Trial Evidence
FROM THE SECTION OF LITIGATION TRIAL EVIDENCE COMMITTEE
Fall 2011, Vol. 20 No. 1

TABLE OF CONTENTS

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ARTICLES

Supreme Court Reverses Trend on Loss Causation

By Kara Altenbaumer-Price – September 15, 2011

Loss causation is continuing to prove an important consideration for securities lawyers who defend securities class actions in the Fifth Circuit. Until this summer's U.S. Supreme Court decision in *Erica P. John Fund v. Halliburton*, 131 S. Ct. 2179 (2011), the Fifth Circuit was the most difficult venue for plaintiffs to maintain a securities class action. Even with a new, relaxed standard on certifying a securities class in the Fifth Circuit, proving loss causation is still a difficult needle for Fifth Circuit plaintiffs to thread.

Loss Causation and Class Certification

As recently as last year, the Fifth Circuit was still actively narrowing the ability of a plaintiff to maintain a securities class action in the Fifth Circuit, issuing opinions that required proof of loss causation at class certification. The U.S. Supreme Court, however, eased the class-action certification burden on securities-fraud plaintiffs in the Fifth Circuit (and elsewhere) this summer when it ruled plaintiffs are not required to prove that a company's misrepresentation caused their particular loss before having their class certified under a fraud-on-the-market theory of causation. The Court's ruling in *Erica P. John Fund v. Halliburton* resolved a conflict throughout the circuits as to the burden of proving loss causation before certifying a securities class action.

The *Halliburton* case arose from a corrective disclosure related to the company's exposure to asbestos-related liability. *Id.* at 2183. The Fifth Circuit affirmed a denial of class certification in the case because the plaintiffs failed to prove "that the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in losses." *Id.* at 2184. In other words, the court had required plaintiffs to prove that the decline in value of the stock could not be caused by other factors before certifying the class. *Id.* The Supreme Court disagreed.

The Supreme Court harkened back to its ruling in *Basic v. Levinson*, 485 U.S. 224 (1988), holding that invoking a fraud-on-the-market theory of reliance allows the presumption that "the market price of shares on well-developed markets reflects all publicly available information, and hence, any material misrepresentations." *See Halliburton*, 131 S. Ct. at 2181. As the high court wrote, "The fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively, through the fraud-on-the-market theory." *Id.* at 2186. The Court held that, while reliance is required to prove predominance under Federal Rule of Civil Procedure 23(b)(3), loss causation is not a component of reliance and therefore irrelevant at the class-certification stage. *Id.* Instead, loss causation becomes relevant as the case proceeds forward. *Id.* at 2186–87.

The impact of this decision is twofold. First, it reverses the high burden required by potential plaintiffs seeking to establish a class action in the Fifth Circuit—which had a stricter certification requirement than any other circuit—and may cause an increase in class actions filed in the circuit. Second, it marks an uncharacteristically "plaintiff-friendly ruling" by the Supreme Court. The Court shed some light on this latter impact in a footnote in *Walmart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, n.6 (2011), when it noted that its ruling arose, in part, from the "insuperable barrier" to pursing securities-fraud class actions that would exist if each plaintiff was required to prove particularized reliance in order to achieve certification.

Proving Loss Causation in the Fifth Circuit

While some of the ultimate rulings in the cases discussed in this section have since been overruled, they provide insight into the Fifth Circuit's view of the elements of proof required for loss causation at other stages in litigation, as well as some of the confusion the court seems to have internally on the matter. Although the burden on plaintiffs has eased with respect to proving loss causation at the class-certification stage, the Fifth Circuit still requires plaintiffs to jump a high hurdle in other stages of proving loss causation.

With *Oscar Private Equity, Inv. v. Allegiance Telecom Inc.*, the Fifth Circuit began requiring plaintiffs to prove a direct causal link between defendants' alleged misrepresentations and plaintiffs' losses to trigger the general fraud-on-the-market presumption of reliance and qualify for class certification. *See* 487 F.3d 261 (5th Cir. 2007), abrogated by *Erica P. John Fund v. Halliburton Co.*, 131 S. Ct. 2179 (2011). In *Oscar*, the Fifth Circuit required the district court to look beyond the pleadings to the merits of the claims at the class certification stage. Specifically, the court required that when multiple pieces of negative information are revealed at the same time as a corrective disclosure, plaintiffs must prove by a preponderance of the evidence that a particular corrective disclosure, and not other negative statements, caused their loss.

Less than two years after *Oscar*, in another class certification case, the Fifth Circuit vacated a district court's denial of class certification, holding that the lower court applied too strict a standard for proving loss causation at the class certification stage. *See Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228 (5th Cir. June 19, 2009). The panel in *Alaska Electric Pension Fund* held that the district court used the wrong standard to determine loss causation at the class certification stage by requiring a fact-for-fact disclosure that completely corrects prior misstatements. *Id.*

The court held that such a rule would do away with the fraud-on-the-market theory of reliance: "If a fact-for-fact disclosure were required to establish loss causation, a defendant could defeat liability by refusing to admit the falsity of its prior misstatements. And if a 'complete' corrective disclosure were required, defendants could 'immunize themselves with a protracted series of partial disclosures.'" *Id.* at 230(internal citations omitted). Instead, the test lies somewhere in the middle. The panel held that on remand, the plaintiffs must "prove by a preponderance of the evidence that the market learned more than that [defendant's] earnings guidance was lower and

so its business seemed less valuable" to establish that the losses were caused by prior misstatements. *Id.* at 232.

Flowserve also addressed loss causation proof at the summary judgment stage, with the Fifth Circuit reversing the district court's grant of summary judgment on the investors' Exchange Act claims because the district court failed to conduct a loss causation analysis for summary judgment independent of its loss causation analysis for class certification. *Id.* at 221. The court held that the two have no relation to one another.

