OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXVIII NUMBER II
FEBRUARY 2021
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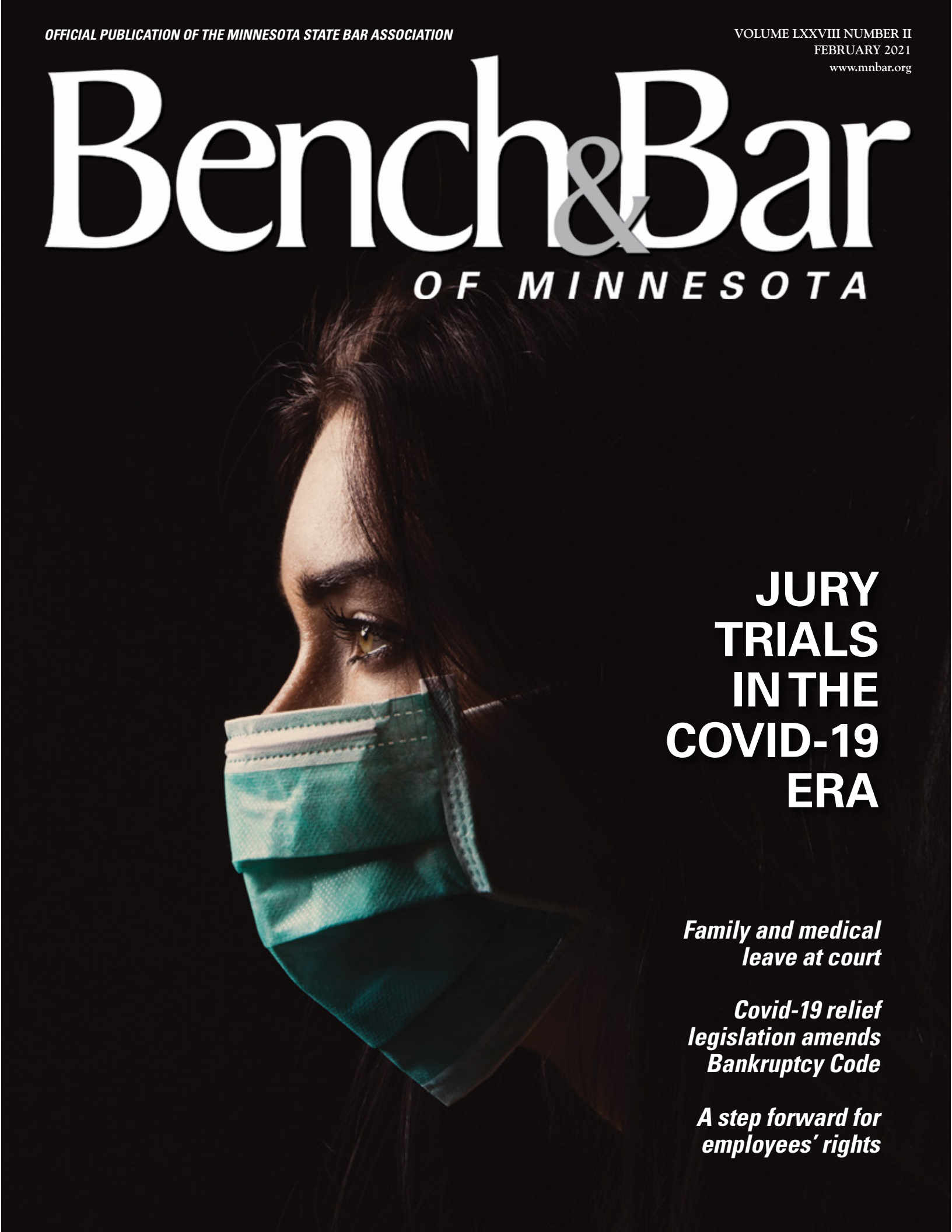

JURY TRIALS IN THE COVID-19 ERA

Family and medical leave at court

Covid-19 relief legislation amends Bankruptcy Code

A step forward for employees' rights

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Get on the team

My father was a high school basketball coach. One of the most significant lessons I learned from my dad is the importance of teamwork. At any point in time there may be a star player on the court who gets a lot of the glory, but the coach knows that without the support of a strong team, that individual player would not enjoy as much success. Indeed, as legendary college basketball player and coach John Wooden noted, "The main ingredient to stardom is the rest of the team."

One of my law firm's core values is "interdependence." To us, this means appreciating the value the whole team—the lawyer, the paralegal, the administrative staff—provides to the client experience. At trial, I may be the one at the free-throw line, with one second remaining and the game tied, but I know my teammates helped me get there.

Being the member of a team, and recognizing and valuing each member's individual strengths and contributions, have accounted for some of my most rewarding experiences. When everyone on a team is accountable and committed, the reward comes from the satisfaction of the effort regardless of the final score of the game or the outcome of the project.

I believe this is the reason I was initially drawn to, and became so involved in, the MSBA and why I have found it to be so personally rewarding. The MSBA epitomizes the concept of teamwork and working together toward a common goal, and it has filled a gap in my professional life.

DYAN EBERT is a partner at the central Minnesota firm of Quinlivan & Hughes, P.A., where she served as CEO from 2003-2010 and 2014-2019. She also served on the board of directors of Minnesota CLE from 2012-2019.

The MSBA has given me the opportunity to collaborate with and learn from attorneys across the state, and even across the country, about some of the most significant issues facing our profession and society. Most recently, these discussions have focused on issues related to recognizing and confronting systemic racism in our justice system, the ongoing efficacy of the bar examination, and defending the rule of law and the Constitution in the face of unprecedented attacks on our democracy. Through these experiences and discussions, my eyes have been opened to a variety of perspectives that I likely would not have encountered or appreciated but for my involvement in the MSBA. I am a better lawyer, and a better citizen, because of the things I have been exposed to through membership and leadership with the MSBA.

Each member of the MSBA has the opportunity to serve on the team and to make a unique and valuable contribution.

Each member of the MSBA has the opportunity to serve on the team and to make a unique and valuable contribution to the overall success of the association and, in turn, the profession. When the intelligence and commitment of these members are focused on a common goal, the force is formidable and both the individuals and the team are elevated. Whether it is through involvement in a section or a committee, or through service on the Assembly, Council, or Executive Committee, individual egos fall away when MSBA members are working on a project, and the focus quickly turns to finding a path to the decision that will benefit the entire team.

This is not to suggest that there are no differences of opinion about what is best for the association or the profession, or about how a problem should be addressed. Indeed, that is another aspect of my involvement in the MSBA that I have found so rewarding: the willingness and commitment to consider a wide diversity of opinions and ideas when confronting tough issues. Even when an issue is controversial, the MSBA strives to provide a forum for healthy, respectful debate. These sessions remind me of another Coach Wooden-ism: "Surround yourself with smart people who'll argue with you."

Join the team. Be active in the MSBA. Step forward to take on a leadership role in one of the sections or committees—raise your hand and volunteer when asked. You'll enjoy the satisfaction of the effort, and the camaraderie that develops, perhaps even as much as you enjoy making that game-winning shot. ▲

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WE'D LIKE TO HEAR FROM YOU: To query potential articles for Bench & Bar, or to pass along your comments on matters related to the profession, the MSBA, or this magazine, write to editor Steve Perry at sperry@mnbars.org or at the postal address above.

MSBA sets 2021 lobbying agenda

The MSBA Council has identified the association's primary lobbying priority for the 2021 Minnesota legislative session as adequate funding for the Minnesota judicial branch, legal aid and pro bono programs, and the public defender system. As the Legislature develops the state budget for FY 2022-23, the MSBA's voice on this issue is particularly vital given budgetary shortfalls related to the pandemic public health emergency.

The Council has established two priorities directly related to pandemic exigencies, one of which will help avoid malpractice issues. Minnesota Session Laws 2020, Chapter 74, Section 16 created some ambiguity regarding suspension of statutes of limitation (SOLs) during the public health emergency. The MSBA will seek legislation to clarify that only SOLs extinguished during the emergency are suspended and to allow 60 days after the emergency ends for litigants to make initial filings under SOLs extinguished during the emergency.

The MSBA will also lobby to make permanent the harmless error standard for nonconforming execution of a will, allowing a nonconforming last will and testament to be probated if the execution defects are shown by clear and convincing evidence to be harmless error. This statutory change was adopted in the 2020 legislative session as a temporary standard and will expire on February 15, 2021.

Finally, the MSBA will prioritize advancing legislation to provide a right to counsel for public housing tenants facing eviction due to an alleged breach of lease.

Nominations open for Becker Awards

Each year, the MSBA honors those who exemplify the legacy of Bernard P. Becker, a champion of legal rights for the vulnerable and those living in poverty. Three Becker Legal Services Staff awards are presented annually to attorneys, paralegals, administrators, or other staff employed by a private, nonprofit agency that provides legal services to low-income eligible clients. The Becker Student Volunteer Award is presented to a law student who has demonstrated a commitment to the provision of legal services to low-income persons. The deadline for nominations is February 26, 2021. Visit *www.mnbar.org/becker-awards*

SECTION IN ACTION

▲ In December the MSBA Civil Litigation Section hosted a drop-off donation event at the Soule & Stull offices for My Very Own Bed, a non-profit organization that supplies bedding for children in need. In addition to virtually donated items, the section council members gathered a box full of new bedding, stuffed animals, and books to donate. Hot chocolate, cookies, and good cheer were served to those who stopped by. The event even attracted some passersby and neighbors who were eager to give for such a worthy cause.

Civ Lit Section honors one of its own

Kim Allen Pennington

On December 9, the Civil Litigation Section met for their Annual Meeting & CLE which included an opportunity to honor a colleague for outstanding contributions to the profession and to civil justice in Minnesota. The 2020 Advocate Award went to Kim Allen Pennington from Pennington Cherne Gaarder & Geiger Hagen, PLLC of St. Cloud.

Kim played a key role in transitioning our civil justice system to a model that incorporates mediation as a central feature. He has demonstrated a strong commitment to mediation for decades, including a dedication to underrepresented groups. While it was unfortunate that we were not able to meet to honor him in person with our regular annual gala, we were delighted to be able to honor him in an intimate setting.

The Civil Litigation Section is now seeking nominations for the 2021 Advocate Award. To submit a nomination, please email the following information to Kara Haro (kharo@mnbars.org):

- Your name and professional address
- The nominee's name and professional address
- A short statement of the nominee's qualifications

More information can be found at: **www.mnbar.org/advocate-award**

A Fastcase update

By now you may already have heard that the legal research platform Fastcase (available free to MSBA members) recently merged with its rival Casemaker. For now, this development will have no impact on members' experience with Fastcase. Moreover, Fastcase has promised that any new developments at the platform will be announced well ahead of launch.

We are excited by this development. Some of you might remember that the MSBA piloted a Casemaker member subscription in 2016. We liked Casemaker's breadth of content and its simple user interface. But we subsequently returned to Fastcase. Members like it and Fastcase is rapidly developing. Since the MSBA renewed its agreement, Fastcase has added Law Street, Docket Alarm, and Minnesota CourtOps. They acquired the AI resource Judicata and updated their NextChapter offerings. We're excited to see where Fastcase is growing and we'll be sure to keep members up to speed. In the meantime, read the merger FAQ (*www.fastcase.com/blog/fastcase-casemaker-merge*) and direct any questions to MSBA Practice Management Adviser Mike Carlson (*mcarlson@mnbars.org*).

Upcoming CLE roundup

On February 19 the Public Law Section will host a lunch-hour virtual CLE with the New Lawyers Section called "How to be a Successful Attorney in Government Practice." Attendees will hear from a panel of public sector professionals on their backgrounds, how they came to their current positions, and their advice on how best to pursue a career in public law as a new attorney. This event is a great opportunity for law students and new lawyers to learn about public law and professional development.

On March 4 the MSBA, HCBA, Federal Bar Association, and Minnesota Women Lawyers (RISE) are hosting a "rotating roundtable" event celebrating trailblazing women attorneys and judges. This event is the latest in a series of The Vintage events, which bring together experienced and new lawyers to preserve the history of our bar and share stories and learning. We will use breakout rooms to simulate roundtables with smaller groups that allow for more personal conversations.

Visit **www.mnbar.org/cle-events** to register for these or other upcoming webinars.

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8th & 9th Judicial Districts
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5th Judicial District
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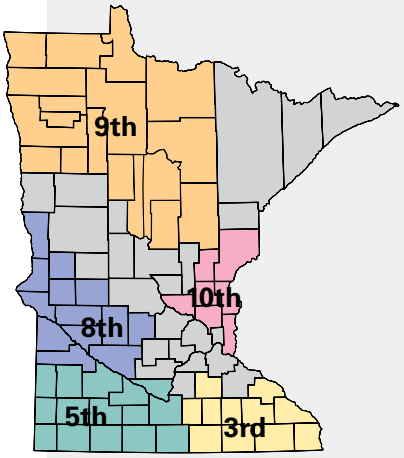
APRIL 30

10th Judicial District
JULY 8



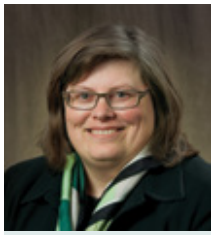
Public discipline summary for 2020

Each year I take this opportunity to provide an overview of public discipline. While the year was certainly an unusual one due to the pandemic and the havoc it wrought, public discipline in 2020 was very similar to 2019, with 33 attorneys receiving public discipline as compared to 35 the year prior.

Discipline in 2020

Public discipline is imposed not to punish the attorney, but to protect the public, the profession, and the judicial system, and to deter further misconduct by the attorney and others. Besides the 33 attorneys who received discipline in 2020, the year was also remarkable for the number of transfers to disability status in lieu of public discipline proceedings. Five attorneys had discipline files placed on administrative hold due to disability. Many disability transfers are due to lawyers practicing longer than their mental or physical health suggests they should—primarily due to financial reasons. As the profession continues to age and the economy struggles, I worry that we will see this trend continue.

Three attorneys were disbarred in 2020: Paul Hansmeier, Daniel Lieber, and Thomas Pertler. Each disbarment is notable in its own way but they are striking collectively because none involved the intentional misappropriation of client funds, which remains the most common cause of disbarment. Mr. Hansmeier was disbarred for committing bankruptcy fraud, following a lengthy prior suspension for engaging in sanctionable litigation misconduct that included lying to the courts. Mr. Pertler was disbarred for prosecutorial misconduct, discussed at length in my November 2020 column. Tragically, Mr. Pertler died on November 16, 2020, at the age of 56. His obituary reports he fell ill last autumn while looking for a retirement home in Alabama.



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

SUSAN.HUMISTON@COURTS.STATE.MN.US

Daniel Lieber's permanent disbarment was a first in Minnesota. Mr. Lieber was originally disbarred in July 2005. Disbarment, however, is not generally permanent. A disbarred lawyer, after a minimum of five years, may retake the bar exam and petition for reinstatement. They have a heavy burden to prove fitness, but can be reinstated. The Court determined that Mr. Lieber met that burden in 2013, and reinstated him to the practice of law, placing him on probation.

Mr. Lieber then engaged in additional misconduct similar to his prior misconduct, namely failure to properly maintain his trust account books and records, which was found to be willful. In an interesting decision in early 2020, the Court issued the unusual discipline of a "stayed disbarment," as opposed to the lengthy 18-month suspension recommended by the referee, and the three-year suspension recommended by the Director.[1] In its decision, the Court took into consideration the significant mitigation that Mr. Lieber offered, including the serious illness of his daughter. The Court noted it hoped to never see Mr. Lieber again. Alas, Mr. Lieber had engaged in additional misconduct, and ultimately stipulated to permanent disbarment in September 2020. As he did following his prior disbarment. Mr. Lieber continues to work in the legal field as nonlawyer staff at his former law firm.

Suspensions

Twenty-four attorneys were suspended in 2020, a number very similar to 2019 (22 attorneys). The 24 cases reflect no particularly noteworthy trend but include several interesting ones. Kent Strunk was suspended for five years for his five felony convictions for possession of child pornography. Felony criminal convictions will always lead to public discipline but do not always lead to disbarment if the convictions are for conduct outside the practice of law. In Mr. Strunk's case, the referee recommended to the Court a three-year suspension with credit of one year for voluntarily stopping the practice of law upon his arrest, and with the suspension to terminate upon successful completion of Mr. Strunk's criminal conviction. The Director challenged this recommended disposition on the grounds that a five-year suspension was more consistent with the Court's prior case law and the seriousness of the crimes committed. The Supreme Court agreed, but reiterated that disbarment is the presumptive discipline for a felony conviction and that the disposition in such cases is "fact intensive, and considers numerous factors, including the nature of the criminal conduct, whether the felony was directly related to the practice of law, and whether the crime would seriously diminish public confidence in the profession."[2]

Duane Kennedy received a lengthy suspension for sexually harassing his young client, attempting to have a sexual relationship with his client, making false statements to police and the Director about his misconduct, and failing to provide accurate trust account books and records as part of his probation.[3] Mr. Kennedy was taped soliciting sex from a client in a criminal matter who was 22 years old and approximately 50 years his junior. The client reported the attempt to law enforcement. The county attorney ultimately declined to prosecute Mr. Kennedy for bartering for sex, but referred the matter to the Director.

