14th ANNUAL
D. BROOK BARTLETT LECTURES
JUNE 27, 2014

"EVIDENCE, ETHICS & EFFECTIVE LAWYERING"

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Loyola Law School

Hypo #1

Beware of Social Media

Defendant is charged with participating in a terrorism conspiracy. Prosecutors seek to introduce a posting on Defendant's Facebook page showing him posing for a picture with members of a radical and violent jihadist group. Accompanying the picture is a statement by defendant that, "Some of my best friends are martyrs." In pretrial negotiations, the prosecutor said he realized that maybe the posting was in jest, but given the seriousness of the charges, he thought he could sell it to the jury as further evidence of the defendant's intent to help terrorists.

Defendant objects to the admission of the Facebook post. Should the court admit it?

Authorities

Fed. R. Evid. 902 (Authentication)

United States v. Hassan, 742 F.3d 104 (4th Cir. 2014)

United States v. Castillo, 2014 U.S. App. LEXIS 8270 (11th Cir. 2014) (unpublished)

Holder v. Humanitarian Law Project, 561 U.S. 1, 130 S.Ct. 2705, 177 L.Ed. 2d 355 (2010)

ABA Model Rule of Professional Conduct 3.4: Fairness to Opposing Party and Counsel

Hypo #2

Cyberspace Mischief

Prosecutors charged high-ranking local officials with a series of serious crimes. While the case was pending, one of the prosecutors used a pseudonym and went on various social media sites and engaged in a secret public relations campaign to turn public opinion against the defendant. Not only did the prosecutor reveal incriminatory evidence presented to the grand jury, but he urged the defendants to "plead guilty before they ever stepped into the courtroom." He also posted articles that referred to the defendants as "corrupt," "ineffectual," and included an old Italian proverb to illustrate why the defendants were responsible for illegal acts by their subordinates: "The body rots from the head down."

Defendants seek to dismiss the case against them. Should the indictment be dismissed?

Authorities

United States v. Bowen, 969 F.Supp.2d 546 (E.D. La. 2013)

Fed. R. Crim. Proc. 6(e)

28 C.F.R. § 50.2: Release of information by DOJ personnel relating to criminal and civil proceedings

U.S. Attorney's Manual, Chapter 1-7.110, 1-7.500: Rules for dissemination of information

ABA Standards Relating to the Administration of Criminal Justice, Prosecution Function, Standard 3-1.4: Public Statements

Hypo #3

Piling On

Defendant is accused of securities fraud. Prosecutors claim that the defendant, the President and CEO of a small public company, did not comply with SEC rules for stock issuance. To support their case, prosecutors seek to introduce the fact that the SEC had filed a complaint against the defendant for violating the same rules. However, as it turns out, defendant settled that civil action with no admission of liability.

Should the civil complaint be admitted?

Authorities

Fed. R. Evid. 404(b): Prior Similar Acts

United States v. Bailey, 696 F.3d 794 (9th Cir. 2012)

United States v. Cook, 557 F.2d 1149 (5th Cir. 1977)

ABA Model Rule of Professional Conduct 3.4: Fairness to Opposing Party and Counsel

Hypo #4

Loose Lips Sink Ships

Defendant is on trial for conspiracy to commit bank and wire fraud. The court issued a standard sequestration order under Federal Rule of Evidence 615 excluding witnesses from being present during the testimony of other witnesses. After he testified in the case, the case agent met with another agent scheduled to testify and shared his testimony with him. Defendant claims that the court's sequestration order has been violated and the court should impose appropriate sanctions against the government.

Should the court find a violation and impose sanctions?

Authorities

Fed. R. Evid. 615: Sequestration of Witnesses

United States v. Engelmann, 701 F.3d 874 (8th Cir. 2012)

ABA Standards Relating to the Administration of Criminal Justice, Prosecution Function, Standard 3-5.2: Courtroom Professionalism

Hypo #5

Attacking the Truth

Julie Wagstaff is representing Suzy Schmitz in a tough mail fraud case. Although she knows that the government's witness, Mary, is telling the truth, Wagstaff vigorously cross-examines her and later calls her a "liar" during closing argument. Moreover, during her cross-examination of Mary, Wagstaff asks her, "Are you saying that if any witness who comes in here and disagrees with you, he or she must be lying?"

The prosecutor objects. Has Wagstaff acted inappropriately?

Authorities

United States v. Schmitz, 634 F.3d 1247 (11th Cir. 2011)

ABA Standards Relating to the Administration of Criminal Justice, Defense Function, Standard 4-4.3: Relationship with Prospective Witnesses

ABA Standards Relating to the Administration of Criminal Justice, Defense Function, Standard 4-7.6: Examination of Witnesses

Hypo #6

Hiding the Ball

In a civil qui tam action, the government fails to disclose evidence that could impeach its key whistleblower witness. This evidence includes a memorandum from another government lawyer warning that the whistleblower will "lie every chance he is given." Defendant moves to dismiss the qui tam action and ask for sanctions.

Should defendant's motion be granted?

Authorities

United States v. Project on Gov't Oversight, 893 F.Supp.2d 330 (D.C. D.C. 2012)

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)

Fed. R. Civ. P. 26

ABA Model Rule of Professional Conduct 3.3: Candor Toward the Tribunal

Hypo #7

Pseudo-Expert

Plaintiffs sue defendant police officers for civil rights violations under 42 U.S.C. § 1983. Defendants claim that their use of force was within policy. One of defendant's lawyers used to be chief of training for the police department. Although he was not on the force at the time of the assault at issue, he regularly reviews the department's use of force policy for his other clients. To avoid the high costs of another expert, the lawyer offers to testify as to the proper use of force by officers. Plaintiffs object.

Should the objection be sustained?