The court rejected arguments by the plaintiffs that the district court required a higher loss causation standard for class certification than for summary judgment, holding that the argument improperly "conflates the issue of loss causation for purposes of establishing predominance under Rule 23 with the issue of loss causation on the merits." *Id.* at 229. "As a matter of law," the court ruled, "a district court's findings in connection with a holding on class certification do not resolve loss-causation issues on the merits, even when—as here—the two issues are practically identical." *Id.* at 233. The court pointed out that a party could lose its bid for class certification and still prevail on the merits in its individual claims as to loss causation. *Id.* at 229.

Just two months after *Flowserve* was issued, the Fifth Circuit upheld the denial of another class certification because the plaintiff's expert looked at how the "stock reacted to the *entire bundle* of negative information," rather than considering the "evidence linking the *culpable* disclosure to the stock-price movement." *See Fener v. Operating Eng'rs Constr. Indus. & Misc. Pension Fund (Local 66)*, 579 F.3d 401 (5th Cir. Aug. 12, 2009) (*Belo*). In *Fener*, the court ultimately held that when there are multiple sources of negative information, plaintiffs must establish by a preponderance of the evidence that it was the negative truthful statement—and not other sources of negative information—that caused the decline in share price. *Id.*

Despite recitation of the *Oscar* standard by both courts as well as the standard from *Greenberg v. Crossroads Systems, Inc.*, 364 F.3d 657 (5th Cir. 2004), that a plaintiff must prove "(1) that the negative 'truthful' information causing the decrease in price [was] related to an allegedly false, nonconfirmatory positive statement made earlier and (2) that it is more probable than not that it was this negative statement, and not other unrelated negative statements, that caused a significant amount of the decline," *Flowserve* holds that a plaintiff does not have to compare fact for fact between the omission and the later disclosure, while *Belo* holds that a plaintiff must show a statement-for-statement analysis of proof or at least disprove other potential information as the source of the decline in value. *Belo* favorably cites *Flowserve* but offers no explanation for the arguably inconsistent results.

Then in February 2010, the Fifth Circuit again rejected a class certification, holding in *Archdiocese of Milwaukee Supporting Fund v. Halliburton* that plaintiffs could not use revised earnings guidance to prove that earlier earnings estimates were untrue. *See* 597 F.3d 330 (5th Cir. 2010), vacated and remanded by *Erica P. John Fund v. Halliburton Co.*, 131 S. Ct. 2179 (2011). Clarifying its opinion in *Flowserve*, the court held instead that to prove loss causation,

plaintiffs must prove that the alleged "corrective" disclosure "shows the misleading or deceptive nature of the prior positive statements." Subsequent disclosures that do not "correct" earlier statements and "reveal the truth" of the earlier misstatement are insufficient to prove loss causation. *Id.* at 336. The court stated that "a company is allowed to be proven wrong in its estimates" without being liable for fraud. *Id.* at 340. That ruling, discussed at the beginning of this article, was ultimately overturned by the U.S. Supreme Court.

The court made an important point in *Flowserve*—the burden for proving loss causation at the class certification stage is on the plaintiff, while the burden for proving a lack of loss causation at the summary judgment stage is an affirmative defense. *See Flowserve*, 572 F.3d at 234. While the Supreme Court decision in *Halliburton* overrules or negates some elements of these cases, they still provide valuable insight into the Fifth Circuit's high standards for proving loss causation.

Loss Causation and Pleadings

As in the seeming contradiction between *Flowserve* and *Belo*, the court is also creating confusion on the issue of the pleading standard for loss causation. In *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228 (5th Cir. 2009), which was decided in April 2009, the court held that notice pleading is sufficient for loss causation. The court looked to Federal Rule of Civil Procedure 8(a)(2) to hold that a plaintiff must allege "in respect to loss causation, a facially 'plausible' causal relationship between the fraudulent statements or omissions and plaintiff's economic loss." *Id.* at 258. Or, the court phrased it another way, "the complaint must allege enough facts to give rise to a reasonable hope or expectation that discovery will reveal evidence of the foregoing elements of loss causation." *Id.*

Just seven months earlier, in September 2008, the court appeared to use Federal Rule of Civil Procedure 9(b)'s more stringent pleading standard for loss causation in its unpublished opinion in *Catogas v. Cyberonics, Inc.*, 28 F. App'x 311 (5th Cir. 2008). There, the court directly quoted the heightened pleading requirements found in Rule 9(b), holding that "plaintiffs failed to plead loss causation with the requisite particularity." *Lormand* makes no mention of the *Cyberonics* opinion, citing for support the Supreme Court opinions *Dura Pharmaceuticals., Inc. v. Broudo*, 544 U.S. 336 (2005), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). And, unlike the *Belo* and *Flowserve* panels, the *Lormand* and *Cyberonics* panels have an important similarity; Judge Barksdale served on both panels.

Conclusion

The Fifth Circuit acknowledged the ever-increasing burden it is placing on plaintiffs in securities class actions when it wrote in *Flowserve* that "[t]o be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action. Those ever higher hurdles are not, however, intended to prevent viable securities actions from being brought." *See Flowserve*, 572 F.3d at 235. What is also clear from these recent cases is that loss causation is an important and evolving issue in the Fifth Circuit. And for securities class-action defendants, the "higher hurdle" created by the court's

loss-causation analysis is proving an important defense tool. Finally, as the *Belo* court noted, it is a tool at all stages of litigation—pleadings, summary judgment, and trial on the merits. *See Fener*, 579 F.3d at 407.

