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South Florida Judge's Error Puts Deed Scammers' Guilty Verdict in Jeopardy

by Melea VanOstrand

South Florida's real estate market is hot, and while that means it's the perfect time to build and invest for some, it also means there are many opportunities to commit fraud. With home title theft and deed scams on the rise, judges are cracking down on the perpetrators.

Just last year, three scammers were caught posting elderly residents' South Florida properties on Zillow to lure unsuspecting buyers in a deed scam.

And in Broward County, married couple Patricia Anne Tinker and Illya Tinker appealed their judgment to the Fourth District Court of Appeal after a jury found them guilty of 101 counts related to an alleged scheme to obtain properties via fraudulent deeds.

It's a case that highlights the gravity of being found guilty of obtaining a fraudulent deed, but also how a judge's error can change the course of a case.

According to an opinion issued Wednesday, the defendants faced over 115 counts of aggravated white-collar crime, grand theft, criminal use of personal identification information, criminal use of a deceased individual's

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$560K in Attorney Fees Gone After South Florida Court Cited 'Inconsistent' Precedent

The Fourth District Court of Appeal ruling written by Judge Spencer Levine reversed nearly $560,000 in attorney fees while ruling the appellee will not have the option for multiple "bites at the apple."

by Michael A. Mora

A Florida Fourth District Court of Appeal ruling is bad news for the estate of a deceased smoker. The hundreds of thousands of dollars in attorney fees the trial judge entered as sanctions against the opposing party went up in flames on appeal.

Matt Mandel, an attorney fees expert and the chair of the litigation division at Weiss Serota Helfman Cole + Bierman in Fort Lauderdale, is not involved in the litigation between the appellant, Philip Morris USA Inc., and the appellee, the Estate of Rita Shifrin.

Mandel said the ruling by Fourth DCA Chief Judge Spencer Levine and Judges Alan Forst and Mark Klingensmith, is a cautionary tale of a trial court erring in its issuance of what the appellate court labeled as "undefined and unlimited sanctions" that were "arbitrary and intimidating."

SEE FEES, PAGE A4

Miami Lawyer John Ruiz Made $2 Billion in the Final Days of SPAC Fever. Can He Keep It?

by Dan Roe

Big Law made untold millions advising on corporate mergers via special purpose acquisition companies last year, generating six- and seven-figure fees in the deals. Market leaders such as Ellenoff Grossman & Schole and Kirkland & Ellis handled more than 100 deals each for roughly $33 billion in respective deal value, according to SPAC Research.

But no lawyer went bigger on SPAC fever than Miami personal injury lawyer John Ruiz, who valued his Medicare secondary payer recovery company at $32.6 billion when it was identified as the merger target of Lionheart Acquisition Corp. II last July. With more than 2 billion of 3.2 billion total shares, Ruiz saw his net worth surpass $20 billion, on paper at least.

Now, as a recessionary economy and impending U.S. Securities and Exchange Commission regulation constrict the SPAC spigot to a trickle, the market will decide how much of his moonshot valuation Ruiz will get to keep. His company, MSP Recovery, began trading on the Nasdaq on May 24 at $10. Share prices quickly dropped to

Class action lawyer and Medicare payments entrepreneur John Ruiz is down $19 billion as his public company trades at $1 following a disastrous IPO.

$1 and stayed there, wiping out most of the company's lofty valuation—but still

SEE RUIZ, PAGE A2

'Every Lawyer Should Take on a Civil Rights Case': South Florida Attorneys Repping BLM Protester Shot in Head

by Raychel Lean

Though video footage of George Floyd's neck under the knee of a police officer propelled the issue of police brutality to the forefront of public consciousness, many attorneys are still reluctant to take on cases that could help tackle the problem.

That's according to the South Florida team representing LaToya Ratlieff, who was shot by police with a rubber bullet at a Black Lives Matter protest in Fort Lauderdale and has filed a federal civil rights lawsuit two years on.

Though this case has the potential to result in a significant jury award or settlement, it's actually the small wins that will create the biggest impact in the long run, according to Michael T. Davis. He's handling the litigation with his Kuehne Davis Law partner Benedict Kuehne and Stuart Ratzan of Ratzan Weissman & Boldt.

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LEGAL EDUCATION

'We're Humans, Not Machines': Reddit Users Commiserate Over Bar Prep Burnout

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RUIZ

netting Ruiz $2 billion that he didn't used to have.

In Ruiz's version of events, it's a timing issue. His company completed a de-SPAC merger and began trading on the Nasdaq during an economic downturn. Tech stocks got hit, Tesla was down, Amazon was down, and interest rates and inflation continued to rise. Even Elon Musk was worried about the economy, said Ruiz, who also believes naked shorting contributed to the speedy decline of his company's share price.

"We've been going through our public market de-SPAC process for almost a year—you don't get to pick when you come out," Ruiz said. "If you're coming out of your house, you don't get to pick the weather. I got dealt the perfect storm."

Whatever the weather, best to emerge from a really big house. For Ruiz, a prominent class action attorney and high-profile University of Miami athletics booster, that's a $49 million home in Coral Gables. For MSP Recovery, that's a near-record valuation of $32 billion, or the amount Ruiz and the SPAC's sponsors expect the company to earn by 2026. That year, MSP Recovery experts to earn $7.2 billion in gross revenue, more than Kirkland & Ellis earned last year and 95 times more than the company projects to earn this year.

MSP Recovery uses proprietary algorithms to identify payments made by Medicare and Medicaid managed care plans that private insurers should have made. The company buys the rights to bundles of claims and litigates them, sometimes through MSP Recovery Law Firm, a 40-lawyer firm that Ruiz owns with MSP Recovery CLO Frank Quesada. Before the merger, the company had received about $1 billion in private investment.

According to Ruiz, the company owns about $85 billion in recoverable claims. After splitting recoveries 50/50 with insurers and paying outside counsel and expenses, MSP Recovery expects to earn $5.2 billion in net income by 2026, SEC filings indicate.

If these sound like outsized expectations for a company that reported a $33 million loss on $14.6 million in revenue last year, you'll understand why the SPAC boom is fizzing out.

PUNCTUATING THE SPAC ERA

Although most de-SPACs have yielded public companies that trade below the SPAC IPO price of $10, the deals have printed money for everyone involved in them. Deal volume hovered between $20 billion and $30 billion in the years preceding the pandemic. In 2020, deal volume shot up to $162 billion, according to SPAC Research, and peaked at $324 billion in 2021.

Before long, M&A juggernauts such as Kirkland & Ellis and Skadden, Arps, Slate, Meagher & Flom had muscled in on the territory of seasoned SPAC practices at smaller firms such as Ellenoff Grossman & Schole and Graubard Miller, which held their own near the top of industry rankings. Companies frequently pay around $300,000 in initial legal fees and up to five times that for the de-SPAC portion of the transaction, Business Insider reported.

The MSP Recovery SPAC, Lionheart Acquisition Corp. II, generated legal fees for a handful of law firms. DLA Piper and Weil, Gotshal & Manges advised on the SPAC, Sidley Austin served as underwriters' counsel, Holland & Knight conducted due diligence on MSP Recovery, and Miami midsize firm Bilzin Sumberg Baena Price & Axelrod also worked as counsel to MSP Recovery and its members.

Sponsors and underwriters make out far better: MSP Recovery underwriter Nomura Securities earned $24 million in transaction and underwriting fees, while SPAC sponsor Lionheart Equities walked away with a $64 million "promote" for its efforts.

However, the market's appetite for SPACs is waning, with just $23 billion in deal flow so far this year. And proposed SEC regulations would expose SPAC underwriters to potential liability under the Securities Act, meaning that the financial institutions that sponsor the deal could be held responsible for inaccurate disclosures. If a significant number of investors lost money on a SPAC that felt misleading, those rule changes could expose the underwriters to a greater extent, said SPAC pioneer Douglas Ellenoff.

"There's always the risk, if a stock drops that precipitously, of civil litigation to find out what happened," Ellenoff said. "If there's a suggestion that disclosures or due diligence weren't what they should have been, then you run the risk of being sued."

HOW TO MAKE BILLIONS IN A DOWN MARKET

Whoever gets left holding the bag on an overvalued transaction may be motivated to litigate. Ruiz, a plaintiffs lawyer, is already facing an "investigation" into potential claims on behalf of MSP Recovery purchasers by plaintiffs firm Bronstein, Gewirtz & Grossman. Ruiz, however, characterized the public investigation as a violation of lawyer advertising rules.

But is it possible for almost everyone involved to come out ahead? Ruiz seems to think so.

Lionheart Acquisition Corp. II raised $230 million when it went public in August 2021, offering 23 million Class A common stock shares at $10 each that could be redeemed before the final business combination. Investors redeemed $109 million worth of shares by the time the SPAC announced its intent to merge with MSP Recovery. By the final combination last month, all but 2.2 million shares had been redeemed.

Such high redemption rates may signal a lack of investor confidence. They have also become commonplace as SPACs have underperformed in public markets, with SPACs offering investors decent returns on shares they always intended to redeem.

"With that level of redemption, you can make the assumption that it was not well-received by investors who held shares," Ellenoff said. "That's one of the great features of SPACs: If investors don't like the deal, they can have their money back. Regulators should be comforted because retail investors got their money back."

To prevent the rest of its investors from redeeming shares ahead of the final combination, the SPAC offered shareholders new and original warrants that are now trading at a combined $10, making them whole as the stock continues to trade near $1.

That MSP Recovery's original warrants are also trading near $1 has drawn the interest of observers. "If the value of a warrant is greater than the price of the stock, that is unusual and could be consistent with material nonpublic information being in the possession of some," said securities law expert John Coffee, a professor at Columbia Law School.

Ruiz said he believes short selling of varying legality explains part of his stock's lackluster performance, which he thinks will turn around now that the share price has hit the warrant price. "People were buying a warrant that was going to go up and a stock that was going down, so they were making money on both sides, assuming the stock only goes up and the warrant goes with it," he said. "They kept squeezing the stock down until it met the warrant, which is why it's starting to inch up already. It's no longer a pure financial transaction where you don't look at what the company is."

Ruiz added that MSP Recovery is also investigating naked shorts, or the sale of stock that investors didn't own, citing trading data that shows more shares were being transacted than the number outstanding.

The number of outstanding shares jumped from 2 million to about 8 million in early June as MSP Recovery shareholders exercised warrants they received with their shares. Of those shares, Ruiz owns just over 100,000—not quite billionaire territory, and nowhere near Ruiz's $2 billion windfall in the deal.

The rest of the money, and Ruiz's ability to keep it, comes from one of the key upsides to the SPAC boom: Lofty, lightly scrutinized growth projections.

With a valuation of $32.6 billion, the SPAC was able to issue 3.25 billion shares at $10 each to the members of MSP Recovery, with about 2.1 billion shares going to Ruiz. On the final business combination, those shares became convertible to shares of MSP Recovery. Once the SEC approves those shares, Ruiz will formally own more than 2 billion shares of his public company, or $2 billion at current prices.

If the market decides that shares of MSP Recovery are worth 50 cents, Ruiz will still be a billionaire. "This is more like a bump in the road," Ruiz said. "Our business is not really tied to the economy."

Dan Roe covers the business of law, focusing on Florida-based and national law firms. Contact him at droe@alm.com. On Twitter: @dan_roe_.

FLORIDA **LEGAL REVIEW**

Insurers Continue Dominance in Business Interruption Litigation: 11th Circ. Rules Against Alabama Clothing Store

by Mason Lawlor

The U.S. Court of Appeals for the 11th Circuit has joined courts across the country in siding with an insurer against businesses trying to recover lost profits during the COVID-19 pandemic. The court issued a written opinion on June 6 citing the bleak track record for companies regarding pandemic-related claims.

Dukes Clothing LLC sued its insurance provider, The Cincinnati Insurance Company, after Alabama Governor Kay Ivey and the State Health Officer issued several executive orders restricting the operations of "non-essential" businesses, including retail stores. Dukes has locations in Tuscaloosa, Alabama, and Mountain Brook, Alabama; both of which were forced shut down.

Neither Alabama's Supreme Court or its appellate courts have ruled on the issue, however, the 11th Circuit determined that the wealth of recent business interruption cases implies that the state's courts would also favor the insurer.

The 11th Circuit has ruled on case law involving businesses recuperating lost pandemic revenue. Senior Judge Frank M. Hull cited the most recent business interruption cases, like the 11th Circuit's own 2022 decisions in *SA Palm Beach LLC v. Certain Underwriters at Lloyd's London* and *Henry's LA Grill v. Allied Ins. Co. of Am.* as comparable references.

"Our Court observed that every federal or state appellate court to consider the issue has held that the presence of COVID-19 causes a business to intangible harm, not physical loss or damage," Hull said. "After review and with the benefit of oral argument, we conclude that Alabama appellate courts would reach the same result."

JOHN DISNEY

"Our Court observed that every federal or state appellate court to consider the issue has held that the presence of COVID-19 causes a business to intangible harm, not physical loss or damage," Senior Eleventh Circuit Judge Frank M. Hull said.

In Dukes' official policy, it states that Cincinnati Insurance pays for the actual loss of "business income" due to necessary "suspension of operations." However, the suspension must be caused by a "direct loss to property at premises." The coverage also continues through the period of restoration, beginning with the first day of loss until the premises has been rebuilt or repaired, according to Hull's opinion.

Among Dukes' claims include negligence and breach of contract, as well as alleging Cincinnati tried to deny the claim before it was even made. Because there was no Alabama case law on the matter, the magistrate judge granted the insurer's motion to dismiss.

Counsel for the clothing retailer, Attorney Raymond Glover of Prince, Glover & Hayes, was not available for comment.

The 11th Circuit relied on Alabama law regarding insurance policies. In the 1999 Alabama Supreme Court case *State Farm Fire & Cas. Co. v. Slade*, it was established that the language of policies is only ambiguous if its provisions are subject to "two or more constructions" or there is reasonable doubt. Therefore, the court interprets Cincinnati's insurance policy in clear, practical terms.