Authorities

Fed. R. Evid. 702: Expert Witnesses

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)

ABA Model Rule of Professional Conduct 3.7: Lawyer as Witness

Hypo #8

[Maybe No One Will Notice]

Defendant is on trial for unlawfully distributing controlled substances. The analyst, "Johnny B. Goode," who tested the seized substances failed to show up for trial. However, another analyst, "Jon B. Gud" is available. The prosecutor thinks that there is a good chance that the overworked and unprepared defense lawyer will not notice that a different analyst is testifying and that he will be able to admit the forensic report through Gud. Gud is being called as an expert on the collection of controlled substances.

Is it improper for the prosecutor to use Gud to introduce the forensic report?

Authorities

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)

Bullcoming v. New Mexico, 564 U.S. __, 31 S.Ct. 2705, 180 L.Ed.2d 610 (2011)

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.. 2d 314 (2009)

Williams v. Illinois, __ U.S. __, 132 S.Ct. 221, 183 L.Ed.2d 89 (2012)

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

ABA Standards Relating to the Administration of Criminal Justice, Prosecution Function, Standard 3-5.6(b): Presentation of Evidence

Hypo #9A

Investigating Jurors

During voir dire in a major products liability case, defendant hires a jury consultant to check into the background of the prospective jurors. Among other investigative measures, the consultant checks on the jurors' web pages to learn more about the jurors and their attitudes. For one of the jurors, the consultant poses as one of the juror's friends to get access to that juror's Facebook page.

Plaintiff objects to the conduct of defendant's jury consultant and seeks sanctions against defendant's counsel. Should the court grant the motion?

Authorities

N.Y. State Bar Ass'n Comm. on Prof. Ethics, Op. 843 (Formal Opinion 2010-02), available at http://www.nycbar.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites

San Diego County Bar Ass'n Legal Ethics Opinion 2011-2 (available at http://www.sdcba.org/index.cfm?pg=LEC2011-2

Philadelphia Bar Ass'n, Op. 2009-2, March 2009 (available at http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf

ABA Model Rules of Professional Conduct, 4.1: Truthfulness in Statements to Others

Hypo #9B

Lying Jurors

After losing at trial, plaintiff searches a juror's Facebook page and learns that the juror lied during voir dire. Plaintiff submits an affidavit in support of a motion for a new trial setting forth the witness's lies.

Should the court consider the affidavit?

Authorities

Fed. R. Evid. 606(b): Juror Affidavits

Warger v. Schauers, 721 F.3d 606 (8th Cir,. 2013), cert. granted, No. 13-517 (Mar. 3, 2014)

Hypo #10

Don't Even Ask

John Doe and Bob Smith are being sued for fraud. Doe hears that Smith is thinking of agreeing to a settlement with the plaintiffs. Counsel for Smith refuses to return any calls from Doe's counsel. Sensing his lawyer's frustration, Doe calls Smith directly and tells him that Smith's lawyer needs to talk to Doe's lawyer before Smith makes the worst decision of his life. When Smith asks Doe why it would be such a bad decision, Doe then tells Smith that some confidential information from the plaintiffs was accidentally sent to Doe's lawyers and, after carefully reviewing it, Doe's lawyer thinks they can easily win the case. In fact, John's lawyer plans to use the information, which includes memoranda of client interviews by plaintiffs' counsel, to cross-examine the plaintiffs during trial.

A. Can Doe's lawyer use the memorandum to cross-examine the witnesses?

B. Does Doe's conduct raise any ethical issues for his lawyer?

Authorities

Fed. R. Evid. 502(a): Privileges

Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009)

Fed. R. Civil Proc. 26(b)(3): Work-Product Privilege

United States ex rel Bagley v. TRW Inc., 204 F.R.D. 170 (C.D. Cal. 2001) (inadvertent disclosures)

ABA Model Rule of Profession Conduct, Rule 4.2: Communication with Person Represented by Counsel

Hypo #11

Fooled Ya!

Eric Hulder is prosecuting a defendant for being the getaway driver at a bank robbery. The actual robber was not captured, but FBI agents arrested defendant based upon eyewitness reports regarding the getaway vehicle.

From all reports, the defendant is intellectually slow. Hulder is dying for the defendant to testify so that he can rip him apart on cross-examination. In fact, defendant does testify. He claims that a friend of his asked him to drive him to and from the bank so that the friend could get some money for the two of them to party. Defendant claims he had no idea that the friend would rob the bank and just thought he was doing his friend a favor.

On cross-examination, Hulder asks the defendant if he lied on his recent driver's license application. When the defendant says no, Hulder holds up a computer printout. Hulder then asks the question again. In fact, the computer print out has nothing to do with driver's license records. It is a copy of Hulder's latest on-line purchase from J.Crew. Nonetheless, visibly shaken, the defendant admits he lied.

Did Hulder act properly in his cross-examination of the defendant?

Authorities

Fed. R. Evid. 608(b): Impeachment with Specific Instances of Conduct

ABA Standards Relating to the Administration of Criminal Justice, Prosecution Function, Standard 3-1.2: The Function of the Prosecutor

Hypo #12

Change of View

Defendant is charged with misappropriation of government property. Prosecutors claim that the defendant stole government property from her job as a clerk at the local Veteran's Hospital because she was in desperate need of funds and had a bad narcotics habit. Defendant claims that it would be impossible for her to steal anything given the location of her desk and where the property was stored. At both parties' request, the court permits a jury view of the setting.

Prior to the jury view, defense counsel cleans out defendants' cubby and replaces pictures of defendant drinking with her friends with pictures of defendant's family attending church services.

Has defense counsel acted properly?

Authorities

ABA Model Rule of Professional Conduct 3.4: Fairness to Opposing Party and Counsel

Hypo #13

Don't Spoil Things

Plaintiff Research Inc. sued Biometric Corp. for misappropriating trade secrets and patent infringement. Biometric seeks sanctions against plaintiff, alleging that plaintiff failed to preserve documents related to the litigation and that it cost defendant more than $2.8 million for a computer specialist to try unsuccessfully to recover the documents. In its defense, Research Inc. claimed the documents were inadvertently deleted because they initially failed to suspend their auto-delete practices.