Mr. Kennedy denied the misconduct, claiming the audio reflected consensual sexual banter and that any unprofessionalism warranted at most a 30-day suspension. The Court rejected his arguments, concluding that sexual harassment of a client is serious misconduct. Mr. Kennedy's lewd comments were persistent and pervasive and took advantage of a trust relationship. In light of respondent's disciplinary history (which included

admonitions, a public reprimand, and several short suspensions) and the seriousness of the misconduct (sexual harassment and lies), the Court imposed a suspension of two years.

The Court also suspended attorney Ignatius Udeani for misconduct across multiple client matters.[4] Mr. Udeani was an immigration attorney and his conduct involved violations of almost every rule of ethics—including a pattern of incompetent representation, neglect, failure to communicate with clients, and failure to return unearned fees; failing to properly supervise a nonlawyer assistant and failing to take reasonable steps to prevent the known misconduct of the nonlawyer assistant, which resulted in the theft of client funds; failing to safeguard client funds and maintain all trust-account-related records; representing a client with a conflict of interest; and failing to cooperate in multiple disciplinary investigations. Mr. Udeani was suspended for three years, but two justices thought Mr. Udeani should be disbarred due to the vulnerable nature of his immigrant clients and the persistent nature of his misconduct, much of which occurred while on probation for prior misconduct and while being supervised by an experienced probation supervisor who was trying to help Mr. Udeani with his practice.

Public reprimands

Six attorneys received public reprimands in 2020 (one reprimand-only, five reprimands and probation). A public reprimand is the least severe public sanction the Court generally imposes. One of the most common reasons for public reprimands is failure to maintain trust account books and records, leading to negligent misappropriate of client funds. Four of the six reprimands related in some manner to trust account issues. As always, ensuring that you accurately maintain your trust account records and are very careful with client funds is a fundamental ethical obligation of lawyers. We have a lot of resources on our website to assist with this important duty, and are always available to answer questions if you are uncertain.

Conclusion

The OLPR maintains on its website (*lprb.mncourts.gov*) a list of disbarred and currently suspended attorneys. You can also check the public disciplinary history of any Minnesota attorney by using the "Lawyer Search" function on the first page of the OLPR website. Fortunately, very few of the more than 25,000 active lawyers in Minnesota have disciplinary records.

As they say, "there but for the grace of God go I." May these public discipline cases remind you of the importance of maintaining an ethical practice, and may these cases also motivate you to take care of yourself, so that you are in the best position possible to handle our very challenging jobs. Call if you need us—651-296-3952. Please also note that we have moved to a new location in St. Paul after 20 years at our old office: Our new address is 445 Minnesota Street, Ste. 2400, St. Paul, MN 55101. Emails, fax, and telephone numbers remain the same. ▲

Notes

[1] *In re Lieber*, 939 N.W.2d 284 (Minn. 2020).
[2] *In re Strunk*, 945 N.W.2d 379 (Minn. 2020).
[3] *In re Kennedy*, 946 N.W.2d 568 (Minn. 2020).
[4] *In re Udeani*, 945 N.W.2d 389 (Minn. 2020).

The SolarWinds breach and third-party vendor security

This past December, it was discovered that many Fortune 500 companies and U.S. government agencies had been hacked by a Russia-based attacker. The breach seems to have begun last spring—and to have gone undetected for months. The attacks that have been confirmed involve SolarWinds, a software company that provides system management tools used by the IT teams of hundreds of thousands of companies and organizations, including the U.S. government. The attacks took advantage of a routine SolarWinds update in its popular Orion product, a network management system.

Essentially the attackers took control of the controls. According to the New York Times, "the Russians, investigators said, were able to insert counterfeit 'tokens,' essentially electronic indicators that provide an assurance to Microsoft, Google or other providers about the identity of the computer system its email systems are talking to."[1] Many experts deem this hack the largest and most sophisticated of its kind in the past five years. While the intent and extent of the breach have not been fully ascertained, the attack underscores the import of considering third-party risk and embracing strong proactive security strategies.

MARK LANTERMAN is CTO of Computer Forensic Services. A former member of the U.S. Secret Service Electronic Crimes Taskforce, Mark has 28 years of security/forensic experience and has testified in over 2,000 matters. He is a member of the MN Lawyers Professional Responsibility Board.

In the past I've discussed the often-underestimated element of third-party risk and its impact on an organization's overall cybersecurity posture. Regardless of the strength of internal security practices, policies, and procedures, an organization essentially assumes the risks of its third-party vendors. While it is challenging to accurately identify and mitigate every risk that may exist as a result of entering into a third-party agreement—especially considering the vast amount of data collected by many firms and companies—it is important to manage these risks as effectively as possible. Establishing a responsible party for reviewing contracts and third-party vendor relationships as well as creating a regular auditing schedule can help to address potential threats and enable organizations to better respond to cyber events when they happen.

Unfortunately, the third party involved in this attack was not made aware of the breach until months after it was initiated. The cyber attackers did their best to go unseen, minimizing their activities to prolong their access to the affected systems, networks, and data. The stealth and sophistication of this attack illustrate an important axiom about cyber risk: The most lethal attacks tend to be those that evade detection for the longest periods of time. And while companies, particularly Microsoft and FireEye, claim to have produced a "kill switch" for the offending malware,[2] it's entirely likely that the attackers have embedded additional backdoors into a very large number of compromised systems. I believe that this attack is one that the U.S. will have to contend with for years to come.

This attack is distinctive in several ways, making its true impact difficult to quantify. First, the attackers were able to bypass security sandboxing (a mechanism used to separately run, and isolate, potential sources of malware) by delaying the execution of the malware once it was installed. According to FireEye, "The sample only executes if the filesystem write time of the assembly is at least 12 to 14 days prior to the current time; the exact threshold is selected randomly from an interval."[3] Second, in addition to delaying execution, the malware would also attempt to determine the IP address of the infected system prior to execution. If it was Microsoft-owned or linked to a Microsoft-owned network, the malware would not execute. This further demonstrates the attackers' intent to evade identification for as long as possible.

For purposes of mitigation, I believe it is best for an organization to assume it has been compromised if it is currently deploying, or has recently deployed, Orion. It is also important to assess any vulnerabilities in other network management systems, especially given the prevalence of verbose logging (the detailed logging of network traffic) and the prioritization of data availability over security. For the legal community, accounting for third-party risks is an essential component of a strong cybersecurity posture. Utilizing third-party services is largely unavoidable, and supply chain compromises are very difficult to control, but it is critical to identify and manage these risks to the best of your firm's ability. The better you know your third-party vendors' approach to security, the better you are able to holistically assess and improve your own security posture. The SolarWinds episode is also a reminder to actively scan your network for threats and conduct regularly scheduled security assessments. ▲

Notes

[1] *https://www.nytimes.com/2020/12/13/us/politics/russian-hackers-us-government-treasury-commerce.html*

[2] *https://cisomag.eccouncil.org/sunburst-malware-kill-switch/*

[3] *https://www.fireeye.com/blog/threat-research/2020/12/evasive-attacker-leverages-solarwinds-supply-chain-compromises-with-sunburst-backdoor.html*

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'We are blessed to be members of this honorable profession'

Why did you go to law school?

Politics. In college I was a student leader. I wanted to give back and to help my fellow classmates with the challenges that they were facing. I was elected as student body president and then chair of the statewide nonprofit student association. I lobbied frequently at the state legislature and in Washington D.C. I quickly learned that many of the most successful politicians were lawyers. So law school became the natural next step. I didn't know at the time that I'd soon fall in love with being a criminal defense attorney, and with helping people with the challenges that they are facing.

What's the best advice you ever got?

Ever since grade school, my father would frequently tell me to "show up." He tried to instill in me the idea that those who show up will end up being the most successful. I took those words to heart throughout school, college, and law school, and now to this day as a practicing attorney. His words have always proven to be true. I've brought that same advice into my professional work as a lawyer and I have found success through showing up to bar association meetings and events, other professional activities, Supreme Court board meetings, etc.

SAMUEL EDMUNDS is a criminal defense lawyer. He represents clients in criminal cases ranging from misdemeanor to homicide throughout Minnesota and Wisconsin, and he is a Board Certified Criminal Law Specialist. Samuel is a former chair of the MSBA New Lawyers Section, chair of the MSBA's Practice Management and Marketing Section, and chair of the Elections and Appointments Committee, and he is a delegate to the American Bar Association House of Delegates. Outside the organized bar, Samuel has been inducted into the membership of both the Minnesota Society for Criminal Justice and the Academy of Certified Trial Lawyers of Minnesota, and he is a Life Fellow of the American Bar Foundation.
SAM@SIEBENEDMUNDS.COM

How has the pandemic changed your practice?

We are private practice attorneys at Sieben Edmunds Miller PLLC. Our practice areas include criminal defense and personal injury litigation. The early months of the pandemic brought a significant slowdown. Lucky for us, however, during the latter part of 2020 we have seen our practice thrive once again. More importantly, the pandemic has forced us to get creative. We aren't meeting clients in person. We are not going to the courthouses. We cannot meet other lawyers at the bar association. Instead, we've found ways to use technology to continue all of the important parts of our work, including video conferencing, online scheduling, virtual court appearances, and remote lunches or happy hours.

You've been involved in volunteer work for the bar for many years and in numerous capacities. Why? What do you get out of it?

There are three answers to this. First, I feel that all of us lawyers have a professional obligation to give back. We are blessed to be members of this honorable profession. Membership in the bar is coveted by many but achieved by few. As lawyers, we should all contribute to making sure that our honorable profession remains honorable. And we can do that through the various bar associations, lawyer organizations, and boards and committees, and through outreach outside the legal community.

Second, the bar association is fun. I met many of my best friends during my early days in the New Lawyers Section of the MSBA. Bar association work gives me the chance to leave my day-to-day law practice for a short time and to engage with other lawyers who are facing the same challenges that I face.

Last, and no less important, the bar associations have been key to my success as a small firm lawyer. At every meeting or event, I'm in a room with a group of lawyers who don't do what I do. Cultivating those relationships has turned out to be my number one source of business as a criminal defense lawyer.

What do you like to do when you're not working?

I'm lucky to have the best wife and five kids that I could ever hope for. They are the reason that I do all the rest of this. I'm also a golfer, a scuba diver, and downhill skier, when I find the time. In earlier times, I was fortunate to have the opportunity to scuba dive in places like Honduras, Vietnam, St. Thomas, and many others. Now, I try to start my kids off early in skiing or golfing, hoping that they'll find the same enjoyment that I do as they get older. ▲

WE ALL NEED IT AT SOME POINT

The MSBA's proposal for family and medical leave at court

By Christine B. Courtney

Imagine that one of your elderly parents has a sudden fall and fractures a hip, resulting in a long and painful rehabilitation in a long-term care facility. You are your parent's attorney-in-fact and health care agent, so you are the point person to navigate matters of care, scheduling, bills, and home upkeep. At the same time, you have a non-emergency court proceeding looming. Your client would prefer to delay the proceeding for a short time rather than transition the case to another attorney due to the additional expense and the client's relationship with you. You are concerned about requesting a continuance from the court for a variety of reasons, although that option seems logical given the circumstances.

Why doesn't Minnesota have a rule providing for a continuance in a legal matter to allow attorneys to take a reasonable family or medical leave?

In the summer of 2020, the MSBA convened a working group of attorneys and judges to draft amendments to various Minnesota rules that would allow attorneys to request a continuance of a court proceeding in the event of the attorneys' temporary inability to represent the client due to a health condition; the birth or adoption of a child; or the need to care for a spouse, dependent, or parent who has a serious health condition.

> "The default is to just offload your cases on to someone else so no one is 'inconvenienced' by the birth…. The reality is that it takes an unbelievable toll on a woman's practice and professional trajectory. It forces women to take a step back and, I believe, adds to the incredible attrition rates of women in private practice."
>
> – Survey respondent

> "I opted not to ask for the continuance as my male partners expressed the view that I had been on 'vacation'."
>
> – Survey respondent

Why do we need to change court rules?

During the fall of 2020, the MSBA surveyed attorneys on whether they had ever requested a family or personal leave from the court. Of those attorneys who chose to take the survey, some 13 percent had requested some form of a continuance from the court in an active case. In most instances, they indicated, co-counsel acquiesced and the court granted the request.

Unfortunately, that experience is not universal. As one attorney noted, "I asked for a hearing to be postponed because I had only given birth seven days prior and the request was denied." Other attorneys reported significant pushback from opposing counsel. In one instance, opposing counsel refused to stipulate to amend the scheduling order: "Ultimately, I moved to amend the scheduling order and was forced to provide details of my pregnancy, due date, and leave plans to the [c]ourt. The [j]udge approved my request. The whole ordeal was humiliating, time consuming, and a waste of judicial (and client) resources." While her amendment was granted, the process required to obtain the amendment illustrates the defects with our current makeshift system: It is inefficient for the court and for clients, and it is unduly humiliating and problematic for a professional to be forced to share personal medical details, sometimes on public record, in their clients' cases.

In a profession where reputation is critical to your success on behalf of clients, special care is taken to maintain that reputation. In one instance where an attorney asked for a trial continuance, the trial judge denied the request. Reflecting on that experience, the attorney told us that she chose not to escalate the request to the chief judge because she "felt like if [she] took the request to the chief judge [she'd] get punished in the future by the trial judge." Other attorneys expressed a similar reluctance to potentially prejudice their clients in front of a judicial officer.

More alarmingly, the survey demonstrated that a higher share of attorneys (26 percent of those who responded to our survey) chose not to ask for a leave, even when it was necessary for their own health or an important family matter. Some reported that it never occurred to them that they had the option to ask the court for a continuance; others believed that such a request would be denied.

Several attorneys worried that even asking for a continuance for a significant medical or family reason would cause the attorney to be viewed as "decidedly unprofessional." Another noted a concern that asking for a continuance for a personal reason would result "in a report to the Board that I had failed somehow in my duties or in my professional responsibility." Altering court rules to create a mechanism to request a continuance would normalize and protect this practice so that attorneys would not be vulnerable to this kind of attack.

Many attorneys responded that it is more appropriate to ask another attorney to fill in on the case while on health or family leave. Others pointed out the obvious detriments of this solution: "[The attorneys at my firm] are not fungible and each [has] knowledge of our own cases, not the others'." Aside from the logistical challenge of passing an active court case to another attorney, one of the attorneys pointed out that a simple substitution of counsel "does not work… from the client's perspective, and I think forcing women to explain that to clients exacerbates negative stereotypes that female attorneys already face compared to their male counterparts."

The sheer number of attorneys who felt proscribed from asking for a needed continuance (or who had to reveal personal medical information to substantiate a continuance request) is appalling. This makeshift system is entirely reliant upon the predilections of opposing counsel and the assigned judge. It opens the requesting attorney to potential and unnecessary abuse, embarrassment, or humiliation at the hands of the court or opposing counsel.

Proposed rule changes

The MSBA's working group has drafted amendments that would allow attorneys to apply for a continuance of a court proceeding in the circumstances outlined above. The application process is designed to be simple, requiring no personal or medical information from the attorney, and to avoid wasting client and judicial resources on an extensive back-and-forth motion practice.

While attorneys need a mechanism to request a continuance, there are other issues that must be balanced: the clients' right to a resolution of their matter and the system's interest in protecting against abuse of this new provision. For that reason, the proposed amendments have a built-in process for challenging the continuance request. The proposed amendments also safeguard against impairing a substantial right of the client when alternate arrangements can be made. Of course, attorneys retain the option of working with co-counsel and substitute counsel in lieu of requesting a continuance through this rule change.

> "There are times when I think I just can't keep pulling off this magic trick of being a litigator and a mother and wife and daughter of two elderly parents."
>
> – Survey respondent

A call to action

At present, the proposed amendments have been submitted to the various sections of the MSBA for comment and approval. The bulk of the proposed changes can be found in Minnesota Rule of General Practice 17. There are related changes to Minnesota Rules of Appellate Procedure 126.02 and 134.02, and Minnesota Rule of Civil Procedure 26.04. Comments are due from each of the sections by March 31, 2021.

As you deliberate these rules, consider that our colleagues are first people: people with medical conditions, with children, with aging parents. These rule amendments provide another way that each of us can continue our work while also managing the other responsibilities in our lives. One attorney who wrote to us summed it up well: "We all need it at some point."