"Policy language is not rendered ambiguous just because parties disagree about the meaning of a policy provision," Hull said. "Our duty is to 'decide what the state courts would hold if faced with the question of whether lost business income resulting from COVID-19 is covered by this all-risk insurance policy.'"

Although the number of business interruption cases across the country has increased since the height of the pandemic, plaintiffs have had little luck securing victories in court. By interpreting the language of insurance policies as plain and practical, insurers have been given significant leeway in lawsuits.

Just this week, a restaurant in Georgia was denied coverage of pandemic losses on the grounds that there was "no accidental physical damage" to their premises.

Mason Lawlor reports for Law.com, an ALM affiliate of the Daily Business Review. Contact him at mlawlor@alm.com.

Florida Prison 'Gain Time' Case Roils Appeals Court

by Jim Saunders

Rejecting longstanding legal precedent, a state appeals court said Friday that a man convicted of attempted sexual battery on a child is eligible to be considered for early release from prison.

The ruling by the full 1st District Court of Appeal turned down arguments by the Florida Department of Corrections and drew two dissents. It involved whether inmate McMillan Gould should be eligible for what is known as prison "gain time" after pleading no contest to attempted sexual battery on a child under age 12.

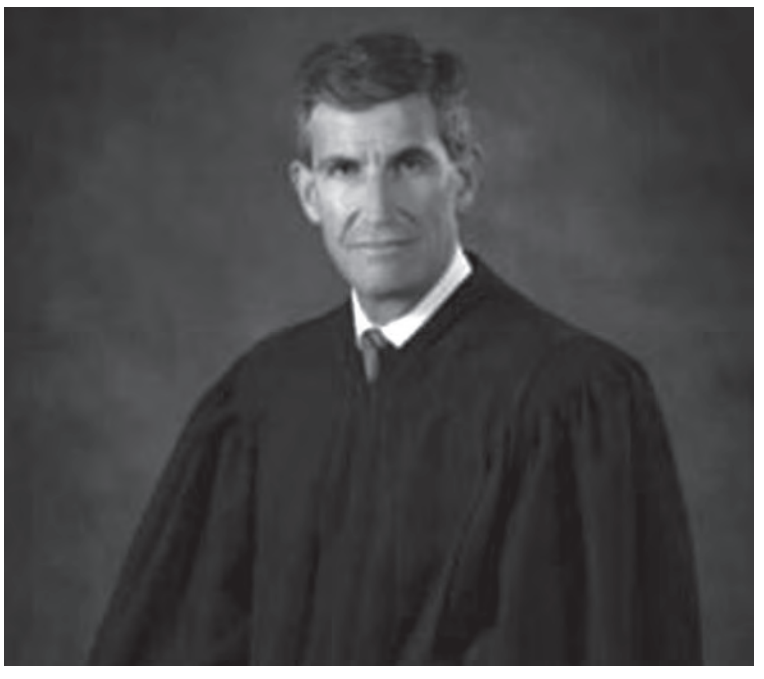
Judge Adam Tanenbaum, in a 22-page majority decision, said state law bars gain time for people convicted of committing sexual battery — but not, as in the Gould case, for attempted sexual battery. Inmates may receive gain time based on factors such as their behavior and taking part in work and programs.

Tanenbaum also wrote that the Tallahassee-based appeals court was backing away from what he called "a plainly incorrect legal principle regarding Florida's general criminal attempt statute" in rulings dating to 1996 and 2001.

"Gould has a clear right to consideration for the award of incentive gain-time," Tanenbaum wrote in an opinion joined fully by Chief Judge Lori Rowe and Judges Brad Thomas, Clay Roberts, Stephanie Ray, Timothy Osterhaus, Thomas Winokur, Harvey Jay, M. Kemmerly Thomas, Rachel Nordby and Robert Long. "There is no statutory preclusion. The department in turn is required to exercise its discretion on that question."

But Judge Scott Makar, in a dissent joined by Judges Ross Bilbrey and Susan Kelsey, blasted the decision, which he described as "the judicial equivalent of an unprompted cannonball dive into a long-placid wading pool."

"Upending time-honored precedent with no discernable benefit to society or the legal system is ill-advised … particularly when doing so directly thwarts the Legislature's clear and obvious intent to deny gain-time to convicted felons such as Gould, who — because of today's jurisprudential flip-flop — is now eligible for potentially earlier release from prison despite his attempt to commit a sexual battery on a child under 12 years old," Makar wrote.



Judge Adam Tanenbaum wrote that the Tallahassee-based appeals court was backing away from what he called "a plainly incorrect legal principle regarding Florida's general criminal attempt statute" in rulings dating to 1996 and 2001.

Bilbrey, in a dissent joined by Makar and Kelsey, pointed to the long period of time since the 1st District Court of Appeal's 2001 ruling in a case known as Wilcox v. State, which involved a defendant who had been convicted of attempted capital sexual battery and terms of probation.

"Had the Legislature been dissatisfied with Wilcox or cases from other districts relying on it, the issue could have been rectified at any time over the past 21 years," Bilbrey wrote.

But Tanenbaum wrote that the court in the Wilcox case had improperly found that "someone convicted of criminal attempt has violated the underlying offense statute, 'as modified.'"

"We disavow both the general principle and its application in Wilcox because they run counter to the unambiguous text of the criminal attempt statute," he wrote.

The ruling did not detail the underlying circumstances of the Gould case, but Department of Corrections records indicate he was sentenced in 2016 in Orange County to 25 years in prison. Gould sued the department in Leon County circuit court after it said he was not eligible for gain time.

Former Leon County Circuit Judge Karen Gievers sided with Gould, finding that the department was required to consider his eligibility for gain time, according to Friday's ruling. That prompted the department to take the issue to the appeals court in 2019.

The case remained pending for three years before the full court decided in March to consider it. Judge Joseph Lewis agreed with the outcome of the majority opinion Friday but did not fully sign onto it.

Jim Saunders reports for the News Service of Florida.

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PROTESTER

"There are so many civil rights cases, people who are falsely arrested, people who are maybe arrested lawfully but excessive force is used, and many of their cases go unanswered or without a lawyer because the damages are too low. I think every lawyer should take on a civil rights case and be a part of the movement to vindicate the rights of people," Davis said.

The majority of lawsuits against police don't offer much in the way of monetary value for litigators, but Davis said that doesn't mean they shouldn't take them on.

"Take a case," Davis said. "If lawyers want to make a difference and they want to be part of the solution, when you have that friend who tells you about being stopped for no reason, even if there's no damages, you take that case, you file for an injunction and you get an injunction against that police officer. And that injunction will make a difference because when that officer does that again he is now violating an injunction. It's the second time that he violates a civil right, and he's now going to face harsher consequences."

'LAWYERS SHOULD CARE'

The team's latest lawsuit points the finger at the city of Fort Lauderdale and nine police officers over their handling of a protest against police brutality, organized in response to Floyd's murder in 2020.

The demonstration descended into chaos when officers began deploying tear gas and firing rubber bullets, allegedly without warning. Plaintiff Ratlieff was captured on video as she stumbled away from the gas after being shot above her eye. Her lawsuit said she'd protested peacefully and held a sign that read, "Stop Killing Us."

The city of Fort Lauderdale has since apologized to Ratlieff and acknowledged that she did nothing wrong.

City Attorney Alan Boileau's office declined to comment on the lawsuit but did note that, "On the broader issue, I think it is important for attorneys to understand that use of force by law enforcement is not synonymous with the term 'police brutality' ... which I believe is inaccurate and misleading."

The case is an example of how attorneys can push for social change through litigation, the way Ratzan sees it.

"Lawyers should care because this case is one great example of how trial by jury can make the ultimate difference in the lives of our citizens and in this community, and how trial by jury can enhance and enforce safety that helps deter this kind of brutality and makes us all better and all safer," Ratzan said.

'WE'RE NOT TRYING TO STOP THEM'

One unusual aspect of the case is that it implicates the city, which is not protected by qualified immunity they way police generally are.

"The question for the city of fort Lauderdale is whether there was a policy or a final decision maker who decided to use tear gas and rubber bullets," Davis said.

That means a critical part of the litigation will examine police policies and practices, which Ratlieff seeks to change.

"The city of fort Lauderdale, like many municipalities, has resisted change and resisted acknowledging responsibility for this grievous assault on LaToya, and we expect them to mount a similar challenge," Keuhne said.

Ratlieff has presented the Fort Lauderdale Police Department with a list of what she argues are more safe and effective law enforcement practices. The suggestions included: requiring officers to sit with a mental health professional once a year; stopping the use of rubber bullets; using non-lethal options such as BolaWrap remote restraint devices for certain situations; and making successful de-escalation one of the criteria for promotions within the department.

Her attorneys say nothing has been implemented yet.

Raychel Lean is ALM's Florida bureau chief, overseeing the Daily Business Review. Email her at rlean@alm.com or follow her on Twitter via @raychellean.

FROM PAGE A1

DEED

personal identification information, and unlawful filing of false documents or records against property at trial.

The state alleged that the Tinkers, their son and other co-defendants owned properties with fraudulent deeds, according to the opinion. The Tinkers were listed as corporate officers for two companies the husband started, and the son was listed as a corporate officer during some of the schemes.

The opinion said witnesses testified they faked their signatures, or the signatures of people they were familiar with, on fake deeds or documents. Witnesses were the grantors of the property, family members of dead people who were the purported grantors of the properties, and notaries.

'THIS WAS ERROR'

Patricia Anne Tinker was sentenced to 35 years in prison followed by 20 years of probation. Illya was given a total of 177 years in prison. But in a consolidated opinion, the Fourth District Court of Appeals found a new trial was warranted.

"We agree with defendants that the trial court erred in: (1) permitting a detective to identify defendant wife's and the son's signatures on documents; and (2) its handling of a document improperly given to the jury during its deliberations. We reverse and remand for a new trial," Chief Judge Burton Connor wrote.

Broward Circuit Judge Barbara Anne McCarthy handled the litigation in the trial court, according to the ruling.

Connor wrote that when the trial court announced it had decided to give a curative instruction, the defendants said they were not given the opportunity to review the entirety of the document.

"After the trial court stated it was going to give a curative instruction, defendants' counsel began to ask, 'What kind of curative –', but the trial court cut off defense counsel and declared that it 'made [its] ruling' and was 'going to have the deputy bring the jurors in.' This was error," wrote Connor.

According to law, if the defense doesn't have the opportunity to address a jury's question and a curative instruction isn't given, a mistrial should be granted.

Carla Lowry of Lowry at Law in Fort Lauderdale represented appellant Illya Livingstone Tinker.

Public defender Carey Haughwout and assistant public defender Benjamin Eisenberg of West Palm Beach represented appellant Patricia Anne Tinker. Attorney General Ashley Moody of Tallahassee, and assistant attorney general Richard Valuntas Assistant of West Palm Beach, represented the state of Florida.

They did not respond to a request for comment by deadline.

Melea VanOstrand is ALM's South Florida real estate reporter. Contact her at mvanostrand@alm.com. On Twitter: @meleavanostrand.

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FEES

"Attorney fees are a derogation of common law, and appellate courts are reticent to give or affirm them unless there is an attorney fees provision in a contract or a specific provision in the statutory cause of action," Mandel said. "Appellate courts want cases to be tried on the merits, and not have cases turn into a minitrial within a trial, having nothing to do with the underlying substance of the case, especially when they had a significant award like this."

Neither Kenneth J. Reilly, a partner at Shook, Hardy & Bacon in Miami who represented Philip Morris, nor Scott P. Schlesinger, a partner at the Schlesinger Law Offices in Fort Lauderdale who represented the estate, responded to a request seeking comment.

The dispute in this case is based on the sanction award Broward Circuit Judge Carlos A. Rodriguez imposed on Philip Morris after finding the tobacco giant made several opening statements that were in bad faith, according to the appellate ruling.

Among the multiple statements was one in which Philip Morris' counsel claimed the estate would not call the medical expert who diagnosed the plaintiff with chronic obstructive pulmonary disease, commonly known as COPD, to testify. The estate responded that the doctor was dead.

However, when Philip Morris asserted the jury should not punish the company for other pending lawsuits involving e-cigarettes, Rodriguez had had enough. Soon after, the trial judge ruled that the estate was entitled to attorney fees under Florida Statutes 57.105(1).

But at that point, when Rodriguez asked the estate whether it wanted to request a mistrial during opening statements, it declined. Effectively, the estate "proceeded at her own peril by not availing herself of a mistrial," the Fourth DCA ruled.

The Fourth DCA ruled that when the estate sought attorney fees for the entire trial, the sanctions only applied to the opening statement. As a result, Rodriguez's ruling was inconsistent with the precedent set in *Moakley v. Smallwood*.

Now, the Fourth DCA reversed the nearly $560,000 in attorney fees, leaving the estate empty-handed without the option for multiple "bites at the apple."

José M. Ferrer, a partner at Mark Migdal & Hayden in Miami, said the ruling stemmed from the Florida Supreme Court's failure in its 2002 ruling in *Moakley* to establish clear-cut standards that established what constituted bad faith conduct and what the appropriate dollar amount is for that bad-faith conduct under *Moakley*.

"*Moakley* is generally applied when a trial judge is outraged or fed up with an attorney's behavior or conduct," Ferrer said. "But this level of tolerance is different in trial courts, which has resulted in an uneven and inconsistent application of the *Moakley* standard. Its lack of applicable standards left the job of establishing those standards to the state courts of appeal."