Should sanctions be granted and jurors instructed that they can infer that the plaintiffs destroyed the documents because they were harmful to their case?

Authorities

Research Foundation of SUNY v. Nektar Therapeutics, 2013 WL 214562 (N.D.N.Y., May 15, 2013) (setting forth standards for spoliation claim)

Hypo #14

Judicial Schmooze

Plaintiff has a case pending before Judge Thompson. Plaintiff's lawyer knows that Judge Thompson will be attending the next Federal Bar Association luncheon. Accordingly, Plaintiff's counsel uses the opportunity to do a short MCLE at the bar luncheon on the law applicable to Plaintiff's case. In particular, there is a thorny judicial notice issue that plaintiff plans to raise, although the judge does not yet know about it because the case was only recently filed. While Plaintiff's counsel uses hypotheticals for his discussion, the facts clearly parallel Plaintiff's case.

Has Plaintiff's counsel acted properly?

Authorities

Fed. R. Evid. 201: Judicial Notice

ABA Model Rule of Prof. Conduct 3.5(a)(b): Impartiality and Decorum of the Tribunal; Ex parte communications

14th ANNUAL D. BROOK BARTLETT LECTURES

Kansas City Metropolitan Bar Association

Kansas City, MO

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THE ELEMENTS OF A STRONG INTRODUCTION TO A BRIEF

Presented By

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TABLE OF CONTENTS

I. INTRODUCTION: THINKING STRATEGICALLY ABOUT PERSUASION

THE SITUATION: What are your current circumstances?

- Procedural: What is the posture of the case?
- Substantive: What are the issues? The facts? The burden of proof or standard of review?
- Practical: How much persuasive work are you going to have to do? What do you want? What will the judge require of you to get what you want?

THE STRATEGY: What perspective should you bring to your "persuasive" situation?

- Option A: Beat the audience into submission.
- Option B: Judge Posner's formula:

Persuasive effort needed = distance x resistance

Hence: *Reduce* the amount of persuasive effort you will need to achieve agreement by:

- Reducing the distance from the judge=s starting place to your goal
- Reducing the judge=s resistance by:

--making obstacles less difficult
--making the goal more attractive
--making your company along the way more agreeable

Correspondingly, increase the distance and resistance the judge perceives in your opponent's argument.

THE TOOLS: What skills will you need to get what you want?

- **Thinking like a lawyer**: What are the strongest substantive aspects of your case?

- **Thinking like a rhetorician**: How can you make that substance more compelling?

- **Thinking like a writer**: How can you (a) capture the judge's attention and (b) make it easier for the judge to follow and remember your arguments?

In the materials that follow, we will generally assume that you have mastered the first skill, and therefore focus on the other two—not because you necessarily lack them, but because they are not sufficiently taught in law school or understood in law practice.

II. RHETORIC AND CLARITY: SUMMARIES

THE ELEMENTS OF PERSUASION

The difference between logic and persuasion:

Logic leaves your reader no choice but to agree with you.

But, since few readers believe themselves so trapped:

Persuasion makes your reader *want* to agree with you.

How do you make logic more persuasive?

Qualities of the:	**Classical rhetoric for the polloi**	**Modern legal advocacy for the judge**
Speaker	*Ethos*: deference to an attractive persona (looking "up") • popularity • prestige • righteousness	*Ethos*: respect for a credible persona (looking "at") • veracity, integrity • professionalism
Argument	Authority *Logos*: plausible reasoning (thinking "for")	Authority *Logos*: systemic reasoning (thinking "with") • the legal "story" • consistency and coherence constraints
	Axios: worthiness of results	*Axios*: principled results • legal risk-avoidance • doing justice
Audience	*Pathos*: invoking emotion	*Pathos*: evoking emotion

III. A NEGLECTED FORM OF INTRODUCTION: THE TABLE OF CONTENTS

Example #1:

TABLE OF CONTENTS

Example #2:

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IV. WRITING EFFECTIVE INTRODUCTIONS AND PRELIMINARY STATEMENTS

> Unfortunately, the judge does not possess the luxury of time for leisurely, detached meditation. You'd better sell the sizzle as soon as possible; the steak can wait.
>
> Ruggero J. Aldisert (retired Chief Judge of the U.S. Court of Appeals for the Third Circuit), *Winning on Appeal: Better Briefs and Oral Arguments* (1992)

Writing introductions is an art form, and no two should look the same. But it helps to approach them with method as well as inspiration. Here is a framework for thinking about what judges want at the start of a brief, and what you should do to state your case persuasively.

What Judges Want: Clarity

When judges are asked what they would like to see at the start of a brief, they give remarkably similar replies. They want the following:

- If the brief is their first taste of a case, a succinct, simple "big-picture" summary of what the case is all about. How did the dispute arise, and why are the parties fighting? The most common complaint: the brief plunges into the details of its argument before explaining the basics of the underlying dispute.
- If it's not clear from the face of the brief, the specific relief you want.
- A clean, clear statement of the questions they have to resolve to get rid of the case. The most common complaints: issues phrased too vaguely to define the ultimate question, and a scattershot list of more issues than they can remember.
- A clean, clear statement of why you think you should win.
- A clean, clear map of the brief's analytical structure. The most common complaint: a one-thing-leads-into-another approach ("moreover," "furthermore," etc.) that doesn't let the judge focus on specific, distinct arguments.

What they do not want to see at the start of a brief:

- Attacks against the opponent that show how strongly you feel, but give the judge no useful information.
- Piling on: a laundry list of issues and arguments.
- Too much boilerplate or inessential procedural detail.

- Clotted prose.

What You Want: Persuasion

The trick to persuasion is to perpetrate it in the same breath as you give the judge what he or she wants, not as a separate act. If you spend much time trying to persuade in language that offers the judge no useful information, you have failed. To pull off this trick, you need to turn the elements listed above to your advantage:

- Although the "big-picture" context should be factual and non-argumentative, it should never be neutral. Seizing control of the context is just as important as seizing control of the issues.

