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DAILY BUSINESS REVIEW

11th Circuit: Violent Felon's Previous Cocaine Charges Are Not 'Serious Drug Offenses'

by Mason Lawlor

The U.S. Court of Appeals for the Eleventh Circuit remanded the enhanced sentence of a five-time violent felon under the Armed Career Criminal Act of 1984.

The appeals court filed its decision on June 10, striking down the ruling of the U.S. District Court for the Southern District of Florida.

Defendant Eugene Jackson pleaded guilty to one count of being a felon in possession of a firearm in Florida back in September 2017, according to the appeals court's opinion. Jackson's probation officer determined that he was on path for an enhanced sentencing during his presentence investigation report.

The ACCA increases the sentence of a felon in unlawful possession of a firearm if he or she has three or more convictions for a prior violent felony or "serious drug offense." Jackson was sentenced to the 15-year minimum mandated by the ACCA after a ruling by U.S. District Judge Kathleen M. Williams of the Southern District of Florida in August 2019.

The defendant had a 1998 conviction for battery on a police officer, a 1998

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Florida Ponzi Scheme Representative of Disruption in Cryptocurrency Industry, Class Action Attorney Says

by Michael A. Mora

J. ALBERT DIAZ

Plaintiffs attorney Adam Moskowitz, managing partner of the Moskowitz Law Firm, is leading the suit against defendants Empires X Corp. and those who operated its web-based platform.

A Coral Gables attorney has filed a class action complaint centered around what he says is a "well-orchestrated cryptocurrency Ponzi scheme" that's emblematic of the scams running rampant in South Florida.

The class action lawsuit, filed in Miami-Dade Circuit Court, claims the scheme cost vulnerable victims tens of millions of dollars.

Plaintiffs attorney Adam Moskowitz, managing partner of the Moskowitz Law Firm, said the suit is against defendants Empires X Corp. and those who operated its web-based platform, Emerson Pires, Flavio Goncalves and Joshua Nicholas.

And that filing comes as politicians released last week what was widely dubbed as the most highly anticipated legislation in the history of the cryptocurrency industry. Moskowitz predicted that the Responsible Financial Innovation Act

SEE PONZI, PAGE A4

These Attorneys Want You to Be Aware of a Tactic Insurers May Use to Reduce Medical Evidence

by Jasmine Floyd

South Florida attorney Michael Hersh said he expects an upcoming trip-and-fall premises liability case will expose an emerging tactic used by insurers which may result in decreased medical expenses being allowed into evidence at trial.

Hersh and Ian Kirtman of Hersh Kirtman Injury Law have just filed a lawsuit for their client Marc Hirschberg who they alleged tripped over and fell on an unrepaired and dangerous defect in the pavement.

Hersh said lawyers will learn about a tactic by insurance companies that is unlikely to be unique to this case and of which they are probably unaware — and if not noticed, this tactic may limit evidence admitted at trial — and with it, recoverable damages.

Hersh said he anticipated that the defense in his case would aim to reduce the medical expenses that may be presented to the jury, because juries tend to consider past medical expenses when determining the amounts for future medical care and non-economic harm such as pain and suffering.

"There's a million-dollar policy, and our position is by doing what the defendant did as far as the health insurance," Hersh said. "Given what the judge said at the hearing, this would be evidence which could be presented to a jury in a bad faith case. We think the million dollar policy might not be enough and they didn't protect their insured properly."

Ian Kirtman, left, and Michael Hersh, right, of Hersh Kirtman Injury Law filed a lawsuit for their client, who they alleged tripped over and fell on an unrepaired and dangerous defect in the pavement.

The most unique hurdle plaintiffs counsel face though is one that was improperly created by the defense, its carrier, and its former attorneys. According to Hersh, Hirschberg's total medical bills amount to many hundreds of thousands of dollars, all of which were submitted through Medicare.

SEE TACTIC, PAGE A2

'Big Names' Are Coming: Law Firms, Tech Companies Are Snapping Up Miami Office Space

by Melea VanOstrand

Business migration to South Florida is ramping up with the number of new-to-market office leases almost exceeding last year's numbers.

That's because the migration of capital is stronger than ever before, according to Cushman & Wakefield's Ryan Holtzman.

"It's not slowing down. I think the future is extremely bright here for Miami," said Holtzman.

Talented, young employees are rethinking their lifestyles, and with new construction developments a lot of firms are able to redefine their workspace and culture.

"We see a lot of large tech companies, and professional service firms or law firms that are also circling the wagon," said Holtzman. "The reason they are circling the wagon is that their clients are here and they want to be next to them, whether it's in the same building or right next door. You'll see some big, big names in the next couple of months."

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COCAINE

conviction for the selling cocaine, a 2003 armed robbery conviction, a 2004 conviction for possession with intent to sell cocaine, and a 2012 conviction for aggravated assault with a deadly weapon, the appeals court said.

However, Jackson argued that he only had two ACCA-worthy charges: the 2003 armed robbery and the 2012 aggravated battery. According to him, neither of his cocaine-related incidents counted as ACCA predicate offenses because he was charged with intent to sell ioflupane (a cocaine analogue).

Eleventh Circuit Judge Robin S. Rosenbaum used the well-known constitutional tenet of "fair notice" to support her determination of ACCA's description of "severe drug offenses." She noted the consequences if defendants such as Jackson were not fully aware of an increased sentence.

"Police and courts would be free to punish individuals for conduct that the law does not criminalize," she said. "That type of situation would do violence to the interests of 'fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws' that due process protects."

Based on this statute, Rosenbaum used the 2017 version of the Controlled Substances Act schedules and its guidelines for severe drug offenses. In this case, the offense must be punishable by a maximum term of imprisonment of at least 10 years.

Rosenbaum noted that only at one time was ioflupane considered a Schedule II substance because it derived from cocaine. However, recent developments discovered that it has value in potentially diagnosing Parkinson's disease. This was enough for the U.S. attorney general to "remove the regulatory controls and administrative, civil and criminal sanctions" to the drug in 2015.

While the court agreed that Jackson's 1998 and 2004 crimes both involved an "intent to sell or distribute" and they are punishable by at least 10 years, they do not satisfy the "controlled substance" measure.

"When Jackson possessed the firearm here—the federal Schedule II expressly excluded ioflupane as a cocaine-related controlled substance," Rosenbaum said. "His state offenses did not 'necessarily entail' the conduct set out in ACCA's 'serious drug offense' definition."

The prosecution, on the other hand, argued its case using legal precedent found in *United States v. Smith* (11th Cir. 2014) and *Shular v. United States* (11th Cir. 2020). The government claimed that the Eleventh Circuit is bound by the prior panel's precedent law, but Rosenbaum disagreed.

Instead, she felt that the constitutional provisions are what binds the Eleventh Circuit, not prior cases. As she described in her foreword, the Fifth Amendment to the U.S. Constitution enshrines a due process clause, which gives awareness that certain conduct may violate the law.

"Forewarned is forearmed. That's a common-sense notion that people have recognized for at least hundreds of years," Rosenbaum said. "[It] also explains why fair notice is so important."

Counsel for Jackson, federal public defender Andrew Adler of Southern Florida, was not available for comment.

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

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TACTIC

"According to his family, he seems to have aged more quickly following this crash. To this day, he continues to require treatment and care. As his attorneys, we face the typical hurdles presented in any premises case," Hersh said. "Medicare paid a discounted amount of approximately $60,000, but the defense, through its carrier and the carrier's counsel, surreptitiously contacted Mr. Hirschberg's health insurer (Humana Medicare) to improperly have the itemized list of related medical expenses reduced, as is explained further below."

Kirtman said the most interesting aspect of the case is how significantly it prevents our client's ability to achieve justice.

"This is the first time that I've seen something like this done in 12 years of practice, and others should know about it in case it happens elsewhere in our state," he said.

Palm Beach Judge Scott Kerner is the presiding judge.

West Palm Beach attorney defense counsel John Chiocca of Cole, Scott & Kissane did not respond to request for comments.

According to Hersh the incident occurred when Hirschberg, was walking through a parking lot with his daughter, who has a disability, heading toward a restaurant in Boca Raton.

"The company that owns the parking lot, the defendant in this case, is a well-known landowner in South Palm Beach that owns a substantial amount of property. Unbeknownst to Mr. Hirschberg, the parking lot pavement had a defect in it that caused a portion of pavement to be elevated right on the approach to a walking path," Hersh said. "This defect caused Mr. Hirschberg to trip and fall. He suffered an elbow fracture that later required a total elbow replacement and a lower back injury that resulted in a fusion surgery. Mr. Hirschberg is left with permanent limitations, including an inability to lift more than five pounds with his injured arm."

Hirschberg filed a Complaint on Dec. 17, 2019, and he later filed an amended complaint on about Dec. 3, 2020.

Hirschberg has health insurance through a Humana Medicare Advantage Plan. The plan paid for his medical care and treatment including two surgeries, the complaint stated.

Pursuant to the Medicare Secondary Payer Act, Humana allegedly asserted a lien in the case and the plaintiff is responsible for satisfying the lien if a recovery is made from the defendants, according to the complaint.

Around Sept. 22, 2021 Humana allegedly provided plaintiff with an update lien totaling $534,424.94 in overall billed charges and $60,546.03 in total benefits paid by Humana. These numbers included all payments made by Humana relating to plaintiff's left elbow and lumbar spine injuries, which Hirschberg alleges resulted from the incident at issue in this case, the complaint stated.

On Jan. 21, 2022, defendants' current counsel provided the undersigned with correspondence from Humana dated Oct. 23, 2021, which allegedly contained vastly different numbers for total billed charges and the amounts paid.

Humana's October correspondence itemized $253,322.78 in total billed charges and $16,437.08 in total benefits provided. All expenses and payments related to plaintiff's back injuries — including the Dec. 16, 2019, fusion surgery — had been removed from the itemized list of claims paid, despite there not having been any adjudication as to whether such expenses and payments were causally related to the subject incident, according to the complaint.

Further investigation revealed that the defendant's carrier's conduct and urge led to the lumbar spine-related payments made by the health insurer being removed from the itemized lien, the complaint stated.

Matt Dorius, an attorney with the law firm Carr Allison in Birmingham, Alabama, on behalf of defendants and their carrier is seeking to have all payments associated with the injury removed from Humana's related charges.

Dorius allegedly contacted the Humana claims representative arguing to the plaintiff's health insurer the injury-related payments should be removed from the itemization and lien since Hirschberg Jan 3, 2019, didn't cause aggravation or any injuries to the lumbar spine.

Dorius sent a follow up email to Humana demanding all payments relating to the lower injuries be removed from Humana's itemization and lien.

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS AND TO STRIKE PLEADINGS FOR FRAUD UPON THE COURT

In the defendants' response In opposition to plaintiff's motion For sanctions and to strike pleadings for fraud upon the court, they stated Hirschberg failed to provide any evidence that defendants themselves deliberately and intentionally set in motion to interfere with the court or plaintiff's ability to prosecute his case.

According to the defendant's response, they believe the plaintiff's motion for sanctions alleges plaintiff failed to prove convincing evidence that defendants "knowingly" set in motion an unethical scheme that was calculated to interfere with Plaintiff's case that would warrant entry of default.

Defendant also mentioned that no prejudice was suffered by plaintiff as a result of the medical lien reduction because plaintiff can simply present the original medical lien amount at trial, rather than the reduced amount, according to the defendants' response.

Kirtman suggests attorneys have to keep their eyes and ears open.

"We are not suggesting that the lawyer who's currently representing the defendant has done anything wrong in this case. We're not alleging that he's done anything wrong. In the hearing, he was very transparent that this is something the carrier had done out of state. In terms of the most important thing people can take from this is you really have to be vigilant. You have to keep your eyes and ears open," Kirtman said. "You have to be monitoring the liens and make sure that this conduct is not happening in our state. We know it's happening elsewhere, and we know what other carriers are doing. We know that this is happening but we don't know if it's a growing trend or not because the court was very clear that this is a sanctionable conduct that should not exist in our civil justice system."

Jasmine Floyd is a South Florida litigation reporter with the Daily Business Review. Contact her at jfloyd@alm.com.

FLORIDA **LEGAL REVIEW**

Synagogue Challenges Florida Abortion Law Over Religion

by Curt Anderson

A new Florida law prohibiting abortion after 15 weeks with some exceptions violates religious freedom rights of Jews in addition to the state constitution's privacy protections, a synagogue claims in a lawsuit.

The lawsuit filed by the Congregation L'Dor Va-Dor of Boynton Beach contends the law that takes effect July 1 violates Jewish teachings, which state abortion "is required if necessary to protect the health, mental or physical well-being of the woman" and for other reasons.

"As such, the act prohibits Jewish women from practicing their faith free of government intrusion and this violates their privacy rights and religious freedom," says the lawsuit, filed Friday in Leon County Circuit Court.

The lawsuit adds that people who "do not share the religious views reflected in the act will suffer" and that it "threatens the Jewish people by imposing the laws of other religions upon Jews."

The lawsuit is the second challenge to the 15-week abortion ban enacted earlier this year by the Legislature and signed into law by Republican Florida Gov. Ron DeSantis. Planned Parenthood and other reproductive health providers also sued earlier this month to block the law from taking effect.

In a previous statement, DeSantis' office said it "is confident that this law will ultimately withstand all legal challenges."