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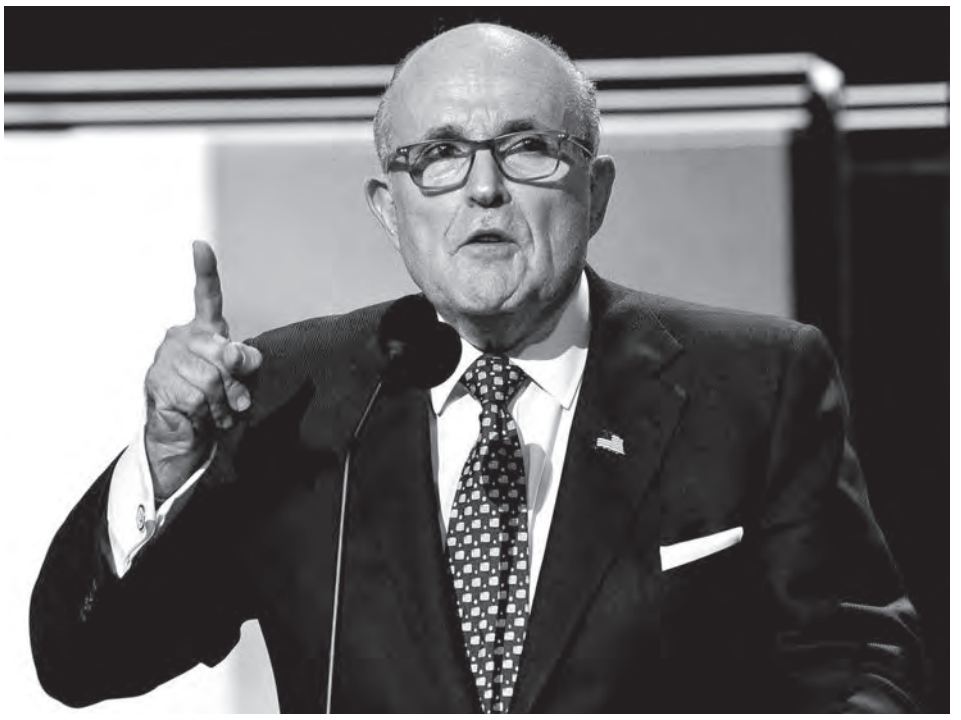
FROM THE COURTS

Giuliani Gets Ethics Charges for Baseless Election Lawsuit

by Andrew Goudsward



SHUTTERSTOCK

Washington, D.C.'s attorney discipline office found Rudy Giuliani had "no non-frivolous basis" to bring election fraud claims in Pennsylvania.

The disciplinary office for D.C. lawyers brought ethics charges against Rudy Giuliani related to claims he made in a federal lawsuit in Pennsylvania that sought to overturn that state's 2020 election results.

The District's Board on Professional Responsibility alleged that Giuliani "brought a proceeding and asserted issues therein without a non-frivolous basis in law and fact for doing so" and "engaged in conduct prejudicial to the administration of justice," two violations of the Pennsylvania rules of professional conduct.

Giuliani, who was serving as a personal lawyer to former President Donald Trump, represented Trump and a group of Pennsylvania voters who filed a lawsuit against the Pennsylvania Secretary of State and various county election boards in November 2020 seeking to invalidate the results of the election in the pivotal swing state.

Giuliani has already been suspended from practicing law in New York after a disciplinary board there found he had "communicated demonstrably false and misleading statements to courts, lawmakers and the public at large."

Giuliani was not listed on the initial complaint in Pennsylvania, but joined the case the day before oral arguments on a motion to dismiss. A 19-page filing from the D.C. attorney disciplinary office recounts Giuliani's role in the suit, which sought to prevent Pennsylvania from certifying the results of its election and cast aside between 680,000 and 1.5 million of the roughly 2.6 million mail ballots cast in the state.

The complaint against Giuliani called the relief sought "extraordinary," and said he had "no non-frivolous basis in law and fact for asserting to the district court that the defendants committed election fraud, much less a factual basis for setting forth fraud with particularity."

The suit was dismissed in U.S. District Judge in the Middle District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit denied Giuliani's request to file a second amended complaint.

Giuliani had several gaffs during his appearance for oral arguments in that case, including forgetting opposing counsel's name, and struggling when asked about what standard of review should apply, replying at one point: "On a motion to dismiss? The normal one."

Giuliani was also forced to backpedal on the fraud claims during the oral argument, after the judge reminded him that federal rules of civil procedure required him to state with "particularity the circumstances constituting fraud."

After that exchange, Giuliani claimed that the complaint "doesn't plead fraud" and "this is not a fraud case."

But the next day, Giuliani submitted a second amended complaint "which included (and amplified) factual allegations sounding in fraud that were included in the initial complaint," according to the filing from the D.C. disciplinary board.

In dismissing the complaint U.S District Judge Matthew Brann, an Obama appointee, said he was unable to find another election case in which plaintiffs proposed "such a drastic remedy."

"This court has been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence," Brann wrote. "In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its sixth most populated state. Our people, laws, and institutions demand more."

Brann's decision was one of a series of setbacks Giuliani and Trump's legal team faced as they sought to challenge the results of the election in courtrooms across the country.

Giuliani will have 20 days to file a response to the charges.

Andrew Goudsward covers the Justice Department and regulatory affairs. Contact him at agoudsward@alm.com. On Twitter: @agoudsward.

Sacha Baron Cohen Urges Court to Toss Defamation Suit

by Jane Wester

"At best, you may still have a claim for intrusion or invasion of privacy in a situation involving sexually-oriented or offensive behavior or questioning, but you didn't bring such a claim," said U.S. Court of Appeals for the Second Circuit Judge Gerard Lynch.

Attorneys for former Alabama U.S. Senate candidate Roy Moore and the comedian Sacha Baron Cohen appeared before the U.S. Court of Appeals for the Second Circuit, with Moore's attorney Larry Klayman urging the three-judge panel to reverse the district court ruling dismissing Moore's suit.

Moore sued Cohen in 2018, accusing him of defamation and fraudulent inducement in connection with Moore's 2018 appearance on Cohen's television show "Who Is America?" in which Cohen claimed to be an anti-terrorism expert wielding a device that could detect sex offenders and pedophiles.

The "Who Is America?" segment started with a montage of news footage regarding Moore's 2017 Senate run, including discussion of accusations of sexual misconduct against him. Viewers then saw Cohen talking with Moore and waving the device in his direction; it beeped, and Moore ended the interview.

Klayman said his client deserves to have his case heard by a jury, drawing an analogy to the recent verdict in the Johnny Depp-Amber Heard trial, which he said started out with what appeared to be low chances of success for Depp.

"There is nothing worse, and I ask Your Honors to sit in the shoes of Judge Moore—whatever you may think about him on any other basis—and to say would you want to be branded a pedophile like this on national and international television and then be cut off of your right to even take discovery," Klayman said.

Circuit Judge Gerard Lynch asked Klayman about the details of the contract, noting that Moore crossed out and initialed "a specific part of a specific part," namely the parenthetical phrase "such as any allegedly sexual-oriented or offensive behavior or questioning" in a clause about intrusion or invasion of privacy.

"At best, you may still have a claim for intrusion or invasion of privacy in a situation involving sexually-oriented or offensive behavior or questioning, but you didn't bring such a claim," Lynch said.

Cohen's attorney Elizabeth McNamara of Davis Wright Tremaine argued that Moore, a former Alabama Supreme Court justice, was clearly qualified to read and understand the contract he signed before his interview. Moreover, she argued, the modification to the parenthetical shows that he read it.

McNamara reiterated Lynch's point that Moore failed to assert the intrusion or invasion of privacy claim.

"The claims he asserted were defamation, which was waived, intentional infliction of emotional distress, which was waived, and fraud, which was waived, so there was no ambiguity, we submit, on the face of the agreement for the court to go beyond it," McNamara said.

McNamara argued that even if the panel found the agreement was not fully enforceable, they should still affirm the district court's dismissal on First Amendment grounds.

"Whether you found it funny or not, it was clearly satirical commentary on the events that were depicted at the beginning of the episode," McNamara said, adding that "no reasonable viewer" would believe the sex offender-detecting device was real or that it depicted "actual facts" about Moore.

Circuit Judge Rosemary Pooler, who joined Lynch and Circuit Judge Raymond Lohier on the panel, shared her own view on the segment after McNamara described it as a comedy.

"You said comedy," she said. "Not very funny. This program was not very funny. Fortunately, that's not the test."

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FROM THE COURTS

Judge Loses Patience With Emails From Pro Se Trump Aide

by Andrew Goudsward

Former Trump trade adviser Peter Navarro is off to a rocky start as he seeks to challenge contempt of Congress charges without a lawyer.

Navarro drew a rebuke from U.S. District Judge Amit Mehta of the District of Columbia on Thursday for twice emailing Mehta's courtroom deputy this week without including prosecutors on the message.

"This is not proper," Mehta wrote in a docket notice. "Defendant is not permitted to have ex parte communications with the court — that is, communications outside the presence of government counsel — absent the court's consent."

Mehta told Navarro that he would need to communicate with the court through written filings submitted through the clerk's office or he could seek filing privileges in U.S. District Court in D.C.

Navarro was arrested on June 3 and charged with two counts of contempt of Congress for defying a subpoena from the Jan. 6 House select committee. Navarro was appointed a federal public defender for his initial appearance that day, during which he lashed out at the FBI and federal prosecutors for his treatment during his arrest.

DIEGO M. RADZINSCHI

"Defendant is not permitted to have ex parte communications with the court," said U.S. District Judge Amit Mehta.

At the hearing, Navarro told a magistrate judge that he planned to proceed pro se in the case, saying he did not "want to spend my retirement savings on lawyers."

But he appeared to have a change of heart, writing in a June 8 email to the court that he was "very actively seeking a legal team" but faced "a number of hurdles." In the message, he asked for a 45-day delay of his arraignment before Mehta.

Navarro's second email to the court came a day later when Navarro wrote to the courtroom deputy to advise that he was preparing a response to the government's request for a protective order.

Prosecutors had asked for an order governing documents turned over in discovery after Navarro made several statements to the press condemning the prosecution and accusing the U.S. Justice Department and Jan. 6 committee of misconduct. Prosecutors said the order was necessary to prevent Navarro from using discovery for "improper purposes."

"I should have it be [sic] cob tomorrow," Navarro wrote to the courtroom deputy, referring to his response to the motion.

Following the second email, Mehta lost patience with Navarro's messages.

"The court assumes that defendant was unaware of the prohibition on ex parte communications," Mehta wrote in his order, "and trusts that they will cease going forward."

Andrew Goudsward covers the Justice Department and regulatory affairs. Contact him at agoudsward@alm.com. On Twitter: @agoudsward.

Antitrust Suit Could Follow After PGA Suspends LIV Players

by Everett Catts

A legal battle could be looming between the PGA Tour and the new LIV Golf Invitational Series after 17 players were suspended by the PGA or were deemed no longer eligible to play in its events after opting to compete in LIV Golf's first tournament.

Although 10 of the suspended players had already resigned from the PGA Tour, the seven others could appeal their suspensions. One, Ian Poulter, has already said he will, according to an ESPN.com report. The LIV tour or one or more of its players could sue the PGA for antitrust law violations, arguing that the PGA has engaged in monopolistic tactics and that its players are independent contractors.

According to its website, LIV Golf is a new pro golf tour with eight events or tournaments (seven in the regular season and then one playoff event) scheduled from June through October in North America, Europe, the Middle East and Asia.

The suspensions were announced Thursday, the opening day of the LIV tour's first tournament at Centurion Club in London. The suspended players also can't play on the PGA's Korn Ferry, Champions (for senior players), Canada and Latinoamérica tours. However, LIV players can participate in the PGA's four major championships.

The suspensions came after PGA players who sought to get releases from the PGA to play in LIV tournaments during the same weeks PGA events would take place were denied their requests.

'CLAIM FOR DAMAGES'

Antitrust lawyer James Fishkin, a partner with the Dechert firm in Washington, D.C., said LIV and its players could be waiting to file one or more antitrust lawsuits against the PGA as the suspensions run their course, since the PGA decided to suspend the players rather than ban them from the PGA Tour permanently.

"I think that's something to look into," said Fishkin, who has worked as an antitrust lawyer for more than 30 years. "Are they suspended for a month? Six months? A year? Indefinitely? … The suspension rather than an outright or permanent ban may be due to trying to determine how the situation may play out with the public and the fans for the potential legal implications."

Whether the LIV tour or one or more players decides to file suit, Fishkin said they would need to prove they suffered damages from the suspensions.

"If a player wants to sue, under the antitrust laws, they also need to make a claim for damages resulting from the ban," he said. "For example, if you're only suspended for 30 days … any potential damage claim will be less than a much longer suspension. So what is the quantifiable harm to those banned golfers? They would need to show that they could have won 'X' dollars based on their prior performance or perhaps they would not have lost an endorsement fee if a sponsor drops them. This is why the duration of the suspension is important."

"Right now, you don't know what the outcome is going to be because you don't know how long the suspension will last or at least I don't know at this time," he added.

LIV OFFERING MORE MONEY

But legally, based on the money the LIV tour is offering players over the PGA Tour, players may have a hard time proving damages.

According to its website, each LIV tournament will be smaller and shorter than PGA Tour events, with only 48 players and three rounds instead of four. Also in the LIV series, there will be a season-ending team competition with 12 teams.

But the biggest difference is the money involved, with players competing for the largest prize purses in history, according to the LIV website. At each regular-season event, players will be competing for $25 million in prizes, with the winner getting $4 million and the last-place finisher receiving $120,000. That $25 million figure is well above all PGA Tour purses and nearly double the PGA Tour's record $15 million prize purse at this year's PGA Championship in May.

Also, individual players on the LIV tour will be competing for $30 million among the top three players in the seven regular-season events, and all 12 teams will be battling for a $50 million purse at the season-ending team championship.

The LIV's first event on American soil is June 30 through July 2 at Pumpkin Ridge in Portland, Oregon. Its tour is led by Greg Norman, a former PGA player who also played on the PGA's Champions Tour. Players who have already opted to compete on the LIV tour include seven who have won major championships.

But the LIV tour has been criticized because it is funded by the Public Investment Fund of Saudi Arabia, which is controlled by Crown Prince Mohammed bin Salman. Salman has been accused of several human rights violations, including the 2018 murder of Washington Post journalist Jamal Khashoggi.