- Themes persuade; arguments alone seldom do. An argument should create a chain of syllogisms so inexorable that readers are compelled to accept your conclusion. A theme should make them want to accept it. As you draft your clean, clear statement of why you should win, your goal should usually be to create a memorable, one- or two-sentence theme as well as an argument. But cases vary: some lend themselves to equitable themes, some to syllogistic inevitability.

- Details persuade; generalizations and conclusory statements do not. Although introductions must be concise, they are often much more persuasive if they deploy a few carefully selected details.

  Note: There is a tension between the last two points. Writing introductions often requires striking the right balance between a strong, concise, uncluttered theme and enough detail to flesh out what would otherwise be abstract, conclusory, and therefore unconvincing propositions. In different cases, the balance is struck in different places: the examples that follow range from half a page to five pages in length.

- If an argument is a sure winner on its face, simplicity is best. Few things beat a simple, impeccable syllogism. If it's not such a sure thing, however, you may persuade best if you summon more than one reason to support your conclusion. This strategy does not justify arguments in the alternative. It just makes the common-sense point that two or three reasons may be more persuasive than one. The most useful discussion of this principle is Stephen Toulmin's Uses of Argument, which provides an alternative to classic syllogistic logic. Toulmin's approach is most helpful in the details of your argument, but it sometimes helps with introductions as well—though you should be very careful not to over-complicate them.

If you follow all the advice above too literally, it will tie you in knots—and lead you to write

introductions that are much too long. The advice is intended to be a framework for thinking about introductions, not a formula to be applied to every one.

The Elements of a Strong Introduction

Making the Reader "Smart"

Label
Map – Structure
Point
Legal

Getting the Reader's "Attention"

Practical
Positive

Making the Reader "Comfortable"

Non-negative

Language

* * * * * * * * *

The Elements of Judicial "Attitude"

"I want to do justice."

I want to do justice *safely.*"

"I need to do justice *quickly.*"

Strategy

The "big picture" – what the case is about; why the judge should care

The "laser focus" – precisely what should the judge be thinking about amidst the case's complexity

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #1

Motion to dismiss

This introduction has its heart in the right place: it sets out to describe the case's context, and to focus on the issues. But it lacks the patience and discipline to do a good job at either task: it rushes through the "big-picture" context at the same time as it tries to describe the personal jurisdiction issue. And it has other flaws:

- It relies on broad, conclusory statements unsupported by any convincing detail.
- It lacks thematic flair: nothing in it makes the reader want to join the writer's side.
- The long list of rules is classic piling on of a kind judges dislike.

The revision, though not perfect, tries to:

- Create a big-picture "frame" that is both lucid and persuasive. It implies—or, at least, leaves open the possible implication—that the other side is scrambling to recover through the courts money it lost as the result of bungling a simple commercial transaction.
- Be more specific about the issues (not just personal jurisdiction, but minimum contacts), and to avoid piling on.
- Support its arguments with some carefully chosen detail.

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #1

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF PANACEA

MIDWEST SEED, INC.,	)	
Plaintiff,	)	No. C89-1572
v.	)	
FIRST CITIZENS BANK, a banking corporation; RELIABLE EXPRESS, INC., a Washington corporation; RESOURCE DEVELOPMENT COMPANY, a Lebanese corporation,	)	MEMORANDUM IN SUPPORT OF DEFENDANT FIRST CITIZENS BANK'S MOTION TO DISMISS THE COMPLAINT
Defendants.	)	

PRELIMINARY STATEMENT

This case arises from a single international sales transaction. Plaintiff's alleged breach of contract claim is one regarding which the plaintiff has not alleged and cannot allege personal jurisdiction over the bank which issued a letter of credit in connection with the transaction. Plaintiff's attempt to bolster this claim with an inherently thin and improperly alleged Racketeer Influenced and Corrupt Organizations Act ("RICO") claim is not sufficient to prevent dismissal of this transaction under Fed. R. Civ. P. 9(b), 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5) and 12(b)(6).

FACTS

Plaintiff, a Panacea corporation, sold 1000 metric tons of seed to .....

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #1 REVISED

PRELIMINARY STATEMENT

This case arises from a single international sales transaction. Plaintiff and its shipping agent, Reliable Express, Inc., failed to satisfy the terms of a letter of credit through which it was to be paid for a shipment of seed. Because of this failure, the letter could not be honored by First Citizens Bank ("FCB"), its issuer. Plaintiff has sued FCB, Reliable Express, and Resource Development Company, to which it was attempting to sell the seed, for breach of contract. In addition, in an effort to create federal jurisdiction for a simple letter of credit case, it asserts a Racketeer Influenced and Corrupt Organizations Act ("RICO") claim against the defendants for conspiring to breach the letter of credit contract.

Plaintiff's complaint should be dismissed as to FCB because it does not and could not allege that FCB—a Lebanese bank with no office or assets in the State of Panacea—has sufficient minimum contacts with the State for this court to assert personal jurisdiction over it. In addition, the complaint fails to allege any of the predicate facts necessary to establish a RICO claim, and fails to [ ].

FACTS

.....

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #2

Appeal

The "before" version commits at least two sins:

- It rushes into its argument before explaining the context: what happened, and why did a quarrel result?
- It fails to create a clear, visible structure for its argument. The first words in the third and fourth paragraphs—"moreover" and "at any rate"—are symptoms of this failing.

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #2

BIG BANK, N.V.,	
Plantiff-Appellant,	New York County Clerk's Index No. 2222/22
-against-	
MEGACORP,	
Defendant,	
-and-	
MINICORP,	
Defendant-Respondent.	
MINICORP,	
Third-Party Plaintiff,	
-against-	
MEGACORP, JOHN JONES, AND JILL JACKSON,	
Third-Party Defendants.	

BRIEF OF PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

The instant appeal by Plaintiff-Appellant Big Bank, N.V. ("Big Bank") relates to an Order issued by Hon. James Rogers, dated January 30, 1991 (the "Order"), pursuant to which Justice Rogers granted, in part, the motion by Defendant-Respondent Minicorp ("Minicorp") which

sought to invalidate Big's assertion of the attorney-client privilege with respect to certain documents and as to testimony concerning communications between Big and its attorneys.