JOHN RAOUX/ASSOCIATED PRESS

The lawsuit is the second challenge to the 15-week abortion ban enacted earlier this year by the Legislature and signed into law by Republican Florida Gov. Ron DeSantis.

The two lawsuits are likely to be consolidated into a single case. A hearing on a proposed injunction to block the Florida abortion law is likely in the next two weeks.

The law mirrors a similar measure passed in Mississippi that is now before the U.S. Supreme Court, which may use it to overturn the Roe v. Wade abortion decision based on a leaked draft opinion. A final ruling on Roe is expected by the end of June.

In Florida, Rabbi Barry Silver of Congregation L'Dor Va-Dor — the name means "Generation to Generation"— said it practices "cosmic Judaism," which he defines on the synagogue's website as "the Judaism of tomorrow today" that respects science, tradition and spirituality.

Silver is an attorney, social activist and former Democratic state legislator who styles himself as a "Rabbi-rouser" on his own website. In an interview Tuesday, Silver said when separation of religion and government crumbles, religious minorities such as Jews often suffer.

"Every time that wall starts to crack, bad things start to happen," he said, noting that DeSantis signed the law at an evangelical Christian church.

The new Florida abortion law, contains exceptions if the abortion is necessary to save a mother's life, prevent serious injury or if the fetus has a fatal abnormality. It does not allow for exemptions in cases where pregnancies were caused by rape, incest or human trafficking.

Under current law, Florida allows abortions up to 24 weeks.

No faith is monolithic on the abortion issue. Yet many followers of faiths that do not prohibit abortion are aghast that a view held by a minority of Americans could supersede their individual rights and religious beliefs such as the position of Judaism as outlined in the lawsuit.

"This ruling would be outlawing abortion in cases when our religion would permit us," said Rabbi Danya Ruttenberg, scholar in residence at the National Council of Jewish Women, "and it is basing its concepts of when life begins on someone else's philosophy or theology."

Curt Anderson reports for the Associated Press.

State Pursues 'Holistic' Approach to Fatherhood

by Ryan Dailey

Florida is preparing to launch mentoring and outreach programs geared toward bolstering fathers' parenting skills and, in turn, helping at-risk youths as part of a $70 million initiative.

The initiative was included in a new law (HB 7065) approved unanimously this year by the Legislature and signed by Gov. Ron DeSantis in April. Some state agency heads appeared at a news conference Tuesday to tout the effort, which DeSantis has said comes as the nation faces a "fatherhood crisis."

A significant portion of the money will go toward expanding mentorship programs for youths and funding grants designed to help fathers.

Department of Juvenile Justice Secretary Eric Hall said providing fathers with resources and improving outcomes for youths go hand-in-hand, in part because roughly half of the children who interact with Hall's department come from single-parent homes.

"Unfortunately, in the Department of Juvenile Justice, we see too many of our young people coming from a single-parent home," Hall told reporters. "What we are looking at is how do we engage those fathers that have an opportunity to be more engaged than what they are, or in some cases, how do we get male role models in the absence of a father?"

Hall said increasing educational opportunities also is a large part of the measure, which provides the juvenile justice department with $3.7 million to help support access to postsecondary education.

FLORIDA HOUSE OF REPRESENTATIVES

Department of Economic Opportunity Secretary Dane Eagle said his agency will help carry out portions of the measure, including working with CareerSource Florida and local programs to help noncustodial parents.

"The one thing we do know is that if we can close academic gaps and get them on a pathway into postsecondary education and training and get a credential that helps them accomplish their goals and their dreams, that's how we change the life trajectory for them and their families," Hall said.

Some of the grants funded through the law will be aimed at helping fathers find employment and pay child support, part of what Hall described as a "holistic" approach to solving larger problems.

Department of Economic Opportunity Secretary Dane Eagle said his agency will help carry out portions of the measure, including working with CareerSource Florida and local programs to help noncustodial parents.

"Let's help noncustodial parents become better fathers and be present. Help them establish gainful employment, help them with child support so they can be better fathers and be present," Eagle said.

Officials described the initiative as requiring extensive collaboration between state agencies. But local organizations will largely determine whether the initiative makes an impact.

Florida Department of Corrections Secretary Ricky Dixon stressed the importance of working with local groups in helping the thousands of fathers who come home after being incarcerated.

"We release around 8,000 individuals a year who are fathers," he said. "So, it's us working to provide the resources and partnering with local communities and the faith-based and civic organizations to provide those support structures that we need."

The state Department of Health, meanwhile, is responsible under the law for facilitating "engagement activities" for fathers, "such as providing individualized support to fathers to increase participation in services that strengthen family and child well-being."

Ryan Dailey reports for the News Service of Florida.

FROM THE COURTS

US Marshals Dinged for Crypto Management

by Brad Kutner

Cryptocurrencies seized by the U.S. Marshals Service should be better handled, according to a new federal audit released Tuesday, which dinged the government for infractions such as a lack of documented policy on accessing thumb drives storing millions of dollars in assets.

The Office of Inspector General report examined the agency's management of about $466 million in crypto assets seized since 2017 and found some of the storage methods are problematic.

"The USMS uses several spreadsheets to track and manage its seized cryptocurrency inventory because the DOJ's official seized asset tracking system, the Consolidated Asset Tracking System (CATS), does not have the necessary functionality to enable daily management of cryptocurrency assets," reads the report.

Among the specific issues was differences between seized crypto assets present in one spreadsheet but not in the CATS system.

"Without periodic reconciliations, seized assets could be mismanaged and inventory records could be fraudulently altered without detection," the report notes.

The grounds for these concerns aren't coming out of the digital blue. During the fed's investigation into the notorious online drug market the Silk Road in the early 2010's, two federal agents were linked to crypto theft and faced jail time for their crimes.

"The government has a heightened concern about its insiders, so it often has security protocols that are often more intense internally than externally," said Dechert partner Andrew S. Boutros, who was part of the task force which helped bring the Silk Road down in 2014.

Boutros said, beyond the heightened need for internal security, the unique nature of cryptocurrencies requires special storage. The report noted U.S. Marshals were storing seized crypto in thumb drives, something the former federal investigator said can be susceptible to manipulation.

"It is not unprecedented that there are certain types of property that require certain kinds of storage," Boutros said.

The report noted the agency's thumb drive storage, calling it adequate, but noted the specifics of handling the drives lacks documentation.

Brad Kutner is part of the litigation team for the National Law Journal, an ALM affiliate of the Daily Business Review. Contact him at bkutner@alm.com. On Twitter: @BradKutner.

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OFFICE

Before the pandemic, the average space tenants rented in Miami was about 5,000 square feet. Now, the numbers look a lot different.

"Within the next six to 12 months we're going to see larger users coming," said Holtzman. "I'm talking 200,000 to 300,000 feet, perhaps full relocations of firms or big portions of these firms relocating to Miami and setting up shop."

The latest firm to come to Miami is A-CAP, a New York-based insurance and financial services company that signed a full-floor lease at 830 Brickell. That building is a new 55-story, Class A-plus office tower under construction in the city's Brickell Financial District.

"A-CAP is excited to open its new office at 830 Brickell. The building is an A-plus facility and is located at the heart of Miami's Financial District. We look forward to calling 830 Brickell A-CAP's new home," said Kenneth King, chairman and CEO of A-CAP.

A-CAP will occupy 20,000 square feet on the 35th floor in 2023 and joins big names such as Microsoft, private equity firm Thoma Bravo, Canadian asset manager CI Financial, aviation financing company AerCap, Marsh Insurance, WeWork and others in the tower.

830 Brickell's ownership was represented by Cushman & Wakefield's Brian Gale, Ryan Holtzman and Andrew Trench. A-CAP was represented by Jennifer Goldstein of Douglas Elliman Real Estate.

"A-CAP's decision to open a Miami office at 830 Brickell reaffirms the tower's position as the premier location for financial firms and talent in the South Florida market," said Vlad Doronin, chairman and CEO of OKO Group, and Jonathan Goldstein, CEO of Cain International in a joint statement.

Holtzman said 830 Brickell is the trophy address of choice when it comes to the Class A office market, but the benefits go beyond the building.

"What's interesting about A-CAP's deal is that the firm expanded to a full floor after realizing more folks wanted to move to Miami, which we believe we'll continue to see as Miami grows as a global gateway city," said Holtzman. "When you factor in tax savings, the quality of life benefits, and the diversity of our talent pool, it's no surprise why people and companies are relocating here."

MIAMI'S DRAW

The kind of lifestyle Miami offers is a big draw, according to Holtzman, not to mention the amenities. Before the pandemic, standard amenities included a gym, cafe and conference center.

"Outdoor space is one of the huge driving factors for these bigger firms looking to relocate. Balconies on every floor and rooftop spaces as well," said Holtzman. "Outdoor bars, gardens, areas for yoga and hosting events. It's one of those features that you're going to see in Florida in pretty much every Class A development."

Holtzman said the hope is that 830 Brickell is fully leased by the end of the summer.

"It's been a snowball effect over the past few years," he said. "I don't think it's stopping. I think we're on the second inning of something very special."

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

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PONZI

would inhibit future legal action from holding wrongdoers accountable.

"If you classify cryptocurrency not as securities, you are gutting the power of federal and state regulators from having any power," Moskowitz said. "They are meant to be securities, but, instead, the cryptocurrency lobby is trying to make them commodities, like pork bellies and orange juice. People in the public need to understand this, so it is not secretly done like the opioid manufacturers."

The main selling point of Empires X was a trading bot that utilized an algorithm promising investors it would deliver a 1% return on investment each day, according to the complaint. The corporation also touted a "master trader" that was the brains of the operation.

But that master trader was not a former Goldman Sachs alum registered with the Securities and Exchange Commission, and neither was Empires X, according to the lawsuit. The corporation allegedly falsely claimed to be registered with the Commodity Futures Trading Commission, the Federal Reserve System and other regulatory organizations like the Financial Industry Regulatory Authority.

To invest, Expires X instructed its users to transfer their funds into a Coinbase Inc. account, which the corporation controlled. Coinbase holds itself as a digital currency wallet and secure online platform in which merchants and consumers transact digital currencies.

And to drive growth in the platform, Empires X ran a referral program similar to a traditional multilevel marketing scheme. The corporation sold a sunny future in which it projected "monthly growth" of 30% and expectations of 6000% total growth by 2023.

But its evolving excuses and increasing restrictions sought to prevent account holders from withdrawing their investments. Still, Coinbase allowed Expires X to liquidate assets through its exchange, violating banking laws, plaintiff counsel alleged in the complaint.

Coinbase, which is not a defendant at this stage of the litigation, did not respond to a request seeking comment.

Ultimately, Empires X shut down, leaving many in South Florida, particularly in the Hispanic community, empty-handed.

Now, Miami-Dade Circuit Judge Alan Fine granted an emergency appointment of a receiver, Amir Isaiah, a partner at Morgan & Morgan in Miami, as well as injunctive relief.

Moskowitz, who is joined by David Nuñez of Meyer & Nuñez and Herman J. Russomanno of Russomanno and Borrello, sued for one count of breach of fiduciary duty and one count of conversion against Empires X and separately against Pires, Goncalves and Nicholas.

Moskowitz said that like many of these surging cryptocurrency scams in South Florida, those behind the Empires X alleged Ponzi scheme are on the run with their victim's money, leaving many without their life's savings and a sense of embarrassment for being duped.

"You really feel for these people," Moskowitz said, adding that the court-appointed receiver will investigate business records to backtrack the swindled cryptocurrency and "follow the money" to recover the lost capital of those victimized by this alleged Ponzi scheme.

Michael A. Mora covers litigation and he is based in South Florida. You can contact him by email: mmora@alm.com.

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FROM THE COURTS

Trump Appointee Chastises 9th Circuit for 'Distorted' Precedent

by Avalon Zoppo

Judge Lawrence VanDyke, in a fiery dissent Monday, accused his colleagues of frequently sympathizing with asylum seekers challenging the federal government, and of relying on "distorted" immigration precedent while saying the court too often overturns agency decisions.

In the underlying case, the U.S. Court of Appeals for the Ninth Circuit granted Mario Rajib Flores Molina's petition for review of his asylum claim, finding that threats he received in Nicaragua before fleeing the country were evidence of persecution. Judges Richard Paez and Edward Korman, sitting by designation, remanded the case back to the Board of Immigration Appeals, which originally denied Molina's bid for asylum.

VanDyke, however, said whether Molina faced past persecution was a "close call," and that the Immigration and Nationality Act requires the courts to defer to the agency's decision in such cases.

"Despite the importance of this highly deferential and narrow scope of review to which Congress has anchored us, our court simply cannot resist the sirens of sympathy. So we frequently set our discretion free from the constraints of this hyper-deferential regime and reverse the agency in favor of a more palatable result," the Trump appointee wrote.

"[T]he next panel, drawn again to the sirens of sympathy or the lure of its own discretion … instead starts from the bobbing buoy of our last wayward precedent," he continued. "The process is foreseeable and plays out once again in this case—the majority latches onto a handful of similar facts from previous panel decisions that overruled the agency, and now erects its own new buoy of precedent, just a little further out to sea for the next sympathetic panel to analogize to (and stray further from)."

DIEGO M. RADZINSCHI

Judge Lawrence VanDyke, in a fiery dissent, accused his colleagues of frequently sympathizing with asylum seekers challenging the federal government.