We look forward to your feedback and to making progress for our profession in Minnesota. ▲

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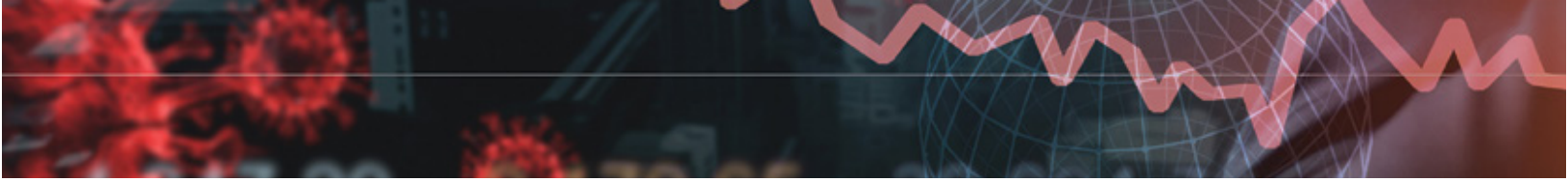
New covid-19 relief legislation amends Bankruptcy Code

A brief guide to what you need to know

By George H. Singer

In response to the continuing crises brought on by the covid-19 pandemic, Congress recently passed the Consolidated Appropriations Act, 2021 (CAA). The legislation signed into law by the president on December 27, 2020 is one of the longest bills (5,593 pages) and largest spending measures ever enacted. The CAA contains among its provisions a number of amendments to the United States Bankruptcy Code, 11 U.S.C. §§101 *et seq.*, all of which became immediately effective upon being signed into law. Most of the changes are temporary and sunset on either the first or second anniversary of enactment. The amendments to the Bankruptcy Code are briefly summarized in this article.



■ **Property Not Considered Property of the Estate (11 U.S.C. §541).** Section 541 of the Bankruptcy Code defines—very broadly—what constitutes property included in the estate of a debtor in a bankruptcy case. Section 541(b) also defines what is *not* property of the estate and thereby excluded from administration in bankruptcy.

The CAA adds a new subsection 541(b)(11). The amendment excludes federal coronavirus relief payments ("recovery rebates made under section 6428 of the Internal Revenue Code of 1986," a provision created by the CARES Act signed into law on March 27, 2020[1]) from the estate. Such payments are not recoverable by creditors or a Chapter 7 bankruptcy trustee. This amendment has a one-year sunset.

■ **Chapter 13 Plan Default Relief (11 U.S.C. §1328).** Chapter 13 of the Bankruptcy Code provides individual debtors who have regular income with the opportunity to reorganize their debt by providing partial payment to unsecured creditors under a plan and to preserve their possession of their residence by making regular payments to the mortgage lender.

The CAA amends section 1328 of the Bankruptcy Code to help Chapter 13 debtors retain their discharge under a confirmed plan even if the debtor has missed up to three monthly payments due on a residential mortgage. The debtor must demonstrate causation—namely that the defaults were attributable to a material financial hardship due, directly or indirectly, to the covid-19 pandemic. The missing mortgage payments must still be paid, but the debtor would not lose the benefits of the discharge for other debt. This amendment has a one-year sunset.

■ **Additional Protection from Discriminatory Treatment (11 U.S.C. §525).** Section 525 of the Bankruptcy Code is designed to protect debtors from discriminatory treatment by governmental entities or private employers on the grounds that they have been a debtor in bankruptcy.

The CAA adds a new subsection 525(d) to provide that debtors are similarly protected from discrimination based on receipt of CARES Act assistance in the form of mortgage debt forbearance, mortgage debt payment assistance, or eviction relief. This amendment has a one-year sunset.

■ **Claims Process for CARES Act Forbearance Claims (11 U.S.C. §§501, 502).** Sections 501 and 502 of the Bankruptcy Code address the filing and allowance of claims in bankruptcy cases. The CARES Act mandates that certain mortgage lenders forbear from exercising their rights on federally backed mortgage loans. These forbearance periods can be as long as 12 months, which can create complications in Chapter 13 bankruptcy cases. At the end of the forbearance period, the debtor is required to pay the deferred mortgage payments in a lump sum.

The CAA amends section 501 and 502 of the Bankruptcy Code to establish a process by which creditors may file proofs of claim for amounts lost due to forbearance periods mandated by the CARES Act. The new relief legislation imposes requirements for such claims, including that any such forbearance claim shall be timely filed if filed before the 120th day after the expiration of the forced forbearance period. As such, servicers may file proofs of claim even if the claims bar date has passed. These amendments have a one-year sunset.

■ **Ability to Modify Confirmed Chapter 13 Plans (11 U.S.C. §1329).** Section 1329 of the Bankruptcy Code contains provisions that allow a debtor to modify his or her plan after confirmation. The CAA amends section 1329 of the Bankruptcy Code to allow a debtor to modify a Chapter 13 plan to account for CARES Act forbearance proofs of claim that are filed by a creditor in the case during the extended period. If the debtor fails to modify his or her plan to address the deferred mortgage payments, the court (on its own motion), the U.S. Trustee, the Chapter 13 trustee, or any party in interest may move the court for such a modification. This amendment has a one-year sunset.

■ **Temporary Debt Limit Increase for Small Business Cases *Not* Extended.** Congress previously amended the Bankruptcy Code to create subchapter V of Chapter 11, which became effective on February 19, 2020, to address challenges faced by "small business debtors" in Chapter 11 cases.[2] An otherwise eligible debtor with non-contingent, liquidated debts not exceeding $2,725,625 could avail itself of more streamlined relief under Chapter 11 of the Bankruptcy Code. The CARES Act raised the subchapter V debt limit for eligibility to $7,500,000 to allow more business debtors to avail themselves of this relief. However, the increased debt limit was enacted with a sunset date of March 27, 2021. Congress, perhaps as an oversight, did not extend the sunset date in the CAA so, in the absence of an extension in future legislation, the recently enacted small debtor bankruptcy provisions will be available to a much smaller universe of businesses.

■ **Small Businesses May Now Qualify for PPP Loans (11 U.S.C. §364).** The Paycheck Protection Program (PPP) was established under the CARES Act to allow eligible businesses to obtain guaranteed loans administered by the Small Business Administration (SBA). Under the PPP, eligible businesses may obtain loans to cover certain expenses that may be forgiven if the proceeds are used to cover allowable expenses and certain conditions are satisfied. While the CARES Act was silent on the issue of excluding companies in bankruptcy from receiving PPP loans, the SBA promulgated rules denying bankruptcy small businesses access to PPP loans. Litigation of the issue around the country ensued almost immediately after the passage of the Cares Act, and a significant number of courts upheld the SBA's determination.[3]

The CAA amends section 364 of the Bankruptcy Code to provide that bankruptcy courts may now authorize small business debtors to obtain a loan under the PPP. However, the new legislation on this issue *is not effective until* the date on which the SBA Administrator submits to the Director of the Executive Office for the United States Trustee a written determination that corporate debtors are eligible for CARES Act funding. In other words, the new statute seemingly delegates to the SBA administrator the discretion to approve PPP loans in future bankruptcy cases.

Provided that such eligibility is determined, the changes to Section 364 contemplate that a business debtor may file a motion with the bankruptcy court to obtain CARES Act funding and the court is required to hold a hearing within seven days. If the court authorizes the loan, it can do so on a final basis and, to the extent not forgiven, the loan will be treated as a priority claim ahead of other administrative expenses under sections 503(b) and 507 of the Bankruptcy Code. A plan

may be confirmed, however, if it proposes to make payments when due under the terms of the loan. Debtors in bankruptcy cases existing prior to the effective date of the CAA are not grandfathered and eligible for funding. This amendment has a two-year sunset.

■ **Extended Time to Perform under Unexpired Leases of Nonresidential Real Property (11 U.S.C. §365).** Section 365(d)(3) of the Bankruptcy Code requires a tenant in bankruptcy to continue to timely perform its obligations under an unexpired lease of nonresidential real property.

The CAA amends section 365(d)(3) to provide that debtors in "subchapter V small business chapter 11 bankruptcy cases" may obtain an additional 60-day delay (120 days total) to pay rent if the debtor can demonstrate that it has experienced and is continuing to experience a material financial hardship, directly or indirectly, as a result of the covid-19 pandemic. The amendment provides that any claim arising from such extension (i.e. rent deferral) shall be treated as an administrative priority expense for purposes of confirmation of a subchapter V small business plan. However, unlike other administrative expense claims (which are typically required to be paid on the effective date of the plan), debtors are allowed to repay the delayed administrative rent over time (rather than in a lump sum) under their plan. This amendment sunsets two years after enactment, but the provisions will continue to apply to any subchapter V small business Chapter 11 bankruptcy case commenced before the sunset date.

■ **Extended Time to Assume or Reject Unexpired Leases of Nonresidential Real Estate (11 U.S.C. §365).** Section 365(d)(4) of the Bankruptcy Code currently provides that an unexpired lease of nonresidential real estate is deemed rejected unless it is assumed by the debtor within 120 days following the entry of the order for relief.

The CAA amends section 365(d)(4) to afford additional time for a Chapter 11 debtor to assume, assume and assign, or reject its nonresidential real property leases to 210 days. Because the bankruptcy court already had the ability under existing law to increase section 365(d)(4)'s period by 90 days, this means that a debtor under an unexpired lease of nonresidential real property can potentially obtain up to 300 days to decide whether to assume or reject the lease. This amendment also sunsets two years after enactment, but the provisions will continue to apply to any subchapter V small business Chapter 11 bankruptcy case commenced before the sunset date.

■ **Reduced Exposure for Landlords and Suppliers from Otherwise Recoverable Preferential Transfers (11 U.S.C. §547).** Section 547 of the Bankruptcy Code allows avoidance and recovery of so-called preferential transfer payments—late payments made by a debtor to its creditors shortly before the bankruptcy filing on outstanding debt.

The CAA amends section 547 to insulate deferred payments made by a debtor pursuant to an amended arrangement made after March 13, 2020, from being recovered from commercial landlords (i.e. rental arrearages) and suppliers of goods and services (late invoice payments). However, such payments are sheltered only to the extent such deferred payments do not include any fees, penalties, or interest in an amount greater than the fees, penalties, or interest the debtor would otherwise have owed the creditor without the deferral. The legislation removes the risk of payment "clawback" for certain landlords and suppliers that work with their tenants and customers during this unprecedented time. Significantly, however, the payments sheltered from avoidance under the CAA include only those that have been paid under executory contracts (as defined in section 365 of the Bankruptcy Code) that deferred the payment otherwise due. In other words, payments that are simply received late, but not pursuant to an amended agreement, would not appear to be protected by the CAA. This amendment sunsets two years after enactment, but the provisions will continue to apply to any bankruptcy case commenced before the sunset date.

■ **Limited Relief from Termination of Utility Services (11 U.S.C. §366).** Section 366 of the Bankruptcy Code regulates the alteration, refusal to provide, or termination of utility services to a debtor in a bankruptcy case. The CAA amends section 366 to preclude a utility from terminating services to an individual debtor (even if the debtor fails to furnish a security deposit), so long as the debtor pays the utility for any services provided during the 20-day period beginning on the date of the bankruptcy filing and thereafter makes timely payments for services provided during the bankruptcy case. This amendment has a one-year sunset.

■ **Subrogation and Customs Duties (11 U.S.C. §507).** Section 507(d) of the Bankruptcy Code prevents subrogation with respect to certain claims entitled to priority under the Bankruptcy Code. The CAA amends section 507(d) to provide that a party that pays the United States government a customs duty on behalf of an importer is subrogated to the government's priority status for customs duties. The provision benefits forwarders and customs brokers that frequently pay the government for customs duties on behalf of their importer clients.

Conclusion

As the economic fallout of the pandemic continues, Congress will be pressed to address ways to provide additional relief for struggling families and businesses. President-elect Biden has in fact called the CAA a "down payment" on recovery.[4] So further legislation, including changes to the Bankruptcy Code, may very well be enacted in 2021. ▲

Notes

[1] *The Coronavirus Aid, Relief and Economic Security Act*, S. 3548.

[2] *The Small Business Reorganization Act of 2019* (creating 11 U.S.C. §§1181-1195, known as "subchapter V").

[3] *See, e.g., USF Federal Credit Union v. Gateway Radiology Consultants, P.A.*, 2020 WL 7579338 (11th Cir. 12/22/2020).

[4] 'Biden Endorses $908 Billion Covid Relief Plan as 'Down Payment,' Washington Post (12/3/2020).

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SUPREME COURT SAYS NO PAY CAN STILL PLAY

Abel v. Abbott Northwestern Hospital is a step forward for employees' rights

By Thomas E. Marshall

The Minnesota Supreme Court's July 2020 opinion in *Abel v. Abbott Northwestern Hospital*[1] represents a win for employees at several levels: through its broad acceptance of the continuing violations theory at the Rule 12 stage of proceedings; by eliminating "compensation" as a necessary element in the definition of "employee" under the Human Rights Act; and in its affirmation of a duty to protect employees and students from known foreseeable conduct. For employers, the lessons are that early motions to dismiss will be carefully scrutinized and bad facts will no longer be excused by Minnesota's highest court.

The facts as pled

The underlying proceedings in the court involved motions to dismiss and for judgment on the pleadings. Accordingly, the facts, as pled, must be accepted as true by the Court.[2] The following facts, accepted as true, tell a sad tale.

Meagan Abel, a St. Mary's University (SMU) graduate student in psychology, needed to complete practicum hours at an accredited institution. Her SMU advisor recommended Allina's clinical psychology program at Abbott Northwestern Hospital. Abel was accepted and began the practicum in September 2015.[3]

According to the allegations of the complaint, Dr. Jeffrey Gottlieb, a clinical psychologist and practicum training director, "regularly engaged in inappropriate and harassing behavior." This behavior included touching, massages, and mimicking sex acts as well as flirtatious behavior. He referred to female students as his "girls" and even referred to Abel, who is of Asian-Indian descent, as "the brown one."[4]

According to the decision, Abel "raised concerns with Allina throughout the practicum experience." Abel also had "similar conversations with" SMU. On December 23, 2015, Allina removed Gottlieb as training director. But he continued to work in the hospital, subject to a no-contact order with students. Nevertheless, after Abel returned from a stress leave, Gottlieb would still make eye contact and threatening gestures toward Abel and other students.

Abel ended her practicum early on May 27, 2016. During oral argument at the Supreme Court, her counsel indicated she had been too afraid to come to work on her last day or even have a going-away party.[5] Gottlieb resigned in June 2016.[6]

With respect to the conduct of SMU, one faculty member instructed Abel to apply to another internship that was associated with Gottlieb and "suck it up." Abel was further told to put her Gottlieb experience behind her. The allegations stated that SMU was well aware of Gottlieb's actions yet still encouraged students to apply for the practicum.[7]

The claims

On May 26, 2017, Abel filed a charge with the Minnesota Department of Human Rights claiming race and sex discrimination in the area of employment against Allina.[8] This charge barely beat the one-year statute of limitations under the Minnesota Human Rights Act (MHRA), leaving her two days (May 26 – 27, 2016) for the facts underpinning her claim.[9] Her lawsuit, which followed on March 2, 2018, added claims of reprisal in employment, education, and public accommodation.[10] She also made a negligence claim.

On March 5, 2018, Abel brought suit against SMU, claiming discrimination in education and public accommodation under the MHRA as well as a negligence claim.

Both defendants moved to dismiss and for judgment on the pleadings. In both the district court and court of appeals (with Judge Klaphake dissenting), the discrimination claims were considered time-barred and, as to negligence, no common law duty was seen to exist as a matter of law.[11]

Abel sought Supreme Court review on the issues of statute of limitations and continuing violation, the necessity of paid consideration to maintain a claim, and the duty of a defendant regarding a foreseeable risk to a plaintiff.

The Minnesota Supreme Court accepted review, considering first the "measuring date" for the discrimination claims under the Human Rights Act. The date of May 26, 2017 was uncontested for the Allina employment discrimination claim. Under the MHRA, the limitations period is one year. Although Abel had not specifically identified claims for education and public accommodation in her charge, she argued these claims should fall within the statute of limitations since they arose from the same facts as the employment claim and Allina certainly had notice of those facts.

The Court declined this approach and followed the determinations of state and federal courts, which have held that the failure to identify the specific area of discrimination precluded a later claim in an area unmentioned in a charge. The Court noted that the MHRA requires each discriminatory practice—whether in employment, education, or public accommodation—be separately identified. Since Abel did not do so, or amend her charge to add those claims, they remained time-barred since they were not formally asserted until the complaint was served, nine months after the charge of discrimination.

Continuing violation

The Court next turned to whether Abel sufficiently alleged an employment discrimination claim. Abel asserted that her claim was one for a continuing violation, which included actions up through her last two days of employment in the practicum.

A "continuing violation" tolls the statute of limitations "where a pattern of discriminatory conduct constitutes a sufficiently integrated pattern to form, in fact, a single discriminatory act."[12] To prove this, Abel would have to demonstrate a series of related acts, one or more of which fell within the limitations period, or demonstrate a discriminatory system both before and during the limitations period.[13] The Court wrote: "[t]he critical question is 'whether any present violation exists' within the statute of limitations period."[14] Abel argued that what she experienced at Allina was "part of a series of related acts of discrimination by combining the two methods of proof." The Court found the allegations sufficient to withstand a motion to dismiss based on Abel's description of the various related acts perpetrated by Gottlieb in person or through his colleagues at Allina, including her last two days of work. Abel, in other words, plausibly alleged a continuing violation and Allina did not meet its burden of demonstrating the claim was outside the statute of limitations. As noted by Justice Lillehaug during oral argument, the allegations may not be enough to ultimately withstand summary judgment, but the case is at a different stage of the proceedings.[15] The claims for education and public accommodation, relating back to March 2, 2017 (one year before the complaint), were clearly time-barred, as Abel had been out of the practicum for several months by that time.[16]

During the arguments, as noted above, Abel's counsel argued that the actions caused Abel not to go into work. The Court made an interesting comment, citing *Sigurdson* to note that "the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." It added, again citing *Sigurdson*, "[b]ut if a mere continuing effect will extend the limitation period, the statute of limitations would be effectively emasculated." While the Court applied the continuing violations theory in what some may consider a broad manner, the Court did not alter existing Minnesota precedent. Acts, not effects, still control the limitations period. Whether there really are "acts" that occurred in Abel's last two days of work may well ultimately determine this action. Fortunately, Abel pled such acts occurred and the Supreme Court considered that sufficient at this early stage of the proceeding through the continuing violation argument.