As demonstrated below, however, the applicable legal principles do not support the decision of the lower Court, and instead fully support Big's assertion of the attorney-client privilege. The burden on a party seeking to invalidate the attorney-client privilege is extremely high, and Minicorp has simply not made the requisite showing for the abrogation of Big's attorney-client privilege. Specifically, Minicorp, not Big, has placed the issue of Big's reliance on counsel's advice in issue in this case. As such, and in accordance with the cases discussed in Point B (e.g., Chase Manhattan Bank, N.A. v. Drysdale Securities Corp., 587 F. Supp. 57 (S.D.N.Y. 1984)), there has been no waiver of the attorney-client privilege by Big, and Minicorp's attempted wholesale invalidation of Big's attorney-client privilege should be rejected.

Moreover, Big's indication that it relied on counsel's advice demonstrates only that Big's counsel (in addition to Big itself) did have communications with Minicorp employees. As the court below noted (R. 16), Big has previously agreed that Minicorp is perfectly free to inquire as to these non-protected communications, and Minicorp has already had the opportunity to question Big's attorneys as to their contacts with Minicorp's employees. Minicorp should not, however, be permitted to invalidate Big's attorney-client privilege in its zeal to determine what its employees may or may not have told Big's representatives.

At any rate, Minicorp has itself repeatedly taken the position that only its own actions could create Mr. Smith's apparent authority. As such, any communications between Big and its attorneys are, according to Minicorp itself, irrelevant to the fundamental issue in this case. Therefore, nothing justifies Minicorp's attempted abrogation of Big's attorney-client

privilege.

Accordingly, the decision of the Court below, to the extent that it compelled Big to produce documents as to which it had claimed the attorney-client privilege and had further required Big's representatives to provide testimony concerning communications between Big and its attorneys, should be reversed.

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #2 REVISED

BRIEF OF PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

Plaintiff-Appellant Big Bank, N.V. ("Big") appeals from an Order issued by Hon. Richard Rogers that granted, in part, a motion by Defendant-Respondent Minicorp Securities Corporation ("Minicorp") to remove the attorney-client privilege from certain documents and from testimony concerning communications between Big and its attorneys.

In the underlying action, Big seeks to recover approximately $6,000,000 in loans to Minicorp. As an inducement to Big to make the loans, an employee of Minicorp executed a letter representing that Minicorp would maintain certain collateral. Minicorp does not dispute that the representation was fraudulent. It does claim, however, that the employee did not have apparent authority to make the representation. In its motion, it asked for a wholesale abrogation of the attorney-client privilege between Big and its attorneys on the basis that Big's attorneys had communicated with Minicorp's employees during the course of arranging the loan and that Big had subsequently relied on counsel's advice in making the loan.

The burden on a party seeking to invalidate the attorney-client privilege is extremely high [*What is the burden?*]. For three reasons, Minicorp has failed to meet this burden.

First, Minicorp has itself repeatedly taken the position that only its own actions could create the employee's apparent authority. As a result, any communications between Big and its attorneys are, according to Minicorp itself, irrelevant to the fundamental issue in this

case.

Second, Minicorp itself—not Big—placed the question of Big's reliance on counsel's advice in issue in this case. Big cannot, therefore, be held to have waived the privilege.

Third, Big has agreed that Minicorp is free to inquire about communications between Big's attorneys and Minicorp's employees, and Minicorp has already questioned the attorneys about these contacts. Minicorp does not need to attack the attorney-client privilege between Big and its attorneys in order to investigate the attorneys' communications with Minicorp.

Accordingly, the decision of the Court below should be reversed to the extent that it compelled Big to produce documents as to which it claims attorney-client privilege and required Big's representatives to provide testimony about communications between Big and its attorneys.

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #3

Preliminary injunction

The problems:

- The first paragraph is cluttered with trivia.
- Although the second paragraph has a point to make, it takes far too long to make it.
- The first paragraph of the Introduction relies primarily on invective, not argument.
- As the Introduction proceeds, instead of stating issues and arguments concisely and in a clear order, it plunges into the details of the opponent's claims.

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #3

Nature and Stage of the Proceedings

Plaintiffs preliminary injunction motion challenges the Asset Purchase Agreement, dated June 9, 1990, between Minicorp, Inc. ("Minicorp") and Megacorp, Inc. ("Megacorp"), pursuant to which Minicorp transferred its Green Thumb seed division to Megacorp in consideration for $231 million in cash and Megacorp's stockholdings in Minicorp. Plaintiffs filed their complaint on May 3, 1990, and obtained an Order for expedited discovery the next day.

In accordance with that Order, Minicorp produced five witnesses in four days for depositions. In addition, plaintiffs deposed a person from each of Megacorp, Megabucks and Maxibucks, the investment banking firms that represented Minicorp and Megacorp, respectively, in connection with the deal. All that was done to accommodate plaintiffs' initial request that this Court hear a motion for a preliminary injunction sometime in late December before the Minicorp agreement with Megacorp was consummated. However, by their own choice, plaintiffs then decided not to attempt to enjoin the transaction from going forward; instead, knowing that the agreement would be consummated in the interim, plaintiffs asked the Court for a hearing on July 2, 1990, and filed their motion for a preliminary injunction on June 16. The transaction was consummated on June 22, 1990.

This is the Answering Brief of Minicorp and its individual director-defendants.

Introduction

As will be shown herein, this motion is based wholly upon conjecture, hypotheses and distortions of evidence having no basis in reality whatsoever. Such distortions will be

demonstrated in the Statement of Facts by reference to the evidence. Plaintiffs' attack upon the fairness of the transaction to Minicorp, as well as the alleged ulterior "entrenchment" motivation for it, has no basis. Plaintiffs have falsely derived an excessive valuation of Green Thumb, attributable to no person or evidence, to create an argument that it was sold at an undervalued consideration for the purpose of entrenching Minicorp's Chief Executive Officer, Roger Rogers.