It's not the first time VanDyke has criticized the court over immigration decisions.

He accused the court last March of "mischief" and "judge-jitsu" in a case challenging a Trump-era rule that withdrew asylum eligibility from migrants entering outside designated ports of entry along the border of the U.S. and Mexico. And in November, he called the circuit's immigration rulings "perpetually embarrassing" while dissenting to a panel decision that gave two Indonesian evangelical Christians another chance at asylum.

In the case Monday, Molina, a graduate of the Autonomous National University, received torture threats from Nicaraguan government operatives over social media after he participated in demonstrations against the ruling Ortega regime in 2018. A month later, a group of masked men spray-painted "Bullets to Strikers" on his home.

Before seeking asylum in the U.S., Molina fled his home to two different hideaways in Nicaragua, but six masked members of a youth group linked to the Ortega regime found him and assaulted him in November 2018.

VanDyke said any reasonable adjudicator could have found that while Molina suffered harassment in Nicaragua, he was not persecuted because the physical encounter was "relatively minor" and the BIA had evidence of improving conditions in Nicaragua.

He said the Ninth Circuit has case law that both supports granting Molina's petition and goes against it, and accused the panel of "cherry-picking immigration cases that justify its interpretation" instead of deferring to the BIA.

The majority cited two Ninth Circuit cases from 2012 and 2004 that held that when a person is forced to flee her home in the face of an immediate threat, it can constitute persecution. But VanDyke said the circumstances in those petitions were more severe than in Molina's.

He noted that the U.S. Supreme Court, in a unanimous decision, reversed one of the circuit's rulings last year about asylum-seeker credibility, and compared the circuit to a "meandering elephant being smacked by a fly swatter."

"Our failure to defer begets more (and worsening) failures to defer, as our court keeps relying on its own distorted immigration precedent to justify a downward spiral. … But like a meandering elephant being smacked with a fly swatter, our court lumbers on. Unaffected by the occasional reversal, our ever-growing pile of perfidious immigration precedents make it harder and harder for judges to properly defer to the agency without seemingly conflicting with some precedent," he said.

In a concurrence, Korman defended the majority against VanDyke's position, saying the BIA didn't question the accuracy of how Molina described his past experiences and that the court doesn't need to look to the agency's conclusion in making its own decision.

"Although we owe deference under the substantial evidence standard to 'the administrative findings of fact,' '[w]hether particular acts constitute persecution for asylum purposes is a legal question reviewed de novo,'" Korman wrote. "The substantial evidence standard is not a good fit for questions, like the one presented in this case, regarding the application of a legal standard to settled facts."

Avalon Zoppo is an appellate courts reporter for The National Law Journal, an ALM affiliate of the Daily Business Review. Contact her at azoppo@alm.com. On Twitter: @AvalonZoppo.

Judges Trade Barbs in Skirts-Only School Dress Code Case

by Avalon Zoppo

Judges on the U.S. Court of Appeals for the Fourth Circuit exchanged sharp barbs in a fractured en banc ruling over whether a charter school's skirts-only dress code for girls violates the U.S. Constitution.

The full court sided with students who claimed the North Carolina-based Charter Day School is a state actor, and therefore its dress policy meant to promote chivalry violates the Equal Protections Clause. It also held the students can pursue claims under Title IX of the Education Amendments of 1972 against the school and the for-profit management company that runs it, since they receive federal funding.

The ruling marked a reversal from the panel decision that sided with the charter school.

"The skirts requirement blatantly perpetuates harmful gender stereotypes as part of the public education provided to North Carolina's young residents," read the opinion penned by Obama-appointee Barbara Keenan and joined by nine other Democratic-appointed judges. "CDS has imposed the skirts requirement with the express purpose of telegraphing to children that girls are 'fragile,' require protection by boys, and warrant different treatment than male students, stereotypes with potentially devastating consequences for young girls."

The 103-page ruling featured two dissents and two concurrences, where the judges went back-and-forth over the meaning and idea of "chivalry" and whether historically Black colleges could be affected.

Five of the judges in the majority joined a concurrence, authored by Judge James Wynn, attacking arguments made in a dissent led by Reagan-appointee Judge J. Harvie Wilkinson, in which he said the circuit's decision will hamper "innovation" among academic institutions and school choice for parents.

Wilkinson argued that parents may choose to enroll their kids in Charter Day School because of its focus on promoting chivalric values, and other schools with certain "cultural and curricular components of education" may face litigation as a result of the majority's ruling.

He was joined by Judges Paul Niemeyer, a Reagan-appointee, and G. Steven Agee, named to the bench by George W. Bush.

"To a great many people, dress codes represent an ideal of chivalry that is not patronizing to women, but appreciative and respectful of them… 'Chivalry' harkens to the age of knighthood, defined as '[t]he brave, honorable and courteous character attributed to the ideal knight,'" Wilkinson wrote. "CDS uses chivalry in an aspirational sense, not to recreate an earlier time in all of its particulars, but to capture the contemporary connotations of a chivalric order as one in which women are due from the very inception of schooling the greatest measure of respect."

"No one is forced to go to a charter school, and certainly not to CDS. North Carolina offers a wide-ranging menu of educational options. While CDS may not suit the tastes of some, there should be no problem with letting others make that choice," he continued.

Wynn's concurrence called Wilkinson's point "so plainly wrong it borders on the offensive."

He rejected the idea that requiring girls to wear skirts is akin to "innovation" and part of the state's "diverse assortment of educational institutions."

"[I]nstead of offering concrete legal or factual arguments, the second dissent time travels back to the Middle Ages, dons knightly armor, and throws down the challenge gauntlet, presenting two broad policy arguments for why finding state action here is a bad idea," Wynn wrote. "In the second dissent's world… the Constitution is not the primary safeguard of civil liberties but an inconvenient wellspring of frivolous lawsuits; equal protection of the law is not a basic principle of freedom but a 'rigid' and 'calcif[ying]' tool of 'monolithic' thought that 'stamp[s] out the right of others to hold different values and to make different choices'; and unconstitutional discrimination is not the scourge of liberty and progress but the price of 'innovation' and diversity.'"

Wynn's concurrence and the majority opinion both also took issue with Wilkinson's argument that siding with the students will negatively impact HBCUs down the road.

The majority called that statement "baffling and disturbing." Wynn said HBCUs don't segregate students and admit white and Black applicants.

"HBCUs are not segregated schools—like other modern higher-educational institutions, they are open to students of all races. Their notable attribute, of course, is that they are historically Black; just as other higher-educational institutions are historically white," Wynn wrote.

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FROM THE COURTS

PI Lawyer Testifies About Fee Dispute With Michael Avenatti

by Meghann M. Cuniff

Trial lawyer Brian Panish told a jury in Orange County, California, that he blamed Michael Avenatti for shorting him $500,000 in attorney fees in a $39 million settlement 11 years ago, taking the stand as the final witness in a civil trial that pits a former co-counsel against former clients.

"I was upset at that time. I thought we worked really hard. I thought I had a big part of making this happen, and I didn't understand why this was happening. It was a good thing. Now it had turned into a terrible thing," said Panish, whose high-profile cases include his present representation of cinematographer Halyna Hutchins' family over her shooting death on the "Rust" movie set.

Panish said he enlisted Avenatti to help him in a malicious prosecution lawsuit against FLIIR Systems on behalf of former executives and electrical engineering doctorates William Parrish and Timothy Fitzgibbons. They'd worked together for five years before Panish opened his own firm, and Panish said he knew of Avenatti's prowess in business litigation.

"He's a good lawyer. He didn't get where he was because he's a bad lawyer," said Panish, the founding partner of Panish | Shea | Boyle | Ravipudi in Los Angeles.

But as established through questioning from Parrish and Fitzgibbons' new lawyer, Chris Wesierski of Wesierski & Zurek in Irvine, Panish said he had been told repeatedly by Avenatti that he had $5.4 million secured in a client trust account as he negotiated with co-counsel Robert Stoll of Stoll, Nussbaum & Polakov. In reality, Avenatti had spent the money on personal items, including a donation to George Washington University School of Law, according to testimony last week from forensic accountant Barbara Luna.

Now a case that Avenatti initiated in 2011 seeking a court order that he didn't owe Stoll anything has morphed into an effort by Stoll to hold Parrish and Fitzgibbons' liable for the missing $5.4 million, based on their obligations in their attorney retainer agreement to pay each attorney themselves.

Represented by James and Katherine Keathley of Keathley & Keathley in Irvine, Stoll's law firm is the plaintiff, with the claims against Parrish and Fitzgibbons including aiding and abetting and conspiracy. Testimony began June 1 before Orange County Superior Court Judge Walter Schwarm and was expected to last up to nine weeks, but it instead ended Monday. Closing arguments are scheduled Thursday.

REFUTING AVENATTI'S DEPOSITION

Parrish and Fitzgibbon's defense has involved casting the dispute as one that's the responsibility of Avenatti, while also trying to establish Stoll as uninvolved in the true work that achieved the $39 million settlement, $15.3 million of which was attorney fees.

In his case in chief for Stoll, James Keathley played for jurors a 2015 video deposition in which Avenatti said Parrish and Fitzgibbons told him not to pay Stoll.

In defense, Wesierski and his co-counsel, Larry Conlan of Cappello & Noël in Santa Barbara, have entered as exhibits emails and other evidence showing that the men believed Avenatti had Stoll's $5.4 million secured in a client trust account as he negotiated.

Panish testified Monday that he didn't know Avenatti hadn't told the clients of the deposition, or that he was blaming them for not paying Stoll. Avenatti may have said the clients directed him not to pay Stoll, "but that wasn't true," Panish told Keathley on cross.

Panish supported Conlan and Wesierski's narrative that the dispute is between the lawyers and not the responsibility of Parrish and Fitzgibbons, who paid the agreed-on 40% to Avenatti and shouldn't be blamed for him stiffing Stoll. Clients don't disperse the money only because they don't have it, "the lawyers have it," Panish said.

Clients can rely on attorneys to sort out fees, Panish said, and there's no evidence Parrish and Fitzgibbons had any control over the money once they sent it to Avenatti.

"Only an attorney can access an attorney trust," Panish said.

Wesierski showed Panish the email Fitzgibbons wrote Avenatti in May 2018 that cited "the recent Los Angeles Times articles about you," requested proof of the trust account and quoted Ronald Reagan's statement about dealing with adversaries, "Trust but verify."

Panish replied, "I don't know if he has an account. I don't have and have never had any of the money."

PANISH LAMENTS '$500K LESS'

Panish's approximately two and a half hours on the witness stand was the first public airing of his own fee dispute with Avenatti.

Panish said he thought his $5.25 million check from Avenatti was $500,000 less than his firm was due, though he also said Keathley showed him during deposition in this case that it was only about $200,000.

Wesierski showed jurors an email Panish sent Avenatti saying that it wasn't "good for us bringing you into the case and we get $500,000 less," to which Avenatti replied, "Brian, I'm not interested in squeezing you one dollar. I've told you that."

"I don't want your money, not now or ever. But Stoll should not even get close to $5.4 million. That is bullshit and we all know it," Avenatti continued.

Panish testified Monday: "I thought Mr. Avenatti was somehow involved in this, and I was upset. And I told him, 'This is not appropriate.' I think somewhere I used bad language."

The "back-and-forth about who should get what was very frustrating for me, because I wanted to help these guys," Panish said, so he eventually told Stoll, "You want to get more than me, go ahead, that's OK. Let's get to work and help these guys."

"Why did you say he should get more?" Wesierski asked.

"Because I didn't want to have a problem. Not that I knew this was going to happen, but I certainly didn't want to be here," Panish answered.

Panish's appearance at the West Justice Center, an Orange County Superior Court branch courthouse in Westminster, followed an appearance last Thursday from another well-known Los Angeles lawyer, Edith Matthai of Robie & Matthai.

The legal ethics expert, who said she's defended about 250 judicial officers in 17 years, took the stand as a hired expert for Parrish and Fitzgibbons, testifying that they had no obligation to pay their lawyers more than the 40% of the settlement as outlined in their contingency agreement, and that they shouldn't be blamed for Avenatti secretly spending Stoll's money "in a nanosecond."

"It is not the client's obligation to make certain their lawyers comply with the rules of professional conduct and the law. That is the lawyer's obligation," Matthai said.

BIG VERDICTS, ELITE PRESIDENCY

Wesierski opened his direct examination with about 10 minutes of questions about Panish's background and accolades, which includes six verdicts over $50 million and 500 settlements and verdicts over $1 million. Asked if he had 100 verdicts over $10 million, Panish answered, "I think so."

Wesierski asked about his record $4.91 billion jury verdict in 1999 in *Anderson v. General Motors*, which Panish testified was at the time the largest products liability verdict ever in the United States.

"We didn't get all that money, but it was a great achievement. It helped change the design of the fuel systems. It took care of the clients who needed many, many burn surgeries," Panish said.

MEGHANN M. CUNIFF

A star witness in a state court civil trial over an 11-year-old fee dispute, Brian Panish revealed his own dispute over fees with Avenatti while bolstering the defense narrative of his former clients.

Panish also discussed his membership in the elite 100-member Inner Circle of Advocates, which he described as "a sharing organization."

"A lawyer in New York might have a similar case like a GM case like I had," Panish said, so he would "share information to help him do better for his clients."