The Court affirmed the dismissal of the claims against SMU, as the allegations about her past practicum did not show a continuing violation. The practicum ended a year before her complaint against SMU and while Abel's "continuing consequences... may be significant… this is insufficient to extend her claim."[17]

An employee does not need to be paid

The next issue for consideration was Abel's unpaid status in the practicum. Allina argued that this meant she could not be considered an employee for purposes of an employment discrimination claim. The Court considered helpful the approaches taken in Title VII cases and decided to employ a "hybrid" test. The Court first looked at common agency principles, including the employer's right to control the means and manner of performance.

Considering federal courts, which have gone both ways on whether compensation should be a requirement, the Minnesota Supreme Court remarked, relying on its recent *Kenneh* decision, that the MHRA has historically "provided more expansive protections to Minnesotans than federal law."[18] Accordingly, the Court declined to find a compensation requirement as a prerequisite for a discrimination claim since it is not specifically mandated by the statutory language. The Court went even further, stating that reliance on common law agency principles alone would be "unnecessarily restrictive in light of the liberal construction we must afford the [MHRA]." Under the Court's new hybrid test, the employment relationship "is construed in light of general common-law concepts, taking into account the economic realities of the situation."[19] A court should use the economic realities of the work situation to decide whether the worker "is likely to be susceptible to the discriminatory practices Title VII was designed to eliminate." No single factor is dispositive.

Abel sought Supreme Court review on the issues of statute of limitations and continuing violation, the necessity of paid consideration to maintain a claim, and the duty of a defendant regarding a foreseeable risk to a plaintiff.

Chief Justice Gildea, joined by Justice Anderson in a well-supported dissent, maintained the "common sense view" that compensation has long been an essential requirement for an employment discrimination claim and would have eliminated Abel's MHRA claim.[20] Even applying the hybrid test now pronounced by the Court, Chief Justice Gildea would not have found Abel an employee. She reasoned that Abel had a discrimination claim, albeit for education—not employment—discrimination. Unfortunately, she did not timely plead the claim and the majority should not be undermining the MHRA's protections for employees to create a new and unbounded rule of law to save Abel's claim. In other words, at least from Allina's point of view, bad facts have made bad law.

The majority, however, looked at the whole. Despite the absence of compensation, Abel applied for the practicum and Allina selected her to take part. In her role she accessed human resources and information technology departments. She provided services to Allina and Allina billed and received compensation for Abel's work. For those reasons, the majority considered her an employee.[21]

Duty of foreseeable risk to a foreseeable plaintiff

The Court then turned to the negligence claims. Allina and SMU both denied they owed a duty of care for the actions of a third party. The Court noted two exceptions: "when there is a special relationship between a plaintiff and a defendant and the harm to the plaintiff is foreseeable"; and "when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff." Abel argued both circumstances applied to her. The Court did not use the special relationship test for either Allina or SMU. Instead it considered only the second exception.

Allina argued that passive non-action, or nonfeasance, does not result in a duty of care being owed. But the Court found that the alleged facts demonstrated active misconduct or malfeasance, not passive inaction. Allina ran the practicum and made Gottlieb the supervisor of the program. Allina fielded student complaints, exercised control, removed Gottlieb from the program, and initiated the no-contact order. Moreover, it was "objectively reasonable" for Allina to assume Gottlieb's misconduct against Abel would occur. Certainly, as a student in Gottlieb's class, she was a foreseeable plaintiff.

As to SMU, the Court reminded all that on considering a motion for judgment on the pleadings, the Court considers only the facts alleged in the complaint, accepting them as true, and drawing all inferences in favor of the nonmoving party.[22]

For the same reasons as Allina, the Court found the facts alleged against SMU were "far from 'passive inaction.'" Rather than protect Abel, the SMU faculty actively encouraged her placement with Gottlieb and told her to remain despite the discrimination and harassment. She would be a foreseeable plaintiff, as SMU was aware of Gottlieb's prior conduct.

Chief Justice Gildea dissented, troubled that Abel only argued the "special relationship" below and did not even raise the foreseeable plaintiff theory in her petition for review. Based on past precedent that appellate courts do not consider issues unheard below, the Court should have passed on the issue. Even so, she did not consider the allegations against either Allina or SMU misfeasance, and so no duty existed.

As to MHRA preemption, because of the stage of the litigation, the Court felt such a decision to be premature and chose not to give more attention to the issue.

Conclusion

In 2020, the Minnesota Supreme Court has certainly indicated its willingness to allow discrimination plaintiffs to have their day in court.

The bad facts of the Abel case, as alleged, are troubling, and Abel did beat the statute of limitations by two days. At this early stage of litigation, the Court believed she should be given the opportunity to develop her case and made her an employee, despite the lack of compensation. Frankly, besides the issue of compensation, the Court carefully comported existing law to the alleged facts as it should at this initial stage of the proceedings. As the facts develop in discovery, it will be interesting to see if Abel, as her counsel suggested at oral argument, did not actually go to work on May 26 and 27, 2016. If so, we will find out at summary judgment if "acts" or "effects" will control and whether her discrimination claim is timely. This case may again find itself in the Supreme Court. ▲

Notes

[1] 947 N.W.2d 58 (Minn. 2020).

[2] "The reviewing court must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

[3] *Abel*, 947 N.W.2d at 65.

[4] *Id.* Additional allegations stated that when Gottlieb learned Abel had reported past incidents of racial discrimination, he told her he would never have let her join the program. He also "fostered a climate of isolation and dependence" and told students "that others at the clinic did not want them there…, and that it was only by virtue of his power and influence that the practicum program continued." He allegedly told students "that obeying him was integral to their continued participation in the practicum and future paid employment."

[5] *http://www.mncourts.gov/SupremeCourt/OralArgumentWebcasts/Argument-Detail.aspx?vid=1382*

[6] *Abel*, 947 N.W.2d at 67.

[7] *Id.*, at 66. An SMU faculty member told Abel "Dr. Gottlieb was culturally incompetent" and "that she had advised St. Mary's to discontinue sending students to work with him." Abel learned other students experienced similar race- and sex-based discrimination and that SMU "counseled them on how to 'get through' it." The faculty member told Abel she knew of "at least three previous students who had been sexually and racially harassed."

[8] *Id.*, at 67.

[9] Minn. Stat. §363A.28, subd. 3(a). A claim must be brought "within one year after the occurrence of the practice."

[10] *Abel*, 947 N.W.2d at 67.

[11] *Id. See also Abel v. Abbott Northwestern Hospital, et al.*, 2019 WL 4745372 (Minn. App. 2019) (unpublished).

[12] *Id., citing Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 440 n.11 (Minn. 1983).

[13] *Id.*, at 70-71, *citing Smith v. Ashland, Inc.*, 250 F.3d 1167, 1172 (8th Cir. 2001).

[14] *Id.*, at 71, *citing Sigurdson v. Isanti County*, 448 N.W.2d 62, 67 (Minn. 1989).

[15] Supra note 5.

[16] *Abel*, 947 N.W.2d at 73.

[17] *Id.*, at 73. During oral argument the arguments discussed the United States Supreme Court case of *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061 (2002). This decision is not mentioned at all in *Abel*. The results however, appear to be the same. *See Morgan*, 536 U.S. at 117-18, 122 S. Ct. 2074-75 (2002).

[18] *Id.*, at 75, *citing Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 229 (Minn. 2020).

[19] *Id., citing Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994).

[20] *Id.*, at 81-83.

[21] *Id.*, at 76.

[22] *Id.*, at 79, *citing Zutz v. Nelson*, 788 N.W.2d 58, 61 (Minn. 2010).

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What to expect as courts work to deliver justice through the rest of the pandemic

JURY TRIALS IN THE COVID-19 ERA

By Kristi J. Paulson

When I opened my eyes on New Year's Day 2020, I looked forward to a year of work that would revolve around trials. Two cases that had been languishing were finally scheduled for trial, and my mediation practice calendar was already filled with dates running into the summer and fall.

And then—well, you know. Beginning in March, the coronavirus closed courthouse doors across the nation. Jury trials, the backbone of the American system of justice, were stopped or suspended by court order.

After months of closures, courts necessarily began to reopen. Slowly. Technologies such as Zoom had been adopted to allow pleas, sentencings, and motions to go forward. But the jury trial—since its inception, an in-person process—challenged the court system and threatened to stall justice. Courts faced the unprecedented challenge of rethinking every stage of the process, from how *voir dire* is used to select the jury all the way through the delivery and rendering of the verdict by that same jury.

Courts nationwide suddenly were faced with the tricky task of redesigning the jury trial to balance the health of the jurors—compelled by law to serve—with the jury trial rights of defendants, many of whom had seen their cases stall for months. Courts struggled to address defendants' rights to speedy and public trials while also treating fairly the involvement of a variety of outside individuals.

September marked the first civil jury trials to take place in Minnesota's court system since the start of the pandemic; two trials proceeded in Hennepin County on the same floor on the same day. Those two cases were tried to verdict and demonstrated that, with proper care and precautions, justice could go forward.

Though an autumn surge in covid infections in Minnesota and around the Midwest once again put in-person proceedings on hiatus, we can expect that jury trials will be resuming in Minnesota courts under pandemic precautions and that the system will continue to operate in that mode for the foreseeable future as the long process of inoculating the American public proceeds in 2021.

So what will courtrooms look like as we return to jury trials in the not-too-distant future?

What can we expect our courthouses to look like?

Courts across the country have recognized the need to implement communicable disease safety protocols. This is an expensive and time-consuming process for the courts, many of which were already facing funding and staffing challenges.

Going forward we can expect to keep seeing what has become known as the "covid questionnaire" to screen for possible exposure. Individuals will be subject to temperature checks. Without question, masks will remain mandatory. There will be hand-sanitizing stations throughout the courthouses. Many jurisdictions have reported increasing the size of cleaning crews for use during the jury process.

In this time of "six feet apart," physical logistics will pose a whole new set of headaches: how many people a jury box can safely hold; how far apart witnesses need to be; where lawyers and clients can be in relation to the judge. Strategically placed plexiglass will fill courtrooms to provide barriers and shield jurors, witnesses, and court personnel. One or two courtrooms will be identified as jury trial courtrooms. Counsel tables will be equipped with plexiglass barriers to protect attorney and client. Jury trials will be limited. The U.S. District Court in Minnesota has indicated that when jury trials resume, only one jury trial will be conducted at a time until the court is comfortable with the process—and that no more than two trials at one time will be conducted in either Minneapolis or St. Paul.

What role will technology play in trials?

Technology isn't just underwriting more remote participation; courtrooms are seeing an increase in the use of devices to permit communication between counsel and the court. Some courtrooms are being supplied with tablets to enable such communication, and headsets with microphones that allow for private communication are now being integrated into the courtroom scene. Zoom appearances are becoming more the norm than the exception, and courtrooms are being outfitted with monitors and devices to allow jurors and the parties to adequately see and hear witnesses presenting testimony.

What will pre-trial stages look like?

Pretrial hearings and conferences are essential elements to address potential issues that will come up in trial. Generally, these are in-person meetings between the judge, counsel, and parties; for the foreseeable future, most pretrials will be taking place via Zoom instead. And these conferences are likely to become even more important as courts try to minimize evidentiary disputes and bench conferences. Being prepared will prove more important than ever: Advance determinations regarding motions *in limine*, the marking of exhibits, and agreements as to evidence and witnesses can greatly speed along the trial process.

For the short term, case selections are likely to be carefully considered. There may be a tendency to avoid complex and lengthy cases while covid-19 numbers are surging. Processes such as settlement conferences, alternative dispute resolution, and bench trials will likely see an increase in use by lawyers and judges.

U.S. District Court Chief Judge John Tunheim's Minneapolis courtroom has been extensively modified with plexiglass partitions and covid-related supplies and signage. (Stan Waldhauser)

How will we select our juries?

The pandemic presents numerous challenges in picking a jury and conducting *voir dire*. Traditionally, both of these processes have involved large groups and close gatherings. Prospective jurors are bound to harbor fear and safety concerns that will need to be addressed. The vetting process will have to include questions about their concern for their own individual safety and health and that of family members. No one wants a juror's mind to be on anything but the trial at hand.

Courts will face the challenge of making sure that jury pools reflect the community and will prove fair to those using them. When certain segments of the community are being told to stay home, there will be questions about whether a trial is truly by one's peers; to the extent that the groups hardest hit by covid-19—the elderly, minorities, individuals with health issues—begin to opt out of the jury process, the jury pool may be affected.

The importance of jury questionnaires has become evident during the pandemic. More and more judges are now using them to learn basic information as courts try to minimize contact by limiting the number of jurors called. Supplemental medical questionnaires, sealed and available only to the court, ask for private medical information about covid-19-related issues to allow the court to properly protect the health and safety of all involved.

One other notable difference has been the pressure to reduce the size of the jury pools. During the past year Minnesota courts have sought to keep the number of jurors called for *voir dire* small. There has been pressure to empanel a jury quickly and keep the trial process moving. Similarly, there was pressure to reduce the number of alternates due to potential covid exposure issues. Every alternate juror is one more person to put at risk or pose a risk in the process. In civil cases, attorneys are now being asked to discuss circumstances in which less than unanimous verdicts might be accepted.

Where will we select our juries?

While in-person questioning may be preferable, courts and attorneys are discovering that *voir dire* questioning of a prospective jury panel can be done online in a virtual setting. Many jurisdictions are going forward with jury selection at an alternate offsite location that provides for better distancing. Empty arenas, college auditoriums, and large libraries have accordingly been pressed into service as places to question prospective jurors. Other jurisdictions are exploring a form of remote *voir dire* in which prospective jurors may be questioned at home, or in some cases at "Zoom rooms" inside courthouses.

One difference that seems to be emerging in covid time: When a juror is discharged, he or she is sent home, not told to wait around for another case. And there's no longer coffee in the jury room.

May it please the court: Opening statement and closing arguments

Lawyers love to move around the courtroom, and never more than during opening statements and closing arguments. Judges are now instructing lawyers that they have to remain behind the podium and limit movement. Lawyers pride themselves on connecting with the juries and movement is an essential tool, now restricted. Trial lawyers feel confined.

The social distancing requirements are creating new challenges and logistical issues with the ability of the lawyers to connect with the jurors and for the jurors to see the evidence.

Should we unmask the witnesses?

Masks pose a variety of conundrums. It can be hard to hear someone speaking through a mask. Lawyers cannot see the fleeting smiles, scowls, or smirks that often communicate more than words. Clients can look like bandits; masked lawyers who stand in front of juries asking for money can look like bank robbers.

Witness testimony is routinely taken in open court so that the jury can assess the credibility of the witness and weigh the evidence at trial. The mask requirement has created some barriers to this assessment that most courts are finding cannot be offset. As a result, surrounding an unmasked witness with plexiglass is seemingly common. The attorneys in the recent Hennepin County case indicated that the witnesses did not wear masks but were placed behind plexiglass barriers. Other attorneys trying cases in this era have reported that witnesses wore face shields. Some courts are now mandating clear masks that will be worn by all witnesses.

The importance of being able to see the nonverbal communication of the witness is becoming increasingly evident. Elements like eye contact and the facial expressions and reactions of the witnesses are often as important as the words the witness speaks. In the interest of justice, courts will likely unmask witnesses, but take precautions to ensure the well-being of those witnesses.

What about the mask protocols for everybody else?

Lawyers will continue to be required to wear masks in the courthouse and the courtrooms. The recent developments of items such as clear masks or masks printed to match facial features may mean that these masks are not so noticeable. Some jurisdictions are going so far as to use court-ordered masks so that everyone presents a consistent appearance in the courtroom. One piece of advice, though: Don't forget to carry a spare mask. You never know when you might need it.

While lawyers may not like masks on jurors, they are likely to remain. And they will frequently make it difficult to gauge reactions and determine who is paying attention. But courts are likely to determine that both parties are equally disadvantaged in this regard and public safety outweighs those concerns.

What about the support systems of people on trial? The presence of friends and family at trial are generally deemed essential to communicate the client/defendant's humanity to jurors and to provide emotional support to the client or defendant. Distancing restrictions will have a distinct impact on this dynamic, as courts prohibit additional people in or around the courtroom in the interest of public health.

May I publish this exhibit to the jury?