PGA PREVIOUSLY PROBED

Fishkin said because the LIV tour has its own staff of antitrust lawyers, based on news reports he'd read, it's more likely it will sue the PGA instead of a single player or group of players doing so. He also said he believes it's more plausible for a group of players to sue instead of just one.

In the early 1990s, the Federal Trade Commission investigated the PGA Tour's regulations when Norman tried to start a breakaway World Golf Tour that had a similar format to LIV. But after a four-year investigation into antitrust claims and the FTC recommending federal action, none was ever taken, thanks to then-PGA Tour commissioner Tim Finchem and the tour's successful lobbying.

Fishkin, who spent 15 years at the FTC as a lead attorney on several merger investigations, did not work on the PGA Tour investigation. He said the fact that nothing came out of that probe would not impact the LIV or its players in their decisions on possibly filing an antitrust suit against the PGA. Fishkin added that the antitrust laws have not changed since that investigation took place.

"If a player or group of players or the LIV tour sues the PGA under the antitrust laws, I'm confident they would bring their actions under the same antitrust laws," he said, adding he doesn't expect the FTC to investigate the PGA today regarding any antitrust claims the LIV tour or players made against it because it has "scarce resources."

'NO REASONABLE JUSTIFICATION'

If the LIV tour or its players go to court over the issue, Fishkin said the PGA would need to prove "their actions were necessary."

"It is well established under the antitrust laws that a monopolist or a dominant firm cannot engage in an unreasonable boycott or refusal to deal to maintain its market position and harm a rival," he said. "If there were a challenge to the actions by the PGA Tour, whoever is suing would need to demonstrate there is no reasonable justification for the actions by the PGA Tour and that they have been harmed. The PGA Tour would need to be able to justify why their actions were necessary.

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INTERNATIONAL

Ant Group's Benjamin Bai Pivots to Crypto: It's Now or Never

by Jessica Seah

Benjamin Bai, former vice president and chief intellectual property and international litigation counsel at Ant Group, recently moved on to digital asset trading company Amber Group as chief legal counsel.

Bai, who will soon be relocating to Singapore from Shanghai, was previously a partner and head of the regional IP practices at Allen & Overy and Jones Day.

His latest professional defection is a sign of the times.

In recent years, several senior lawyers have also made transitions into in-house roles. Notably, the most prominent moves have all been moves into start-ups. The latest and by far the most high profile is that of Julie Gao, a former partner at Skadden, Arps, Slate, Meagher & Flom, who had built an entire brand for herself in advising Chinese companies on their high stakes U.S. listings. Gao has moved to the Chinese media technology company ByteDance. Months before that, her colleague Chris Betts—another former Skadden partner—left to join super-app company and Southeast Asian ride-hailing giant Grab Holdings in Singapore.

In 2020, Paul, Weiss, Rifkind, Wharton & Garrison also lost its China head, Jeanette Chan, to a general counsel position at digital payments company Airwallex.

To be sure, Bai's move in-house happened earlier. In 2016, he left Allen & Overy after almost six years to join Ant Group, which owns and operates China's largest digital payment platform, Alipay.

Ant's parent company and e-commerce juggernaut, Alibaba Group, which hadn't yet gone public, started courting him shortly after he joined Allen & Overy from Jones Day, where he had led the firm's patent litigation practice in China. But he turned down the opportunity.

"I was skeptical, to be honest," said Bai. "The idea of working for an e-commerce platform back then just didn't appeal to me."

The opportunity came via Alibaba's general counsel, Tim Steinert, a former Freshfields Bruckhaus Deringer partner. Alibaba and Ant continued raiding international law firms for talent. The company now counts former Simpson Thacher & Bartlett partner Leiming Chen and Fangda Partners' veteran lawyer Jonathan Zhou among its ranks.

Several years after Bai was first approached about a position at Ant Group, parent company Alibaba did its mammoth US$25 billion U.S. initial public offering. Bai was approached again, by Chen. This time he relented and never looked back.

"We talked about what else could we do together, and my potential contribution to, at the time, the emerging fintech company that comes from China," said Bai of his conversation with Chen.

Prior to moving to Ant, Chen was one of the leading international lawyers advising Chinese companies on their American and Hong Kong IPOs. "It was different for me. I was a lawyer who was representing international companies like IBM or Apple, chasing Chinese companies for IP infringement," said Bai.

But he told himself that before he died or retired, he wanted to be able to do something for a deserving Chinese company.

Benjamin Bai, formerly head of the intellectual property practice at Allen & Overy and Jones Day, left private practice to join digital payments juggernaut Ant Group in 2016. But his latest move marks yet another pivot, this time to the risky world of digital assets.

"Ant was my pick, and it now has the largest blockchain patent filings in the world," he said.

Over the past few years, Bai has developed a keen interest in Web 3, a catch-all term for the vision of a new and better internet, based on blockchains and digital assets like cryptocurrency and non-fungible tokens (NFTs). He has become an investor in cryptocurrencies himself and has closely followed the growth and evolution of digital currencies and assets.

While Ant takes blockchain very seriously, having launched a myriad of blockchain-based solutions and platforms. Bai's fascination with Web3—and with cryptocurrencies in particular—was impeded, as China prohibits any form of cryptocurrency trading.

"At the beginning of last year, I started thinking to myself, 'What if we are missing something?' So I started looking into crypto from a work perspective. I got interested so much that I started to buy crypto on my own," he said.

And so, when the opportunity arose, Bai found that a friendly conversation with Michael Wu, co-founder and chief executive officer of global digital asset company Amber, and Wayne Huo, the company's chief operating officer, was particularly appealing. "We hit it off and that was it—here I am," said Bai, laughing.

His newly-discovered penchant for risk-taking when it came to his crypto investments didn't come naturally. Much of it was acquired only after leaving private practice. But after over five years at Ant, risk-taking now has a very different tune to it, Bai said.

"I think in law firms, you analyze risks but you tend not to take risks. Risk-taking is a mindset and also an ability. It has been what my team is all about," said Bai.

"In-house counsel must be able to work with business people because if you tell your business colleagues that they are going to infringe, for example, some IP rights, and you give them no options and they cannot move forward at all, it'll kill their business," he explained.

"Risk must be quantified, and the business can use that to make their own decisions," Bai. continued. "Though as an in-house lawyer, I might tell them, 'if you do this you are going to get clobbered but you'll generate enough commercial benefits, and I'd litigate for you so long as it is not criminal.' "

When it comes to digital assets, the willingness to take risks is even more crucial, yet, it goes against the grain for how lawyers are traditionally trained. Additionally, most traditional lawyers find it even harder to grapple with the highly complex and evolving subject of the metaverse and Web3, and their relative lack of regulatory frameworks and legal protections.

"Crypto is hard, especially on the regulatory front, so you see a lot of law firms trying to build a crypto regulatory practice," said Bai. "But if you are going to do crypto regulatory work, you need to understand how bitcoin works, how Ethereum works. It's an entirely different world."

And when law firms discuss working with him, Bai is no-nonsense about this.

"I tell my outside counsel that if they don't understand crypto, then they are unlikely going to understand our products, which means they really don't have business talking to me."

Web3 and its relevant elements present a plentiful opportunity for investors, stakeholders and law firms alike but include also a myriad of risks and legal and regulatory issues.

First and foremost, Bai says local governments need to figure out how crypto should be regulated.

"In the traditional financial world, the landscape has already been set but it's set to the point that the traditional institutions cannot innovate," he said.

"Innovation won't occur if you put on so many shackles. If that happens, you strangle innovation," he explained. "So how much leeway do you give to the crypto world? How do you protect investors and encourage innovation? That's something every country is trying to figure out."

With Alipay and WeChat pay, for example, the regulation came after the innovation took off, Bai said.

It's not just government putting on the brakes, however. Innovation can also be stifled by the failures of the innovation itself, Bai noted, pointing out that the mess that was the stablecoin LUNA, which lost almost its entire value just last month, is a prime example. Investors lost millions of dollars with no recompense, and the lack of legal protection for investors grabbed the headlines.

But Bai argues that failures are part and parcel of innovation. He believes firmly in the rise of stablecoins and posits that in the next decade, half of the world's financial products will be based in cryptocurrencies and the other half fiat.

Bai's pivot into digital assets wasn't a natural one, either, even though he'd been around innovation for most of his time in private practice, having focused predominately on intellectual property.

"I would not have been able to do this without having gone through my experience at Ant," said Bai. "IP was only 20%, maybe 30% of what I did. I did a lot of general legal work, litigation, investigations, AML (anti-money laundering), sanctions and financial regulatory work, so it became the perfect transition for me having spent some years at a world-leading fintech company."

Still, Bai took time to think about whether he should make the move to Amber, as he didn't want to create a succession issue at Ant, he said. At the same time, though, he knew the crypto train wasn't going to wait for him.

"In the crypto world, every month is like a year in the traditional world. I said if I waited for two years, you know, I would miss a lot of fun," Bai said.

Amber currently has about a dozen lawyers globally. The team will continue to grow. Bai's plan is to shape the legal department in terms of its culture, risk-taking and corporate governance structures. The idea of building a function almost entirely from scratch appealed to him. A legal panel will soon be put in place.

"I don't have a preconceived notion in terms of size," said Bai, who added that instead of hiring a bigger team to work on the day-to-day needs, he will lean on external counsel for routine work. He will also rely on law firms for litigation needs.

"So my team gets to do what in-house counsel must do to really add value to the business. I need to build a team that will focus on enabling our business to grow rapidly," he said.

On Bai's LinkedIn profile, he describes himself as a "crypto enthusiast." But underpinning that enthusiasm is a belief system that resonates with Amber's mission.

"We are going to use crypto to touch upon many people around the world who may not even have a bank account. We're going to bring financial inclusion via crypto," said Bai. "And this is the vision I share with Amber. I'm going to lead my legal team to make it happen."

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PRACTICE FOCUS / HEALTH CARE

The Florida Supreme Court Curtails the Rights of Medicare Recipients

Commentary by Michael A. Hersh

In April, the Florida Supreme Court decided *Dial v. Calusa Palms Master Association,* a ruling that may upend the collateral source rule and lead to inequitable personal injury results for Medicare recipients, and, in the future, perhaps others. The *Dial* court ruled that the Florida Supreme Court's decision in *Joerg v. State Farm Mutual Automobile Insurance*, which prohibits evidence of Medicare benefits for calculating future medical expenses, *does not apply to past medical expenses*.


Hersh

The amount of past medical expenses presented at trial drastically influences case outcomes because juries tend to consider the extent of past medical expenses when determining amounts for future care and noneconomic harm. As such, should *Dial* limit plaintiffs to presenting at trial only the amounts paid by Medicare, Medicare recipients will recover significantly less in personal injury cases.

As members of the judicial system, we must ask ... what is right, just and fair? Clearly, not all will agree, but in my view—*Dial* gets in wrong, cannot be squared with *Joerg*, and harbingers a deterioration of our state's very important collateral source rule, threatening progressively unfair and unjust results for the hurt and harmed in Florida, exactly the opposite of what our systems aims to accomplish.

THE 'DIAL' DECISION

The majority opinion in *Dial* has just two paragraphs of analysis. In contrast, *Joerg* provided an extensive, thorough, and detailed rationale, analyzing numerous legal authorities. Providing no substantive reasoning, the *Dial* court simply stated that *Joerg* has no application to past medical expenses. As written, *Dial* seems to do *no* more than merely answer the question presented— *whether Joerg applies to past medical expenses*— in which case the import of *Dial* is limited and what past medical expenses may be presented at trial by a Medicare recipient plaintiff remains subject to further consideration by the court.

However, despite lacking in analysis, *Dial* affirmed the lower court's decision to limit the plaintiff's past medical expense evidence to only the amounts paid by Medicare. *Dial* will, therefore, probably be interpreted as imposing this evidentiary limitation in future cases involving Medicare recipients. Justice Ricky Polston's concurring opinion also suggests expanding the ruling to scenarios involving Medicaid, private insurance, and other third-party agreements.

Limiting past medical expense evidence to the discounted amounts paid by Medicare, or other third parties, however, is contrary to legal precedent and unjust and unfair.

'JOERG' DEMANDS A DIFFERENT RESULT

The collateral source rule stems from the longstanding principle against tortfeasors benefiting from collateral sources available to plaintiffs. It historically governed both damages and evidence. The damages rule, prohibiting reducing plaintiffs' damages by available collateral sources, was abrogated by Fla. Stat. Section 768.76.

BOARD OF CONTRIBUTORS

The evidentiary collateral source rule, though, has remained intact. The evidentiary rule renders evidence of payments from collateral sources inadmissible because, as *Joerg* reiterated, such evidence "misleads the jury," "subverts the jury process," "may lead the jury to believe that the plaintiff is trying to obtain a double or triple payment for one injury," and is otherwise highly prejudicial.

Confusion arose, however, when, in 1984, the Florida Supreme Court ruled, in *Florida Physician's Insurance Reciprocal v. Stanley*, that evidence of free or low-cost services from governmental or charitable agencies was admissible at trial. *Stanley* relied exclusively on the Illinois Supreme Court opinion in *Peterson v. Lou Bachrodt Chevrolet.* Relying on *Stanley* and *Peterson*, the Second District, in 2004, decided *Cooperative Leasing v. Johnson*, which became the seminal case upon which defendants would later argue against plaintiffs presenting full medical bills.

The lower court decisions affirmed in *Dial* were decided based upon *Cooperative Leasing*.

Without more analysis, the *Dial* decision's apparent approval of *Cooperative Leasing* is inexplicable. In 2015, the Florida Supreme Court, in *Joerg*, expressly receded from *Stanley*, highlighting the especially prejudicial effect of evidence of social legislation benefits. The court proclaimed that "tortfeasors should not receive a windfall due to benefits available to the injured party, however those benefits were accrued." The court also recognized that *Stanley* had become the minority view in this country, and *Peterson*—the Illinois decision upon which *Stanley* was based—was overruled by *Wills v. Foster*, 229 Ill. 2d 393 (2008).