"It's very strict and it's confidential," said Panish, who ends his three-year term as Inner Circle of Advocates president next month. A former Fresno State University football player and high school coach, Panish is licensed to practice in California, Texas and Washington state, and he recently passed the bar in Nevada with his daughter Diana.

Schwarm sustained a relevancy objection when Wesierski asked Panish about his current representation of Hutchins' husband and son in a wrongful death lawsuit against Alec Baldwin over the movie set shooting. But he allowed questions about Panish's current work as co-lead counsel in litigation over the Woolsey and Thomas fires in Los Angeles, as well as the litigation over the 2015 Potter Ranch suburban gas blowup, which settled last September for $1.8 billion.

"It's been going on for a while. but there's 35,000 people. It takes a long time to distribute. There's a lot of money," Panish said.

Asked to "tell us about some of the other awards that you've received through the years," Panish answered, "I've been roasted," then mentioned being voted trial lawyer of the year for California, Los Angeles and the American Board of Trial Advocates, as well as top 10 national lawyers and top 100 lawyers before telling Wesierski, "I think you covered all this. … Let's get to it."

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Attorney Reprimanded for Cursing Out Probation Officer

by Allison Dunn

A Virginia criminal defense attorney was publicly reprimanded with terms last week for an "angry and aggressive" in-court exchange with a probation officer that was followed up by an email containing some choice words.

On June 8, the Seventh District Subcommittee of the Virginia State Bar voted to approve an agreed disposition for a public reprimand with terms for attorney Aaron M. Burgin, a solo practitioner in the Shenandoah Valley.

Kellie Woods, a probation officer with the Virginia Department of Corrections, was assigned to a probation violation involving one of Burgin's clients in 2019, according to the disciplinary order.

In the fall of 2021, Burgin spoke to Woods' supervisor and the prosecutor regarding the probation officer's miscalculation of the sentencing guidelines in one of her major violation reports for that client. In an email, Woods acknowledged the error and apologized, to which Burgin thanked Woods for reaching out and advised her there was no problem, the order said.

About two weeks later, when the probation violation matter went before the court, Woods said that Burgin's "tone changed in court and that he became angry and aggressive with her during cross examination," the order said.

The next day, according to the order, Burgin allegedly wrote an email to her, which said: "Don't f--k around with me or one of my clients again. I will always be the best f--king attorney in the court room. Try and pull that kind of s--t again and you will be begging to get off the witness stand."

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INTERNATIONAL

African Nations Pass Laws to Benefit Local Economies

by Jennigay Coetzer

An increasing number of African countries are enforcing local content laws, which were initially aimed at the mining industry, but are spreading to other sectors.

The rationale behind the laws has colonial overtones, whereby foreign companies exploited Africa's natural resources and exported them, used their own equipment and services and employed "expats" to do the skilled work.

"So the goods get exported and the profits get exported and the expats move on, taking their skills with them," said Dayo Okusami, partner at Templars in Lagos.

As a result a minimal number of local companies own the assets and few locals are trained and qualified in these sectors, among others.

The Nigerian local content act was passed 12 years ago specifying varying thresholds for ownership, services and local employment.

For example, the government is aiming for the majority of the personnel who work in the mining industry to be Nigerian.

Likewise it wants Nigerian companies to provide as much as 70% of services to the oil and gas sector, including legal services.

IGOR KARDASOV

While Nigerian law firms have been benefiting for a decade from local content laws, this type of legislation is a recent phenomenon in some African countries.

GROWTH CATALYST

"The push for local content has contributed at least 40% to Templars' growth over the last 10 years, and during that time our firm has tripled in size."

He said the firm is now instructing UK and international firms on

billion dollar projects. "Right now, I am instructing a London law firm on a project worth nearly $1 billion."

He said 15 years ago Nigerian law firms would get the offal and the international firms would get the meat of the major transactions. "Now we are the butcher and we decide who gets the offal and who gets the meat!"

This changing market dynamic also means that African lawyers don't need to work overseas for international companies, because they are getting to work on international business on the continent.

Similarly, the African legal market has evolved to the extent that African companies are comfortable to be advised by local law firms and not look overseas for legal services, said Okusami.

While Nigerian law firms have been benefiting for a decade from their local content laws, this type of legislation is a recent phenomenon in some African countries.

OPPORTUNITIES AND CHALLENGES

For example, local content laws were introduced in Tanzania in 2017 that require companies operating in the country to hire Tanzanians and use local suppliers and service providers, including lawyers.

However, enforcement has not been that stringent, due to the lack of mechanisms to do so, said Wilbert Kapinga, managing partner of Bowmans in Tanzania

"There is no clarity on how to implement the laws.

"So, I have clients that have had to keep applying for exemptions since 2019 and carry on business regardless, as the authorities continue to set up a workable structure," he said.

Local content will be an increasing advantage for firms like Bowmans who require that the majority of the equity of the firm is owned by Tanzanians, said Kapinga.

"Already this is allowing us to qualify for jobs that require Tanzanian local content and win many of the tenders."

He said the same will apply to Bowmans' six other African practices in Kenya, Malawi, Mauritius, South Africa, Uganda, and Zambia, which have the same business model.

He said international law firms are more comfortable dealing with the likes of Bowmans, which adhere to international best practices and have the right local content profile.

"So instead of doing a transaction directly, they will do it through us."

In 2017 when local content laws were introduced in Tanzania a number of investors withdrew from the country.

But the then president became ill and died suddenly in 2021 and the current female president Samia Suluhu Hassan has gone out of her way to encourage foreign investment and make the laws more acceptable.

"As a result, several mining companies are returning or increasing their existing investments in the country," said Kapinga.

Jennigay Coetzer reports for Law.com International, an ALM affiliate of the Daily Business Review. Contact her at jcoetzer@alm.com.

Lawyers Form Alliance to Protect Rule of Law in Mexico, US

by Amy Guthrie

Two legal groups—one in Mexico and the other in the United States—have agreed to work together to protect the rule of law in both countries.

The New York City Bar Association's Cyrus R. Vance Center for International Justice and the Mexican Bar Foundation have agreed to form a joint committee that will focus on strengthening judicial and democratic institutions in both countries.

"The rule of law is suffering today in Mexico," said Enrique González Calvillo, chair of the board of trustees at the Mexican Bar Foundation and founding partner at González Calvillo Abogados, a large Mexican law firm. "The Vance Center's support and experience will be absolutely key to us."

Inaugural members of the joint committee include Todd Crider, partner at Simpson Thacher & Bartlett and Antonia Stolper, of counsel at Shearman & Sterling. Both attorneys have focused on Latin America throughout their careers.

Mexican lawyers are engaged in a delicate dance to preserve the independence of the judiciary under President Andrés Manuel López Obrador, whose six-year term began in late 2018.

The president has labeled Mexican lawyers who defend international companies "traitors" and has accused Mexico's judicial branch of being at the service of private interests.

Critics say López Obrador has also stacked the Supreme Court with supporters while working to discredit other democratic institutions that provide much-needed checks and balances in a country with a long tradition of authoritarianism.

"Weakened rule of law in Mexico will also affect the United States, as an erosion of our institutions would affect Mexico," said Simpson Thacher's Crider.

In addition to sharing a large border, Mexico is a top trade partner of the U.S., and Latin America's second-largest economy. Mexican Americans make up more than 11% of the U.S. population.

One of the core missions of the Vance Center is supporting efforts to strengthen the rule of law around the world. The New York Bar Association, meanwhile, has actively called on members in recent years to shore up the rule of law in the U.S., where the Bar cataloged multiple actions by the Trump administration to undermine democratic institutions.

The joint committee said it will study and evaluate threats to the institutions of democracy and to the rule of law in Mexico. It will issue reports addressing concerns and identify strategies to reinforce the institutions.

"We are paying close attention to Mexico, where the erosion of traditionally solid institutions is worrying, and where we believe it is critically urgent for the legal community to organize itself in defense of core institutions," said Stolper, who is vice chair for Latin America at the Vance Center.

The committee said it will recruit pro bono support from law firms and seek the perspective of civil society organizations. It also will focus on topics relevant to the rule of law, with particular attention to the preservation of democracy, including judicial and prosecutorial independence; media freedom; immigration enforcement; corruption; independence and capacity of governmental institutions; election integrity; public safety and crime.

The collaboration also will examine democratic institutions in the U.S., noting that a breakdown in governability is also occurring north of the U.S.-Mexico border.

"The rule of law is suffering today in Mexico," said Enrique González Calvillo, chair of the board of trustees at the Mexican Bar Foundation and founding partner at González Calvillo Abogados, a large Mexican law firm.

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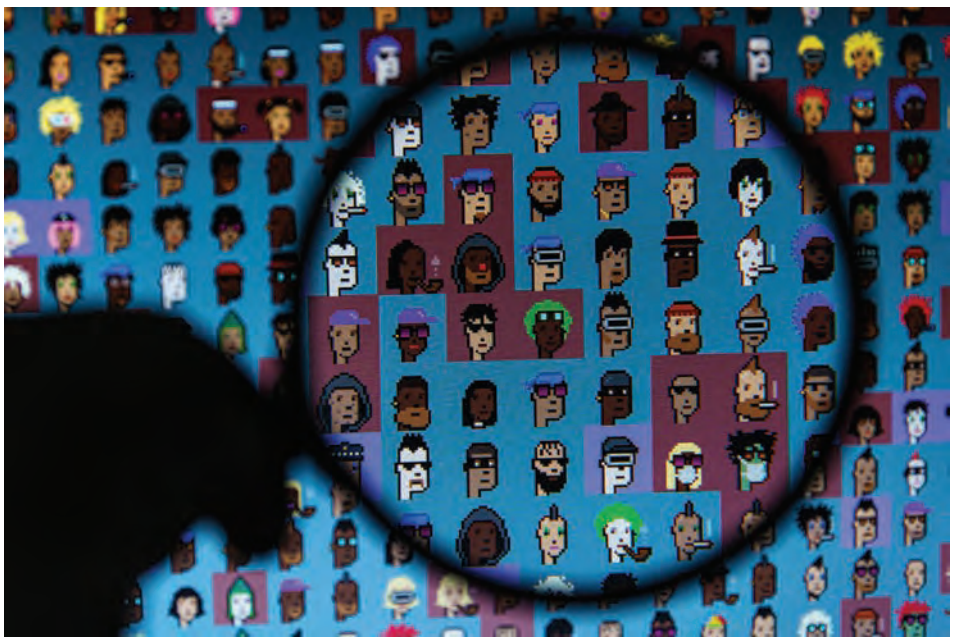
PRACTICE FOCUS / TRADEMARK LAW

Hermès Case Gives Guidance on How Trademark Law Applies to NFTs

Commentary by Thomas W. Brooke, Danielle Garno and Rodrigo Javier Velasco

Judge Jed Rakoff of the U.S. District Court for the Southern District of New York on May 18, issued an order denying self-proclaimed artist Mason Rothschild's motion to dismiss the French luxury brand Hermès International's trademark infringement case, but set the stage for the litigation by finding the *Rogers* test applicable in determining infringement. Although the merits of Hermès' trademark claims were not addressed in the court's order, the ruling offers some insight as to how courts will treat trademark claims involving nonfungible tokens (NFTs).



SHUTTERSTOCK

THE BIRKIN BATTLE: PROTECTED SPEECH OR INFRINGEMENT?

The ongoing dispute between Rothschild and Hermès centers around Rothschild's production, marketing and sales of his MetaBirkin NFTs, which are digital images of furry versions of Hermès' iconic Birkin bag. Rothschild sold the MetaBirkins and other NFTs through social media and online storefronts under the "MetaBirkin" name. Hermès claims, among other things, that the MetaBirkin NFTs infringe and dilute its famous BIRKIN trademark.

The issue at the heart of Rothschild's motion to dismiss was which test should apply in determining whether MetaBirkin NFTs infringe Hermès' federally registered trademarks. Rothschild argued that the MetaBirkin NFTs are, in fact, artwork and therefore his use of the Birkin mark is entitled to First Amendment production pursuant to *Rogers v. Grimaldi,* 875 F. 2d 994 (2d. Cir. 1989), which found that the use of a name or mark for artistic purposes does not necessarily constitute trademark infringement. Specifically, the *Rogers* court found that an artist may claim First Amendment protection if "the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or content of the work." In opposition, Hermès argued that the *Rogers* test should not apply because of the extensive commercial use of the "MetaBirkin" mark to "brand a product line, and to attract public attention and signify source," thus making Rothschild's use of the mark ineligible for First Amendment protection.

BOARD OF CONTRIBUTORS

In his order, Rakoff held that the *Rogers* test applied because the MetaBirkin NFTs "could constitute a form of artistic expression," and that Rothschild's method of marketing the NFTs is in line with the holding in *Rogers*. Addressing the mechanics of NFTs, Judge Rakoff found that *Rogers* applies even when NFTs are used to authenticate the MetaBirkins "because NFTs are simply code pointing to where a digital image is located and authenticating the image, using NFTs to authenticate an image and allow for traceable and subsequent resale and transfer does not make the image a commodity without First Amendment protection any more than selling numbered copies of physical paintings would make the paintings commodities for purposes of *Rogers*."