In trial, lawyers often will admit evidence and then ask permission to publish that exhibit to the jury. This allows that piece of evidence to be handed to the jurors and passed through the jury box.

At least for the time being, that isn't how it's likely to go. There is continuing concern about the touching of surfaces, including exhibits. Gloves have not factored into this pandemic generally and seem to actually offer a false sense of security. Courts and counsel seem to be addressing this issue by creating additional sets of paper exhibits and limiting the touching of such items.

The fact that the jurors tend to be spread out throughout the courtroom and sometimes between rooms further complicates the use of tools such as foam-board exhibits, flip charts, and white boards. These are effective when the jury is seated so they can all see them but lose the effect when you have to wheel them around. But creativity is all part of being a lawyer and it won't be long until we will see new methods of communicating information visually to jurors.

"There may be a need for longer breaks—which, in turn, may increase the deliberation or trial time. Even things as simple as transporting jurors in elevators will need to be factored in."

Jury, have you reached a verdict?

Deliberation is fundamental to the process of trial by jury. Traditionally, the jurors have been placed in small rooms—and always in person. This arrangement allows them to discuss the evidence, think about the testimony and statements they have heard, share ideas and rationales, and move to a collective decision. These secret, private deliberations often go on for hours or days.

Essential to this process is the safety and well-being of the jurors. Larger spaces will need to be used in order to allow the safe distancing of jurors. Privacy concerns will also need to be factored in. For example, most courtrooms contain communication systems, and privacy will require that they be disabled in spaces that will be used for deliberations. The role of court clerks and deputies will likely change some as we juggle the need to safeguard the jurors and yet meet their needs, permitting them to do their assigned duty and render a verdict.

Masks and sanitizing procedures will need to be strictly enforced. There will need to be standards in place for the handling of exhibits. There may be a need for longer breaks—which, in turn, may increase the deliberation or trial time. Even things as simple as transporting jurors in elevators will need to be factored in—you simply cannot put the entire jury on one elevator, as has been done in the past.

What if someone tests positive during trial?

One of the greatest challenges for courts holding jury trials in the covid-19 era will be what to do in those inevitable instances when someone involved in the trial tests positive. Options such as declaring a mistrial, temporarily adjourning the trial, or continuing with alternates are all options. Courts will have to grapple with safety and health issues such as the question of testing all participants in a given trial.

This is likely to be a developing issue. Courts will no doubt continue to place an emphasis on moving things along quickly in case someone gets sick. But as longer and more complex trials return to the court system, these issues will play more of a role. It is only a matter of time.

Conclusion

At the time of this writing, Minnesotans have experienced over 450,000 cases of covid-19, and more than 6,000 people have died as a result. The Minnesota Judicial Council announced in mid-January that criminal jury trials, which had been scheduled to recommence on February 1, would remain suspended until March 15. But as the Star Tribune noted in its story about the move, "the council increased the exceptions that would allow for criminal jury trials and also opened the door to conducting some civil jury trials using video technology if all parties and the presiding judge are in agreement." In the U.S. District Courts, no jury trials may commence before Monday March 15, 2021 (U.S. District Court, General Order #25).

Despite the availability of coronavirus vaccines in 2021, numerous factors—from slower-than-optimal vaccine distribution to the specter of possible vaccine-resistant covid strains—suggest that pandemic public health precautions will remain with us for the foreseeable future. And we will need to continue to observe safeguards at every step of the trial process to promote and guarantee the American right to a trial by jury. Lawyers and judges have shown, and will continue to demonstrate, the resilience, creativity, and adaptability required to keep our system working. ▲

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Landmarks in the Law

Current developments in judicial law, legislation, and administrative action together with a foretaste of emergent trends in law and the legal profession for the complete Minnesota lawyer.

CRIMINAL LAW

JUDICIAL LAW

■ **Sentencing: Fifth degree possession is not a gross misdemeanor for criminal history calculations if the defendant previously pleaded guilty to a petty misdemeanor drug offense.** When calculating appellant's criminal history following his conviction for felony domestic assault, the district court assigned four and one-half felony points, which included one-half felony point for appellant's 2007 conviction for fifth-degree possession of cocaine. Under Minn. Stat. §152.025, subd. 4, for some possession offenses, including appellant's 2007 offense, "[a] person convicted [of a fifth-degree controlled substance crime], who has not been previously convicted of a violation of this chapter or a similar offense in another jurisdiction, is guilty of a gross misdemeanor."

Prior to 2007, appellant pleaded guilty to a petty misdemeanor violation of chapter 152 for possessing a small amount of marijuana. However, appellant argues this petty misdemeanor offense is not a "convict[ion] of a violation" of chapter 152, because petty misdemeanors are not considered "crimes" and a "conviction" requires a finding of guilt for a crime. Without this petty misdemeanor drug offense, appellant argues his 2007 conviction should qualify as a first-time fifth-degree possession offense and, therefore, a gross misdemeanor for his criminal history calculation.

The court of appeals rejects appellant's argument, noting that section 152.025, subd. 4, refers to "convict[ions] of [ ] violation[s]" of chapter 152 and does not use the term "crime." "Conviction" is defined in section 609.02, subd. 5, to include a guilty plea accepted and recorded by the district court. Thus, when appellant entered a guilty plea, and the court accepted and recorded appellant's guilty plea, to a petty misdemeanor violation of chapter 152, he was "convicted of a violation" of chapter 152. As such, appellant's 2007 cocaine possession offense was not a first-time possession offense and it does not qualify for classification as a gross misdemeanor. The district court properly counted the offense as a felony when calculating appellant's criminal history score. ***State v. Morgan***, ___ N.W.2d ___, 2020 WL 7484757 (Minn. Ct. App. 12/21/2020).

■ **Firearms: A distress flare is not a "firearm."** Appellant was previously adjudicated delinquent of a violent crime and prohibited from possessing firearms. Police found appellant at a store when responding to a call of a burglary in progress and discovered a distress flare launcher in his pocket. Appellant was charged with, among other offenses, possession of a firearm by an ineligible person. The district court granted appellant's motion to dismiss that charge, finding a distress flare launcher is not a "firearm" under Minn. Stat. §624.713, subd. 1. The court of appeals concluded a "firearm" must be a "weapon," but held that a distress flare launcher could be a "firearm" if appellant used or intended to use it as a weapon.

The Supreme Court holds that a "firearm" under section 624.713, subd. 1, "is an instrument designed for attack or defense that expels a projectile by the action or force of gunpowder, combustion, or some other explosive force." Under this definition, the Supreme Court concludes that a distress flare launcher is not a firearm.

Section 624.713, subd. 1, does not define "firearm," so the Supreme Court looks to dictionary definitions, all of which define "firearm" as a "weapon." The dictionary definitions of "weapon" further make clear that it is "an instrument designed for attack or defense." This interpretation is consistent with the nature of section 624.713, subd. 1, which establishes a possession crime, not a crime based on a defendant's use or intended use. The record here establishes that a distress flare launcher is not an instrument designed for attack or defense. As it is not a "weapon," it cannot be a

firearm under section 624.713, subd. 1. ***State v. Glover***, __ N.W.2d __, 2020 WL 7636412 (Minn. 12/23/2020).

■ **City code violations: A letter contesting a zoning violation notice is not a "request relating to zoning" if it is not on an agency application form or does not clearly identify a request for government approval.** Respondents are co-owners of an undeveloped parcel of land fronting Lake Minnetonka, on which they installed a "seasonal dock" in April 2017. The city issued a notice of zoning violation on 5/11/2017 because the property lacked a "principal dwelling" and respondents did not occupy the property. Respondents answered by letter on 5/13/2017, arguing the city code prohibited only "permanent" or "floating," but not seasonal docks on unoccupied property. The city did not respond to the letter. The city ultimately withdrew its notice violation, but, in July 2017 the city adopted an amended ordinance prohibiting the use of any type of dock on unoccupied property. Respondents again installed a dock in June 2018, and the city issued another notice violation. Respondents were charged with two misdemeanor violations of the city code. The district court dismissed the charges for lack of probable cause, and the court of appeals affirmed.

The Supreme Court considers whether respondents' 5/13/2017 letter was a "request" that triggered Minn. Stat. §15.99, subd. 2(a)'s 60-day time period and automatic approval provisions. Under that section, "[a]n agency must approve or deny within 60 days a written request relating to zoning… for a permit, license, or other governmental approval of an action." "Request" is defined in subd. 1(c) as "a written application related to zoning… for a permit, license, or other governmental approval of an action," and must either be submitted to the agency on an agency application form or "clearly identify on the first page the specific permit, license, or other governmental approval being sought." If the agency does not respond within 60 days, the request is automatically approved.

Respondents' letter was not made on an application form from the city, nor does the first page of the letter clearly identify the permit, license, or other governmental approval being sought. Therefore, for the 60-day time period to apply, the letter must clearly identify the specific "other governmental approval sought." The Court notes that "governmental approval" is not defined in section 15.99 and is ambiguous, as the phrase is open to multiple reasonable interpretations. The Court concludes that "other governmental approval" refers "to the official permission that a person must seek and receive from an agency before undertaking the specific action that the person proposes to pursue," that is, "a prospective request for agency permission, rather than retroactive approval by the government of a person's unilateral action or view of the law."

Under this definition, respondents' letter was not a "request" under section 15.99 and their dock was not automatically approved upon the city's non-response to the letter. The matter is remanded to the district court to reinstate the criminal complaint against respondents. ***State v. Sanschagrin***, __ N.W. 2d __, 2020 WL 7759466 (Minn. 12/30/2020).

■ **1st Amendment: Nonconsensual dissemination of private sexual images statute is a constitutional restriction on speech.** Minn. Stat. §617.261, subd. 1, makes it "a crime to intentionally disseminate an image of another person who is depicted in a sexual act or whose intimate parts are exposed… when: (1) the person is identifiable…; (2) the actor knows or reasonably should know that the person depicted in the image does not consent to the dissemination; and (3) the image was obtained or created under circumstances in which the actor knew or reasonably should have known the person depicted had a reasonable expectation of privacy." Respondent was charged with a felony-level violation of section 617.261 after he accessed his ex-girlfriend's online accounts, obtained a photograph and video of her engaged in sexual relations with another individual, threatened to disseminate the images, and sent the photograph and video to 44 individuals and posted them online. He moved to dismiss the charge, arguing it violated the 1st Amendment. The district court denied the motion and found him guilty after a stipulated facts trial. The Minnesota Court of Appeals reversed, finding section 617.261 overbroad in violation of the 1st Amendment.

As to respondent's first argument, that section 617.261 is an impermissible content-based restriction on speech, the Supreme Court agrees with the court of appeals that section 617.261 criminalizes more than just obscenity, but finds that the statute is constitutional because it is narrowly tailored to serve a compelling state interest. The statute prohibits both protected and unprotected speech, as it covers more than only obscenity, speech integral to criminal conduct, and child pornography, as the state argues. Some sexual images may be indecent, but not obscene. Private sexual images are also generally not used to facilitate the commission of a crime, are not offers to engage in illegal transactions, and are not requests to obtain unlawful material. Furthermore, more private sexual images depict adults, not children. Thus, because not *all* of the speech proscribed by the statute is unprotected, section 617.261 is not exempted from the 1st Amendment.

Next, the Court declines to ascertain whether the statute is a content-based restriction, requiring strict scrutiny analysis, or content-neutral restriction, requiring an intermediate scrutiny analysis. The Court does so because it finds section 617.261 survives even "the more searching strict scrutiny analysis." The state has a compelling interest in protecting its citizens from the "harrowing," "profound" effects of the nonconsensual dissemination of private sexual images. Nonconsensual dissemination of private sexual images can cause victims deep psychological damage and permanently tarnish their reputations. The problem is also "widespread and continuously expanding."

The Court determines that section 617.267 is narrowly tailored to solve this problem. The statute is the least restrictive means available to address the problem. The statute criminalizes only private speech that is intentionally disseminated without consent, falls within numerous specific statutory definitions, and is outside of seven broad statutory exemptions.

Respondent also argues section 617.267 is unconstitutionally overbroad because it burdens a substantial amount of protected speech. While the Court notes "that the relationship between the overbreadth doctrine and a strict scrutiny analysis is unclear," the Court declares that "[w]hen a statute is challenged on both scrutiny and overbreadth grounds, a scrutiny analysis should be conducted first," "because a statute that survives a scrutiny analysis will necessarily survive the overbreadth analysis." Here, because section 617.267 survives strict scrutiny, the Court does not complete an overbreadth analysis, and the statute is upheld as constitutional. ***State v. Casillas***, __ N.W.2d __, 2020 WL 7759952 (Minn. 12/30/2020).

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **Unpaid commissions; limited percentage of profits.** An unpaid salesman for a Bloomington industrial equipment company was entitled to a percentage of profits, for one year. The 8th Circuit, in a decision written by Judge David Stras of Minnesota, upheld a decision by U.S. District Court Judge Wilhemina Wright of Minnesota in a case for jury trial on an "ambiguous" provision in an employment contract regarding commissions on rental purchase options. ***Auge v. Fairchild Equipment, Inc.***, 982 F.3d 1162 (8th Cir. 12/16/2020).

■ **Employee dishonesty; insurance coverage denied.** A company sought coverage for losses sustained after one of its employees allegedly conspired to defraud investors. Upholding a lower court decision in a decision written by Judge James Loken of Minnesota, the 8th Circuit Court of Appeals held that the firm's payments to settle third party liability claims based upon an employee's dishonest acts did not constitute a "direct loss" covered under the applicable insurance policy and did not fall within a court-covered cause for any "dishonest" actions. ***Federal Insurance Company v. Axos***, 2020 WL 7133355 (8th Cir. 12/7/2020).

■ **OSHA inapplicable to tribe; sovereign immunity applies.** A penalty sought by the Occupational Safety & Health Review Commission (OSHA) upon a tribal fisher business due to a boating accident that killed employees was deemed not actionable by the 8th Circuit. The 8th Circuit refused to review the dismissal of the charges on grounds that OSHA was inapplicable to the tribe due to the principles of tribal sovereignty and self-government. The business was owned and operated solely by members of the tribe. ***Scalia v. Red Lake Nation Fisheries, Inc.***, 2020 WL 7083327 (8th Cir. 12/4/2020) (unpublished).

■ **Age discrimination; RIF claim fails.** An employee who was terminated as part of a companywide reduction in force failed in his age discrimination claim. Upholding a ruling of the Ramsey County District Court, the Minnesota Court of Appeals held that the statements made by non-decision-makers do not reflect a pretext for discrimination and the company had provided legitimate, non-discriminatory reasons for discharging the claimant, who failed to show the discharge was pretextual or partially motivated by his age. ***Mentonis v. Abbott Laboratories, Inc.***, 2020 WL 7134471 (Minn. Ct. App. 12/07/2020) (unpublished).

■ **Wrongful discharge; retaliation, discrimination, and defamation rejected.** The city clerk-treasurer of Gilbert, an Iron Range town, lost her three-pronged wrongful termination case. The Minnesota Court of Appeals affirmed a St. Louis County District Court ruling dismissing a whistleblower claim, along with claims of age and gender discrimination and defamation on grounds of lack of *prima facie* case, absence of pretext, and immunity. ***Sakrison v. City of Gilbert***, 2020 WL 7332556 (8th Cir. 12/14/2020) (unpublished).

■ **Unemployment compensation denied; beauty salon employee quit.** An employee who quit her job at a beauty salon was not entitled to unemployment compensation benefits. Affirming the ruling of an unemployment law judge (ULJ) with DEED, the appellate court held that the employee was not eligible for benefits because she voluntarily quit her job without "good cause" attributable to the employer. ***Tehranpour v. Beauty Basics, Inc.***, 2020 WL 7134847 (Minn. Ct. App. 12/07/2020) (unpublished).

■ **Ineligibility due to misrepresentation; untimely appeal.** An employee who challenged the determination of ineligibility for unemployment benefits because she received undisclosed earnings was unsuccessful because her appeal was untimely. The court of appeals affirmed the ruling of a ULJ that the appeal was not filed within the requisite 20-day time period, which it deemed "absolute." ***Nelson v. TEMA, Inc.***, 2020 WL 7134847 (Minn. Ct. App. 12/07/2020) (unpublished).

■ **Unemployment compensation; refusal to commute.** An employee who refused to commute 20 miles from home was denied unemployment benefits. Upholding a DEED determination, the appellate court held that the applicant was not "available for suitable employment." ***Modeen v. Meribel Enterprises***, 2020 WL 7332899 (Minn. Ct. App. 12/14/2020) (unpublished).

■ **Unemployment compensation; absences bars benefits.** An employee's repeated absences barred unemployment benefits. The court of appeals agreed with DEED that the absences constituted disqualifying "misconduct." ***Peterson v. DJ's Companies***, 2020 WL 7332903 (Minn. Ct. App. 12/14/2020) (unpublished).

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ENVIRONMENTAL LAW

JUDICIAL LAW

On remand, Minnesota Court of Appeals rules on remaining issues in White Bear Lake case. The Minnesota Court of Appeals issued an opinion in December 2020 resolving a dispute that initially arose in 2013 between the White Bear Lake Restoration Association, the Minnesota Department of Natural Resources and its commissioner, the city of White Bear Lake, and the town of White Bear regarding alleged impairment of White Bear Lake and the Prairie du Chien-Jordan Aquifer caused by municipal groundwater pumping.