Joerg commended the *Wills* decision. *Wills* approved the plaintiff presenting her full medical bills, allowing her to request the reasonable value of her medical expenses without regard to any discounted Medicare payments. *Joerg* recognized that *Wills* addressed *past* medical expenses, but expressly stated that that distinction was irrelevant given the court's agreement with the policy pronouncement in *Wills*.

Accordingly, *Joerg* expressly receded from *Stanley*, and applauded *Wills*, which overruled *Peterson* and outwardly criticized and rejected *Cooperative Leasing*. In so doing, *Joerg* effectively overruled those cases that attempted, even if wrongly, to apply *Stanley* and *Peterson*. That included *Cooperative Leasing*, which the court in *Dial* now seemingly, and inexplicably, suggests should be the law of this state.

Dial, unfortunately, fails to address that *Cooperative Leasing* is based on outdated law previously rejected by *Joerg* and that, as Justice Jorge Labarga's dissent notes, *Joerg* already answered the question presented. The *Joerg* court undeniably, in 2015, ruled that evidence of Medicare, Medicaid, and other third-party benefits is inadmissible regardless of whether it pertains to past or future benefits.

UNJUST AND UNFAIR

Not only does *Dial* ignore established precedent, but its evidentiary limitation is also unjust and unfair.

As *Wills* noted, limiting a plaintiff to introducing only the amount paid in settlement of medical bills improperly focuses on write-offs available to the victim rather than on the harm caused by the tortfeasor. This bestows a potential windfall upon the tortfeasor based on the victim's relationship to others, arbitrarily diminishing the tortfeasor's liability to a Medicare beneficiary as compared to the same tortfeasor's liability to an uninsured or privately insured victim. This also discriminates against certain plaintiffs, such as the poor, disabled, and elderly, whose recoveries will shrink. As *Wills* stated, a defendant's liability should not be "dependent on the relative fortuity of the manner in which a plaintiff's medical expenses are financed."

Further, to the extent a windfall is unavoidable, it should inure to the benefit of the injured and not the tortfeasor. The Fourth District, in *Calloway v. Dania Jai Alai Palace,* explained that the "principle behind the [collateral source] rule is that it is better for the wronged plaintiff to receive a potential windfall than for the tortfeasor to be relieved of responsibility for the wrong."

In addition, permitting evidence of discounted medical bills ignores the highly prejudicial impact the collateral source rule aims to prevent, and anonymity is no fix. Even if the source of the payments is not divulged to the jury, limiting the evidence to the amount paid—as opposed to the gross amount billed—indirectly accomplishes what is directly prohibited by the collateral source rule. The collateral source rule operates to prevent the jury from learning *anything* about collateral income. *Dial* threatens to the do the exact opposite.

What is right, just and fair? In my opinion, *Dial* is not it. I remain hopeful though, for the sake of the hurt and harmed, that the court merely awaits a better opportunity to fully consider the policies announced in *Joerg*, as it pertains to past medical expenses.

Michael A. Hersh is a founding partner of Hersh Kirtman Injury Law. He dedicates his practice entirely to representing and helping those who have been injured, suffered harm, or lost loved ones because of the negligence or wrongdoing of others.

FROM THE COURTS

Dechert Billing Manager's Racism Claims Fall Short

by Dan Packel and Justin Henry

A Pennsylvania federal judge absolved Dechert of allegations of a racially discriminatory work environment raised by a former billing manager.

U.S. District Court Judge Chad Kenney found there was no evidence that supported Celiena McClelland's claims that she was the subject of unlawful employment discrimination and retaliation by the firm and its director of financial operations, Elaine Wry.

In a June 2021 complaint, McClelland, who is African American, alleged that on many occasions Wry would contact billing members asking them questions about her for no apparent reason, something McClelland claimed that Wry did not do to non-African Americans.

She resigned from the firm in December 2020, after two decades at the firm, concluding she could no longer tolerate the alleged harassment from Wry.

Ruling on Dechert and Wry's motion for summary judgment, Kenney concluded that there is no genuine dispute of material fact regarding any of McClelland's claims of racial discrimination, hostile work environment or retaliation claims that could be resolved by a jury and that Dechert and Wry are entitled to judgment as a matter of law on each claim.

DIEGO M. RADZINSCHI

U.S. District Judge Chad Kenney found no evidence to support Celiena McClelland's claims that she was the subject of unlawful employment discrimination and retaliation by the firm.

"Ms. McClelland has failed to produce sufficient evidence such that a reasonable jury could rule in her favor," Kenney wrote in the opinion. "Therefore, the court grants summary judgment in favor of defendants on all remaining counts."

Kenney reasoned there was no dispute that McClelland's arguments satisfied the first two prongs of establishing a prima facie case, that she is African-American and worked for Dechert for approximately twenty years and was promoted soon before the discriminatory behavior was alleged to take place.

The judge said the third prong of the inquiry is where McClelland "fails to establish a genuine issue of material fact that she suffered an adverse employment action."

"Ms. McClelland relies primarily on such isolated or sporadic incidents to state her claim," the judge wrote, recounting her allegations.

"One person failed to introduce her on a conference call, another excluded her from emails, another failed to follow up on her complaints to Human Resources, etcetera," he continued. "Presuming these instances occurred exactly as stated and constitute discrimination, they all come from different people in isolated instances that occur sporadically over nearly two years."

In a statement, Carolyn Short, one of the lawyers from Holland & Knight representing Dechert, said "Dechert is pleased that the court recognized that Ms. McClelland was not discriminated against in her employment at Dechert. Dechert is an equal opportunity employer and treats all employees with respect and dignity."

Scott Diamond, a lawyer at Derek Smith Law Group who represents McClelland, did not immediately respond to a request for comment late Friday.

Dan Packel writes about change and innovation in the legal marketplace. Contact him at dpackel@alm.com. On Twitter: @packeld. Justin Henry covers business news and trends at law firms. Contact him at juhenry@alm.com. On Twitter: @jstnhenry87.

Bayer Gets Another Win in Trial Over Monsanto's Roundup

by Amanda Bronstad

Bayer won a jury verdict over Roundup, the third defense win in a row over Monsanto's pesticide.

A jury in Jackson County Circuit Court in Kansas City, Missouri, found that Monsanto was not liable for Allan Shelton's non-Hodgkin lymphoma.

"The jury's verdict in favor of the company brings this trial to a successful conclusion and is consistent with the evidence in this case that Roundup does not cause cancer and was not the cause of Mr. Shelton's cancer," Bayer said in a statement. "These conclusions are consistent with the assessments of expert regulators worldwide as well as the overwhelming evidence from four decades of scientific studies concluding that Roundup can be used safely and is not carcinogenic. While we have great sympathy for Mr. Shelton, the jury has weighed the evidence from both sides in this case and concluded that Roundup is not responsible for his injuries."

Bayer was represented at trial by Shook, Hardy & Bacon partners Hildy Sastre, in Miami, co-chair of the product liability litigation practice; Robert Adams, in Kansas City, co-chair of the general liability litigation practice; Jason Zager, in Kansas City; and James Shepherd, in Houston.

DIEGO M. RADZINSCHI

Despite scientific findings that glyphosate is carcinogenic, Bayer has cited the U.S. Environmental Protection Agency's approval of Roundup's key ingredient as safe.

Shelton, of Kansas City, Missouri, alleged he was diagnosed with cancer in his 20s after spraying Roundup at his home. His attorneys were W. Wylie Blair, of OnderLaw in St. Louis, T. Roe Frazer of Frazer Law in Nashville; and Shawn Foster of Preuss Foster in Kansas City.

Jury selection in another trial is planned for this fall in Missouri.

"The plaintiff is considering his options at this time, and very disappointed in the verdict," Frazer said in a statement. "The plaintiff's trial team is looking forward to a four-plaintiff trial in October in St. Louis County against Monsanto."

The latest Roundup trial, which began on May 3 after being postponed due to the COVID-19 pandemic earlier this year, is the third in the past year, all ending in favor of Bayer.

On Oct. 5, a jury in Los Angeles County Superior Court found that Roundup was not a "substantial factor" in causing 10-year-old Ezra Clark's diagnosis of an aggressive form of cancer called Burkitt's lymphoma.

Then, on Dec. 9, a jury in San Bernardino County Superior Court, also in California, found that Roundup did not cause a 71-year-old woman's non-Hodgkin lymphoma. Originally in person, that trial ended up on Zoom after a COVID-19 outbreak.

In 2018 and 2019, juries in San Francisco County Superior Court and Alameda County Superior Court, as well as U.S. District Court for the Northern District of California, awarded a total of nearly $2.4 billion in verdicts to Roundup plaintiffs.

In 2020, Bayer agreed to pay about $10 billion to settle an estimated 100,000 claims alleging Roundup's main ingredient, glyphosate, causes non-Hodgkin lymphoma, but thousands of cases remain.

Additional trials are possible this summer in Missouri and Florida.

Despite scientific findings that glyphosate is carcinogenic, Bayer has cited the U.S. Environmental Protection Agency's approval of Roundup's key ingredient as safe.

Bayer also has petitioned the U.S. Supreme Court to overturn one of the verdicts, for $80 million, arguing that federal law preempts the plaintiff's claims. U.S. Solicitor General Elizabeth Preloger filed an amicus brief last month urging the Supreme Court to reject the petition, two years after the Justice Department, under the Trump administration, agreed with Bayer's federal preemption argument in the case, then before the U.S. Court of Appeals for the Ninth Circuit.

Amanda Bronstad is the ALM staff reporter covering class actions and mass torts nationwide. Contact her at abronstad@alm.com.

COMMERCIAL REAL ESTATE

Apartment Rents Power Through $2k Threshold

by Paul Bergeron

The price of rent is giving the cost for a gallon of gasoline a run for its money in what's startling American consumers these days.

The median monthly asking rent in the US exceeded $2,000 for the first time in May, rising 15% year over year to a record high of $2,002, according to real estate brokerage Redfin.

Optimists will say that growth rate is smaller than March's (17 percent) while pessimists will note that it repeats April's annual increase.

Last week, GlobeSt reported numbers from four other rent-tracker analyst firms that indicated record growth in nearly every market.

GROWTH SHOULD 'CONTINUE TO SLOW' BUT 'REMAIN HIGH'

Redfin deputy chief economist Taylor Marr said in a prepared statement that more people are opting to live alone, and rising mortgage-interest rates are forcing would-be homebuyers to keep renting.

"Although we expect rent-price growth to continue to slow in the coming months, it will likely remain high, causing ongoing affordability issues for renters," Marr added.

Austin, Nashville, Seattle and Cincinnati all had their average rents up 30% annually—with Austin surging 48% year over year.

Portland's rent growth slipped below 30% for the first time this year and sits at 24%.

The only three markets among the 50 most populous metro areas to see rents fall in May from a year earlier were Milwaukee, Kansas City, and Minneapolis.

Paul Bergeron reports for GlobeSt.com.

DIEGO M. RADZINSCHI

May numbers indicate high growth, especially in Austin, Cincinnati, Seattle and Nashville.

Hoteliers Look Forward to a Full Recovery

by Erik Sherman

Hoteliers are poised for a full recovery from pandemic challenges with room rates within 3 percent of their all-time high and occupancy up 2,000 basis points from its pandemic lows, according to a report from Marcus & Millichap.

Accommodation employment, however, is 20 percent below pre-pandemic levels, and because hotels are struggling to service all rooms while being pressured by higher wages, they are left to hike room rates.

With mask mandates all but lifted in June, summer travel expectations are high, according to Marcus & Millichap.

SALES VOLUME UP 111%

Kevin Davis, Americas CEO, JLL Hotels & Hospitality Group, tells GlobeSt.com that the hospitality recovery is in full swing, with sales volume up 111% in April YTD.

"We are seeing a continuation of the strong performance of drive-to leisure resorts and are now also seeing a recovery of urban markets and hotels that cater to group and business transient demand," Davis said.

"In fact, through the end of April, the RevPAR in urban markets has grown more than any other US market type. As more companies return to office and COVID restrictions are completely relaxed, we expect this urban recovery to strengthen."

SUMMER TRAVEL IS ON

Summer travel appears ready to reappear after two lackluster years, David I. Haas, partner at Duane Morris, tells GlobeSt.com.

"Hotels are being freed from the COVID shackles of the past 2+ years," Haas said. "Everyone seems to be traveling someplace this summer. So far, the summer travel bug is supplanting inflationary pressures on consumers who have already made their summer travel plans and are sticking with them."

Shawn Gracey, executive vice president of Key International, tells GlobeSt.com, "The hotel industry has experienced a remarkable rebound from the challenges brought by the pandemic. There is a huge pent-up demand for travel, especially in outdoor, nature-focused and coastal destinations.

"The hospitality sector will continue to experience sustained growth with increasing domestic and international travel."

Kip Sowden, Chairman and CEO of RREAF Holdings tells GlobeSt.com that the industry has learned, with the help of COVID, that leisure and the extended stay categories are two very resilient asset classes within the hospitality space.

"Whether it is the leisure hospitality assets or extended stay assets, these are pivotal areas that will continue to thrive despite inflationary pressure. For example, beach-front resort properties are hotels tourists are going to flock to, now that summer is here."

OPERATORS BETTER PREPARED FOR CRISIS

Ryan McAndrew, real estate senior analyst with RSM US, tells GlobeSt.com that hotel room rates held strong throughout the pandemic, especially in the economy and mid-scale segments, as hotel management and owners understood the pricing power that was given up during the Great Financial Crisis and opted to be better prepared during the recovery.

"Hotel operators were well aware that room demand was artificially flattened due to COVID-19 lockdowns, so there was little incentive to drop rates to increase traffic," McAndrew said. "As a result, rate growth should continue for all hotel segments on the strength of leisure travel and the return of international, group and business travelers."

Paul J. Titcher, partner at Cox, Castle & Nicholson, tells GlobeSt.com, "In an inflationary environment, the ability of the hospitality sector to adjust pricing on the fly is a significant advantage."