Keywords: litigation, trial evidence, loss causation, securities class actions, Fifth Circuit, Supreme Court

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Establishing an Arbitrator's "Evident Partiality"

By Laura M. Fontaine – September 15, 2011

An undisclosed 13-year history of social and business encounters between a party's lead counsel and an arbitrator required vacatur of a $22 million JAMS arbitration award in *Karlseng v. Cooke*, 286 S.W.3d 51 (Tex. App.—Dallas 2009, no pet.) (*Karlseng I*) and *Karlseng v. Cooke*, ___ S.W.3d ___, 2011 WL 2536504 (Tex. App.—Dallas Jun. 28 2011, no pet.) (*Karlseng II*). This provides an instructive guide to post-arbitration discovery and evidentiary proceedings.

The arbitration at issue arose out of a partnership dispute. The parties agreed to JAMS arbitration and selected Robert Faulkner as the sole neutral arbitrator. Faulkner filled out the standard JAMS disclosure form, requiring him to disclose any professional or personal relationships with the attorneys or parties. Faulkner disclosed that one of the claimant's attorneys had appeared before him in a previous arbitration. Four days later, the claimant filed his original claim for relief naming a different lawyer, Brett Johnson, as lead counsel. Faulkner never supplemented his disclosures. *See Karlseng I*, 286 S.W.3d at 53. After Faulkner awarded Johnson's client, Cooke, $22 million, including $6 million in attorney fees, Cooke quickly moved to confirm the arbitration award in Texas state court. *Id.* at 54.

Texas has adopted a version of the Uniform Arbitration Act, which lists specific grounds for vacating an arbitration award. *See* Tex. Civ. Prac. & Rem. Code § 171.088(a); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 89 (Tex. 2011).

One ground for vacatur is that "the rights of a party were prejudiced by . . . evident partiality by an arbitrator appointed as a neutral arbitrator. . . ." The Federal Arbitration Act similarly provides that "the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . where there was evident partiality or corruption in the arbitrators, or either of them . . . ." 9 U.S.C. § 10(a). The ground is mandatory, not discretionary. *See* Tex. Civ. Prac. & Rem. Code § 171.088(a) ("On application of a party, the court *shall* vacate an award . . . .") (emphasis added).

The respondents, as the losing parties to the arbitration, filed a motion to vacate as well as a motion for a continuance requesting additional time to develop evidence of arbitrator partiality. *Karlseng I*, 286 S.W.3d at 54. The respondents alleged that Johnson had been a clerk to a U.S. district judge in Sherman, Texas, at the same time that Faulkner had been the only U.S. magistrate judge in the courthouse, but Faulkner had not amended his disclosures to disclose this fact. *Id.*

Less than one month after the arbitration award was issued and only a week after it was finalized, the state district court held a hearing on the motion to confirm the arbitration award and respondents' motion for a continuance and to vacate the award. After the court denied the motion for a continuance, there was a break in the proceedings. *Id.* During the break, the respondents subpoenaed Johnson's ex-wife, who then provided testimony at the hearing in support of the motion to vacate. She testified that Johnson had taken Faulkner to dinner to celebrate his retirement as a magistrate judge and subsequent plans to become an arbitrator and that, on two or three occasions, Johnson had taken their son to the Sherman courthouse to visit Faulkner and the federal judge for whom Johnson had worked. *Id.* at 55.

The respondents also presented the telephonic testimony of an expert on arbitration ethics, who testified that, based on the contacts disclosed by Johnson's ex-wife, Faulkner should have disclosed his relationship with Johnson in the JAMS disclosure form. *Id.* The respondents' counsel took the stand to testify that during the break in the proceedings, he had attempted to serve Faulkner with a subpoena, but JAMS would not reveal his location and had referred him to the JAMS general counsel, who accepted service of the subpoena but did not allow Faulkner to appear. *Id.* As Johnson had not appeared at the hearing either, the respondents renewed their motion to continue until they could procure the testimony of Faulkner and Johnson. The trial court denied the motion to continue and confirmed the arbitration award.

On appeal, the respondents challenged the denial of the motion to vacate as well as the denial of their motion to continue. Under Texas law, evident partiality is established by the nondisclosure of facts creating an impression of partiality, not by any evidence of bias in the performance of the arbitrator's duties. *Karlseng II*, 2011 WL 2536504 at *8; *see Burlington N. R.R. Co. v. TUCO, Inc.*, 960 S.W.2d 629, 636 (Tex. 1997) (citing *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 147 (1968)). *But see, e.g., Borst v. Allstate Ins. Co.*, 717 N.W.2d 42, 45 (Wis. 2006) ("Evident partiality cannot be avoided simply by a full disclosure and a declaration of impartiality."). Therefore, the court reviewed all evidence of contacts between Johnson and Faulkner prior to the arbitration (as Faulkner had disclosed none) rather than the record of the arbitration itself. Instead of addressing the substantive question of the motion to vacate, the *Karlseng I* court held that the trial court had abused its discretion by denying a continuance to take discovery on arbitrator bias when there was "some evidence" of an undisclosed relationship between Faulkner and Johnson. *Karlseng I*, 286 S.W.3d at 58. The court remanded for discovery on the evident partiality issue, vacated the order, and confirmed the arbitration award.

After remand, the trial court held a second evidentiary hearing, considered as an extension of the original hearing. *Karlseng II*, 2011 WL 2536504 at *1. Both Johnson and Faulkner testified. The parties also introduced emails between Johnson, Faulkner, and their spouses. The evidence is extensively described in the appellate decision, but, in short, Johnson and Faulkner had a long-standing relationship that included dining out and attending sports events together.