In August 2017, the district court granted declaratory and injunctive relief pursuant to Minn. Stat. §116B.03 of the Minnesota Environmental Rights Act (MERA) and the public trust doctrine. White Bear Lake, White Bear, and the DNR appealed on nine issues, only two of which were decided by the Minnesota Court of Appeals in April 2019. *White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.*, 928 N.W.2d 351 (Minn. App. 2019) (*White Bear Lake I*). Upon review of this court's holding on two issues, the Minnesota Supreme Court remanded for further consideration of the remaining issues. *White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res.*, 946 N.W.2d 373, 387 (Minn. 2020) (*White Bear Lake II*).

Excluding the two issues reviewed by the Minnesota Supreme Court, at issue in this appeal was whether the district court erred by (3) finding that respondents failed to exhaust administrative remedies, (4) refusing to require joinder of affected permit holders, (5) interpreting MERA to require the DNR to reopen and amend permits, (6) failing to give appropriate deference to DNR permitting decisions, (7) violating separation-of-powers principles, (8) requiring amendments of existing permits without holding administrative hearings, and (9) making clearly erroneous factual findings.

This court affirmed the judgment in favor of respondents White Bear Lake Homeowners' Association, Inc. on the grounds that there were no reversible errors of law and the facts were adequately supported by evidence in the record, notwithstanding an amendment to the judgment to provide administrative hearings to permit holders prior to amending existing permits.

In addressing issue three, this court found that the district court correctly held that the DNR did not exhaust administrative remedies prior to litigation. In addressing issue four, this court found that the district court correctly refused to require joinder because it fairly determined that permit holders do not have legally protected interests and are not necessary parties under Minn. R. Civ. P. 19.01. However, in addressing issue eight, this court found that permit holders have a statutory right to seek a contested-case administrative hearing and the district court's holding that the DNR must "immediately amend" all permits conflicts with that right.

This court also found that the district court did not exceed its authority under MERA nor violate separation-of-powers principles. This point turns on the Supreme Court's decision in *White Bear II* that MERA grants broad authority and discretion to the district court to apply a balancing test on a case-by-case basis in considering the gravity of the harm versus the utility of the conduct. The district court acted as it should, the court held, as a traditional court of equity under the statutory requirements and thus did not err.

Finally, this court found that the district court did not make clearly erroneous findings of fact. Reversal would require that the findings of fact were clearly erroneous and the court is firmly convinced that a mistake has been made, which the court held was not the case here. Minn. R. Civ. Pr. 52.01; *see also Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). ***White Bear Lake Restoration Association, ex rel. State of Minnesota v. White Bear Lake Homeowners' Association, Inc.***, No. A18-0750, 2020 WL 7690268 (Minn. Ct. App. 12/28/2020 (*White Bear Lake III*).

ADMINISTRATIVE ACTION

EPA finalizes lead and copper rule revisions for drinking water. On 12/22/2020, the U.S. Environmental Protection Agency (EPA) pre-published a final rule to update the treatment technique regulation for lead, referred to as the Lead and Copper Rule (LCR), under the authority of the Safe Drinking Water Act. 42 U.S.C. §300f, et seq. Although the LCR was revised in 2000 and 2007, this is the first major update since the rule was promulgated in 1991.

Lead and copper enter drinking water primarily through plumbing materials as corrosive water is transported through the pipes, leaching lead and other metal ions into the water supply. Hot water, low pH, and low mineral content increase water corrosivity. EPA's non-enforceable maximum contaminant health goal for lead exposure in drinking water is zero. 40 C.F.R. §141.51(b). This level is based on the best available science, which shows that there is no safe level of exposure to lead, which can cause learning disabilities, behavioral problems, and mental retardation, especially during the early stages of brain development.

The LCR requires community water treatment systems to monitor drinking water quality at consumer taps, and to control the corrosivity of the water. 40 C.F.R. §141 subp. I, et seq. Water treatment systems can control the corrosivity of drinking water by adjusting the pH and phosphate levels in the water, which reacts with ions in the water to create a protective coating on the interior of the lead pipes, thus preventing lead from leaching out of the pipes and into the drinking water. However, when corrosion control measures alone are not sufficient to control lead exposure, the LCR requires water systems to educate the public and to replace lead service lines.

A key feature of the final rule is a requirement to identify and remediate areas most affected by lead contamination. The rule requires all water systems to complete and maintain a lead service line inventory and to prioritize collecting and testing tap samples from homes if lead is present in the distribution system.

The previous rule established a lead action level, a measure of the effectiveness of the corrosion control treatment in water systems, at 15 parts per billion (ppb). If 10 percent or more of the tap water samples exceeded the lead action level of 15 ppb, then the water treatment systems were required to take additional actions, such as optimizing their corrosion control treatments, informing the public about lead in drinking water and steps they should take to protect their health, and replacing portions of lead service lines that connect distribution mains to customers.

The updated rule keeps the 15 ppb lead action level, but also establishes a new threshold of 10 ppb, called the trigger level. When the 10 ppb trigger level is exceeded, water systems that already have corrosion control must reassess their water treatment processes and add corrosion control measures, and water systems that do not have corrosion control must conduct a corrosion control study to identify the best treatment approach. The trigger level also requires

systems to start lead service line replacement programs, which was not required in the previous rule. After the 15 ppb lead action level is exceeded, the new rule requires 3% of lead service lines to be fully replaced annually. The previous rule had provisions that allowed for partial replacement of lead service lines and test-outs. The final rule also mandates water systems to notify consumers within 24 hours of lead action level exceedances, and requires testing in 20% of elementary schools and childcare facilities within a service area every year.

The final rule will become effective 60 days after the publication in the Federal Register. **Docket ID: EPA-HQ-OW-2017-0300.**

EPA finalizes TSCA evaluation of asbestos. On 12/30/2020 the Environmental Protection Agency (EPA) issued its risk evaluation for asbestos, specifically chrysotile asbestos, under the Toxic Substances Control Act (TSCA). As part of this risk evaluation, the EPA was charged with reviewing the conditions of use for chrysotile asbestos, which is the only form of asbestos known to be imported, processed, or distributed for use in the United States. The conditions of use reviewed included manufacturing, processing, distribution in commerce, occupational and consumer uses, and disposal. The goal of risk evaluation under TSCA is to determine which conditions of use present unreasonable risks to human health or the environment.

In completing its risk evaluation, the EPA determined that chrysotile asbestos presents an unreasonable risk to human health in 16 of the 32 conditions of use, but further found that there were no unreasonable risks to the environment. Because the EPA found that unreasonable risks to human health were present, a one-year deadline to propose risk management rules to mitigate those risks was triggered under TSCA.

There has been some controversy in the final risk evaluation issued by the EPA given that the evaluations have remained the same as previously provided in the EPA's April 2020 draft evaluation, notwithstanding a finding by EPA's Science Advisory Committee on Chemicals (SACC) that the draft evaluations were inadequate and deficient. SACC had requested that the evaluation be broadened to consider additional uses of multiple types of asbestos before being finalized; however, the EPA did not follow through with the request before issuing its final risk evaluations.

The next step the EPA will undertake is to propose actions to address the unreasonable risks identified by the EPA, and to subsequently accept comments on those proposed actions. The key issue at hand at this point is that the EPA will be transitioning from the Trump administration to the Biden administration. This transition may result in reconsideration of the risk evaluation findings, or a complete re-evaluation. ***Risk Evaluation for Asbestos, Part I: Chrysotile Asbestos***; EPA Document # EPA-740-R1-8012, December 2020.

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FEDERAL PRACTICE

JUDICIAL LAW

Fed. R. App. P. 39(e); discretion to reduce taxable costs; grant of *certiorari*. The Supreme Court has granted *certiorari* to review a 5th Circuit decision holding that district courts have no discretion to deny costs under Fed. R. App. P. 39(e) to a successful appellee. Every other circuit to address the issue—including the 8th Circuit—has held that district courts have that discretion. ***City of San Antonio v. Hotels.com, L.P.***, 959 F.3d 159 (5th Cir. 2020), *cert. granted*, ___ S. Ct. ___ (2021).

Forum defendant rule no longer jurisdictional; *en banc* decision. In March 2020, this column noted the 8th Circuit's application of the forum defendant rule to vacate a lower court decision that had dismissed an improperly removed action on the merits.

Subsequently, the defendant-appellee's petition for rehearing *en banc* was granted, and the 8th Circuit unanimously overruled its prior decisions finding that the forum defendant rule was jurisdictional, and joined every other circuit that has addressed the issue in finding that the forum defendant rule is nonjurisdictional and therefore waivable. ***Holbein v. Baxter Chrysler Jeep, Inc., 948 F.3d 931 (8th Cir.), rev'd sub nom., Holbein v. TAW Enters., Inc.***, ___ F.3d ___ (8th Cir. 2020) (*en banc*).

Fed. R. Civ. P. 23(f); class certification affirmed. Rejecting the defendant's

argument that the district court had not adequately explained its class certification decision, the 8th Circuit affirmed the district court's certification of a plaintiff class, finding that a class action was the "superior mechanism" to try a case involving numerous claims for "tens or hundreds of dollars," because in the absence of a class action, "no plaintiff is likely to pursue their claim individually." ***Custom Hair Designs by Sandy v. Central Payment Co.***, ___ F.3d ___ (8th Cir. 2020).

■ **No review of waived evidentiary objections; dissent.** Where the district court denied plaintiffs' motion *in limine* to preclude the defendant from introducing video simulations in a product liability action, the plaintiffs then introduced the simulations, the jury found for the defendant, the district court denied plaintiffs' motion for a new trial and the plaintiffs appealed, the 8th Circuit found that by introducing the video simulations, the plaintiffs had waived any objection to the evidence, meaning that the district court's evidentiary ruling was unreviewable.

A lengthy and vigorous dissent by Judge Grasz argued that the plaintiffs had preserved their objections in accordance with Fed. R. Evid. 103(b), that waiver did not apply, and that the district court had erred by allowing introduction of the simulations. ***Reinard v. Crown Equip. Corp.***, ___ F.3d ___ (8th Cir. 2020).

■ **Forum selection clause; diversity; *Erie* doctrine.** In a diversity action where the enforceability of a forum selection clause was challenged by the defendants, Judge Tostrud surveyed the "uncertainty as to whether a federal district court in a diversity case should apply state or federal law to decide whether a forum selection clause is enforceable," but found that there was no need to perform a full *Erie* analysis where state and federal law led to the "same result."

The decision is nevertheless important because it identifies important *Erie* issues that will inevitably arise in future diversity actions. ***U.S. Bank N.A. v. Silicon Valley Fence Sales, Inc.***, 2021 WL 37686 (D. Minn. 1/5/2021).

■ **Fed. R. Civ. P. 26(a)(2)(B); expert opinion; "prepared and signed by the witness" requirement.** A recent order by Magistrate Judge Brisbois includes a thorough summary of case law, analyzing the difference between cases where an expert report was prepared by counsel yet reflected the opinion of the expert, versus cases where experts simply signed reports that were prepared by counsel and reflected counsel's opinions rather than the opinions of the expert.

This decision should be required reading for anyone who regularly retains and interacts with experts**.** ***Casler v. MEnD Correctional Care, PLLC***, 2020 WL 7249877 (D. Minn. 9/28/2020).

■ **General discovery objections rejected.** While ultimately denying the plaintiff's motion to compel in an FCRA and FDCPA action, Magistrate Judge Brisbois refused to consider the defendant's "boilerplate" objections where those objections "failed to raise any specific argument in support of that objection." ***Wiley v. Equifax Info. Servs. LLC***, 2020 WL 7626599 (D. Minn. 10/23/2020).

■ **Ongoing infringement; motion for expedited discovery granted.** In litigation arising out of the defendants' alleged sales of counterfeit N95 respirators, Judge Nelson granted the plaintiff's motion for expedited discovery, finding that "good cause" was established where the plaintiff established the potential for ongoing infringement and the expedited discovery would assist the plaintiff in determining the identities of the defendants. ***3M Co. v. Individuals, P'ships and Unincorporated Assocs. identified in Schedule "A"***, 2020 WL 6817650 (D. Minn. 11/20/2020).

■ **Covid-19; motion for enlargement of time to serve expert report granted.** Where the defendants brought a malpractice claim but failed to serve the timely expert affidavit required by Minn. Stat. §145.682 Sub. 2(2) by the stipulated 11/12/2020 deadline, defendants moved to dismiss due to the failure to serve that affidavit, and plaintiffs then served the affidavit on 11/20/2020 and cross-moved for an extension of time, Judge Nelson found excusable neglect for plaintiffs' failure to meet the Nov. 12 deadline where there had been an outbreak of covid-19 at plaintiffs' counsel's law firm leading to "a sudden breakdown in administration." ***Mills v. Mayo Clinic***, 2020 WL 7319137 (D. Minn. 12/11/2020).

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INDIAN LAW

JUDICIAL LAW

■ **OSHA regulations do not apply to on-reservation, tribally owned fishery.** The 8th Circuit denied to review a determination of the Occupational Safety and Health Review Commission dismissing two citations under the Occupational Safety and Health Act filed against Red Lake Nation Fisheries, Inc. The 8th Circuit noted that as a statute of general applicability, OSHA would not be applied to issues involving Indian self-government, in particular in this case, where the Red Lake Nation operates its fishery entirely on-reservation, employs only tribal members, and the fishery executes the nation's treaty-preserved fishing rights. ***Scalia v. Red Lake Nation Fisheries, Inc.***, 982 F.3d 533 (8th Cir. 2020).

■ **Preliminary injunction granted to halt distribution of $12 million in undistributed CARES Act funding intended for tribal governments.** The D.C. Circuit reversed and remanded the district court's denial of the Shawnee Tribe's motion for preliminary injunction, prohibiting the Secretary of the Treasury Department from distributing $12 million of funding originally set aside for tribal governments in the Coronavirus Aid, Relief, and Economic Security (CARES) Act. The district court must now determine on the merits whether the Treasury Department's use of an Indian Housing Block Grant formula, rather than tribally submitted population data, was an arbitrary and capricious method of evaluating tribal population to distribute 60 percent of the $8 billion originally reserved for tribal governments in the CARES Act. ***Shawnee Tribe v. Mnuchin***, No. 20-5286, __ F.3d __, 2021 WL 28207 (D.C. Cir. 1/5/2021).

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INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **Patents: Claims construed considering issue preclusion principles.** Judge Tostrud recently construed claim terms in a patent infringement lawsuit while considering whether issue preclusion applies. Red Rhino Leak Detection sued Anderson Manufacturing Company for infringement of its patent related to leak detection in swimming pools. Red Rhino

previously sued Anderson asserting a separate but related patent. The parties sought claim construction of terms in the patent-in-suit. Red Rhino argued that the terms should be construed as in the first litigation based on issue preclusion. Issue preclusion applies where (1) the party sought to be precluded in the second suit was a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded was the same as the issue involved in the prior action; (3) the issue sought to be precluded was actually litigated in the prior action; (4) the issue sought to be precluded was determined by a valid and final judgment; and (5) the determination in the prior action was essential to the prior judgment.

With respect to the first construed term, the court found that the claim language was similar between the two patents, but material differences existed. The construed term in the first action disclosed three functions, but the construed term in the current action only disclosed two functions, effectively collapsing two functions under a single term. Such differences prevented the application of issue preclusion. With respect to the second construed term, the court found issue preclusion applied. Anderson argued that issue preclusion did not apply because the prosecution history of the patent-in-suit was not before the court in the first action. But the court found the prosecution history of the patent-in-suit was available at the time of the first claim construction order, rendering it necessarily encompassed within the decision of the first claim construction order. ***Red Rhino Leak Detection, Inc. v. Anderson Mfg. Co.***, No. 18-cv-3186, 2021 U.S. Dist. LEXIS 343 (D. Minn. 1/4/2021).

■ **Trademark: Denial of summary judgment on false advertising claim.** Judge Tostrud recently denied defendant Tricam Industries, Inc.'s motion for summary judgment. Wing Enterprises, Inc. sued Tricam for violating the Lanham Act and the Minnesota Deceptive Trade Practices Act for allegedly making false statements that Tricam's multi-position ladders complied with the voluntary industry standard for portable metal ladders. Summary judgment was previously granted in favor of Wing Enterprises on the basis that Tricam had failed to prove the statements were material to consumers' purchasing decisions.

The federal circuit reversed and remanded to determine whether summary judgment was proper on any other grounds. To prove false advertising, a plaintiff must establish (1) a false statement of fact in a commercial advertisement; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement. Tricam argued that it was not responsible for statements on a retailer's website and that the challenged statements were not false. The court found that a reasonable jury could find Tricam caused the statements to be placed on the retailer's website because Tricam made the statements to the retailer by filling out information in an Item Data Management system, which the retailer relies on in advertising products. The court further found that a reasonable jury could find Tricam's statements were literally false, causing commercial injury to Wing Enterprises by allowing Tricam to enter and remain in the market. ***Wing Enters. v. Tricam Indus.***, No. 17-cv-1769, 2021 U.S. Dist. LEXIS 2872 (D. Minn. 1/7/2021).