AMENITIES PACKAGES RECONSIDERED

BrightView's Mark Carlos, Vice President, Managing Director Design Group + Pre-Development, tells GlobeSt.com that many existing properties are analyzing the current amenities package that they offer guests and are repositioning them in response to renewed travel demands.

"Hotel brands are looking at properties and removing outdated amenities, in some cases such elements as tennis courts are being examined to see if they are still viable and being replaced with wellness program amenities to invigorate the guest experience during their stay on property.

"The repositioning of properties follows an assessment to determine what the priorities are now. Many assets didn't place a top priority on landscaping through Covid, but now it is a priority, so they are going back through and upgrading. They are placing a priority on quality landscapes now and it is top of mind.

"We are seeing movement now in repositioning and a reanalysis of space. But we're also seeing renewed interest in ground up development. We are talking with clients about new hotel developments, so there's an up-tick in that side of the business too now. Landscapes and outdoor amenities have become top of mind for hotel brands as travel demands pick up."

Jackson Thilenius, AIA, Senior Vice President of Hospitality and Interiors Americas at RDC, tells GlobeSt.com that its clients are focused on creating hotels which function as community hubs, with hybridized solutions including experiential retail, expansive localized F&B programs, and flexible co-work integration.

"Additionally, our luxury clients are expanding their offerings to include wellness interventions, educational platforms, and proactive environmental solutions to establish values consistent with their customer base. It's an exciting time to be on the frontend of ideation around the relevant hotels of tomorrow."

CLOUDS AHEAD

All is not completely rosy in the industry, however. For example, many hospitality jobs were lost during the pandemic that have not been replaced. "Hotel owners and operators will continue to be challenged with increases in demand going into the fall months and the reality that nearly 600,000 hospitality jobs lost from the pandemic may never return," McAndrew of RSM US said.

More significantly, Desi Co, Managing Partner at Accord Group, tells GlobeSt.com that due to the pandemic, "many hotel owners have faced operational difficulties and a severe reduction in incoming capital that has made it nearly impossible for them to keep up with the necessary maintenance and active management that hotels require to be profitable.

"Even though the hotel industry is recovering, in some cases, there will not be ample time for hotel groups to be able to refinance existing debt or make the necessary capital improvements that have been neglected over the last couple years.

This will lead to distressed hotel sales hitting the market, he said.

There are other indications of possible difficulties ahead.

Like Co, JLL Hotels & Hospitality Group's Davis points to dislocation in the debt capital markets, which could be a slight drag on short-term transaction volume. "We expect to see greater clarity in the capital markets in the coming months, which, coupled with significant investor appetite, should drive strong transaction volume later this year."

For his part, Duane Morris' Haas notes that while hotel performance may look stronger right now, that strength may be fleeting "as unabated high inflation and prospects for a recession take center stage after everyone gets home after the summer."

Erik Sherman reports for GlobeSt.com.

VERDICTS

$8M Verdict Awarded Over Car Crash Likely to Be Capped at $100K

by Melissa Siegel

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The defense contended that the accident caused nothing more than a sprain or strain that should have resolved within 12 weeks.

A jury awarded nearly $8 million to a man who claimed that he suffered spinal injuries in a motor-vehicle accident in Sanford, but that award is likely to be capped at $100,000.

On April 10, 2018, plaintiff James Feaster, 35, a project manager, was driving on West State Road 46, near its intersection at Hickman Drive, in Sanford. His pickup truck's rear end was struck by a trailing car that was being driven by Julia Lyon. Feaster claimed that he suffered injuries of his back and neck.

Feaster sued Lyon and her vehicle's owner, Michael Lyon. Feaster also sued his own insurer, Progressive Select Insurance Co., a subsidiary of Progressive Casualty Insurance Co. The lawsuit alleged that Julia Lyon was negligent in the operation of her vehicle. The lawsuit further alleged that Michael Lyon was vicariously liable for Julia Lyon's actions. Progressive Select Insurance was pursued for underinsured-motorist benefits.

Plaintiff's counsel negotiated a settlement of the claims against Julia Lyon and Michael Lyon, and Progressive Select Insurance's counsel later conceded liability. The matter proceeded to a trial that addressed damages against Progressive Select Insurance.

After a day had passed, Feaster visited a chiropractor. Feaster claimed that he was suffering pain related to the accident. Conservative treatment was recommended.

Feaster ultimately claimed that he suffered herniations of his C6-7, L4-5 and L5-S1 intervertebral discs.

Feaster underwent a total of about four years of chiropractic manipulation and physical therapy. He also underwent administration of six epidural injections of steroid-based painkillers. The injections were directed to his cervical and lumbar regions.

Feaster claimed that he suffers residual pain and limitations that greatly hinder his performance of any activity. He claimed that he has needed as much as an hour of rest after activities as harmless as, for example, playing cards. He also claimed that he refused a golf outing because it would have prevented him from standing during a wedding the next day. A doctor has recommended fusion of a portion of the cervical region of Feaster's spine. Feaster claimed that he also requires additional chiropractic manipulation and physical therapy, and he further claimed that he may require additional painkilling injections. He sought recovery of past and future medical expenses, and he sought recovery of damages for past and future pain and suffering.

The defense contended that the accident caused nothing more than a sprain or strain that should have resolved within 12 weeks. It contended that any other injury predated the accident.

The jury found that Feaster's damages totaled $7,877,492.22. Defense counsel has moved to reduce the recovery to the limit of Progressive Select Insurance's coverage. Defense counsel has also moved for a new trial or, alternatively, remittitur.

Melissa Siegel reports for VerdictSearch, an ALM affiliate of the Daily Business Review. Contact her at msiegel@alm.com.

No Damages for Brain Injury at South Florida Housing Complex

by Melissa Siegel

SHUTTERSTOCK

Plaintiff's expert architect opined that the sidewalk's surface was not even, and his counsel argued that the uneven surface constituted a hazard.

A jury found that a Lake Worth Beach housing development was not liable for a resident's fall and resultant brain injury.

On June 5, 2018, plaintiff Marvin Blitz, 74, a retiree, fell while he was traversing a sidewalk that abutted Wedgewood Village Circle, in the city of Lake Worth Beach. He suffered an injury of his head.

Blitz sued the sidewalk's owner, Winston Trails Foundation Inc., which also owned the housing complex in which the accident occurred. Blitz also sued the complex's operator, Wedgewood Village Property Owners Association Inc. The lawsuit alleged that the defendants were negligent in their maintenance of the premises. The lawsuit further alleged that the defendants' negligence created a dangerous condition that caused Blitz's fall.

Blitz's counsel discontinued the claim against Wedgewood Village Property Owners Association. The matter proceeded to a trial against Winston Trails Foundation.

Blitz claimed that his fall was a result of him having tripped. Blitz's expert architect opined that the sidewalk's surface was not even, and Blitz's counsel argued that the uneven surface constituted a hazard.

Defense counsel contended that Blitz's fall occurred on an even section of the sidewalk. Defense counsel noted that Blitz provided inconsistent testimony regarding the exact area in which the fall occurred. The defense's expert engineer reviewed video footage of the incident, and, after conducting a triangulation process, the expert concluded that the fall occurred on an even section of the sidewalk. The defense noted that Blitz had fallen previously, some two weeks prior to the instant accident, and it suggested that the instant accident may have been a result of a mobility deficit, rather than the sidewalk's condition. The defense also argued that Blitz, who lived in the housing complex and regularly traversed its sidewalks, should have been aware of any significant defect of the sidewalk.

The trial was bifurcated. Damages were not before the court.

Blitz was transported to JFK Medical Center, in Atlantis. He was soon transferred to Delray Medical Center, in the city of Delray Beach. A CT scan revealed that he was suffering a subdural hematoma. Blitz underwent a craniotomy, which involved evacuation of his hematoma. The procedure also included implantation of titanium plates. Blitz's hospitalization lasted two weeks.

Blitz claimed that he suffers residual damage of his brain. He claimed that he suffers resultant impairment of his memory and other elements of his cognition, and he also claimed that he suffers resultant impairment of his gait. He has undergone extensive treatment. He sought recovery of more than $1 million for past medical expenses, an unspecified amount for future medical expenses, and unspecified damages for past and future pain and suffering. His wife presented a derivative claim.

The jury rendered a defense verdict. It found that Winston Trails Foundation was not liable for Marvin Blitz's fall. The defense waived its right to recover fees and costs, and plaintiffs' counsel waived the right to appeal.

Melissa Siegel reports for VerdictSearch, an ALM affiliate of the Daily Business Review. Contact her at msiegel@alm.com.

BANKING/ FINANCE

NYC Activists Protest DeSantis Address to Jewish Group

by Allison Nicole Smith

About 100 progressive activists rallied in New York City to protest an event at Chelsea Piers entertainment center featuring Ron DeSantis, as speculation grows that the Florida governor is gearing up for a presidential run.

Protesters chanted "Shame" and "Boycott Chelsea Piers" as they brandished signs outside the Jewish Leadership Conference, an annual event produced by the conservative nonprofit Tikvah Fund. DeSantis, who rounded off the day's speakers with a discussion on "The Florida Model and Why It's Good for Religious Americans," couldn't resist taking a swipe at his detractors from the outset.

"They can't cancel me. I'm going to speak my mind," DeSantis said at the beginning of his speech.

The 43-year-old Republican used his time on stage to make the case that "unprecedented" levels of people, including conservatives and Jews, were moving to his home state thanks to his "family-friendly" policies.

DeSantis has provoked widespread ire from Democrats since he signed legislation this year that prohibits education about gender identity and sexual orientation in some Florida grades. Critics have dubbed it the "Don't Say Gay" bill, while DeSantis referred to it in his speech as "curriculum transparency."

His appearance in the middle of Pride month in Chelsea, a Manhattan neighborhood known for its rich LGBTQ history, added to the tension. And to some, the fact that he traveled to New York in the middle of his own re-election campaign in Florida suggests he's trying to gain traction for a potential 2024 tilt at the White House.

JOE RAEDLE/GETTY IMAGES/BLOOMBERG NEWS

Florida Gov. Ron DeSantis has provoked widespread ire from Democrats since he signed legislation this year that prohibits education about gender identity and sexual orientation in some Florida grades.

"DeSantis is clearly trying to raise money here in New York City for that speculative presidential bid," New York State Sen. Brad Hoylman told Bloomberg News at the protest. "He's stirring up a hateful set of the Republican party, who want to see LGBTQ people erased from textbooks, schools, if not daily public life entirely."

DeSantis also took aim again at Walt Disney Co., which condemned the governor's anti-LGBTQ legislation in the wake of shareholder pressure. He reiterated his plan to strip the media giant of its special government district status and turn control over to the state.

DeSantis' conservative stances play well among Republicans in Florida, where he's leading in the polls for his November reelection bid.

"There's a Jewish Renaissance taking place in Florida, and we wanted to hear from DeSantis on what his vision for religious minorities is elsewhere in the country, and that's why we invited him," said Jonathan Silver, the co-chair of the Jewish Leadership Conference.

Assembly member Yuh-Line Niou, who was also protesting outside, condemned the use of counterterrorism techniques by local law enforcement including barricades and K-9 units. Citing high death rates among transgender people, she said the presence of DeSantis perpetuated harm against the LGBTQ community.

Silver declined to comment specifically on criticisms lodged against the governor from activists and legislators on his anti-LGBTQ policies, but said his politics were a component of the diverse range of panelists invited to speak. He also declined to address speculation that DeSantis was in New York to raise funds ahead of the 2024 presidential election.

Chelsea Piers said last week "our accepting a booking in no way implies that we endorse the respective organization or its speakers."

Allison Nicole Smith reports for Bloomberg News.

ESG Fund Bosses Hit by 'Reckoning' as Goldman, DWS in Crosshairs

by Frances Schwartzkopff

One of the top legal firms advising asset managers on ESG says the industry needs to brace for a more rigorous enforcement of regulations, effective immediately.

There's "a reckoning" underway, said Sonali Siriwardena, partner and global head of environmental, social and governance at law firm Simmons & Simmons in London. Despite pushing through a "tsunami" of ESG rules, it's now apparent that "regulators aren't necessarily looking at a grace period" to allow the industry to adapt, she said.

The comments come as ESG fund managers digest the crackdown that just hit their industry. On May 31, as police searched the offices of Deutsche Bank AG and its fund unit DWS Group, the authorities who sent them were setting a precedent for ESG investing. The allegations of greenwashing that triggered the raid have been rejected by DWS, but nonetheless prompted the departure of its chief executive.

As if to underline the sense of a new regulatory era, word broke late Friday that the U.S. Securities and Exchange Commission is looking into the ESG claims of Goldman Sachs Group Inc.'s asset-management unit. That's despite the lack of a complete ESG rulebook in the US.

"I believe these are the first ripples of a wave of regulatory interventions that we are likely to see in the coming months," Siriwardena told Bloomberg. "The number of ESG-focused funds has soared, so it's no surprise that the regulators want to set expectations to maintain market credibility.

In fact, "regulators are under some pressure to almost have examples" as a way to encourage other asset managers to "fall in line," she said. And for firms with global portfolios trying to navigate rules in several jurisdictions, "it's an absolute nightmare." Siriwardena declined to comment specifically on the allegations against Goldman Sachs, noting that the New York-based firm is a client of Simmons & Simmons.

SEC officials are examining Goldman Sachs's mutual-fund business, and are trying to ascertain whether some investments are in breach of ESG metrics promised in marketing materials, according to people familiar with the matter. The inquiry is tied to two funds in that business.

The DWS case, meanwhile, is the first of its kind in Europe. Though the firm has been under investigation for alleged greenwashing since last year, a sense of complacency had set in. DWS had continued to expand its ESG business and clients seemed largely undeterred by doubts around the reliability of its ESG statements.

The decision by German authorities to suddenly shift gears coincides with a sense of unease among asset managers that the rules by which they need to abide are uncomfortably vague. What's more, some regulators in Europe agree. According to the head of France's financial supervisory authority, Robert Ophele, the lack of clear guidance around European ESG rules actually "fuels greenwashing."