Despite Johnson and Faulkner's relationship, one respondent testified, the two men "acted as strangers"—exchanging names and shaking hands—when they were introduced in court. *Id.* at *6. Three months after Faulkner issued the award in favor of Johnson's client, he hosted Johnson as well as Johnson's wife and another couple at a dinner where the bill exceeded $1,000. *Karlseng I*, 286 S.W.3d at 54.

Faulkner testified that he had no memory of many of the contacts established by the documentary evidence, but he also admitted he had made no effort to refresh his memory prior to making his disclosures. *Id.* at 55. An expert witness for the respondents testified that an arbitrator should disclose gifts, sports tickets, and expensive meals from a party, supplementing if necessary. *Id.* at 54. While the trial court confirmed the arbitration award a second time on remand, the appellate court reversed and vacated both the trial court's order and the arbitration award.

Ultimately, after considering the chronology of significant contacts and unrebutted expert testimony, the appellate court concluded that "the facts demonstrating this relationship 'might, to an objective observer, create a reasonable impression of the arbitrator's partiality' if not disclosed by the arbitrator." *Id.* at 58, citing *TUCO*, 960 S.W.2d at 636.

This disclosure-based test for finding "evident partiality" is far from universal. Several federal circuits allow or require introduction of evidence from the arbitration itself to show actual bias for or against a party to the arbitration. *See, e.g., Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 645–46 (9th Cir. 2010) (to prove evident partiality, a party must "must establish specific facts indicating actual bias toward or against a party *or* show that [the arbitrator] failed to disclose to the parties information that creates a reasonable impression of bias") (internal quotations omitted) (emphasis added); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 647 (6th Cir. 2005); *Rai v. Barclays Capital Inc.*, 739 F. Supp. 2d 364 (S.D.N.Y. 2010) (arbitrators' short deliberation time and deletion of recordings did not demonstrate prejudicial bias).

In addition, courts differ on the sufficiency and strength of contacts or relationships needed to prove "evident partiality" where such contacts are not disclosed. *See Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 283 (5th Cir. 2007) (nondisclosure must involve "a significant compromising connection" to the parties); *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) (undisclosed facts must give rise to a "reasonable impression of partiality"); *Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins.*

Co., 732 F. Supp. 2d 293, 307 (S.D.N.Y. 2010) (a "material undisclosed relationship" can demonstrate evident partiality).

Nonetheless, the evidentiary framework presented by the prevailing party in *Karlseng* makes a useful template for post-arbitration discovery. First, the testimony of the arbitrator and the persons with whom an improper relationship is alleged establishes the fact of an undisclosed relationship. Second, the testimony of the opposing party, his attorneys, or other witnesses establishes the significance of the relationship. Third, expert testimony establishes whether the relationship meets the forum's standards for disclosure. As the *Karlseng* decision shows, post-arbitration discovery can result in vacatur of a final arbitral award.

Keywords: litigation, trial evidence, arbitration, evident partiality

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Supreme Court Decides *Stern v. Marshall*

By Dawn C. Van Tassel – September 15, 2011

Whether you get your news from C-Span or TMZ, you have likely heard something related to *Marshall v. Marshall*, later recaptioned *Stern v. Marshall*, more colloquially known as the "Anna Nicole Smith" case. Its 16-year journey through state and federal courts in Texas and California came to an end in June 2011 with the pronouncement by the U.S. Supreme Court in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), which resurrected the finding of a Texas probate court jury and precluded a counterclaim brought against Smith's deceased husband's estate.

The Court held that a bankruptcy court lacked the constitutional authority to enter final judgment on a state-law-based counterclaim sounding in tort, regardless of whether the claim fit the statutory definition of a "core" proceeding under 28 U.S.C. § 157(b)(2)(C). Not exactly the makings of a soap opera, but the Dickensian facts giving rise to the suit—the Court itself noted the similarities of this litigation to the never-ending lawsuit that survived the parties in Charles Dickens's masterpiece, *Bleak House*—made this a much-anticipated ruling.

A Saga Begins

The litigation began with a much-publicized celebrity romance. In June of 1994, Anna Nicole Smith, née Vickie Lynn Hogan, wed Texas multibillionaire and octogenarian J. Howard Marshall II. The bride was already a minor celebrity by virtue of her status as *Playboy* magazine's 1993 Playmate of the Year, but the widespread media attention focused on the 62-year age difference between the newlyweds, prompting understandable speculation that the marriage was not exactly a love match. In August of 1995, about 13 months after the marriage, J. Howard died, but before his death, he revised a living trust that omitted his new wife and only provided for assets to pass to his son, E. Pierce Marshall (Pierce).

Parallel Proceedings

Before J. Howard's death, Smith filed suit in Texas probate court, challenging Pierce Marshall's rights to more than $1.5 billion in assets under the trust. The case took nearly six years to litigate, with the trial itself lasting nearly six months. In 2001, the jury entered a unanimous verdict in favor of Pierce. *See Marshall v. MacIntyre* (*Estate of Marshall*), No. 276-815-402 (Harris Cnty., Tex. Dec. 7, 2001).

To further complicate matters, five years earlier, Smith had declared bankruptcy and filed a petition in the Central District of California. Too, Pierce had a counterclaim against Smith related to alleged defamatory comments her lawyers had made to the media suggesting Pierce had engaged in fraud to obtain his deceased father's fortune. Now, Pierce filed an adversary complaint alleging non-dischargeability of the counterclaim. He also filed a proof of claim against Smith's bankruptcy estate asserting the defamation claim. Smith counterclaimed with allegations that Pierce had tortiously interfered with inter vivos gifts J. Howard had given Smith before and during the marriage.