Despite this backdrop, the court refused to dismiss Hermès' complaint finding that Hermès adequately pled that Rothschild's use of the MetaBirkin mark was not artistically relevant and was explicitly misleading; thus potentially making Rothschild's conduct ineligible for First Amendment protection under *Rogers*.

TAKEAWAYS

Interestingly, the court theorized in a footnote that the MetaBirkin NFTs might not be considered artwork if they represent virtually wearable handbags. In that case, the MetaBirkins could be considered a "non-speech commercial product," and therefore not subject to First Amendment protection. This footnote could end up being instructive in other cases as trademark owners attempt to enforce their rights against third parties using marks on articles worn and used by avatars in the metaverse.

As other NFT-related cases make their way through the courts, Judge Rakoff's order provides some much-needed visibility as to how trademark law in the real world will be applied in the metaverse and how brand owners can protect their intellectual property in the wild, evolving world of Web3.

Thomas W. Brooke is an intellectual property attorney in Holland & Knight's Washington, D.C., office. He handles matters ranging from serving as litigation counsel in major intellectual property disputes across the globe, to initial counseling and trademark selection, copyright and trademark registration around the world, licensing and technology transfers. Danielle Garno is a transactional and litigation attorney in the firm's Miami office and Rodrigo Javier Velasco is a law clerk with the firm.

FROM THE COURTS

Redgrave Timekeepers Victims of Evolving E-Discovery Demand

by Bruce Love

News that e-discovery specialist law firm Redgrave is laying off 10% of its timekeepers is likely the result of the commoditization of tech services in the sector, and the increasing attractiveness of full-service e-discovery offerings.

In such a competitive environment, firms that can couple e-discovery with other litigation offerings find themselves with a competitive advantage over standalone offerings and tech vendors.

According to a memo from Redgrave managing partner Jonathan Redgrave, a "substantial decrease in demand" over the past six months led to the firm's decision to shed a tenth of its timekeepers.

Redgrave, founded in 2010 to help corporates and other law firms manage e-discovery, information governance, data privacy, and data security, had around 38 lawyers and 14 advisors before the layoffs, according to a count of personnel on its website.

In his memo, first reported by Above the Law, Redgrave writes that he did not see demand "returning to the same level in the near future," and for that reason, the firm was decreasing timekeepers by "around 10%."

"We have determined that we presently do not have the level of work to keep the current number of timekeepers fully utilized," the memo read.

Neither Jonathan Redgrave nor a spokesperson for the company immediately replied to requests for comment.

Other law firms in the e-discovery space, however, are not seeing such a drop in demand.

Elan Hersh, a partner at Akerman and director of the firm's e-discovery services, said he has found the market for e-discovery services to be growing lately—especially because of the growing volume of electronically stored information (ESI).

"ESI is the lifeblood of discovery. So, with the growth of ESI the demand for e-discovery services continues," said Hersh, adding the market is nonetheless a "very competitive" landscape.

While the vendor side of e-discovery is a multi-billion-dollar industry, a lot of services—especially technical elements such as data processing and data hosting—have become commoditized, driving down prices through competitive pressure, said Hersh.

"Law firms that are exclusively devoted to e-discovery are competing with vendors," he said. "But when you have a full-service law firm that also provides e-discovery consulting and advisory services, that really separates you from the herd. They can provide a true value-add to clients who are dealing with large volumes of electronically stored information."

Akerman provides such a service to its clients, said Hersh.

THE SEAMLESSNESS OF FULL SERVICE

"We've found that our clients really love the seamlessness of having their law firm handle the entire matter—including the e-discovery—rather than outsourcing an important part of the work to an outside vendor," said Hersh, adding that an internal e-discovery offering also affords Akerman lawyers the opportunity to have "better supervision" over what is being done with client data.

The result, said Hersh, has been that Akerman has been able to compete with outside providers in terms of pricing on the technology fees.

"That's really been a win-win for our clients and for us," said Hersh.

In the past 10 years, Hersh said he has found that law firms with robust litigation practices have come to realize that by outsourcing their client's e-discovery work to third-party vendors, the law firms are taking all of the risk. That risk comes from still being ultimately responsible for any mistakes made by the vendor, while the reward—in the terms of additional revenues—passes outside the firm to the vendor.

Jonathan Redgrave founded his company in 2010 to help corporates and other law firms manage e-discovery, information governance, data privacy, and data security.

"Because of that—and the improved supervision attendant to keeping the work in-house—a number of Big Law firms have made the switch to establishing their own internal e-discovery practices," Hersh said.

John Martin, head of Nelson Mullins Riley & Scarborough's e-discovery group, Encompass, said he is seeing "strong" demand, especially in litigation and investigation work, although he does foresee a lag in M&A and corporate transactional work, depending on how the wider economy fares.

Redgrave had announced plans to merge with Nelson Mullins in late 2020, but the merger fell through in the weeks that followed due to client conflicts.

Martin declined to comment on Redgrave's current layoffs.

"Litigation-driven and investigation-driven discovery has remained strong throughout the pandemic and into the current day," Martin said, although he did notice that the pandemic afforded some clients the opportunity to use the shuffling of litigation and court deadlines as an opportunity to "step back and reflect a little" about how they were handling discovery their cases. "We have seen some consolidation with major clients, in the form of moving business to more comprehensive and top providers where they can obtain e-discovery counsel as needed."

And Nelson Mullins' Encompass has been the beneficiary of much of that consolidation, said Martin, who agrees that full-service firms with e-discovery have an advantage over standalone providers. However, Martin has one caveat: "Where it really works is when you have a full-service e-discovery team within a full-service firm. That's the real win-win for the client."

"There are some matters where there's just no substitute for horsepower and bandwidth ability," said Martin, explaining that large clients with high volumes of litigation benefit from standalone e-discovery offerings, because they are dealing with large data sets across multiple matters. "Many of the larger non-law firm providers would qualify there. Within the law firm space, it's a narrower crowd."

DEMAND REMAINS STRONG FOR INNOVATORS

Litigator and legal entrepreneur Tess Blair is the founder and leader of Morgan, Lewis & Bockius' e-data practice. She started the practice in 2004 and has seen the e-discovery business grow exponentially in that time.

"Demand remains strong by every metric—leverage, origination, revenue, realization, and expense control—and we are seeing strong demand, high performance and significant growth in our practice," said Blair, adding that the volume of data the firm handles in a given year, has "almost tripled" in the last six years. "Yet by improving our processes and applying automation, the size of our group has remained relatively steady."

Morgan Lewis's secret sauce, said Blair, is providing a broad range of capabilities on both the legal and the technical sides not just of e-discovery, but also data and analysis services for investigations, information governance and contract analysis across a broad range of corporate needs.

As well as litigation, investigations and transactions, Blair's team provides e-discovery in labor and employment issues and antitrust. She sees antitrust as a growing area of demand as the Department of Justice and Federal Trade Commission increasingly focus on potential anticompetitive behavior.

"[In antitrust reviews] there is plenty of data to be managed, analyzed and secured, and we've become particularly adept at it," said Blair.

Ultimately, Blair said, the demand for her team's services is growing because of the "distinguishing features" of the group.

"All pricing for the technical work being equal, the preference for clients is generally to go to a full-service law firm," said Blair. "We couple our technical services with what we like to think are some of the best legal minds in the profession."

Bruce Love writes about the legal community and the business of law. Contact him at blove@alm.com. On Twitter: @loveonlaw.

Big Names Try to Restore $1.2B Cancer Treatment Verdict

by Scott Graham

When the U.S. Supreme Court is faced with a challenging question of patent law, its instinct is often to request the views of the solicitor general, who in turn consults with the U.S. Patent and Trademark Office.

Bristol-Myers Squibb (BMS) already has those bases covered in its cert petition Tuesday seeking to restore a $1.2 billion judgment over a breakthrough cancer treatment.

The immediate past solicitor general, Noel Francisco, and immediate past USPTO director, Andrei Iancu, appear on *Juno Therapeutics v. Kite Pharmaceuticals*.

"It's a great benefit to have those sounding boards available to look at the arguments we're making here," said Jones Day partner Gregory Castanias, who is counsel of record and leading the charge with BMS deputy GC Henry Hadad. BMS owns petitioner Juno Therapeutics.

The team is trying to fuel the Supreme Court's apparent interest in reviewing the U.S. Court of Appeals for the Federal Circuit's interpretation of Section 112 of the Patent Act. Section 112 requires that a patent contain "a written description of the invention, and of the manner and process of making and using it."

The U.S. Supreme Court has previously described Section 112 as patent law's "carefully crafted bargain" in which inventors publicly disclose new and useful technologies in exchange for a limited-time monopoly.

"The question presented here is this: What scope of disclosure does Section 112(a) require?" BMS' petition asks.

In BMS' telling, the Federal Circuit "has burdened the straightforward textual provision with convoluted, judicially crafted requirements," leading the appellate court to "invalidate numerous patents by demanding the impossible."

BMS' U.S. patent 7,446,190, titled "Nucleic Acids Encoding of Chimeric T Cell Receptors," is one of them. Developed by Memorial Sloan Kettering Cancer Center and licensed to BMS, it teaches how to reprogram the body's T-cells to attack cancer cells by recognizing and binding to an antigen, which is a distinctive structure on the cell's surface. The patent helped pave the way for CAR-T therapy—"a new paradigm for treating and I would dare say, possibly, curing cancer," Irell & Manella partner Morgan Chu told the Federal Circuit last summer.

Orrick Herrington & Sutcliffe partner Joshua Rosenkranz argued for Gilead Sciences, which now owns Kite, that the '190 patent failed to satisfy Section 112, because it describes "millions of billions" of potential antibodies, without a clear roadmap for locating them. "You can't just announce that you have an antigen, and then claim everything that binds to that antigen," Rosenkranz told the court.

Scott Graham focuses on intellectual property and the U.S. Court of Appeals for the Federal Circuit. Contact him at sgraham@alm.com.

COMMERCIAL REAL ESTATE

Here Come More Renters, According to the Numbers

by Erik Sherman

There's been a lot of talk in and around CRE about the shifting desire of many to rent rather than own a home. Perhaps it makes some feel comfortable, but John Burns Real Estate Consulting points to numbers, not emotions.

"A little over a year ago, the monthly cost of owning (as we calculate it) and renting were virtually identical," they wrote. "Now, owning a home costs $839 more per month than renting. This differential is almost $200 higher than at any time since the turn of the century."

Both home prices and rents have both been on the uptick, but "the disparity between rising homeownership costs and rising rents has been greatest where home prices have accelerated the most." In Raleigh-Durham, Denver, Tampa, Nashville, and Phoenix, the disparities are the largest.

But that only covers a range of estimated difference from 35% (Phoenix) to 42% (Raleigh-Durham). The group of 15 following ran from Chicago's 23% to Jacksonville at 34%. The national average is 31%.

According to the firm, "home builders who were once reluctant to sell to rental home investors are now soliciting offers from investors" and those institutional investors will help keep housing prices up.

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Both home prices and rents have both been on the uptick, but "the disparity between rising homeownership costs and rising rents has been greatest where home prices have accelerated the most."

That gets a little more complicated considering what others in the industry have told GlobeSt.com over the last two months. There is a heightened institutional investor interest in single family homes, largely because technology has allowed them to manage and market disparate properties in a way that was impractical 15 to 20 years ago.

But they typically look to properties that are below the median prices in the states where they acquire them. Instead of buying homes across the price spectrum, they aim to the low side because that is what allows enough margin when renting them out. Rather than bidding higher than individual buyers, they're tending to use liquid resources to move quickly and make cash offers, which sellers like, rather than depending on closing a residential mortgage, a process that can easily take more than a month, even assuming the buyers have the down payment.

In its calculations, the consultancy assumed a purchase at 80% of median-priced existing homes with 5% down and a 30-year fixed rate mortgage, and also included PITI, mortgage insurance, and maintenance costs, the latter of which they pegged in a range from 0.85% to 1.25% of the home's value.

Erik Sherman reports for GlobeSt.com.

Multifamily Dealmakers Aren't Hitting Their Whisper Prices Anymore and Institutional Equity Is Moving In

by Erika Morphy

Forty-five days ago, a multifamily asset on the market would receive bids from 30 groups, unintentionally driving up the price for the property. Today, the buyers are still there but there are fewer of them and many of the deals aren't hitting their whisper price, according to Noam Franklin, Managing Director – Head of Eastern US, JV Equity & Structured Capital Group, at Berkadia. "Almost every deal I'll ask if the whisper price has been hit and the answer is no," he tells GlobeSt.com. "There still is a healthy return but there is some discount," usually around 6 to 10%.

Multifamily, as healthy and robust as the asset class is, apparently is not immune to the forces of gravity after all. The same economic uncertainty the greater markets have been experiencing, led by spiraling inflation and rising interest rates, is nibbling around the edges of the apartment asset class with some clear effects. For many in the market, these cracks in the market may be worrisome but for Franklin they spell opportunity. Franklin represents institutional equity in the housing market and for the last year many of the multifamily deals he has sent over have been too rich for institutional capital seeking out value-add JV investments. Once they would unwind the rents and pencil in the money on upgrades, they would find that the return was not equal to the risk they would have to take. So these life companies, private equity providers and pension funds, for the most part, stayed on the sidelines instead of investing through JVs.

Instead, what they did was take a barbell approach, Franklin explains, blending some ground up deals, some core plus and so on to reach a value add return.