Plaintiffs' brief (Pl. Br. 3-4, 22-26)[1]* contends that Minicorp sold its Green Thumb division to Megacorp for $57 million less than its worth by extracting a figure of $400 million used by Megacorp's investment banker, Maxibucks, in preliminary and hypothetical analyses of ranges of premium values that might be attributed to Green Thumb in a possible transaction involving a tender for all of Minicorp's stock at a premium over market price. This hypothetical value was never adopted by either party or their investment bankers or any witness as the actual premium value of the assets sold. In fact, plaintiffs themselves in their interrogatory answer explaining the basis for the complaint's allegation of a $28 million shortfall used a $371 million cash premium inflated value for Green Thumb. To exaggerate the alleged discrepancy, plaintiffs value the Minicorp stock given back by Megacorp at an "unaffected" market value of $91, ignoring the premium value placed on all Minicorp stock in the hypothetical.

Alternatively, plaintiffs suggest a discrepancy of $42.8 million using a total value of $390 million which Megacorp's acquisitions director John Smith one time indicated as the most that he "might" be willing to attribute to Green Thumb in a valuation of all of Minicorp at a takeover price of $130 per share (Roberts 76-78). To exaggerate the discrepancy, at a time when the stock was trading in excess of . . . . . .

[THIS "INTRODUCTION" CONTINUES FOR ANOTHER PAGE]

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #3 REVISED

Introduction

Plaintiffs' preliminary injunction motion challenges the Asset Purchase Agreement pursuant to which Minicorp, Inc. sold its Green Thumb seed division to Megacorp, Inc. for $231 in cash and Megacorp's stockholdings in Minicorp. The agreement was signed on June 9, 1990, and the transaction was consummated on June 22.

Through this motion, plaintiffs hope to unravel a completed transaction despite having chosen not to try to enjoin the transaction from going forward before its consummation. Plaintiffs filed their complaint on May 3, 1990, obtained an order for expedited discovery the next day, and initially asked that a motion for a preliminary injunction be heard in late May—well before the Asset Purchase Agreement was to be signed. However, plaintiffs did not file their motion for a preliminary injunction until June 16, a week after the agreement had been signed. They then asked this Court for a hearing on July 2, knowing that the transaction was to be consummated in the interim. It was in fact completed on June 22.

Plaintiffs' motion relies on two assertions, both contradicted by the facts.

First, it claims an inflated value for Green Thumb by relying on preliminary and hypothetical valuations that neither side took to represent the company's true value. [INSERT A SENTENCE STATING DEFENDANTS' AFFIRMATIVE POSITION: THE SALE PRICE REFLECTED THE TRUE VALUE.]

Second, in a tactic often employed by plaintiffs in this type of suit, the complaint tries to portray Minicorp's outside directors as passive and uninformed, despite facts demonstrating that the directors independently conducted a valuation and independently

concluded Green Thumb should be sold. [INSERT A SENTENCE ELABORATING ON THE STEPS TAKEN BY THE OUTSIDE DIRECTORS.]

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #4

Motion to dismiss

The draft makes a couple of common tactical mistakes:

- It fails to start with a clear, strong theme—a snapshot of why the client should win.
- It becomes too quickly entangled in the other side's arguments, counter punching rather than landing a decisive blow.
- It does not give the argument a structure. In fact, there are at least a couple of distinct reasons why the complaint should be dismissed, and there are three separate counts that have to be addressed.

The revision is by no means perfect (the case settled before the Memorandum was filed), but it sets out to address these problems.

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #4

I.

PRELIMINARY STATEMENT

Defendants Super Communications, Inc., . . . (collectively "Super") submit this memorandum in support of their motion to dismiss plaintiff's Class Action Complaint (the "Complaint") in its entirety pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted.

Super Communications, Inc. is and has been an immensely successful manufacturer and distributor of local area networks ("LANs") since the early 1980s. Although not noted in the complaint, since its inception in 1985, Super has posted profits on average of per annum for straight years. Earnings per share rose steadily from $.15 in the third quarter of 1989 to $.46 in the first quarter of 1991. The second quarter of 1991, while still profitable, yielded slightly lower earnings of $.41 per share. Notwithstanding this spectacular performance and solid rate of return, Super's stock price fluctuated from a high of $50 to $26.75 between [dates] after Super's announcement of its second quarter earnings on July 18, 1991.

Plaintiff Henry Jones purports to bring this class action on behalf of himself and a class of investors who purchased stock between October 18, 1990 and July 18, 1991 (the "Class Period"). Mr. Jones, as the puppet of the plaintiff's securities bar, alleges in boilerplate fashion that Super disseminated false and misleading statements and omitted to state certain information to the financial community thereby artificially inflating the market price of Super stock and causing the plaintiff an unspecified amount of harm. Plaintiff further alleges that Super officers who sold some of their stock prior to the drop in price failed to disclose material adverse facts

known to them and had positions of control and authority as officers and/or directors of Super.

In his recitation of supposed wrongs committed by the defendants, plaintiff ignores the fact that Super made no untrue statements or otherwise participated in the dissemination of false information. Instead, the Complaint assumes—and asks the Court to assume—that because Super reported decreased earnings in one of six quarters, defendants knew about the decline in earnings for the second quarter 1991, disclosed negative information in a non-significant manner, continued to make optimistic predictions about the future while knowing these to be false, and otherwise conspired to keep all of this hidden. Plaintiff s assumption is just that—an assumption. No facts are alleged in support of plaintiff s theory that the price of Super stock declined because of defendants' statements or omissions; plaintiff is simply attempting to extort a large settlement from a successful company. This case exemplifies the kind of abusive litigation to which corporations and their officers are increasingly subjected any time the price of their stock suddenly declines.

II.

STATEMENT OF FACTS

Super, incorporated in 1985, is the leading . . . .