Europe's landmark ESG rulebook for asset managers — the Sustainable Finance Disclosure Regulation — was enforced in March 2021. By being first, Europe was hoping to set a global benchmark. But the speed with which SFDR was pieced together has left it "incomplete and imperfect," the European Securities and Markets Authority recently acknowledged.

Siriwardena said she sees a "huge divergence" in how SFDR is being interpreted not just by asset managers but by their watchdogs. "The whole proposition for Europe is a uniform approach. What we're seeing in practice is that's hardly the case."

One of the main requirements of SFDR is for fund managers to categorize their products so clients know how green they are. An article 6 designation shows ESG has been considered, but isn't really relevant. Article 8 denotes products that promote ESG characteristics. Article 9 — the highest ESG category in the rulebook — reflects an asset manager's view that products under that label prioritize sustainability.

According to Ophele at the French regulator, the rules for Article 8 are so imprecise that interpretations vary wildly. "It's fair to say that every national competent authority is implementing its own approach, if any," he said in a recent interview.

Luke Sussams, an ESG strategist at Jefferies, said "the bar for Article 8 is so low because any quantification or prescription from the EU and from the highest level just isn't there." And "what we're learning is the market is more than happy to take advantage of that ambiguity."

Jefferies' research suggests that "the names that are most held across the Article 8 funds have no real discernible ESG impact in the real economy," he said.

But since SFDR was enforced more than a year ago, asset managers "have felt the pressure to have as many funds as possible meeting at a minimum Article 8 requirements," said Hortense Bioy, global head of sustainability research at Morningstar Inc.

"Many distributors and fund buyers across Europe have said they would only consider funds in Article 8 and 9 categories going forward," she said. So having those products on the shelf "has become a commercial imperative for fund companies."

Siriwardena said clients will need to be able to "answer for themselves" whether they can defend their SFDR allocations. And there are some early signs that investors are starting to treat Article 8 with more caution. Morningstar data show that Article 8 funds experienced their first net outflows on record last quarter.

According to Germany's public prosecutor, the raid of DWS was based "on suspicion of capital investment fraud" and misleading ESG marketing practices. The authorities investigating the firm may now have more material to test those suspicions.

"What happened at DWS is going to push asset managers to be much more careful about the things they're saying," said Sasja Beslik, chief investment officer at NextGen ESG. "This marks the biggest hit we've seen to the hot air and the empty promises over the past years."

Frances Schwartzkopff reports for Bloomberg News.

BANKING/ FINANCE

Financial Adviser Hunted by FBI Ordered to Pay $12M

by Melanie Waddell

A financial adviser who's been missing for nearly two years and was placed on the FBI's Most Wanted list has been ordered to pay $12 million to his victims in Georgia, North Carolina and Florida, according to The Atlanta Journal-Constitution.

A federal court has entered a default judgment in the U.S. Securities and Exchange Commission's lawsuit against Christopher Burns and his companies: Investus Advisers LLC, which did business as Dynamic Money; Investus Financial LLC; and Peer Connect LLC.

"They must pay more than $12 million, Judge William M. Ray II recently ruled," according to the paper. Burns, if he is ever found, is also liable for a civil penalty of $652,629, the Journal wrote.

Burns was last seen on Sept. 24, 2020, one day before he was supposed to turn over documents to the SEC, according to the FBI.

Burns' ex-wife of called on him last March to give himself up.

Christopher Burns has been hunted by the FBI for allegedly scamming about 100 investors as part of a Ponzi scheme involving illegal promissory notes.

The Atlanta-area adviser has been hunted by the FBI for allegedly scamming about 100 investors as part of a Ponzi scheme involving illegal promissory notes.

In an interview in March 2021 with a WSB TV reporter in Georgia, Meredith Burns, the former wife of Burns, called on her ex-husband to "turn yourself in," saying "it's time." She also told the reporter she had "no idea who I was living with" and "had no clue" that he was planning to divorce her and leave.

It's unclear, though, how much, if anything, Burns' victims will ever see, The Atlanta Journal-Constitution reported.

"Federal court documents indicate that there was some money in various bank accounts for his businesses, frozen by court order after his disappearance. And Burns' ex-wife previously agreed to disgorge $320,000 in funds he had transferred to her," the paper reported.

"But federal officials say most of the investors' money was spent to fund Burns' lifestyle, pay business expenses and repay earlier investors, to create the appearance that investments he sold were profitable," the paper said.

Still pending against Burns is a federal criminal complaint, charging him with mail fraud, the paper said. "There's been no action in that case since Oct. 23, 2020, when it was filed."

Melanie Waddell covers regulatory and compliance issues for ThinkAdvisor.com, an ALM affiliate of the Daily Business Review. Contact her at mwaddell@alm.com. On Twitter: @Think_MelanieW.

Why Bitcoin Sees Most of Its Gains While US Traders Sleep

by Vildana Hajric and Katie Greifeld

When Wall Street goes to sleep, Bitcoin is usually just getting going. It often parties all night long, and in the process, notches more robust gains than while U.S. markets are open.

A hypothetical strategy that buys the coin at the equity-market close — at 4 p.m. in New York — and sells it at the next day's open — at 9:30 a.m. — yields gains of roughly 260% going back to the start of 2020, according to Bespoke Investment Group. Conversely, buying it at the U.S. market open and selling it at the close spits out an advance of 3.6%. The coin even tends to trend higher during weekends, the firm found, when stock investors are resting or barbecuing or doing whatever weekend activities they're fond of.

Yet no one seems to be able to agree on why this might be happening.

Theories abound, with some positing that investors have no choice — thanks to the market's 24/7 nature — but to turn to crypto while stocks are closed for trading. Others suggest that crypto traders are forced to process loads of information overnight, which gives way to large price swings.

Here are a few views on why the phenomenon might be happening:

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A hypothetical strategy that buys the coin at the equity-market close and sells it at the next day's open yields gains of roughly 260% going back to the start of 2020, according to Bespoke Investment Group.

THE NATURE OF A 24/7 MARKET

The fact that cryptocurrencies trade around the clock every day of the week makes Bitcoin, by default, the most watched and traded asset when traditional markets are closed, and that's a top reason for the overnight phenomenon, says Bloomberg Intelligence's Mike McGlone. "It's the most fluid global 24/7 trading vehicle in history, which means it's a leading indicator on the downside too," he said.

GEOGRAPHICAL DIFFERENCES

In the U.S. and certain other geographies, riskier assets have sold off this year as the Federal Reserve and other central banks institute policies to combat high inflation. But that might not be the case everywhere, and risk-on attitudes may still be at play across Asia, for instance, says Noelle Acheson, head of market insights at Genesis Global Trading.

Back in 2015 and 2016, China had been a focal point for Bitcoin trading — that's where mining took off and most of the trading volume originated, she said. "There are different cultural attitudes toward riskier investments."

In addition, some investors might be more drawn toward using leverage, and international venues are sometimes more permissive in that way. Original crypto exchanges used to offer 125x leverage, said Acheson, though, in the U.S., regulators have looked to curtail such access. "So they are much more used to high leverage, it's much more what they expect," she said.

LONGER SPAN OF TIME

Bitcoin's correlation to equities could be another factor at work, which is something analysts have been pointing to all year as both cryptos and equities have sold off. Both stocks and digital assets are considered riskier plays, so the two have moved hand-in-hand, says Jake Gordon at Bespoke Investment Group.

Still, the correlation to stocks may not explain why the trend of after-hours outperformance also existed when the market was rallying over the past two years, he said. So another explanation is that the post-close strategy covers a longer span of time, "meaning there is the potential for more news/catalysts to account for."

WATCHING THE CHARTS

From 2021 onwards, due to China's crackdown on crypto, trading volumes and flows have tended to peak around 9:30 a.m. Eastern Time, according to Chiente Hsu, co-founder and CEO at ALEX, a DeFi platform. "So trading volume is highly correlated to the U.S. stock market trading hours," she said in an interview. Hsu, who used to work at Morgan Stanley, cited a research paper showing that the overnight trend of buying at the close and selling at the open was also prevalent in the stock market before the pandemic.

But why might that be the case? Hsu says information flows build up overnight, though that's mostly prevalent during uptrend markets. What about bear markets? "In a downtrend market, it shouldn't work, particularly in very volatile, range-bound markets," she said, adding that she'd like to see more research on these types of topics, as well as how transaction costs play a part.

CORRELATIONS

Vetle Lunde, analyst at Arcane Research, says he expected U.S. trading hours to be the most significant contributor to the Bitcoin selloff in recent months, but hadn't expected to see that being the only contributor. "Then again, it confirms what we've seen elsewhere in the market," Lunde said, citing the coin's strong correlation to stocks this year.

"We saw in mid-2020 to early 2021 that U.S. trading hours were the key trading hours for the initial liftoff during the early bull market. That period was characterized as a period of huge institutional flows into Bitcoin," Lunde wrote in a message.

"Now, most of the institutional market has been focused on de-risking, with the macro backdrop related to inflation and interest-rate hikes being the key component behind the de-risking. This has most definitely had a severe impact on Bitcoin and is likely the root cause behind the very potent continuous selling pressure during U.S. trading hours."

Vildana Hajric and Katie Greifeld report for Bloomberg News.

BANKING/ FINANCE

Wall Street's China Problems Multiply on Banker Pay Warning

by Cathy Chan

One after another, the big names in global finance were summoned by Chinese officialdom.

On the agenda: pay—specifically, telling Credit Suisse Group AG, Goldman Sachs Group Inc. and UBS Group AG to report details on how they compensate their top bankers.

Don't reward your top people too lavishly, Chinese regulators warned the banks this year in meetings in Shanghai and Beijing, or you might run afoul of the Communist Party, according to people familiar with the matter.

The say-on-pay meetings, reported here for the first time, are just one of the many potholes that global banks have hit lately on their long, rocky road into China. After years of losses or skimpy returns, some of them are reassessing their prospects. Short term, the outlook isn't good.

Hopes that banks' business in China finally might be paying off have been dented and dented again. China's COVID-19 lockdowns, its volatile markets and moves by its leader, Xi Jinping, to reshape the business scene—and reassert the state's control—have reverberated through banks in New York, London and Zurich.

Publicly, executives say they're as committed as ever to China. Filippo Gori, the Asia-Pacific chief for JPMorgan Chase & Co., captured the prevailing line in a recent interview with Bloomberg Television, saying his bank was focusing on the next 25 years in China, not the next quarter.

But privately, a growing number of executives in the region are expressing doubts about their banks' immediate futures here.

Interviews with eight senior bankers at firms including Goldman, Morgan Stanley and UBS, all of whom spoke on the condition that they not be named to avoid angering their superiors, clients or Chinese authorities, point to a litany of problems. Questions about pay are but one worry (among other things, regulators have pressed banks to reduce cash compensation and extend deferred bonuses to three years or more, people familiar with the meetings say). Other concerns involve licenses, recruiting, data security and more.

Overriding everything is Xi's campaign to combat what the Communist Party considers undesirable economic and social elements. Xi wants to rein hyper-rich entrepreneurs, narrow the country's stubborn wealth gap and promote "common prosperity." In a sign of the new times, several major banks, among them Credit Suisse, JPMorgan and UBS, recently shuffled senior executives in China. After hiring about 200 people here last year, Credit Suisse now is delaying plans to form a local bank and could let go of dozens, according to people familiar with the matter. Other banks could make similar moves.

"Wall Street banks really need to ask themselves now, why do I want to be in China?" said Veronique Lafon-Vinais, an associate professor at Hong Kong University of Science & Technology. "Are they truly profitable, what is the true return on capital for their China business?"

It's a remarkable turn of fortune. Only three years ago, many of these same banks were celebrating as China began to throw open the market to foreign competition. Global banks were allowed to take control of the joint ventures they'd struck up with Chinese partners in order to gain an initial toehold on the mainland. Morgan Stanley, which formed a securities venture in 2011, eked out a small profit on its China business in 2021. So did JPMorgan, which reestablished itself around 2019. Profit jumped at Credit Suisse, in China since 2008, and UBS, established in 2006, albeit from tiny bases.

RYLAND WEST

Chinese regulators warned the big names in global finance this year not to reward your top people too lavishly, or you might run afoul of the Communist Party.

All in all, the top six global banks made roughly $42 million in China last year, a pittance next to their earnings elsewhere, but welcome news after so many lean years. Those figures don't include profits made from dealmaking with Chinese clients outside the country.

The party didn't last long. China's zero COVID approach to the pandemic locked down Shanghai for months. Financial markets reeled. The economy stumbled. Deals dried up. Global banks most profitable China business—selling new stock in Chinese companies on offshore markets—has plunged 94% this year from the same period last year now that Xi has tightened rules on foreign listings. Offshore bond sales are down 39%. Inside China, foreign banks have made little headway against the country's domestic banking giants.

Tensions between Beijing and Washington have only added to the strains. Speaking on the condition he not be named, a top banking executive in the region said that Chinese regulators have signaled that Xi's uneasy relations with the west—tensions with the US are as high as they've been since the countries normalized diplomatic relations more than four decades ago—have, along with COVID, held up licenses and other necessary paperwork.

Among recent problems at Credit Suisse: Regulators still haven't made an on-site inspection that's required before its mainland securities venture can expand, according to people familiar with the matter.

Thomas Gottstein, the Swiss bank's chief executive officer, said the lender is "waiting a little bit with some of the growth investments," including slowing down its hiring of relationship managers in China. Speaking at a conference last week, he said that the overall roll-out on the mainland was on track, including the licensing process for forming a local bank.

Goldman Sachs finally won approval for several onshore licenses late May, people familiar with the matter said, almost eight months after taking a 100% ownership in October. The bank is still trying to gain final approval to transfer its onshore wealth and trading businesses from its Chinese partner, 18 months after agreeing to buy it out. The process, albeit slower-than-expected, is still within the 2022 targeted timeline.