The bankruptcy court awarded summary judgment to Smith on Pierce's defamation claim and eventually found in her favor on the tortious interference claims, awarding $400 million in compensatory damages and $25 million in punitive damages. *See In re Marshall*, 253 B.R. 550 (Bankr. C.D. Cal. 2000). Pierce appealed this ruling to the Ninth Circuit, which vacated and remanded the action on the grounds that Smith's counterclaim fell within the probate exception. *See In re Marshall*, 392 F.3d 1118 (9th Cir. 2004). On appeal to the U.S. Supreme Court the first time around, the Court reversed and remanded, holding that the probate exception did not preclude the bankruptcy court's ruling on the counterclaim. *See Marshall v. Marshall*, 547 U.S. 293 (2006).

On remand, the Ninth Circuit held that Smith's counterclaim was not a "core" proceeding under 28 U.S.C. § 157; accordingly, the bankruptcy court's ruling on the counterclaim was not final, and the Texas probate court's findings precluded the tortious interference claim as res judicata. *See In re Marshall*, 600 F.3d 1037 (9th Cir. 2010). After Smith passed away in February 2007, her next of kin appealed the ruling to the U.S. Supreme Court a second time. In September 2010, the Court granted certiorari.

The Court's Ruling

In a 5–4 decision authored by Chief Justice Roberts, the Supreme Court held that the bankruptcy court lacked the constitutional power to issue a final ruling on the tortious interference counterclaim. The Court engaged in a two-step analysis, first asking whether the counterclaim fit the statutory definition of a "core" proceeding and then determining whether the Constitution nonetheless permitted a state-law counterclaim to be adjudicated by an Article I judge.

As to the first question, the majority, which consisted of Chief Justice Roberts and Justices Scalia (also writing a separate concurrence), Kennedy, Thomas, and Alito held that the counterclaim by Smith against Pierce fell squarely within the statutory definition of a "core

proceeding" under 28 U.S.C. § 157(b)(2)(C). *Stern v. Marshall,* 131 S. Ct. 2594 (2011). The statute provides, in relevant part:

> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . .
>
> (b)(2) Core proceedings include, but are not limited to . . .
>
> (C) counterclaims by the estate against persons filing claims against the estate.

Under a plain reading of the statute, the majority reasoned, the bankruptcy court had the power to enter a final judgment on Smith's tortious interference counterclaim. *Id.* at 2604.

The Court's analysis continued to the second question: whether Article III of the Constitution confers the authority for the Bankruptcy Court to rule on a state-law counterclaim. It summarized the holding by saying, "The Bankruptcy Court in this case exercised the judicial power of the United States by entering a final judgment on a common law tort claim, even though the judges of such courts enjoy neither tenure during good behavior nor salary protection." *Id.* at 2601.

The Court went on to say, "Article III, § 1 of the Constitution mandates that '[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'" *Id.* at 2608. Noting that the purpose of Article III was to maintain checks and balances on federal power, the Court relied on its seminal jurisdictional holding in *Northern Pipeline* to find that the Bankruptcy Court acted outside its constitutional authority, saying, "When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Id.* at *16 (citing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J. concurring)).

Because the Bankruptcy Court lacked constitutional authority to enter final judgment on Smith's counterclaim, the parties were left with the verdict from the Texas probate court.

The Aftermath

Commentators have speculated on everything from a minimal impact of the *Stern* decision to a catastrophic clogging of the Bankruptcy Courts. To be sure, litigants in bankruptcy proceedings may well run into snags in determining whether the Bankruptcy Court or the district court may enter final judgment on state-law claims, regardless of whether they arise in the procedural posture present in *Stern*.

While no one can know the true impact of the Court's ruling at this time, the Court itself made this prediction:

> As described above, the current bankruptcy system also requires the district court to review de novo and enter final judgment on any matters that are "related to" the bankruptcy proceedings, § 157(c)(1), and permits the district court to withdraw from the bankruptcy court any referred case, proceeding, or part thereof, § 157(d). Pierce has not argued that the bankruptcy courts "are barred from 'hearing' all counterclaims" or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that "finally decide[s]" them. Brief for Respondent 61. We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we agree with the United States that the question presented here is a "narrow" one.

Id. at 2620.

Time will tell whether the majority's prediction comes to fruition.

Keywords: litigation, trial evidence, Bankruptcy Court, Anna Nicole Smith, constitutional authority

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The Status of Service by Mail in the Eleventh Circuit

By Aaron S. Weiss – September 15, 2011

The United States is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, T.I.A.S. No. 6638 (1969) (Hague Service Convention), a multilateral treaty designed to simplify the methods for serving process abroad to ensure that defendants sued in foreign jurisdictions receive actual and timely notice of suit as well as to facilitate proof of service abroad.

Under the Hague Service Convention, the primary method of service is through the central authority established by each member state. However, service through the central authority is often costly and time-consuming. What's more, the central authority for service is not necessarily mandatory under the Hague Service Convention.

As an alternative to service through the central authority, service of process may be effectuated by mail under article 10(a) of the Hague Service Convention, provided that the state of destination does not object. Article 10 provides in relevant part as follows:

> Provided the State of destination does not object, the present Convention shall not interfere with—

> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

The current list of countries where this service method can be used (assuming the U.S. court agrees) includes Albania, Australia, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, China (including Hong Kong and Macau), Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Luxembourg, Malta, Mexico, Monaco, Morocco, the Netherlands, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, the United Kingdom, Antigua and Barbuda, Bahamas, Barbados, Belize, Botswana, Malawi, Pakistan, Saint Vincent and the Grenadines, San Marino, and Seychelles. Read the full text of the Hague Service Convention, along with information about the identities of the member states and the status of each member's position with respect to service by mail under article 10(a).