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #4 REVISED

Defendants Super Communications, Inc., . . . (collectively, "Super") submit this memorandum in support of their motion, pursuant to Fed. R. Civ. P. 12(b)(6), 12(b)(1) and 9(b), to dismiss the Complaint in its entirety.

PRELIMINARY STATEMENT

Plaintiff is represented by experienced counsel in among the best-known firms of the plaintiff securities bar. Yet, with the assistance of that counsel, plaintiff has filed a Complaint that is devoid of the factual allegations necessary to plead, let alone allow him to pursue at considerable expense to Super, a claim for securities fraud. Indeed, unless the securities laws are expanded to provide redress every time a successful company announces quarterly earnings that, while positive, fall slightly short of analyst expectations (which Super has never adopted or endorsed), there are no facts—pleaded or unpleaded—that could support this Complaint. As Justice White has noted, the securities laws are not "a scheme of investor's insurance." Basic, Inc. v. Levinson, 485 U.S. 224, 252 (1988) (White, J., concurring in part, dissenting in part). If this Complaint is sustained, that is exactly what the securities laws will become.

Super is and has been an immensely successful manufacturer of local area computer networks. Since its inception as a public company in 1986, Super's revenues have grown at an average annual rate of 253%.[2] In each of those years, Super's yearly earnings per share have also grown at an impressive rate, with the average annual increase equaling 468%. During the putative class period of October 18, 1990 (the date on which Super announced its results for the third quarter of 1990) to July 18, 1991 (the date on which it announced results for the second quarter of 1991), this impressive pattern was equally present.

In the third quarter of 1990, revenues were $48,355,000 and earnings per share were $.41 (compared to $20,912,000 and $.15 for the prior year's comparable quarter). Complaint ¶ 34; Ex. A at ____. In the fourth quarter of 1990, revenues were $56,256,000 and earnings per share were $.45 (compared to $25,546,000 and $.19 for the comparable quarter). Complaint ¶ 38; Ex. B at ____. For fiscal 1990, overall revenues were $175,957,000 and earnings per share were $1.42 (compared to 1989 levels of $77,289,000 and $.61). Complaint ¶ 38; Ex. C at ____. In the first quarter of 1991, revenues were $61,1 1 1,000 and earnings per share were $.46 (compared to $30,092,000 and $.22 for the comparable quarter). Complaint ¶ 45; Ex. D at ____. In the second quarter of 1991, revenues were $64,067,000 and earnings per share were $.41 (compared to $41,254,000 and $.34 for the comparable quarter). Complaint ¶ 49; Ex. E at 3. Although this pattern is undeniably impressive, it was the 11% decrease in earnings per share from .$.46 in the first quarter of 1991 to .$.41 per share in the second quarter—and nothing more—that drew this lawsuit.

As impressive as Super's business has been, its public disclosures are even more impressive. Although plaintiff quotes passages from Super Form 10-Qs, Form 10-K and Annual Report, plaintiff does not allege that these documents contain a single misrepresentation of fact. Nor could he. These documents set forth concededly truthful historical facts, and make no predictions—let alone promises—of future performance. *See* Exs. A-E. To the contrary, Super's public filings expressly caution that its past results, including the results for any particular quarter or year, may not be indicative of future results. (*See infra* at 5-7).

Super's carefully prepared cautionary disclosures are disregarded by plaintiff's Complaint, which instead seeks to criticize Super's public statements because purported

"material facts" referred to in paragraphs 54(a)-(g) of the Complaint were allegedly "omitted." As we show below, however, many of these "omitted" facts are expressly disclosed in Super's public filings. The remaining "omissions" are either insufficient as a matter of law, or naked conclusions unsupported by a single alleged fact, or both. Even ignoring these fundamental defects, the Complaint is devoid of allegations that could legally support an inference of scienter on the part of defendants, who are also improperly referred to as an undifferentiated mass. Accordingly, Count I of the Complaint, alleging violations of Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78j(b), and Rule l0b-5 promulgated thereunder, should be dismissed pursuant to Rule 12(b)(6) and, as to the conclusory allegations, Rule 9(b).

Similarly, the state law claims for common law fraud (Count II) and negligent misrepresentation (Count III) should be dismissed. In addition to the foregoing defects, plaintiff has failed to plead individual reliance necessary to state a claim for fraud and negligent misrepresentation. Plaintiffs negligent misrepresentation claim further fails because it is based on after market statements. Courts in this district have refused to recognize such claims.

Facts

A. The Company

CRAFTING AN INTRODUCTION: EXAMPLE #1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

DAVID TUNICK, INC.,

Plaintiff,

-against-

91 Civ.
E.W. KORNFELD and GALERIE KORNFELD UND CIE,

Defendants,

-against-

DAVID TUNICK,

Counterclaim Defendant.

----------x

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants E.W. Kornfeld ("Kornfeld") and Galerie Kornfeld Und Cie ("Galerie Kornfeld") respectfully submit this memorandum in support of their motion for summary judgment on each count of the Second Amended Complaint (the "Complaint") filed by David Tunick, Inc. ("Tunick, Inc."), and for summary judgment on their first Counterclaim against Tunick, Inc. and David Tunick (collectively, "Tunick").

One could argue that none of these parentheticals is necessary, except the last.

PRELIMINARY STATEMENT

David Tunick, a professional art dealer and an expert in prints, bought "La Minoturomachie," a well-known print by Pablo Picasso (the "Print"), at an auction conducted by defendant Galerie Kornfeld in June 1990. Galerie Kornfeld shipped the Print to Tunick shortly thereafter, but Tunick never paid for it. For the next sixteen months, Galerie Kornfeld pursued Tunick to collect the debt, but Tunick consistently claimed he was unable to pay. Tunick, meanwhile, attempted to sell the Print, but could not find a buyer at the price he was demanding, apparently because of the decline in the art market.

The theme that develops nicely here is that the reason the plaintiff has filed this suit is obvious, and has nothing to do with the authenticity of the artwork. Note that the brief does not actually characterize the plaintiff's motives—it allows the reader to infer those motives him- or herself.

