duty in Lima. His request for extension was denied for reasons that McMillan asserted were related to the activities he undertook in writing the report for the military but which DEA contended were attributable to his job performance.

When the case reached the Merit Service Protection Board ("MSPB"), an administrative law judge rejected McMillan's position, concluding that McMillan had failed to meet his initial burden of showing that his military service was a substantial or motivating factor in DEA's decision to disapprove his tour extension request. The administrative judge found "no evidence that the appellant's status or obligations as a military reservist played any part whatsoever" in the agency's decision.

The MSPB disagreed, observing that:

> The grammar of the statute, as well as legislative history, indicate that the intent of Congress was to

> prohibit both discrimination based on the possession of military obligations and reprisal for the undertaking or performance of such obligations. Thus, § 4311(a) protects both military status, e.g., membership in the reserves, and military activity, e.g., performance of service.
>
> The most significant and predictable consequence of reserve status with respect to the employer is the employee's absence from work. For this reason, USERRA prohibits an employer from taking an adverse employment action based on the employee's use of or obligation to use military leave. In this case, however, the appellant contends that the agency denied him a benefit of employment based not only on his reservist status and use of military leave, but also on conflicts with management over his specific military assignments. Furthermore, while the agency cites the appellant's alleged performance issues as a reason for denying his request for a tour extension, it is undisputed that its decision was based in part on his interactions with [his DEA superiors] regarding his drafting the report for his military supervisors and participation in the Army's videoconference. We therefore consider *whether and to what extent USERRA prohibits an employing agency from taking adverse employment actions based on an employee's specific military duties and the manner in which they are performed.*

(Citations omitted, emphasis added).

The MSPB concluded that:

> To allow reservists to face the prospect of adverse treatment by their civilian employers based on their military orders would be contrary to the overarching aim of Congress to "encourage noncareer service in the uniformed services by eliminating or minimizing disadvantages to civilian careers and employment which can result from such service." Accordingly, . . . USERRA should be read to prohibit adverse employment actions based on the content and performance of any military assignment, general or specific.

At the same time, the MSPB cautioned that its holding:

> does not imply that USERRA prohibits an employer from considering events which occur during a period of service but do not constitute performance of military duty. . . . To the extent the appellant may have violated those standards, and *was not required to do so by his military orders*, his activity was not protected under § 4311(a).
>
> However, to the extent an employee's military duties are themselves at odds with the interests of the civilian employer, the employer may not take action against the employee on that basis. If, as the appellant asserts, [DEA] would have renewed his tour but for his specific military assignments, the agency violated USERRA regardless of whether its action was also based on his reservist status and general military obligation.

The MSPB remanded the case for further factual findings regarding the real reasons for DEA's denial of McMillan's request for an extension of his tour of duty.

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