Of course, nothing is ever that simple. There is a dispute in the U.S. federal courts as to whether service of process (i.e., summons and complaint and other "jurisdictional" papers, as opposed to motions) may be effectuated under article 10(a). This question hinges on whether the word "send" in article 10(a) means the same thing as the word "service" in paragraphs (b) and (c) of article 10 of the Hague Service Convention.

Five of the federal circuit courts of appeal have addressed the issue. The Second and Ninth Circuits both held that article 10(a) permits service of process via postal channels; the Eighth and Fifth Circuits held otherwise.

In the first federal appellate decision to consider the issue, *Akermann v. Levine*, 788 F.2d 830, 839–40 (2d Cir. 1986), the Second Circuit concluded that the word "send" was intended to mean "service." In a more detailed opinion many years later, the Ninth Circuit agreed, in *Brockmeyer v. May*, 383 F.2d 798 (9th Cir. 2004). In *Brockmeyer*, the court considered the purpose of the convention and concluded that the word "send" in article 10(a) includes service of process. *Id.* at 802. The court relied on commentaries on the history of the negotiations leading to the Hague Service Convention as well as a letter written by the State Department disagreeing with contrary authority. The Seventh Circuit also addressed the issue in passing in *Research Systems Corp. v. IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir. 2002), where it noted that service "by simple certified mail . . . [is]a method permitted by Article 10(a) of the Hague Convention, so long as the foreign country does not object."

If the *Ackermann*, *Brockmeyer*, and *Research Systems Corp.* decisions were the only cases on point, the issue would be far less complicated. However, in *Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989), the Eighth Circuit compared the use of the word "send" in article 10(a) to the use of the words "serve" or "service" throughout the rest of the convention and concluded that the difference was intentional. *Id.* at 174.

The *Bankston* decision drew an immediate rebuke from the U.S. Department of State. On March 14, 1990, Alan J. Kreczko, the then incumbent legal advisor to the Department of State, wrote a letter to the National Center for State Courts, criticizing the Eighth Circuit's decision in *Bankston*. A copy of the Kreczko letter [PDF] can be obtained through a Freedom of Information Act (FOIA) request to the U.S. Department of State.

Kreczko asserted Department of State's position that the *Bankston* decision was incorrect and concluded that permitting service by mail would spare plaintiffs in the United States time and expense. Furthermore, the Kreczko letter notes that a Japanese delegate at a meeting of new Hague Convention members expressed Japan's position on article 10(a), which was that service by mail did not violate Japan's judicial sovereignty. Kreczko, on behalf of the Department of State, asked the National Center for State Courts to distribute his letter to the state courts.

The Kreczko letter is particularly significant because of the long-standing proposition that the opinions of the State Department should be given special weight in construing treaties. *See, e.g.*, *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982); *Bush v. United States* (*The Yulu*), 71 F.2d 635, 636 (5th Cir. 1934); *see also* 1 Restatement (Third) of the Foreign Relations Law of the United States § 112 cmt. c, at 59 (1987).

So what does this mean for practicing lawyers in the courts of the Eleventh Circuit? While the Eleventh Circuit has not interpreted article 10(a), the Alabama Supreme Court and several federal district courts within the circuit have addressed this issue.

Florida Cases

Service by Mail under 10(a) Permitted

The earliest reported case in Florida finding that service can be made by mail under article 10(a) of the Hague Service Convention was decided in 1996. Specifically, in *Lestrade v. United States*, 945 F. Supp. 2d 1557 (S.D. Fla. 1996), Judge William M. Hoeveler of the Southern District of Florida found that the Hague Service Convention permits service of process via postal channels. *Id.* at 1559. The court was persuaded by *Ackerman v. Levine*, 788 F.2d 830 (2nd Cir. 1986). Fourteen years later, in *TracFone Wireless, Inc. v. Bequator Corp., Ltd.*, 717 F. Supp. 2d 1307 (S.D. Fla. 2010), Judge Hoeveler once again found that article 10(a) of the Hague Service Convention permits service of process by mail and supported his finding by citing several district court opinions within the Eleventh Circuit. *See id.* at 1309. Judge Hoeveler also cited several other federal circuit and district court opinions.

In the Southern District of Florida, in *TracFone Wireless, Inc. v. Sunstrike International Ltd.*, No. 10-24386-CIV, 2011 WL 1319022 (S.D. Fla. 2011), Judge Jose E. Martinez found that article 10(a) of the Hague Service Convention permits service of process via postal channels. *Id.* at *1. In support of his conclusion, Judge Martinez cited several Southern District of Florida opinions that had reached a similar conclusion.

Two cases from the Middle District of Florida also support the proposition that service by mail is allowed under article 10(a) of the Hague Service Convention. First, in *Conax Florida Corp. v. Astrium Ltd.*, 499 F. Supp. 2d 1287 (M.D. Fla. 2007), Judge Thomas G. Wilson found that service of process via postal channels is permitted under article 10(a) of the Hague Service Convention. *See id.* at 1293. In reaching his conclusion, Judge Wilson relied on *Brockmeyer v. May*, 383 F.3d 798 (9th Cir. 2004). Also, the court found that service of process by mail is consistent with the purpose of the Hague Service Convention, which is to facilitate international service of judicial documents. Lastly, Judge Wilson noted that his interpretation of article 10(a) is shared by several other member countries of the Hague Service Convention. Likewise, in *Julien v. Williams*, No. 10-CV-2358T-TBM, 2010 WL 5174535 (M.D. Fla. 2010), Judge Susan C. Bucklew found that service of process via postal channels is permitted under article 10(a) of the Hague Service Convention. *Id.* at *2 (M.D. Fla. 2010). Judge Bucklew was persuaded by *Brockmeyer v. May*, 383 F.3d 798 (9th Cir. 2004).