The multifamily market hardly noticed the difference given the abundance of private and GSE capital that has been targeting the space in recent years. "The feedback we received from sponsors was that, at the right time when we need an institutional partner we will call," Franklin says. They rarely did.

The environment has changed dramatically in the last several weeks, Franklin says. "Now, for the first time we have value-add JV deals that our capital relationships can go to committee with and get approvals. Before that, prices were so high it was hard to make sense of it from the perspective of an institutional partner. Now, suddenly, the phone is ringing off the hook."

Sponsors are finding they are not getting the leverage and pricing they thought they would get 30 days ago. They might go to their network and find they can only raise, say, $12 million instead of $30 million. Franklin is also seeing cap rate expansion in several markets. "For example, we have a client who is tying up a deal in Phoenix right now and the cap rate is in the mid 4s and we haven't seen a multifamily deal in Phoenix trade above a 4 in a long time. I am confident that deal will tie up at a mid 4 cap rate."

None of this is to say it has become a buyer's market or that there will be serious distress in the market. "But it is much more a buyer's market now than it was 30 days ago," Franklin says. And institutional capital is ready to jump in.

Erika Morphy reports for GlobeSt.com, an ALM affiliate of the Daily Business Review. Contact her at emorphy@alm.com.

Pay It Forward: How To Align Your Recruitment Strategy To Attract And Retain Gen Z Talent

by Tasha Norman

GEN Z AND REAL ESTATE CAREERS

Gen Z comprises individuals born after 1996 and before 2013. Gen Z is young, but the first wave has already passed through the college years and is entering the workforce in greater and greater numbers.

What do we know about Gen Z? Importantly, it is the most educated and most indebted group in history. According to a report by the Statista Research Department, Gen Z makes up approximately one-fourth of the U.S. population at 67.1 million people. While Generation Z is currently a smaller cohort than Baby Boomers (70.7 million) and Millennials (72.3 million), they are the most racially and ethnically diverse of all generation groups.

Gen Z is also the first generation to have never known a world without the Internet and so these individuals are more technologically-focused than any previous age group.

Although there are many shared goals between Gen Z and Millennials, it is a mistake to lump together Millennial culture with Gen Z culture. According to Eliza Stoker in a Major, Lindsey & Africa article, "Like millennials, Gen Z will expect a workplace that is flexible to their schedule and utilizes technology to allow them to work outside the office." However, she continues, "employers should be careful when assuming that the two generations operate in entirely the same way."

For example, Gen Z'ers appear to be more interested in finding a stable work environment with traditional benefits while still seeking meaningful work that gives them a sense of purpose.

According to a Forbes report, entitled How Commercial Real Estate Leaders Can Meet The Demands Of The Growing Gen-Z Workforce, "You need to strike the balance between designing collaborative spaces and spaces for privacy and deep work."

The Forbes report continues, "Building flexible workspaces means configuring spaces for more human moments, like polishing up a presentation with a co-worker or commiserating after a sales call. Workers, and especially those in Gen Z, want to feel connected with one another. Flexible workspaces can go a long way in facilitating this objective."

A survey published by the Network of Executive Women in partnership with Deloitte, echoes that perspective. The NEW survey also shows that Gen Z'ers look for more tech-oriented workplaces.

Real estate businesses need to understand the values of this new group of CRE professionals to attract and retain the best and the brightest talent for the future, and equally crucial for Gen Z'ers to make their attitudes and standards known to potential employers.

In a recent MacDonald & Co. article, author Matthew Bryan states, "The way we work has considerably changed over the years, and it is important to understand how to align your recruitment strategy. The newer generations actually have several common job preferences that you can draw upon." Bryan refers to flexibility, continuous learning, career advancement, technological advancement, and stability as primary values of Gen Z potential professionals.

It's clear that Gen Z is the future of commercial real estate and every other industry. The good news for recruiters is that Gen Z'ers bring a wealth of talent to the table. By and large, they are enthusiastic and tech-savvy, and they understand millennials in a way that older professionals may not.

Tasha Norman reports for Law.com, an ALM affiliate of the Daily Business Review. Contact her at tnorman@alm.com.

BANKING/ FINANCE

DeSantis Net Worth Drops in Third Year as Governor

by Jim Turner

Gov. Ron DeSantis' net worth dropped just over 8.5% in his third year as the state's chief executive.

Listing the $134,181 he made as governor as his only income, DeSantis reported a net worth of $318,987 as of Dec. 31. DeSantis filed the financial disclosure last week at the state Division of Elections as part of reelection campaign documents.

Last year, DeSantis reported a net worth of $348,832 as of Dec. 31, 2020. That was up from $291,449 at the end of 2019.

State candidates and elected officials are required to file annual disclosure reports that typically detail their finances as of the end of the prior year.

The forms require disclosure of estimated net worths, assets valued at more than $1,000, liabilities of more than $1,000 and information about income.

DeSantis listed assets at the end of 2021 of $202,980 in USAA checking and savings accounts; $89,066 in a thrift savings plan, a type of retirement savings and investment plan; and $48,226 in the Florida Retirement System.

The Florida Retirement System account grew by $17,923 from the previous year, while the USAA total fell by $32,020 and the thrift plan decreased by $16,689.

DeSantis also continued to pay down a Sallie Mae student loan during 2021, with the balance going from $22,225 in at the end of 2020 to $21,285 as of Dec. 31.

DeSantis, who lives in the governor's mansion and listed no real-estate holdings, sold his Ponte Vedra Beach home in March 2019 for $460,000, according to St. Johns County property records.

DIEGO M. RADZINSCHI

Listing the $134,181 he made as governor as his only income, Ron DeSantis reported a net worth of $318,987 as of Dec. 31, 2021.

When DeSantis ran for governor, his reported net worth for 2017 stood at $310,971. It fell to $283,605 the next year.

Democratic gubernatorial candidate Charlie Crist, a congressman from St. Petersburg, posted a net worth of $1.96 million as of Dec. 31.

When Crist last ran for a statewide office in 2014, his net worth was reported at $1.25 million.

In a disclosure report filed Monday, Crist reported just over $2 million in investments and money in bank accounts, along with a 2005 25-foot Trophy Fisherman Center Console boat worth $45,000.

Crist listed as income congressional pay of $174,000, $57,493 from the Florida Division of Retirement, and just over $50,000 from investments.

His only liability in 2021 was $35,000 for rental property in St. Petersburg.

Agriculture Commissioner Nikki Fried, who is competing with Crist for the Democratic gubernatorial nomination, had not filed a new disclosure report as of early Tuesday afternoon.

Reports from Republican state Chief Financial Officer Jimmy Patronis and Republican Attorney General Ashley Moody, both seeking reelection, also had not been posted on the Division of Elections website.

Senate President Wilton Simpson, a Trilby Republican running for agriculture commissioner, filed a disclosure that showed a net worth of $22.5 million as of Dec. 31, down nearly 28.6% from a year earlier.

Simpson has seen his net worth fall more than 32% since becoming Senate president in 2020.

In the new report, Simpson listed assets such as Simpson Farms in Trilby, worth $10.9 million. He also listed a one-third ownership in the limited liability company Belly Wadding as being valued at $592,179. Belly Wadding's major source of income is listed as NOSNAWS Corp., which owns IHOP restaurants in Florida.

Simpson's money-market accounts and other intangible property totals fell from $6.9 million in 2020 to just under $6.3 million at the end of 2021.

In addition to $39,021 in income from the state, Simpson reported drawing $1.65 million from Simpson Farms, $1.25 million from environmental safety company SES Hold Co. and $22,058 from Belly Wadding.

Simpson's home is valued at $602,073, while a Plaza Tower condominium in Tallahassee has an appraised value of $270,870.

Jim Turner reports for the News Service of Florida.

Florida Power & Light Launches Plan to Eliminate Carbon Emissions

by Jim Saunders

Florida Power & Light plans to eliminate carbon emissions from its electricity generation by 2045 through expanding solar energy and other technology, company officials recently announced.

The plan, part of a broader decarbonization effort outlined by FPL's parent company, NextEra Energy, would lead to massive increases in the use of solar panels and battery-storage technology. Also, it would mean shifting to what is known as "green hydrogen" at power plants and continuing to use nuclear power.

FPL Chairman and CEO Eric Silagy, addressing an investor conference, described the plan as a "march" but said it will build on changes that have included FPL ending the use of coal at plants in the state.

"Being clean is good business," Silagy said. "Being fuel efficient is really good business and good for customers."

The plan, while phased in over more than two decades, would represent a huge change in the way FPL does business. In 2021, natural gas made up 67% of what is known as FPL's "fuel mix" for generation. Nuclear was the next-highest at 20%, while solar was 4%, according to information presented during the investor conference.

In 2045, a combination of solar, battery storage and green hydrogen would make up 83% of the utility's production.

SHUTTERSTOCK

The plan would lead to massive increases in the use of solar panels and battery-storage technology, as well as shifting to what is known as "green hydrogen" at power plants and continuing to use nuclear power.

FPL, by far the state's largest utility, and other utilities have moved steadily in recent years to add solar energy. Those moves have come as solar has become more cost-effective, battery storage has developed and climate-change pressures have increased to reduce carbon emissions.

But burning natural gas continues to dominate electricity generation in the state, a dominance that has hit customers during the past year as they have seen monthly bills increase because of higher natural-gas prices.

Under the plan, solar generation would go from the current 4,000 megawatts to more than 90,000 megawatts in 2045, according to FPL. Similarly, battery storage, which is needed to store solar power for times when the sun doesn't shine, would expand from the current 500 megawatts to more than 50,000 megawatts.

Also, FPL said it will convert some natural-gas plants to run on green hydrogen, a fuel made through a process of splitting water into hydrogen and oxygen, according to NextEra. Florida lawmakers this spring passed a sales-tax exemption for such things as equipment needed to produce green hydrogen, a measure that was sought by FPL.

Silagy said FPL is building a $65 million green-hydrogen pilot project that is expected to operate next year.

In a news release, FPL said it intends to carry out the plan "at zero incremental cost for its customers, relative to alternatives," indicating it would not cost more than what customers otherwise would pay.

The FPL plan is part of what NextEra has dubbed its Real Zero effort to decarbonize. NextEra, based in Juno Beach, operates in multiple states.

"We've worked hard in developing Real Zero to ensure we have a credible technical pathway to achieve our goals and well-defined milestones every five years so we and all stakeholders can track our progress," NextEra President and CEO John Ketchum said in a prepared statement. "We're part of an industry that is well positioned to make the most progress in the elimination of carbon emissions and Real Zero is NextEra Energy's goal to set a new standard for all power generators."

Jim Saunders reports for the News Service of Florida.

BANKING/ FINANCE

The SEC War on Wall Street Greenwashing Has Begun

by Tim Quinson

For all the greenwashers out there on Wall Street, the party may really be over.

There's now little doubt that the US Securities and Exchange Commission actually means business in its bid to crack down on misleading claims by managers of environmental, social and governance funds.

Last month, the regulator fined a Bank of New York Mellon Corp. investment unit on allegations it falsely implied some of the firm's mutual funds had undergone so-called ESG quality reviews. And now, the agency has taken on much bigger game, looking into whether some of Goldman Sachs Group Inc.'s mutual funds don't meet the environmental, social and governance metrics proclaimed by the Wall Street giant's marketing materials.

"These are the first ripples of a wave of regulatory interventions that we are likely to see in the coming months," said Sonali Siriwardena, partner and global head of ESG at law firm Simmons & Simmons.

Under Chair Gary Gensler, nominated by President Joe Biden to run the SEC in 2021, officials have been demanding that money managers explain the standards they supposedly use to classify ESG-labeled funds. When the examination division spots potential misconduct, it typically alerts the agency's enforcement unit for further investigation.

The BNY Mellon case may provide a road map for future cases. After a review, the SEC announced May 23 that BNY Mellon Investment Adviser Inc. used "material misstatements and omissions" concerning the consideration of ESG principles in making investment decisions for some mutual funds overseen by the firm.

The agency concluded that BNYMIA had said portfolio holdings in its Overlay funds would be subject to "an ESG quality review." That turned out not to be the case, the SEC said.

As a result, the agency found the firm violated Section 34(b) of the Investment Company Act, which says it's unlawful to make any untrue statement of material fact in any registered document. BNYMIA agreed to pay a civil penalty of $1.5 million. While certainly not a lot relative to other recent securities violations uncovered by the SEC, it's likely just the beginning.

AL DRAGO/BLOOMBERG NEWS

Under U.S. Securities and Exchange Commission Chair Gary Gensler, officials have been demanding that money managers explain the standards they supposedly use to classify ESG-labeled funds.

But one Wall Street lawyer sought to downplay the "wave of regulatory interventions" predicted by Siriwardena.

"We aren't talking about a Ponzi scheme or allegations of an industry-wide fraud like what we saw with the subprime mortgage meltdown," contends lawyer Marc Elovitz of Schulte Roth & Zabel, an adviser to private fund managers. "We aren't talking here about a vast conspiracy by asset managers."

Rather than a concerted Wall Street effort to make as much money as possible by slapping ESG labels on everything, Elovitz argues that the recent inundation of greenwashing is a function of the sector's novelty. ESG is a fairly recent innovation in investment management, Elovitz said. As the market matures, he predicts there will be greater clarity around the definition of ESG and that will ultimately result in better transparency.