Morgan Stanley, which has historically been more cautious in its China expansion and holds fewer licenses than rivals, earlier this year sought four licenses. Still, the China Securities Regulatory Commission in February criticized the bank for subsidizing its Chinese operations with income from overseas. It ordered the bank to fix its business model. Morgan Stanley is waiting for final approval to take control of 85% of its fund management venture, up from 49%.

Spokespeople at UBS, Goldman, Credit Suisse and Morgan Stanley all declined to comment.

Foreign banks looking to build businesses from scratch have run into hurdles too. In April, the CSRC questioned BNP Paribas about its competitiveness in global league tables and the qualifications of a compliance officer, according to documents posted on the regulator's website. The feedback came nearly a year after the French bank applied to set up a securities firm. Standard Chartered Plc was ordered to submit a review of any penalties and investigations against the bank over the past three years. Regulators also asked the London-based bank to explain its cross-border transaction and data flow systems, it said on its website.

A representative for BNP declined to comment. Standard Chartered didn't immediately respond to a request for comment.

The CSRC was the agency that summoned executives to discuss bankers' pay. People familiar with the meetings characterized the discussions as a highly unusual, if not unprecedented, regulatory intrusion into foreign banks' personnel decisions. It's a sign that they are being put on the same footing as local brokers, who were told in the past two years to cut pay and expenses.

Executives in attendance, which included Credit Suisse's local Chairman Janice Hu and Goldman's China co-head Sean Fan, were told by top regulators to keep compensation, especially for senior managers, in line with the "common prosperity" agenda.

The CSRC didn't respond to a request for a comment.

On pay, a first-year managing director at a Chinese broker can get about 4 million yuan ($600,000) in compensation. The bulge bracket Wall Street firms offer 10-20% more than that, while second-tier foreign banks are struggling to match it, according to Eric Zhu, head of financial services recruitment at Morgan McKinley.

With pressure on pay, that gap could now narrow and make it harder to attract talent. The more senior bankers at local firms, which still dominate deal making, can take home well above 10 million yuan, something that foreign firms have a hard time matching, according to local headhunters.

A question for banks is how to lure and retain top talent while trying to follow Xi's prescriptions. Among other things, regulators told the bank executives to avoid excessive income gaps. The were forbidden to pay salaries that might be deemed unfairly high, one of the people said.

Executives also must contend with compliance staff who report directly to regulators rather than the banks—and can't be fired without regulators' approval. Some bankers are worried that local authorities also might refuse to honor tax incentives offered as part of a program to senior foreign managers as the slow economy and a property slump erodes government coffers, people familiar said.

The increasing challenges have coincided with some top executives leaving their China jobs. UBS's China head David Chin, based out of Hong Kong, stepped aside in April partly because of travel curbs and the need to focus on regional business. He was succeeded by Eugene Qian, who's based in Shanghai. The CEO of JPMorgan Securities (China) Co., Houston Huang, also quit and was replaced by Lu Fang, a former official at China's securities regulator. The head of Credit Suisse's securities venture, Tim Tu, stepped aside in April to take on a bigger Asia-Pacific role.

Given that China is home to the world's second-largest economy, global banks aren't about to pull up stakes. For example, UBS in March increased its stake in its securities venture to 67% and its revenue in the mainland has almost doubled to $1 billion in 2021 from 2019. But some might redeploy resources if the business landscape doesn't improve.

Even London-based HSBC Holdings Plc, which traces its history back to British imperial trade and plans to keep adding people in China, hasn't been immune. HSBC remains a "China bull," according to its chief financial officer, Ewen Stevenson. Still, profit from its mainland business fell 10% in the first quarter, reflecting the bank's exposure to the nation's shaky real estate market.

"The big banks attempting to increase their positions in the Chinese markets are playing a high risk game," said Dick Bove, an analyst at Odeon Capital Group who has been covering Wall Street for decades. "China needs their help now but once the country levels its debt issues, foreign banks aren't likely to do well."

Cathy Chan reports for Bloomberg News.

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LEGAL EDUCATION

'We're Humans, Not Machines': Reddit Users Commiserate Over Bar Prep Burnout

by Christine Charnosky

What is one to do when studying for the biggest exam of one's life? Well …

"I had a mini breakdown today and gave up after 3 hours," Reddit users B00bius wrote on Tuesday night. "I cried."

"I'm a 30 year old man. I have no helpful advice or anything," they added.

"But you're not alone," they also told fellow Redditor Small_Potential9199, who had started the thread on the burdens of bar prep with a post that read: "I already feel so burnt out."

"Just checking in to see how everyone's feeling," Small_Potential9199 wrote. "I can barely get more than 4-5 solid productive work hours in a day. I'm starting to panic that I need to pick up the pace."

"Feel the exact same way," user scirefeci said. "Definitely frustrating, but with 7 weeks to go it's to be expected (and completely fine)."

User Responsible_Day8218 also assured Small_Potential9199 that they are not alone.

"Take a breath. We got this!" they replied.

User Accomplished_Skin948 was relieved to hear they are not alone: "I was just sitting on my couch wondering how I'm supposed to do this all summer."

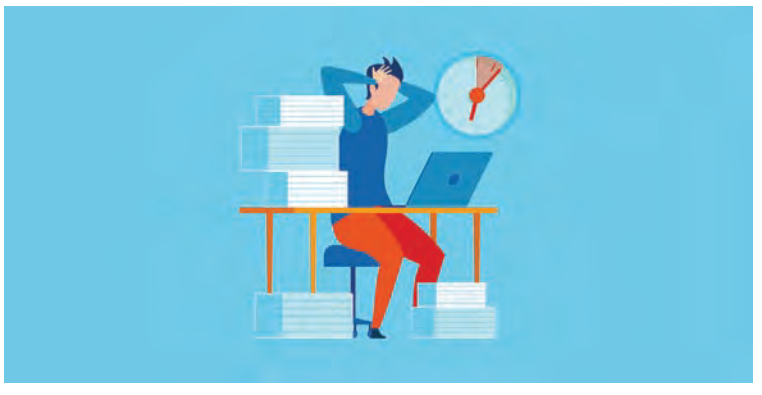
"I'm doing 4-5 hours as well," user ovary-achiever said. "Seem to be on track. The brain can only take so much."

"Just graduated after passing the Feb. and the one thing I can say is that I never didn't feel burnt out," user anon_2012- wrote.

"I have not met a single person who knew wtf they were doing with bar prep," they wrote. "You feel isolated, don't know where you should be or what you should be doing, etc. it's a marathon and my absolute biggest mistake was not taking better care of my mental health and keeping perspective."

"You do not need to get an A, you need to pass. Most jurisdictions that's a 67%," anon_2012- continued, adding that they plastered their apartment with 67%. "lol if it helps to know you don't need to get an A, repeat it to yourself as often as possible."

"Do what you can, when you can, and be graceful with yourself," they continued. "Take a step back from the typical rhetoric of the exam & understand it is very doable and you still have time. You graduated from



SHUTTERSTOCK

"Do what you can, when you can, and be graceful with yourself," advised one Reddit user who recently passed the bar.

essentially three years of hazing and took exams no worse than this one."

"The only difference is what people are feeding you about it. 4-5 hours of productive work is PERFECT," anon_2012- said. "Your consistency is perfect and better than I did & I passed," they added.

"I've seen articles that reference 4-5 hours as the average amount of time you can be deeply engaged in productive, meaningful work every day," user sesamebagelwshmear said. "Obviously you can do more occasionally, but high-level work that requires a lot of concentration and focus maxes out at about 6 hours and your attention and work quality drops off sharply after that."

User coffeeisjoy said they "need to chill" because "I am drowning in my own materials" because they are "looking at every available resource."

"If you are productive for 4-5 hours then embrace that," they added. "You can change your work space by maybe studying outside. Also, take a day off if you need to!"

User wljordan11 advised taking a break, saying, "It's a myth you need to study every single day from 9-5 to pass a bar exam."

"The time you take off to recover mentally and physically, especially the closer you get to the exam, will benefit you far more than trying to cram hours when you are burnt out," they added. "You know far more than you think at this point."

"If you need to take a day off do it. Sleep in late hit the gym watch a movie or play some video games," user jam3s-007b0nd agreed.

"I hit a huge burn out about a week and a half out from the bar. And still got a 274," they said. "It's important to try to reset yourself throughout this time."

User Becsbeau1213 is using exercise to relieve their anxiety.

"I've run [approximately] 15 miles in the last two weeks," they wrote.

"At least you're getting some exercise in," user mercyeis said, adding, "They say exercising helps the brain learn new things."

User mercyeis also added that it seems "95% of bar prep is new, [definitely] not 'review from 1L classes.'"

User grainsofsand11 said they agreed with everyone, but "[a]t the end of the day … we're humans not machines."

Christine Charnosky reports for Law.com, an ALM affiliate of the Daily Business Review. Contact her at ccharnosky@alm.com.

Ilya Shapiro Accepts Job at NYC's Manhattan Institute After Resigning From Georgetown Law Over 'Hostile Work Environment'

by Andrew Denney

It's been a whirlwind five days for Ilya Shapiro, from his reinstatement as head of the Georgetown University Law Center to his resignation from the school Monday to his announcement on Twitter late Tuesday that he has accepted a position at the Manhattan Institute.

"Delighted to be joining the @ManhattanInst as senior fellow and director of constitutional studies," Shapiro Tweeted Tuesday night. "A terrific organization making valuable counterintuitive policy points and home to many friends."

Shapiro told Law.com on Wednesday that he could not comment as to when he had applied to the Manhattan Institute.

On June 2, Georgetown Law reinstated Shapiro to become the new executive director of its Center for the Constitution—ending a four-month paid administrative leave.

In late January, the day before Shapiro was set to start at Georgetown, he was placed on administrative leave due to what hereferred to as an "inartful" tweet regarding President Joe Biden's then-upcoming U.S. Supreme Court pick, which Shapiro said would necessarily be a "lesser black woman."

Shapiro later deleted the tweet, but Mark Stern, a Georgetown Law alum and staff writer at Slate, shared a screenshot of it the following morning:

"Objectively best pick for Biden is Sri Srinivasan, who is solid prog and v. smart," Shapiro tweeted at 11:36 p.m. ET on Jan 26. "Even has identity politics benefit of being Asian (Indian) American. But alas doesn't fit into latest intersectionality heirarchy [sic] so we'll get lesser black woman. Thank heaven for small favors?"

In a June 2 letter to the members of the Georgetown Law community, William Treanor, Georgetown Law dean, said the university's Office of Institutional Diversity, Equity, and Affirmative Action (IDEAA) and Human Resources Department completed their investigations, and Shapiro could begin his employment at the school because "Mr. Shapiro was not a Georgetown employee at the time of his tweets."

"The freedom to debate and discuss the merits of competing ideas does not mean that individuals may say whatever they wish, wherever they wish," Treanor wrote. "I stressed to Mr. Shapiro that, although he has every right to express his views, I expect him, as a staff member at the Law Center, to communicate in a professional manner."

In his resignation letter to Georgetown Law, he said he would have been set up for discipline the "next time I transgress progressive orthodoxy."

In a statement regarding Shapiro's resignation, Georgetown Law defended its free speech policy saying, "Our speech and expression policy promotes free and open inquiry, deliberation and debate and does not prohibit speech based on the person presenting ideas or the content of those ideas, even when those ideas may be difficult, controversial or objectionable."

The mission of the Manhattan Institute is "to develop and disseminate new ideas that foster greater economic choice and individual responsibility," according to its website.

"Shapiro will build on the Institute's long tradition of legal policy scholarship by weighing in on matters of constitutional law and articulating constitutionalist principles of limited government through commentary, media appearances, and events," according to MI's announcement. "Having filed over 500 amicus curiae 'friend of the court' briefs in the Supreme Court in his career, Shapiro's work at MI will also include an amicus program."

Shapiro's initial response to Treanor's letter was positive.

He tweeted June 2: "I look forward to teaching and engaging in a host of activities relating to constitutional education," saying that everyone in his programs "can expect to be accorded the freedom to think and speak freely and to be treated equally."

However, in an about-face on Monday morning, Shapiro tweeted, "You've made it impossible for me to fulfill the duties of my appointed post" calling Georgetown Law a "hostile work environment" that gave him "no choice but to resign."

When Law.com asked Shapiro whether he plans to file a lawsuit against Georgetown Law alleging a hostile work environment he told Law.com Wednesday that he couldn't comment on that.

Shapiro resigned from what he called his "long tenured position" as vice president of the Cato Institute, director of the Robert A. Levy Center for Constitutional Studies and publisher of the Cato Supreme Court Review for the Georgetown Law position.

However, he resigned from Georgetown Law because he said he would constantly be "waiting for the other shoe to drop if someone felt offended" and that he would be "walking on eggshells not being able to be myself and not being able to use my full range of skills that I was hired for."

"I am deeply aware of the pain this incident has given rise to in our campus community, particularly but not exclusively among our Black female students, faculty, staff, and alumni," Treanor wrote in his June 2 letter.

"[N]o reasonable person acting in good faith could construe what I tweeted to be 'objectively offensive,'" Shapiro wrote in his resignation letter.

Shapiro again admitted in his letter that his "tweet was inartful," but "only those acting in bad faith to get me fired because of my political beliefs would misconstrue what I said to suggest otherwise."

In his letter, Shapiro also said that he had deleted the tweet "well before any student was likely to learn of it."

Treanor wrote that Shapiro would be required to participate in required programming on implicit bias, cultural competence and nondiscrimination.

"This whole episode doesn't say good things about academia and the state of our public discourse more broadly," Shapiro said.

"Shapiro recently joined the ranks of scholars leaving academic institutions where free speech is increasingly under attack," according to MI's announcement.

"Ilya Shapiro is a constitutional scholar of the first rank," MI president Reihan Salam said in a statement. "Over the course of his long and distinguished career, he has greatly enriched the national conversation about America's founding ideals, and he's been a steadfast friend of economic opportunity, individual liberty, and the rule of law."

Andrew Denney is the bureau chief for the New York Law Journal. He can be reached at adenney@alm.com. Twitter: @messagetime