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TAX LAW

JUDICIAL LAW

■ **Spouse's refusal to transfer marital property subsequent to a divorce decree not a "theft loss" for purposes of tax deduction.** Ms. Bruno and Mr. Bruno's 10-year marriage was dissolved by a divorce decree issued in 2008. The divorce was contentious, and the 2008 decree did not end the parties' financial entanglement. Mr. Bruno refused to transfer marital property awarded in the decree and was held in contempt numerous times. In fact, the trial court "summarized Stephen Bruno's persistent defiance of court orders and concluded: 'This court has never found a party to be more in contempt of court orders than [Stephen Bruno] has been.'" *Bruno v. Bruno*, 146 Conn. App. 214, 76 A.3d 725 (2013). Mr. Bruno's attempts to evade the effect of the divorce decree included filing for bankruptcy and claiming in the bankruptcy proceeding that the marital assets, which he had been ordered to transfer to petitioner, were gone. Ms. Bruno argued that Mr. Bruno's egregious behavior amounted to a theft loss and that the theft generated a net operating loss (NOL) in 2015. Ms. Bruno sought to carry forward the NOL to 2016 and back to 2013 and 2014.

The tax court, while sympathetic to Ms. Bruno's situation, held for the commissioner. The court applied Connecticut law to ascertain whether Mr. Bruno's persistent failure to pay his debt to Ms. Bruno qualified as embezzlement. The court concluded that Connecticut's law did not support such a reading. Further, the court found that Ms. Bruno had *bona fide* claims for recoupment and had a reasonable prospect of recovery, and therefore was not entitled to a theft loss deduction. ***Bruno v. Comm'r***, T.C.M. (RIA) 2020-156 (T.C. 2020).

■ **In a conservation easement dispute, Judge Holmes asks: Is Sack or Wooster the wiser?** In the opening paragraph in an "exceptionally unusual conclusion in a conservation easement" case, Judge Holmes observes that "Conservation

easements are to the Commissioner what aunts are to Bertie Wooster: 'It is no use telling me there are bad aunts and good aunts. At the core, they are all alike. Sooner or later, out pops the cloven hoof.'" Holmes is referring here to the fictional character in the comedic P.G. Wodehouse *Jeeves* stories. This imminently readable opinion tells the story of former NFL star Warren Sapp and Kumar Rajagopalan's foray into an investment involving property in North Carolina. Rajagopalan and Sapp undertook this investment at a particularly volatile time in North Carolina's real estate market, and their donation of a conservation easement forms the heart of their dispute with the service.

Taxpayers are permitted deductions for charitable contributions of qualified conservation easements, but the contribution must be "(A) of a qualified real property interest, (B) to a qualified organization, (C) exclusively for conservation purposes." IRC 170(h)(1). Unlike many recent conservation easement disputes, this case centers not on the "qualified interest" requirement or the "exclusively for conservation purposes" requirement. Instead, this case presents a valuation dispute. While the dispute is straightforward, the parties were remarkably far apart in their valuations. The commissioner valued the easement at $720,000 while the petitioner (and Mr. Sapp) valued the easement at $2,900,000.

Wide disparities like these are not unusual in charitable contribution cases (or property tax cases, for that matter). What is unusual is that in this case, the court did not come up with a valuation between the parties' proffered numbers. The court candidly "acknowledge[d] how unusual it is in a valuation case to not find a number somewhere between those of the experts who battled it out at trial." Although unusual, the court "[found] it more likely than not that the conservation easement was worth *at least* what SS Mountain (and therefore Kumar and Sapp) claimed on their tax returns." ***Rajagopalan v. Comm'r***, T.C.M. (RIA) 2020-159 (T.C. 2020).

Petitioners allege sales and use tax violates Minnesota Constitution; court disagrees and dissects language of statute. With no facts in dispute, plaintiffs Jeffrey Sheridan and Kirk Lindberg, together with defendant Commissioner of Revenue, asked the tax court to determine whether Minnesota's sales and use tax, chapter 297A of the Minnesota Statutes, violates Article X, Section 5 of the Minnesota Constitution.

Mr. Sheridan submitted an Aircraft Registration Application and Sales/Use Tax Return to the Minnesota Department of Public Safety concerning his 9/23/2016 purchase of his Bellanca N75MM aircraft (Aircraft 1). Mr. Sheridan made a total payment of $3,019.60; $2,921.25 was for use tax and $98.35 was for an annual "in lieu" tax. Subsequently, Mr. Sheridan filed with the Minnesota Department of Revenue a Sales and Use Tax Refund Request and requested a refund of $2,921.25. Mr. Sheridan claimed payment of the use tax violates Article X, Section 5 of the Minnesota Constitution and the tax should be returned. On 7/31/2018, the Department of Revenue (DOR) issued a tax order addressed to Mr. Sheridan denying the refund request. In the order, DOR stated, "[s]ales of aircraft are taxable unless an exemption applies. The information you furnished did not prove this sale was exempt, therefore, the item claimed is being denied."

Similarly, Mr. Lindberg also submitted to the Department of Public Safety an Aircraft Registration Application and Sales/Use Tax Return setting forth the use tax with respect to his 3/3/2017 purchase of a Beechcraft N993MD (Aircraft 2). Mr. Lindberg made a total payment of $11,934.37; $11,515.62 was for use tax and $418.75 was for an annual "in lieu" tax. Mr. Lindberg then filed with DOR a Sales and Use Tax Refund Request, seeking return of $11,515.62. Mr. Lindberg also claimed that payment of the use tax violates Article X, Section 5 of the Minnesota Constitution and the tax should be returned. On 7/31/2018, DOR issued a tax order to Mr. Lindberg denying the refund request. DOR's reason for denying the refund request was the same as for Mr. Sheridan's request; stating that Mr. Lindberg "did not prove this sale was exempt."

Article X, Section 5 of the Minnesota Constitution provides that "[t]he legislature may tax aircraft using the air space overlying the state on a more onerous basis than other personal property. Any such tax on aircraft shall be in lieu of all other taxes." Minnesota Statutes provide for both the "in lieu" tax, and a sales and use tax on aircraft. *See* Minn. Stat. §360.531, subd. 1 (2018); Minn. Stat. §297A.82, subd. 1 (2018).

In cross-motions for summary judgment, plaintiffs argued the constitutional provision prohibiting "all other taxes" renders the sales and use tax on aircraft unconstitutional. Plaintiffs asserted that by the plain language of the Minnesota Constitution, taxes paid under Minnesota Statute §360.531 (the "in lieu" tax) prevents other taxes from being collected relative to the same aircraft. Therefore, taxes collected under the sales and use tax were collected in violation of the Minnesota Constitution.

The commissioner argued the "in lieu of all other taxes" provision prevents a double personal property tax, but does not prevent transactional taxes, such as the sales and use tax. The commissioner contends that the sales and use tax is not duplicative of the "in lieu" tax on an aircraft. Chapter 297A, governs the taxation of sales and use of "tangible personal property" in Minnesota. *See generally* Minn. Stat. §§297A.61-.995 (2018). Section 297A.82 requires that a one-time sales or use tax be paid prior to aircraft being registered. Minn. Stat. §297A.82, subd. 1. «The language reads: ‹[a]n aircraft must not be registered or licensed in this state unless the applicant presents proof that the sales or use tax imposed by this chapter has been paid….›" *See also* Minn. Stat. §360.595, subd. 1 (2018). When purchasers buy an aircraft, "statute requires payment of a sales and use tax, and with proof of pay-

ment, purchasers must then register their aircraft, with payment of the attendant 'in lieu' tax."

Regarding the first sentence of Article X, Section 5, the court stated that it accomplishes two things: "first, it allows the taxation of aircraft, and second, the ability to tax pursuant to this provision is limited to a personal property tax on the aircraft itself." The court further explained that "the plain meaning of this sentence governs the legislature's ability to tax 'aircraft,' which does not include taxation of the sale or use of that aircraft." Analyzing the second sentence, "[a]ny such tax on aircraft shall be in lieu of all other taxes," the court explained that the «plain meaning ‹[a]ny such tax,' refers to the prior sentence's personal property tax on aircraft. The next words, 'on aircraft,' again limit the prohibition of double taxation on aircraft only."

The court agreed with the commissioner that the plain meaning of the Minnesota Constitution's prohibition of double taxation "on aircraft" does not prevent imposition of a sales or use tax and denied plaintiff's motion for summary judgment and granted the defendant's motion for summary judgment. ***Sheridan v. Comm'r of Revenue***, 2020 WL 7250900 (Minn. Tax Court 12/2/20).

■ **Petitioner fails to provide timely and adequate information pursuant to the mandatory disclosure rule.** Petitioner C&R Elton Hills, LLC, timely filed its property tax petition contesting the 1/2/2019 assessment of the subject property. The parties did not dispute that the subject property is leased to third parties, thereby making it income-producing as of 1/2/2019. The county alleged that petitioner failed to timely provide income and expense information for the subject property as required by the mandatory disclosure rule. *See* Minn. Stat. §278.05, subd. 6 (2018).

The county sent petitioner's counsel a courtesy letter on 7/6/2020, noting the petitioner's obligation to provide income and expense information for the subject property by the 8/1/2020 deadline. On 7/17/2020, counsel for petitioner sent a letter advising it of its statutory obligation to provide the county with income and expense information. According to a representative, however, the letter was inadvertently sent to an old address and C&R Elton Hills did not timely receive the 7/17/2020 letter. On 8/21/2020, the county received a 2019 profit and loss statement, an itemized rent roll dated 8/5/2020, a 2020 budget, and a 2020 cash flow statement from petitioner.

One contesting the valuation of an income-producing property must provide the county assessor with income and expense information about the subject property by August 1 of the year in which the tax is payable. Minn. Stat. §278.05, subd. 6(b). Failure to timely provide the enumerated information requires dismissal. *Id.* The mandatory disclosure rule ensures that a property-tax petitioner provides information that would be useful in determining the value in a contested assessment of property taxes, so that petitioners may receive an adequate and speedy remedy. *See Wal-Mart Real Estate Bus. Tr. v. Cty. of Anoka*, 931 N.W.2d 382, 386 (Minn. 2019). "Failure to disclose under the mandatory-disclosure rule requires dismissal, *Kmart Corp. v. Cty. of Becker*, 639 N.W.2d 856, 861 (Minn. 2002), even if that failure causes no prejudice to the county, *BFW Co. v. Cty. of Ramsey*, 566 N.W.2d 702, 706 n.6 (Minn. 1997)."

The rule provides for a safe harbor in two circumstances: Failure to provide the required information shall result in a dismissal of the petition, unless "(1) the failure to provide it was due to the unavailability of the information at the time that the information was due, or (2) the petitioner was not aware of or informed of the requirement to provide the information."

The court agreed with the county that petitioner failed to timely comply with the mandatory disclosure rule. The court held that the county's 7/6/2020 courtesy letter to petitioner's counsel was sufficient notice of the rule's requirement. Because petitioner had notice of the rule, the rule's unaware safe harbor exception expired 30 days after petitioner's counsel received the letter. Therefore, the court dismissed petitioner's tax appeal. ***C&R Elton Hills, LLC v. Olmsted Co.***, 2020 WL 7485197 (Minn. Tax Court 12/10/20).

■ **Notice by mail constitutionally sufficient; arguments in favor of certified mail are better suited for the Legislature.** Thief River Falls resident Jeffrey Olson runs a farming operation and heavy construction business as a sole proprietorship. In 2017, the commissioner selected Mr. Olson for a sales and use tax audit. The commissioner sent several letters, via regular mail, to Mr. Olson. The commissioner also attempted to reach Mr. Olson by telephone. Mr. Olson claimed not to have received the letters, or if those letters were received, to have overlooked them. Mr. Olson learned of the audit when his bank account was levied in January 2018. After unsuccessfully appealing the audit within the Revenue Department, Mr. Olson sought relief in the tax court. The tax court, however, determined that because Mr. Olson's appeal was untimely, the tax court—a court of limited jurisdiction—did not have subject matter jurisdiction. Mr. Olson argued that notice by regular mail (rather than for example, by certified mail) violated his due process rights. In this opinion, the Minnesota Supreme Court affirmed the tax court and rejected Mr. Olson's due process argument. "On the facts before us," the Supreme Court reasoned, "the Commissioner is nevertheless correct that notice by regular mail was constitutionally sufficient." ***Olson v. Comm'r***, No. A20-1048 (Minn. 12/30/2020).

ADMINISTRATIVE ACTION

■ **Regs offer guidance on meals and entertainment deduction.** The Tax Cuts & Jobs Act of 2017 made significant changes to the ability of taxpayers to deduct expenses for business meals and business entertainment. Deductions for business

entertainment were eliminated, and the restrictions on deductions for meals was tightened. The TCJA left some confusion, though, about what to do when food and beverage expenses were incurred in the context of an entertainment venue. The IRS issued Regs. Secs. 1.274-11 and 1.274-12 (T.D. 9925) to supplement temporary guidance, and to address the changes made to the meals and entertainment deduction under the TCJA.

■ **Final regs on carried interest.** The IRS issued final regulations under Code Sec. 1061, which re-characterizes certain net long-term capital gains of a partner that holds one or more applicable partnership interests, as short-term capital gains. These rules are often referred to as the carried interest rules. TD 9945; Reg §1.702-1, Reg §1.704-3, Reg §1.1061-1, Reg §1.1061-2, Reg §1.1061-3, Reg §1.1061-4, Reg §1.1061-5, Reg §1.1061-6, and Reg §1.1223-3.

■ **Paycheck Protection Program loans not taxable for federal purposes but must be included in Minnesota income.** Minnesota employers received more than $10 billion through the CARES Act Paycheck Protection Program. Loans received through the program and used for specified purposes are forgivable and need not be included in federal income. (Most loan forgiveness is income.) As of this writing, the Minnesota Legislature has not conformed to the federal treatment of forgivable paycheck protection loans. In other words, loan forgiveness is non-taxable on the federal return but taxable on the Minnesota return. The Minnesota Legislature, which is in session, could change the tax treatment of PPP proceeds to conform to the federal treatment. Individual members of the Legislature are doubtless keenly aware of the issue—23 Minnesota lawmakers collectively received over $1 million of PPP loans, according to reports from the Minnesota Reformer and Star Tribune. The Department of the Treasury has a searchable database, organized by state, of loan recipients.

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TORTS & INSURANCE

JUDICIAL LAW

■ **Settlement agreements; fraud in the inducement.** Plaintiff initially brought suit against defendant for breach of a promissory note. Defendant acknowledged that it owed plaintiff funds under the note, and the parties began settlement negotiations. Plaintiff asserts that, during these settlement negotiations, defendant made repeated misrepresentations regarding its financial condition. The parties ultimately executed a settlement agreement and judgment was entered.

Later, plaintiff brought this action against defendant seeking money damages and alleging fraudulent misrepresentation and fraudulent omission in the inducement of the settlement agreement, and fraudulent transfer. Defendant, relying on the settlement agreement, moved to dismiss pursuant to failure to state a claim upon which relief can be granted. The district court dismissed the complaint in its entirety, determining that the action was precluded by the no-reliance and integration clauses in the settlement agreement. The district court also deemed the action an improper collateral attack on the judgment of dismissal.

The Minnesota Court of Appeals reversed and remanded for further proceedings. With respect to the settlement agreement, the court noted that the "Minnesota Supreme Court has long held that fraud cannot be waived by a contractual disclaimer." The court continued: "This is not to say that fraud claims are never precluded by such clauses. A court may 'find that reliance on an oral representation was unjustifiable as a matter of law only if the written contract provision explicitly stated a fact completely contradictory to the claimed misrepresentation.'" Because the settlement agreement did not directly contradict the alleged fraud, the court held that the question of reliance was for the factfinder, and the claims were not precluded as a matter of law. The court went on to hold that the suit was not an impermissible collateral attack on the prior judgment because it asserted "new claims and new issues" than the prior case. ***Great Plains Educational Foundation, Inc. v. Student Loan Finance Corp.***, A20-0326 (Minn. Ct. App. 12/28/2020). *https://mn.gov/law-library-stat/archive/ctappub/2020/OPa200326-122820.pdf*

■ **Settlement agreements; fraud in the inducement.** Plaintiff claimed that defendant, his alleged attorney, breached his fiduciary duties to by failing to disclose his participation in a lease agreement involving plaintiff's home and place of business. The district court granted summary judgment to defendant due to plaintiff's failure to satisfy the expert affidavit requirements found in Minn. Stat. §544.42.