Not everyone is so sanguine. "It feels almost inevitable that more names will come out as regulators dig in," said Fiona Huntriss, a partner at law firm Pallas, where she focuses on financial litigation and broader dispute strategies. And it's important to remember, she said, that this isn't just a U.S. or U.K. or Europe issue — it's a cross-border issue.

"We're really just at the beginning of the cycle because there hasn't been proper regulation between now and when asset managers started marketing ESG funds," Huntriss said. "Even as increased regulation is brought in, there is still uncertainty as to what the standards are, and that sort of uncertainty is fertile ground for litigation."

And globally, of course, there's still the unsettled investigation of DWS Group, which really kicked off all the focus on possible ESG misselling.

Tim Quinson reports for Bloomberg News.

Bitcoin's Unrelenting Sell-Off Puts Prices on Verge of $20,000

by Joanna Ossinger and Tanzeel Akhtar

Bitcoin tumbled again, driving the token to the brink of $20,000 as evidence of deepening stress within the crypto industry kept piling up.

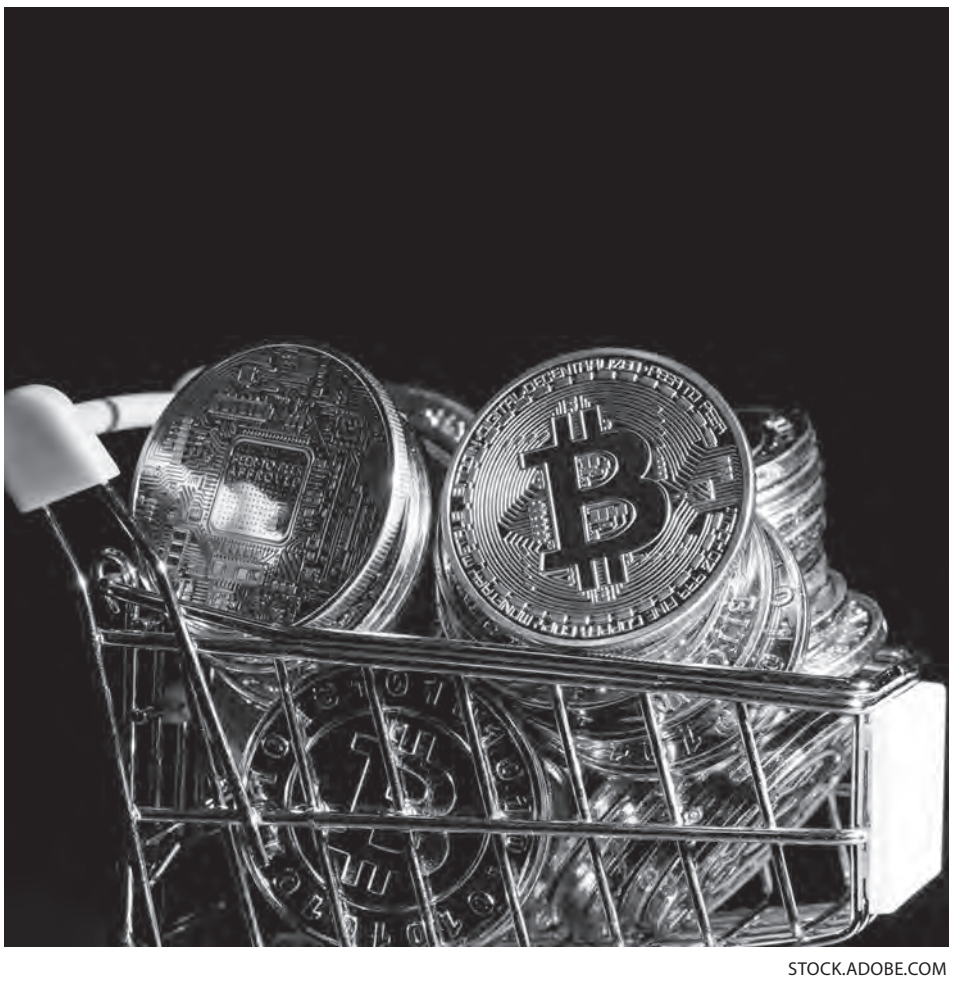
There's a growing sense of anxiety about the stability of crypto projects large and small. Tron founder Justin Sun's roughly month-old stablecoin USDD drifted from its intended dollar peg, at one point dipping below 96 cents, data from CoinGecko show. A tweet from the co-founder of crypto hedge fund Three Arrows Capital fueled speculation that it had suffered large losses.

Bitcoin fell as much as 8.6% on Wednesday to $20,081.95. The largest token has fallen for nine straight days, the longest losing streak since 2014. Ether was on the cusp of breaking the $1,000 mark after a 10% plunge.

A market that started sliding late last year on expectations of tighter monetary policy is now showing signs of widespread panic, after last month's collapse of the Terra blockchain and the recent decision by crypto lender Celsius Network Ltd. to halt withdrawals. Even long-term holders who have avoided selling until now are coming under pressure, according to researcher Glassnode.

"What we're seeing now are the weak hands exiting the market as we wash out the excess of what in retrospect can only be seen as an overextended build up of speculation and leverage," said Mati Greenspan, founder of Quantum Economics.

Historical data show that Bitcoin may find key support around the $20,000 level, as previous sell-offs demonstrate where the token usually finds points of resilience, according to Mike McGlone, an analyst for Bloomberg Intelligence.



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The crypto market now stands at a fraction of its heights in late 2021, when Bitcoin traded at a heady $65,000 and traders poured cash into speculative investments of all stripes.

Prices may "build a base around $20,000 as it did at about $5,000 in 2018-19 and $300 in 2014-15," he said in a note Wednesday. "Declining volatility and rising prices are earmarks of the maturing digital store-of-value."

Fresh apprehension was triggered on Wednesday with traders closely watching developments from the Tron DAO Reserve, the entity that oversees the cryptocurrency reserves backing USDD. The group said on Wednesday that it planned to withdraw 2.5 billion TRX tokens from the Binance crypto exchange in an apparent attempt to counter the selling pressure. Sun has repeatedly taken to Twitter this week to tout efforts to support USDD's peg.

The Tron network's governance token TRX, which has come under attack from short sellers in recent days, has dropped 14% in the past 24 hours.

Adding to the market's nerves, the founder of Three Arrows Capital, an influential hedge fund that has been liquidating crypto holdings, posted a vague tweet. "We are in the process of communicating with relevant parties and fully committed to working this out," former Credit Suisse Group AG trader Zhu Su tweeted from his verified account, without providing further details.

The crypto market now stands at a fraction of its heights in late 2021, when Bitcoin traded at a heady $65,000 and traders poured cash into speculative investments of all stripes. The total market cap of cryptocurrencies is $925 billion, down from $3 trillion in November, according to CoinGecko.

With prices continuing to dive, there are more predictions that losses will accelerate if key levels are broken.

"If these levels break, $20,000 Bitcoin and $1,000 Ether, we can expect massive sell pressure in the spot markets as dealers hedge themselves," BitMEX cofounder Arthur Hayes said in a tweet.

Joanna Ossinger and Tanzeel Akhtar report for Bloomberg News.

BANKING/ FINANCE

Apple's $2 Trillion Market Valuation on Shaky Ground

by Subrat Patnaik

MARC OLIVIER LE BLANC

After briefly surpassing $3 trillion in January, Apple has lost more than $800 billion in capitalization as tech stocks plunged.

Apple Inc.'s run as a $3 trillion stock proved fleeting. Now its grip on a $2 trillion market value is looking wobbly, too.

After briefly surpassing $3 trillion in January, the iPhone maker has lost more than $800 billion in capitalization as tech stocks plunged. With concern growing that the Federal Reserve's interest-rate increases could tip the U.S. into recession, the $2 trillion milestone is looking precarious. Apple closed Tuesday at $2.15 trillion.

"In the same way that Apple benefited from the Fed-fueled bull market, it will suffer as the low interest rate and quantitative easing subsidies fade," said David Trainer, chief executive officer at investment research firm New Constructs.

Economists predict the Fed will raise interest rates Wednesday by at least half a percentage point, with some predicting a 0.75-point increase in the wake of Friday's stronger-than-expected inflation data. Further increases are expected this year. All of that could deepen the selloff in tech stocks, which are particularly vulnerable to higher interest rates as they weigh on the current valuation of companies' future profits.

The FAANG cohort — Facebook owner Meta Platforms Inc., Apple, Amazon.com Inc., Netflix Inc. and Google parent Alphabet Inc. — were poster children of the two-year bull market, rallying at breakneck speed to scale historic valuations. That quickly evaporated this year with the group losing a combined $2.6 trillion in market value as investors fled from growth names for safer assets. Amazon is also close to falling below $1 trillion.

Analysts have grown cautious, too. Over the past three months, they've cut their estimates for Apple's fiscal third-quarter earnings by 7.8%, according to data compiled by Bloomberg. Revenue projections are down about 4.2% over the same period. The stock also has the lowest share of analyst buy ratings in more than a year.

KeyBanc Capital Markets sees signs of softer U.S. demand, citing credit card data spending. Others have raised concerns about the pace of revenue growth at the company's App Store, with Morgan Stanley adding that this poses risks to its estimates for Apple's Services business. According to data compiled by Bloomberg, Apple derived 18.7% of its fiscal 2021 revenue and more than 30% of gross profit from services.

Apple's stock woes have intensified this year with a 25% slump and Saudi Aramco snatching its title as the world's most valuable company. Setting aside the headwinds that have broadly pressured tech stocks — rising interest rates, slowing economic growth and soaring inflation — the tech giant is also facing supply constraints related to COVID restrictions in China. In April, it warned that it could take a $4 billion to $8 billion hit to revenues for the current quarter.

History shows that it can take years for technology stocks to climb back to the highs set in raging bull markets, assuming they ever do. Cisco Systems Inc., a star of the late 1990s tech frenzy, is still 46% below its all-time peak of March 2000.

"I would say that if an investor under-owns these names, then this is an opportunity to add to positions," said Mark Luschini, chief investment strategist at Janney Montgomery Scott, which has about $130 billion in assets. "However, there are always names that lead in some eras, but then it takes years for them to them to regain their record levels. Just because they will continue to grow, that doesn't mean these names will regain their former leadership."

Subrat Patnaik reports for Bloomberg News.

Retail Posts First Drop in 5 Months as Auto Purchases Plunge

by Olivia Rockeman

STOCK.ADOBE.COM

Spending in recent months has been supported by consumers dipping into savings and increasingly using credit cards.

U.S. retail sales fell in May for the first time in five months, restrained by a plunge in vehicle purchases and other big-ticket items, suggesting moderating demand for goods amid decades-high inflation.

The value of overall retail purchases decreased 0.3%, after a downwardly revised 0.7% gain in April, Commerce Department figures showed Wednesday. Excluding vehicles, sales rose 0.5% last month. The figures aren't adjusted for inflation.

The median estimate in a Bloomberg survey of economists called for a 0.1% advance in overall retail sales from a month earlier and a 0.7% increase in the figure excluding autos.

Auto sales dropped 3.5% in May, reinforcing data from Wards Automotive Group that showed sales dropped the most since August in the month. Meantime, spending at gas stations rose 4%, likely reflecting higher fuel prices in the month. Excluding those categories, retail sales rose 0.1%, the smallest gain in five months.

The figures suggest that Americans' demand for merchandise is softening, which could reflect the impact of the fastest inflation in 40 years or greater preference to spend to on services like travel and entertainment. As price pressures become more entrenched in the economy, spending will likely ebb either due to higher prices, higher interest rates, or both.

The figures come ahead of a decision later Wednesday by the Federal Reserve, in which the central bank is increasingly expected to raise interest rates by 75 basis points, the most since 1994.

Spending in recent months has been supported by consumers dipping into savings and increasingly using credit cards. That dynamic could put overall retail sales growth at risk as Americans' financial foundations weaken.

Six of the 13 retail categories showed declines last month, according to the report, including electronics, furniture and e-commerce.

Grocery store sales advanced 1.2%, which could reflect higher prices rather than increased buying activity since the figures aren't adjusted for inflation. Real spending data for May will be released later this month.

Restaurant sales, the report's only services component, rose 0.7%.

So-called control group sales, which are used to calculate gross domestic product and exclude food services, auto dealers, building materials stores and gasoline stations, were unchanged in May.

Olivia Rockeman reports for Bloomberg News.

BANKING/ FINANCE

Biden Tells US Oil Refiners Record Profits Are 'Not Acceptable'

by Justin Sink and Jennifer A. Dlouhy

SHUTTERSTOCK

Refineries are already running near maximum capacity to churn out gasoline and diesel, though production still falls well short of demand.

President Joe Biden told U.S. oil refiners that unprecedented profit margins are unacceptable and called for "immediate action" to improve capacity as the soaring price of gasoline feeds record inflation and fears of a recession.

"At a time of war, refinery profit margins well above normal being passed directly onto American families are not acceptable," Biden said in a letter sent Wednesday to top oil companies.

Biden said his administration was prepared to take any "reasonable and appropriate" steps that would help companies increase output in the near term, and said he's ordering Energy Secretary Jennifer Granholm to hold an emergency meeting on the subject in the coming days.

The president added that the federal government will open talks with the National Petroleum Council, an advisory committee representing the industry, and called on companies to provide the Energy Department with an explanation of why they have cut capacity and what could be done to address gas prices that now average more than $5 per gallon nationwide.