The Florida state courts have not directly addressed service by mail under article 10(a) in any reported appellate decisions. One decision—*Chabert v. Bacquie*, 694 So. 2d 805, 812 (Fla. 4th Dist. Ct. App. 1997)—mentions article 10(a) in passing but only in support of its finding that article 15 of the Hague Service Convention, which relates to service of judgments, does not apply. However, one trial court judge in Florida state court entered a highly detailed order [PDF] allowing service by mail under 10(a) in *Safra National Bank of New York v. Crystal Springs Partners, Ltd.*, Case No. 11-09045 CA 30 (Fla. Cir. Ct. (Miami-Dade Cnty.) May 13, 2010).

Service by Mail under 10(a) Not Permitted

The very first reported decision from any Florida court on 10(a) service by mail came from the Northern District of Florida in *McClenon v. Nissan Motor Corp. in U.S.A.*, 726 F. Supp. 822 (N.D. Fla. 1989), where Judge Clyde R. Vinson found that service of process via postal channels is impermissible under article 10(a) of the Hague Service Convention. Specifically, Judge Vinson stated that "it strains plausibility that the Conventions' drafters would use the word 'send' in Article 10(a) to mean service of process, when they so carefully used the word 'service' in Articles 10(b) and (c)." *Id.* at 826. Judge Vinson's opinion in *McClenon* remains the only Northern District of Florida case on 10(a) service by mail.

The next year in *Wasden v. Yamaha Motor Co., Ltd.*, 131 F.R.D. 206 (M.D. Fla. 1990), Judge Elizabeth A. Kovachevich found that service of process via postal channels is not permitted under article 10(a) of the Hague Service Convention. *Wasden*, 131 F.R.D. at 209. Judge Kovachevich solely relied on the Eighth Circuit's opinion in *Bankston* and did not consider the Second Circuit's contrary view in *Akermann* or the State Department's objection to *Bankston*.

Two years later, the Southern District of Florida joined in completing the trifecta of the Florida federal districts finding that service by mail was not permitted under 10(a). In *ARCO Electronics Control, Ltd. v. Core International*, 794 F. Supp. 1144 (S.D. Fla. 1992), Judge Norman C. Roettger Jr. found that service of process via postal channels is impermissible under article 10(a) of the Hague Service Convention because of the difference between the language used in article 10(a) and the language used in the rest of the Convention. *Id.* at 1147. Persuaded by Judge Kovachevich's decision in *Wasden v. Yamaha Motor Co., Ltd.*, 131 F.R.D. 206 (M.D. Fla. 1990), Judge Roettger expressed his belief that treaty conventions act intentionally. He further concluded that the drafters of the Hague Service Convention intentionally used the word "send" rather than the word "serve" when drafting article 10(a).

Until 2010, the only Florida decision finding service by mail was not permitted under 10(a) came in 2002. In *In re Greater Ministries International, Inc.*, 282 B.R. 496 (Bankr. M.D. Fla. 2002), Bankruptcy Judge Thomas E. Baynes found that service of process by use of postal channels is not permitted under article 10(a) of the Hague Service Convention. *See id.* at 502–3. Judge Baynes concluded that the drafters could have simply used the word "service" if they intended to provide for an additional method of service under article 10(a).

After being an issue that came up in a reported Florida federal opinion about once every three years between 1989 and 2010, service by mail under 10(a) become a frequent topic in 2010, as there were four separate reported decisions on the issue in that year. In addition to the *TracFone* and *Julien* decisions discussed earlier, which found that service by mail was permitted under 10(a), two different Florida federal judges found that service by mail was not permitted under 10(a).

First, in *In re Mak Petroleum*, 424 B.R. 912 (Bankr. M.D. Fla. 2010), Bankruptcy Judge Paul M. Glenn found that article 10(a) of the Hague Service Convention should not be read to permit service of process by mail. *See id.* at 918. Judge Glenn noted that article 10(a) refers to "sending" documents by mail while article 10(b) and 10(c) refer to "effecting service" through judicial officers.Recognizing that the word "service" has a well-established technical meaning, the judge found that article 10(a) should not be read to include the word "serve." Rather, article 10(a) should be read only to enable parties to send documents such as motions and discovery responses. *Id.* at 918–19.

Next, in *Intelsat Corp. v. Multivision TV, LLC*, 736 F. Supp. 2d 1334 (S.D. Fla. 2010), Judge Cecilia M. Altonaga found that service of process via postal channels is not permitted under article 10(a) of the Hague Service Convention. *See id.* at 1343. In reaching her conclusion, Judge Altonaga noted that the majority of district courts in Florida tend to follow the line of cases rejecting service by postal channels under article 10(a). Judge Altonaga also emphasized the difference between the language used in 10(a) and the language used throughout the convention. While the rest of the convention uses the word "service," 10(a) uses the word "send." *Id.* at 1342. Reasoning that this difference in language was intentional, Judge Altonaga stated, "Where a

legislative body uses language in one place but not in another, it is generally presumed that the body acts intentionally." *Id.* at 1342–43.

Georgia Cases

Unlike the federal courts in Florida, the Georgia federal courts have been consistent in construing article 10(a) and have all found that service by mail was permitted under 10(a). First, in *Curcuruto v. Cheshire*, 864 F. Supp. 1410 (S.D. Ga. 1994), Judge Anthony A. Alaimo found that article 10(a) of the Hague Service Convention contemplates service of process via postal channels. *See id.* at 1412–13. In reaching his conclusion, the judge found that such an interpretation provides adequate notice to those served and respects the protocol of the receiving countries. *Id.* at 1412.