The Minnesota Court of Appeals affirmed. After reviewing its precedent, federal case law and secondary sources, the court held: "while a breach-of-fiduciary-duty claim against an attorney may yield different remedies than a legal-malpractice claim, the elements to establish the claims are identical." Given that the elements of a breach-of-fiduciary-duty claim against an attorney are the same as a claim for legal malpractice, the court held that the expert affidavit requirements are the same as well. Because plaintiff failed to submit either affidavit required by Minn. Stat. §544.42, the district court properly granted summary judgment. ***Mittelstaedt v. Henney***, A20-0573 (Minn. Ct. App. 1/4/2021). *https://mn.gov/law-library-stat/archive/ctappub/2021/OPa200573-010421.pdf*

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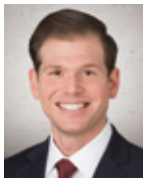

KUPSTIS

ANTHONY J. KUPSTIS has joined Fredrikson & Byron as an associate in the mergers & acquisitions and private equity groups.


ADAMS

TRAVIS J. ADAMS was accepted into the partnership at Melchert Hubert Sjodin PLLP. Adams has been with the firm since 2019. He is a trial lawyer and litigator focusing his practice on personal injury.


HARTWELL

ELIZABETH DROTNING HARTWELL joined Best & Flanagan in the family law practice.


RAUKAR

PETER J. RAUKAR was named a partner of Thibodeau, Johnson & Feriancek, PLLP d/b/a Trial Group North. Raukar devotes his practice to civil litigation.


BRUZZONE

Patterson Thuente IP has elevated patent attorney DANIEL BRUZZONE to the position of partner.


MULLER

MACEY L. MULLER has joined Moss & Barnett practicing in the multifamily and commercial real estate finance and real estate teams.


MARKOWITZ

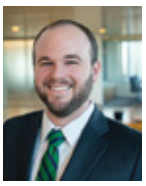
JEFFREY M. MARKOWITZ was elected as shareholder at Chapman, Kettering, Smetak & Pikala, PA. He has been with the firm since August 2015 and co-chairs the appellate practice group.

Gislason & Hunter LLP announced that four attorneys—CHRIS BOWLER, RICK HALBUR, BRITTANY KING-ASAMOA, and DEAN ZIMMERLI—have been named as partners.

Henson Efron announced that ANNE HAALAND and SCOTT EMERY were elected the firm's newest shareholders. Haaland is part of the firm's family law practice group, and Emery is a member of the business law and estate, trust, and probate practice groups.


EASTBURN


JOHNSON


SEITZ

Stinson LLP announced the election of three new partners at the firm's Minneapolis office: BEN EASTBURN, IAIN JOHNSON, and JUSTIN SEITZ.


WEBENDORFER

J. WESLEY WEBENDORFER was promoted to partner at DeWitt LLP. Webendorfer joined the firm in 2013 and is part of the environmental and government relations practice groups.


COLEMAN

Saul Ewing Arnstein & Lehr elected Minneapolis office managing partner ALFRED COLEMAN to the firm's nine-member executive committee.

KYLE PROUTY has joined Heimerl & Lammers LLC practicing family law.


PROUTY

JOHN CHILDS has joined Robins Kaplan LLP as a partner in the business litigation group.

BRANDON ZUMWALT was named partner at Johnson, Moody, Schmidt & Kleinhuizen, PA. He practices in the areas of family law, criminal defense, personal injury, and civil litigation.


ZUMWALT

JIM KRAUSE has joined Lommen Abdo's litigation practice focusing on professional liability, attorney discipline, insurance defense, insurance coverage, and commercial litigation.


KRAUSE

We gladly accept announcements regarding current members of the MSBA for publication, without charge. Email: bb@mnbars.org

Phillip H. Martin died on December 13, 2020 at the age of 80. He was an attorney in the tax, trusts, & estate group at Dorsey & Whitney LLP from 1964 to 2011. His practice focused on corporate and individual income, estate, and gift taxation.

Edward W. Simonet, age 71, a well-known and well-respected attorney from Stillwater, MN died December 15, 2020.

Robert W. Murnane, age 85, died peacefully on December 11, 2020 at his home in St. Paul. He received his law degree from the University of Minnesota in 1959 and enjoyed an impressive 50-year career as a trial attorney at the Murnane law firm started by his father (E.W. Murnane) and his uncle (Charles Murnane) in 1940.

John C. McNulty, age 95, of St. Paul died peacefully at home on December 18, 2020. He practiced law in the Twin Cities for more than 40 years. He was also a municipal court judge in St. Louis Park for a time. McNulty was a former president of the Hennepin County Bar Association, president of the American Judicature Society, chair of the American Bar Association Committee on Professional Discipline, and fellow of the American Bar Foundation.

John F. Angell, age 81, of Saint Louis Park died on December 21, 2020. He began practicing law in 1964. In December 1973, Angell joined the firm of Lasley, Gaughan, Reid & Stich, PA, which would later be known as Stich Angell. He practiced with the firm until his retirement in 2013.

Thomas P. Gallagher passed away at the age of 86 on January 2. He began working as an arbitrator in the early 1970s and made it his full-time specialty around 1980. He was a member of the National Academy of Arbitrators and was on Minnesota's Bureau of Mediation Services arbitration roster.

Thaddeus Richard Lightfoot of Plymouth, MN passed away unexpectedly on December 14, 2020. He was an environmental attorney and partner at Dorsey & Whitney LLP, and a well-respected pro bono legal advisor. A former president of the Hennepin County Bar Association (2017-18), he also served as an adjunct professor at the Mitchell Hamline and University of Minnesota Schools of Law.

Jerry F. Rotman passed away on December 22 at age 87. Following graduation from Harvard Law School, Rotman joined the law practice of Levitt, Palmer, Bowen and Bearmon, which later merged with Briggs & Morgan. He retired from that firm at the age of 55.

Pierce Aldrich McNally died on December 16 at the age of 71. He practiced law at Oppenheimer Wolff & Donnelly and Gray Plant Mooty in Minneapolis. He also served as a board member and elected officer of his family company, Midwest Communications, Inc.

William Myron Pilgram passed away on December 22, 2020 at 103 years of age. He graduated from law school in 1951. He later became a close associate of the law firm Drake and Drake. He practiced law until he retired at age 74.

Michael Fiske Driscoll passed away in January at the age of 77. He previously worked at the St. Paul City Attorney's Office.

Orrin S. Estebo passed away on December 18 at the age of 80. During his lifetime Orrin had a passion for education and donated several million dollars to Redwood Falls, MN area schools and the University of South Dakota School of Law, from which he graduated.

Miguel González-Marcos died on January 18 at the age of 59. He was a public policy professor at University of Maryland.

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ATTORNEY WANTED

LITIGATION ATTORNEY. Evans Haigh & Hinton LLP is currently accepting applications for an attorney with three plus years' experience in litigation. Evans Haigh & Hinton is a growing civil litigation firm with an emphasis in commercial litigation, health care litigation and personal injury litigation. We are looking for an attorney who is interested in litigating complex and significant cases. Applicants with trial experience, civil or criminal, are preferred. We offer an attractive salary and benefit package commensurate with experience. Please send a cover letter and resume to Mark Arndt at: Mark J. Arndt Evans, Haigh & Hinton, LLP 101 North Main, Suite 213 P.O. Box 2790 Sioux Falls, SD 57101 (605) 275-9599 (605) 906-8904 (DD) Email: marndt@ehhlawyers.com Website: ehhlawyers.com

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ATTORNEY WANTED. Waycrosse is a single-family office located in a western suburb of Minneapolis. We have an opening for an Attorney who will work on a variety of high net worth client needs. Key Areas of Responsibility: Estate planning including proactively identifying areas of opportunity, reviewing legal documents; Prepare client presentation material and assist with meeting minutes; Oversight of stock transfers including reviewing certificates and receipts; Entity management and compliance; Foundation compliance; Trust and estate management and administration; Miscellaneous business and contract work; Staying apprised of changes in the tax environment and educating the Legal Group; Supporting internal operations of the Company as needed in the areas of Insurance, Investments, Accounting, Human Resources, Corporate Compliance, Tax, and Private Trust Company Operations; Assist with management and coordination of outside counsel Required Professional Qualifications: Juris Doctorate (JD) Degree; six plus years of legal experience in estate planning and trust and estate administration; Experience assisting with trust compliance, administration, estate planning, contract review/advising (preferred). If you are interested, please send your resume to: humanresources@waycrosse.com for consideration.

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REGULATORY ATTORNEY. Winthrop & Weinstine, an entrepreneurial, full-service law firm, located in downtown Minneapolis has an excellent opportunity for an associate attorney in its fast-paced Regulatory and Government Relations practice. The client base is robust and diverse, spanning virtually every industry, and ranging from individual entrepreneurs to Fortune 100 companies. Qualified candidates will have one to three years of regulatory law experience, with a strong preference for candidates who have served in the general counsel's office or as outside counsel for a state or federal agency. In addition, candidates must have advice and counseling experience, excellent verbal and written skills, a strong work ethic and strong academic credentials. Winthrop & Weinstine offers competitive salary and benefits and a team approach to providing our clients with top quality service. EOE. Please apply at: https://bit.ly/3aXMVDx

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ATTORNEY WANTED. Notice of U.S. Magistrate Judge Vacancy The Judicial Conference of the United States has authorized the appointment of a full-time United States Magistrate Judge for the United States District Court, District of Minnesota. The current salary of the full-time position is $201,112 per year and the position will be located in Minneapolis or St. Paul. The term of office for a full-time magistrate judge is eight years; incumbents may be reappointed to successive terms. The full public notice, application instructions, and application form are available on the Court's website at www.mnd.uscourts.gov/employment. Applications must be received no later than 4:30 p.m. Central Time on February 19, 2021.

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MINNESOTA DEPARTMENT is hiring for an Attorney. To apply, go to www.mn.gov/careers and search for JOB ID#: 42944. Must have: Graduation from an ABA-approved law school. Admission to the Bar (license) to practice law in Minnesota is required prior to appointment. Authorized to practice law in Minnesota. Please email Yer Winder at: yer.winder@state.mn.us if you have any questions.

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ATTORNEY WANTED. Maslon LLP is seeking attorney candidates with at least two years of experience to join the firm as associates in our Corporate & Securities Practice Group. Associates in this group practice primarily in the areas of mergers and acquisitions, private and public securities offerings and compliance, entity formation and governance, commercial contracting, drafting technology agreements and general business counseling. For more information, visit us at www.maslon.com.

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BANKING/REAL ESTATE Associate or Lateral Attorney: Barna Guzy & Steffen, Ltd is a mid-sized north metro law firm seeking experienced banking lawyer to join existing department. Three plus years in banking law required with some real estate experience preferred. Competitive salary and benefit package. Please send CV including description of transaction experience to humanresources@bgs.com. No phone calls. EOE/AA Employer.

ATTORNEY WANTED. Arthur, Chapman, Kettering, Smetak & Pikala, PA is a team-oriented firm committed to providing our clients with superior legal services and we are seeking a highly motivated attorney to join our busy civil litigation practice. The ideal candidate will possess one to four years of practical experience of litigation. Candidates should have excellent research and writing skills, possess a strong attention to detail, be resourceful, and be genuinely interested in litigation work. Candidates with both Minnesota and Wisconsin licenses will take preference. Our firm is dedicated to creating a collegial, diverse workplace and we offer a competitive compensation/benefits package. If you are interested in joining our team, please specify this position in your cover letter and send along with a resume, salary expectations, and writing sample(s) in confidence to: Arthur, Chapman, Kettering, Smetak & Pikala PA Human Resources: recruiting@ArthurChapman.com Equal Opportunity Employer.

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GUNDERSEN HEALTH System is seeking a Contract Services Coordinator in West Salem, WI. This position will manage and administer the implementation of both supply and service contracts and coordinate the contract review and approval process. This position will collect all the necessary data and other relevant information to prepare, review, analyze, negotiate and evaluate the contract terms, including monitoring contract compliance with corporate and departmental policies. Education: Required Bachelor's degree in Legal or Business or a related field. Work Experience: Required one year of contract experience with a background in automated applications. To view the complete job description and apply, please visit: www.gundersenhealth.org/careers. Equal Opportunity Employer.

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REGULATORY ATTORNEY. Winthrop & Weinstine, an entrepreneurial, full-service law firm, located in downtown Minneapolis has an excellent opportunity for an associate attorney in its fast-paced Regulatory and Government Relations practice. The client base is robust and diverse, spanning virtually every industry, and ranging from individual entrepreneurs to Fortune 100 companies. Qualified candidates will have one to three years of regulatory law experience, with a strong preference for candidates who have served in the general counsel's office or as outside counsel for a state or federal agency. In addition, candidates must have advice and counseling experience, excellent verbal and written skills, a strong work ethic and strong academic credentials. Winthrop & Weinstine offers competitive salary and benefits and a team approach to providing our clients with top quality service. EOE. Please apply at: https://bit.ly/3aXMVDx

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ATTORNEY WANTED. Franklin D. Azar & Associates, PC is the largest Personal Injury Plaintiffs firm in Colorado and has represented thousands of people entitled to recover damages from injuries in all types of accidents, from dangerous and defective products, and from employers not paying adequate wages. The firm maintains a powerful team of, in many cases renown, lawyers. Every attorney in our firm benefits from a collegial environment with open access to some of the most experienced and reputable attorneys in Colorado. Requirements: Demonstrate strong dedication to personal injury law and a passion for helping people; Possess strong organizational and writing skills; Be energetic, hard-working, and a team-player; Have experience with complex litigation two years of experience preferred but all candidates will be considered. Franklin D Azar & Associates offers a comprehensive benefits package and competitive compensation based on results. Send resumes to: malcolmo@fdazar.com

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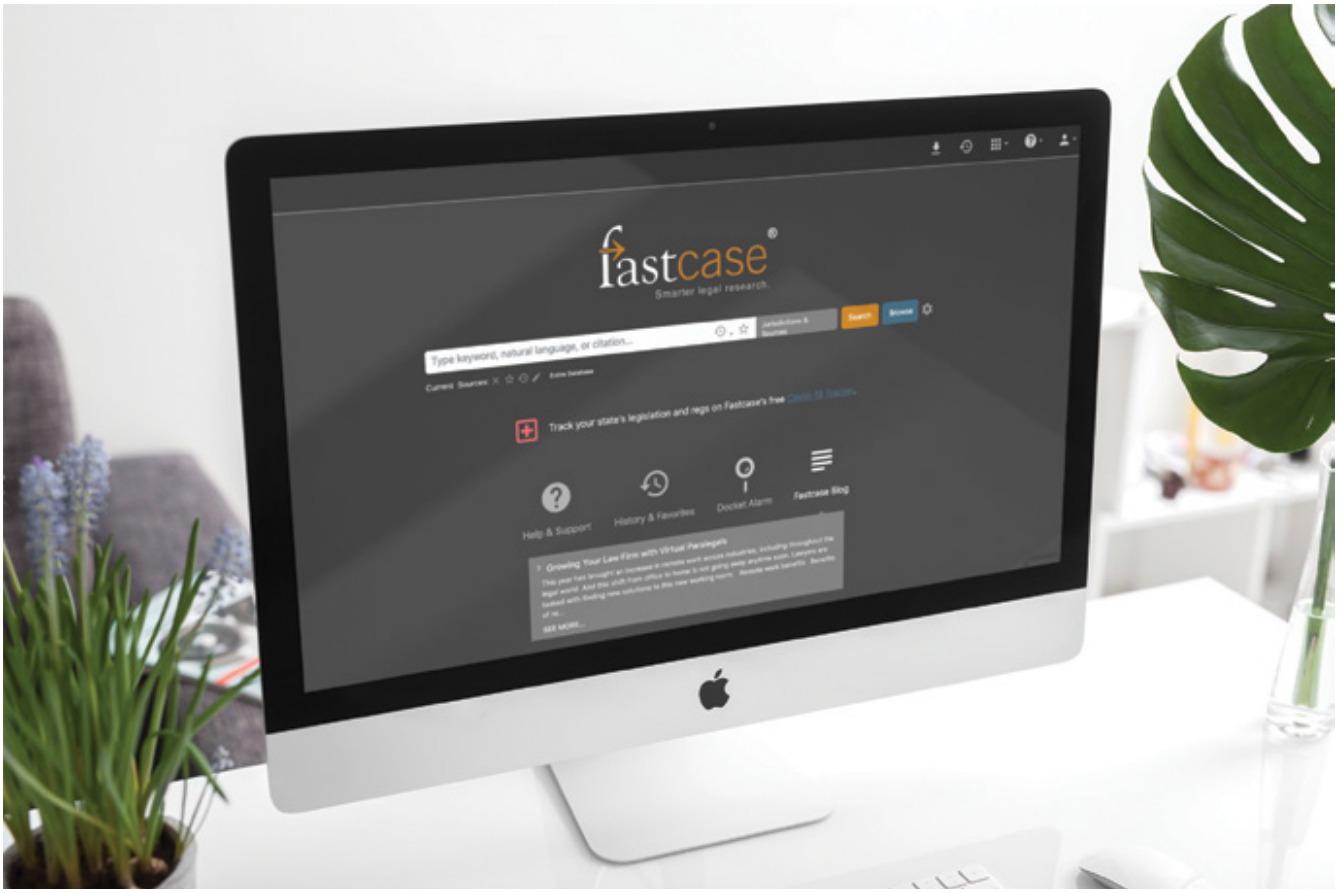

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