But restarting shuttered refineries isn't as easy as flipping a switch. More than 1 million barrels a day of U.S. oil refining capacity, or about 5% of the total, has been shut since the start of the pandemic. Some aging facilities were closed permanently as the virus crushed fuel demand. Others are being modified to produce renewable diesel instead of petroleum-based fuels amid a web of federal policies spurring a shift to green energy; those conversions may be too far along to reverse course.

Biden has intensified his political efforts to address skyrocketing oil prices in recent days, as polls show inflation concerns have badly hurt both his approval rating and Democrats' prospects for retaining control of Congress in November. The S&P 500 saw a sharp selloff earlier this week as investors braced for the possibility that the Federal Reserve later Wednesday could signal a higher-than-previously-expected interest rate hike in an effort to tame inflation.

Last week, Biden teed off on Exxon Mobil Corp. during an event at the port of Los Angeles, saying the company "made more money than God last year."

"We're going to make sure everyone knows Exxon's profits," Biden said Friday, calling on the firm to "start investing and start paying your taxes."

The president is also seeking to mend ties with Saudi Arabia and Crown Prince Mohammed Bin Salman during a trip next month as he asks OPEC producers to boost output.

Firms that received Biden's letter included Exxon, as well as Marathon Petroleum Corp., Valero Energy Corp., Phillips 66, Chevron Corp., BP Plc, and Shell Plc.

In the letter, Biden says that while Russian President Vladimir Putin's war in Ukraine is principally responsible for increased oil prices, high profit margins are worsening the pain of the war. He says gas prices are 75 cents higher and diesel prices are 90 cents higher than the last time crude oil was trading around $120 per barrel.

"The lack of refining capacity — and resulting unprecedented refinery profit margins — are blunting the impact of the historic actions my administration has taken to address Vladimir Putin's Price Hike and are driving up costs for consumers," Biden said.

Still, some refiners are planning expansions and taking other steps to increase output, including deferring maintenance projects that would have temporarily taken some production offline. For instance, Valero has canceled a planned 30-day shutdown of a crude unit at its Memphis, Tennessee refinery to meet demand and capture high product margins, Bloomberg News reported Monday.

Refineries are already running near maximum capacity to churn out gasoline and diesel, though production still falls well short of demand. The market imbalance has stoked high prices and profits, a big shift for the typically low-margin refining industry.

And while high prices typically entice investment, there's little sign that oil companies will build new refineries now, amid a long-term shift away from fossil fuels, long payback times, booming construction costs and permitting challenges.

Even beyond the U.S., there have been big refining capacity reductions since the start of the pandemic, another 2.13 million barrels per day outside the U.S., that have further exacerbated the price pain. U.S. refining allies have stressed that China's export of petroleum products has declined even as the country's refinery run rates shrink.

Daily throughput at U.S. refineries has reached levels not seen since January 2020, with no other country running as much crude or supplying as much to the global market, domestic industry advocates say.

Justin Sink and Jennifer A. Dlouhy report for Bloomberg News.

Senate Panel Advances Retirement Bill as Part of Secure Act 2.0 Plan

by Melanie Waddell

The Senate Health, Education, Labor & Pensions Committee passed by voice vote the Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg, or Rise & Shine Act, legislation that's intended to be included in the Senate's version of Secure Act 2.0.

The Senate Finance Committee is expected to introduce its own bill as part of a Secure Act 2.0 plan before July 4. The bills from the HELP Committee and Finance Committee bill will be combined to make up the Senate's Secure Act 2.0 package.

The Senate bill will reconciled with the House-passed Secure Act 2.0 legislation, which passed in March, before a final bill gets voted on by both chambers.

Sen. Patty Murray, D-Wash., chairwoman of the Senate Health, Education, Labor & Pensions Committee, said, S. 4353, the Rise & Shine Act is "the most comprehensive retirement package this Committee has considered in a decade … And not a moment too soon."

Murray introduced the bill on June 7 with the committee's top Republican, Richard Burr of North Carolina.

During markup of the Rise & Shine bill Tuesday, the HELP Committee agreed to include an amendment that directs the Labor Department to study the effects of inflation on retirement savings.

The COVID pandemic "upended our economy," Murray said during the bill's markup, noting that "there are the countless people across the country who never even had access to a retirement plan or were never even paid enough to make ends meet — let alone save for the future."

Now, she continued, "families are trying to recover — all while paying more at the grocery store and the gas pump."

The Rise & Shine Act takes "so many steps in this bill to bolster families' retirement and emergency savings," Murray said.

Along with a measure on emergency savings accounts, the bill also "makes it easier for employers to offer retirement plans" and "makes it easier to manage plans" as well as improves participation via auto-reenrollment, she said.

The bill allows employers to offer pension-linked emergency savings accounts, which they may automatically opt employees into at no more than 3% of salary. The accounts would be capped at $2,500 (or lower as set by the employer).

Contributions are made post-tax, and are treated as elective deferrals for purposes of retirement matching contributions. Once the cap is reached, the excess emergency savings contributions return to retirement plan savings.

Shai Akabas, director of economic policy at the Bipartisan Policy Center, said Tuesday in a statement that "allowing for automatic enrollment into emergency savings accounts" not only creates "a buffer against unexpected costs in the near term," but also reduces "the likelihood that a person will make early withdraws from retirement savings for those emergency costs."

In addition to helping companies set up traditional retirement plans, the bill also "makes it easier for people to establish new employee-owned businesses," Murray said.

The bill also includes the INFORM Act, "which will ensure people get the information they need when forced to consider whether to take a lump-sum buyout and trade a lifelong pension for a one-time payout," Murray said.

Wayne Chopus, president and CEO of the Insured Retirement Institute, said Tuesday that the bill's passage out of committee "is a critical milestone toward addressing the anxiety and insecurity that many of America's workers and retirees have about achieving a financially secure retirement."

Eric Pan, CEO of the Investment Company Institute in Washington, added in another statement that the "unanimous vote to advance the bill shows that the Senate is working hard to join the House in passing much-needed legislation to expand access to retirement savings plans and improve Americans' ability to save."

ICI , Pan said, "looks forward to the Senate Finance Committee adding to the legislation, and encourages consideration by the full Senate of a bipartisan retirement-savings reform package as soon as is practicable."

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.

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Federal Appeals Court: Employer Can't Force Employee Into Arbitration With Client

by Marianna Wharry

A federal appeals court has unanimously denied Cypress Environmental Management's attempt to force one of its employees to arbitrate a claim against one of the companies' clients.

The U.S. Court of Appeals for the Fifth Circuit affirmed the U.S. District Court for the Western District of Texas' decision to deny the company's motion to compel arbitration after a Cypress employee sued one of the company's customers for an overtime wage violation, court records show.

Troy Hinkle worked as an pipeline inspector for Cypress, and the company assigned him to work as an inspector for Phillips 66, a diversified energy company that stores and transports natural gas and crude oil, according to the circuit court's May 27 opinion.

When Hinkle was hired, Cypress had him sign an employment agreement that contained an arbitration clause, which included that: "[Hinkle] and [Cypress] agree to arbitrate all claims that have arisen or will arise out of [Hinkle's] employment." Only Cypress and Hinkle signed the agreement, and no other party was mentioned in the arbitration clause, according to the opinion.

Hinkle filed a collective action against Phillips 66 in Texas district court only against Phillips 66 and alleged that the company only paid him a day rate without overtime in violation of the Fair Labor Standards Act in April 2020, the opinion said.

Cypress intervened and moved to compel arbitration, along with Phillips 66, and said the delegation clause in Hinkle's arbitration agreement required an arbitrator, not the court, to determine whether Hinkle's claim against Phillips 66 was covered by the agreement, the opinion said.

"The issue is not whether Hinkle has an arbitration agreement with anyone—it is whether he has an agreement to arbitrate with the party he is suing, Phillips 66," Circuit Judge Gregg Costa wrote for the three-judge panel.

The appeals court rejected Cypress's claim that the company is an aggrieved party under Section 4 of the FAA and said Cypress's claim of joint liability due to Hinckle's filing on a collective basis.

Cypress's potential for joint liability did not make it an aggrieved party, the court said, since "[i]t is only where the arbitration may not proceed under the provisions of the contract without a court order that the other party is really aggrieved," court records show.

"As we have explained, Hinkle only promised to arbitrate claims brought against Cypress," Costa wrote. "Claiming that Hinkle did not arbitrate its claims with Phillips 66 is therefore not an allegation that he violated his agreement with Cypress."

Attorney Richard "Rex" Burch is a part of a team from the Josephson Dunlap Law Firm in Houston representing Hinkle and said the team looks forward to pursuing Hinkle's claim.

"The Court's application of basic contract principles confirms what everyone already knew: Mr. Hinkle never agreed to arbitrate anything with Phillips 66," Burch said. "We look forward to litigating Mr. Hinkle's claims on the merits."

Attorneys Richard Mark Schreiber, Andrew Wells Dunlap and Julianne Lomax also represented Hinkle.

Attorneys Shauna Johnson Clark and Kimberly Frances Cheeseman, of Norton Rose Fulbright US in Houston, represented Phillips 66.

Attorneys Rachel Cowen and John Barrick Bollman, of McDermott Will & Emery in Chicago, represented Cypress.

"The issue is not whether Hinkle has an arbitration agreement with anyone—it is whether he has an agreement to arbitrate with the party he is suing, Phillips 66," Circuit Judge Gregg Costa wrote for the three-judge panel.

Counsel for Phillips 66 and Cypress did not return a request for comment prior to publication.

Marianna Wharry reports for Law.com, an ALM affiliate of the Daily Business Review. Contact her at mwharry@alm.com.

State Supreme Court: Race, Ethnicity Relevant to Determining Whether Law Enforcement Has 'Seized' Someone

by Marianna Wharry

An individual's race or ethnicity must be considered within the "totality of circumstances" when determining whether an individual was under seizure by law enforcement, the Washington State Supreme Court held June 9.

The justices unanimously reversed a state Court of Appeals decision upholding a Pierce County man's conviction for making a false or misleading statement to a public servant. His other convictions, unlawfully possessing a firearm in the first degree and attempting to elude a pursuing police vehicle, still stand, according to his attorney.

"Our precedent has always required that the seizure inquiry be made in light of the totality of the circumstances, and we have never stated that race and ethnicity cannot be relevant circumstances," Justice Mary Yu wrote for the court en banc. "However, we have not explicitly held that in interactions with law enforcement, race and ethnicity matter. We do so today."

Palla Sum gave a Pierce County sheriff's officer a false name and birth date before fleeing the scene while police investigated the vehicle under suspicions that it had been stolen in April 2019, according to the court's opinion. The officers initially approached Sum and another individual sleeping inside of a Honda Civic after running the plates and determining that the car was not stolen. Officers regularly patrolled the area looking for stolen vehicles or illegally parked cars, the opinion said.

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An individual's race or ethnicity must be considered within the "totality of circumstances" when determining whether an individual was under seizure by law enforcement, the Washington State Supreme Court held June 9.

The panel determined that Sum was seized when a deputy requested Sum's identification while implying that he was under investigation for car theft. The panel noted in its opinion that the deputy did not inquire about Sum's health or safety and did not ask either he or his passenger if they needed medical assistance.

The justices said the man's false statements to police must be suppressed on remand because an "objective observer" could conclude that Sum had been seized based on the deputy's display of authority, according to the opinion.

"As the [s]tate properly concedes, at that time, the deputy did not have a warrant, reasonable suspicion, or any other lawful authority to seize Sum," Yu wrote. "As a result, Sum was unlawfully seized, and the false name and birth date he gave to the deputy must be suppressed."

The panel also explained that state law provides that a police seizure has occurred if an objective observer can discern that an individual could not freely leave or decline a request.

However, the court said this observer must also have awareness that "implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against Black, Indigenous, and other People of Color (BIPOC) in Washington."

"In any appellate court ruling, whether it's a narrow decision or an expansive one, I hope that it will bring clarity," Pierce County Prosecuting Attorney Mary Robnett told Law.com in a statement. "Unfortunately, this decision will likely further confuse law enforcement officers about their interactions with the public. Police officers and trial court judges, especially, are facing some confusing and uncertain times ahead as they try to correctly apply the court's ruling."

A spokesperson for the office also said the decision went "further and appears to elevate" factors of race and ethnicity "above all other factors, including immigration status, religious affiliation, disability, gender, sexual orientation, use of force by the officer, or any other relevant circumstances."

Sum's attorney Jennifer M. Winkler, of Nielsen Koch & Grannis in Seattle, said she is satisfied with the ruling and time will tell how the court's ruling will impact marginalized communities. She also said she thinks it will help clarify the law and better reflect the reality of marginalized communities.

"Today, we formally recognize what has always been true: in interactions with law enforcement, race and ethnicity matter," Yu wrote. "Therefore, courts must consider the race and ethnicity of the allegedly seized person as part of the totality of the circumstances when deciding whether there was a seizure for purposes of article I, section 7."

Attorneys Britta Ann Halverson and Anne Elizabeth Egeler, of the Pierce County Prosecutor's Office in Tacoma, represented the state.

Marianna Wharry reports for Law.com, an ALM affiliate of the Daily Business Review. Contact her at mwharry@alm.com.