Next, in *Patty v. Toyota Motor Corp.*, 777 F. Supp. 956 (N.D. Ga. 1991), Judge Harold L. Murphy found that article 10(a) of the Hague Service Convention contemplates service of process via postal channels. *Id.* at 959. Judge Murphy found that such an interpretation followed from the language of the convention. The judge also found that such an interpretation serves the purposes of the convention and the Federal Rules of Civil Procedure by providing adequate notice of the complaint and its grounds to those who are served.

The most recent Georgia case on 10(a) came in 2000, in *Schiffer v. Mazda Motor Corp.*, 192 F.R.D. 335 (N.D. Ga. 2000), where Judge Thomas W. Thrash found that service of process by mail is permitted under article 10(a) of the Hague Service Convention. *Id.* at 338. Judge Thrash took a broader view, determining that the purpose of the convention is to create a means to serve documents and finding support for his conclusion in the preamble of the convention. Judge Thrash also noted that all of the articles in the convention involved service of process but not one involved later aspects of a case. Notably—and properly under *Sumitomo Shoji America, Inc.*, 457 U.S. 176—Judge Thrash considered the State Department's position, as set forth in the Kreczko letter. *See Schiffer*, 192 F.R.D.at 339.

Alabama Cases

Like the federal courts in Georgia, the Alabama courts have found that service by mail was permitted under 10(a)—though it has been more than 20 years since a court in Alabama has examined the issue. In *Coblentz GMC/Freightliner, Inc. v. General Motors Corp.*, 724 F. Supp. 1364 (M.D. Ala. 1989), Judge Myron H. Thompson found that service of process by mail was permissible under article 10(a) of the Hague Service Convention. *See id.* at 1373. In support of his finding, the court noted that Sweden had not objected to article 10(a) of the convention. *Id.* at 1372.

Justice Hugh Maddox of the Supreme Court of Alabama indirectly acknowledged that service of process via postal channels is acceptable under the Hague Service Convention. *See Parsons v. Bank Leumi Le-Israel, B.M.*, 565 So. 2d 20, 25 (1990). Justice Maddox was faced with the question of whether a foreign bank was required to serve an Alabama citizen with a translation of the summons and complaint. Justice Maddox held that no translation was required because

service of process was effectuated via postal channels. He noted that "the procedures used for obtaining service of process complied with the Hague Convention."

Conclusion
The courts within the Eleventh Circuit have not reached the same conclusions regarding the scope of article 10(a). Until the Eleventh Circuit weighs in on the issue, lawyers in the circuit should carefully review the existing case law on the topic from lower federal courts and from state courts before they attempt to serve a party by mail under article 10(a) of the Hague Service Convention. This method should be a safe bet in Alabama, as it enjoys support from the Alabama Supreme Court and an Alabama federal court. Likewise, in Georgia, there is no contrary authority. Florida is another case altogether. It is possible, though, to ask the court in advance for an order permitting service by mail under article 10(a)—and this would likely be wise in Florida, where such a request would avoid wasting time with a challenge to service after the fact.

Keywords: litigation, trial evidence, service by mail, Eleventh Circuit, Hague Service Convention

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NEWS & DEVELOPMENTS

Don't Forget to Offer All Grounds for Admissibility

The Seventh Circuit recently issued a gentle reminder to practitioners seeking to introduce evidence at trial: Don't forget to make an offer of proof under Fed. R. Evid. 103(a)(2) if the trial court rules your evidence is inadmissible. In *Duran v. Town of Cicero*, 2011 WL 3444353 (7th Cir. 2011), a federal civil-rights action asserted against police officers and the Town of Cicero, Illinois, by a number of people allegedly injured in a riot occurring after a party to celebrate a baptism, the defendants moved in limine to exclude evidence of a conviction in a prior civil-rights case of the officers and were successful. The plaintiffs unsuccessfully proffered the evidence at trial under one theory of admissibility, Fed. R. Evid. 609(a)(2), but proffered no alternative theories.

On appeal, the plaintiffs urged the Seventh Circuit to find the district court's ruling in error. The Seventh Circuit ruled that because the crime in question did not involve dishonesty or false statements, exclusion under Fed. R. Evid. 609(a)(2) was appropriate and that it was unable to review the admissibility of the conviction under Fed. R. Evid. 609(a)(1) because the plaintiffs had not advanced the argument at trial.

The moral of the story? If you have multiple grounds for admissibility, you'd better include them all in your offer of proof.

Trial Evidence
FROM THE SECTION OF LITIGATION TRIAL EVIDENCE COMMITTEE
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Keywords: litigation, trial evidence, Federal Rules of Evidence, admissibility

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The "Blade" Has Fallen on Snipes's Bid for a New Trial

On September 6, 2011, the Eleventh Circuit Court of Appeals rejected actor Wesley Snipes's contention that the district court erred in failing to grant him a new trial on income-tax-evasion charges in spite of the fact that a juror contended after the trial had ended that certain jurors had made up their minds to convict before the trial even started. *United States v. Snipes* [PDF], 2011 WL 3890354 (11th Cir. 2011). The juror contacted Snipes's attorneys only after the Eleventh Circuit had rejected his appeal on the merits. According to the Eleventh Circuit, the email forwarded to Snipes's attorneys by the juror could not serve as the valid basis for a new trial because it was not admissible under Fed. R. Evid. 606(b). That rule provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Because the email in question fell outside of the enumerated exceptions in Fed. R. Evid. 606(b), the Eleventh Circuit concluded that the trial court appropriately denied Snipes' new trial motion.

Keywords: litigation, trial evidence, Eleventh Circuit, Federal Rules of Evidence

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