Finally, after extending the payment period again and again, Kornfeld threatened to take action to collect the debt. Only then, for the first time, did Tunick make the baseless charge that underlies every count of his Complaint: namely, that the Picasso signature on the Print (the "Signature") was not authentic. Less than ten days after he first made this allegation, he filed suit in this Court seeking to rescind his purchase of the Print—that is, seeking to be relieved of his payment obligation as well as $20 million in alleged "punitive damages." The defendants later counterclaimed to recover the debt Tunick still owes.

On this motion, defendants are asking for summary judgment both on Tunick's claims and on their own counterclaim for breach of contract. No doubt Tunick will respond by cluttering the record with a scattershot of specific points on which the parties do not agree. But there are two points that Tunick cannot dispute, and either one of them supplies sufficient grounds for granting summary judgment in defendants' favor, even if Tunick can identify other areas of dispute between the parties.

First, two years after filing this lawsuit asserting that the Signature is not authentic and publicly accusing Kornfeld of fraud, Tunick still has not found an expert to support his allegations. In response to interrogatories served by defendants seeking the names of any experts that Tunick expects to call at trial and the substance of their opinions, Tunick identified one document examiner, but said that

> Examination of the [Signature] is still in the "investigative" phase as of the date of this response [September 13, 1993]. There are still additional Picasso signatures to be examined before finalizing the forensic analyses being conducted, and the conclusions that will result from those examinations.

Affidavit of Jeremy G. Epstein, sworn to October 12, 1993 ("Epstein Aff."), Exhibit ("Ex.") 1 at 4. In other words, even though a case concerning the authenticity of a signature must rest on the opinions of experts, Tunick cannot find an expert who agrees with him. This lack of support for Tunick's claims is a stunning comment on the carelessness with which Tunick initiated this litigation.[3]* If, even at this late date, Tunick cannot find an expert witness, subjecting the defendants to the additional expense of a trial, and further imposing on the Court's time are both pointless.

No doubt Tunick is still dredging the art world for someone who will support his theory of inauthen-ticity. However, even if Tunick can submit an expert affidavit by the time this motion is fully submitted, it cannot defeat this motion. The Court has grounds for granting the motion that are entirely independent of Tunick's failure to prove the inauthenticity of the Signature. It is undisputed that, after Tunick charged that the Signature was inauthentic, Kornfeld, to show his good faith, promptly offered to exchange the Print for another signed impression of "La Minotauromachie" from his own collection. Tunick refused this offer. Under the Uniform Commercial Code, which is applicable here, Kornfeld thus fulfilled his obligation to Tunick, even assuming that the signature was a forgery. Tunick alleges that Kornfeld "guaranteed" the Print; the undisputed evidence shows that, as a matter of law, Kornfeld honored any such guarantee. Even if Tunick had any basis to challenge the genuineness of the Signature, summary judgment for defendants would still be appropriate because of Kornfeld's offer to cure the alleged defect in the work he sold to Tunick.

Summary judgment is also appropriate on Kornfeld's counterclaim for breach of contract. It is undisputed that Tunick bought and accepted shipment of the Print, and that he has never paid for it. His belated assertion that the Signature on the Print is inauthentic is of no consequence, both because he has no expert to substantiate his allegation of inauthenticity, and because Kornfeld offered to replace the Print with which Tunick purported to be unhappy with another "La Minotauromachie" print.

STATEMENT OF FACTS

Most of the facts in this case are not in dispute. Because this motion is for summary judgment, we restrict ourselves in this statement to facts that are, to our knowledge, undisputed.

A. History of the Print

The Print sold to Tunick by Kornfeld is nearly six decades old. Until now, the Print and the Signature it bears have been universally accepted as genuinely by Picasso.

CRAFTING AN INTRODUCTION: EXAMPLE #2

This introduction has several virtues:

1. Because this is a responding brief, it does not set out to explain the case—but it does tactfully remind the reader of some basic facts that are crucial to its argument.

2. It gives the reader several interwoven reasons to support its position:

    - It would be unfair to give the appellant what it wants.

    - The appellant cannot meet the legal test applied by the court below.
    - The appellant is trying to move the boundaries of the playing field, by asking for substantive consolidation in circumstances in which it has never before been granted.

These themes are all variations on the same basic argument—but they make the argument more persuasive by suggesting more motives for supporting it.

3. Though only a paragraph long, the introduction provides some detail: the amount owed to the secured creditors (to show how much they stand to lose) and the previous treatment of intercompany debt (to show how outrageous it would be to impose substantive consolidation).

CRAFTING AN INTRODUCTION: EXAMPLE #2

Introduction

Ames and the Unsecured Creditors Committee asked the Bankruptcy Court to adopt an extraordinary measure—substantive consolidation—that would, in effect, have deprived the secured creditors of all or part of the security that they bargained for when they lent Ames $900 million. Accordingly, since a bankruptcy court is fundamentally a court of equity, Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934), the movants needed to establish that there were sufficient equitable considerations to override the creditors' legitimate and substantial interest in protecting their security. The movants failed to make such a showing. Indeed, to our knowledge, no court has ever ordered substantive consolidation in a case such as this, where repeated representations were made as to the separate existence of the various debtors, and where the intercompany debt, which would be wiped out by the substantive consolidation, is itself an integral component of the security agreement between the parties.

CRAFTING AN INTRODUCTION: EXAMPLE #3

Because this is a reply brief, the introduction starts directly with the heart of the appellate dispute, not with the basics of the case.

PRELIMINARY STATEMENT

Two well established legal principles are dispositive here. First, common law and statutory remedies are cumulative, unless statutory language expressly preempts the common law remedies. Second, arbitrators may not issue an award upon a matter that is not expressly and unambiguously submitted for their consideration. Respondents attempt to sidestep these principles by offering a version of events without any basis in fact, logic or the Record on Appeal.

ARGUMENT

I

BELCO'S COMMON LAW RIGHT TO RECOVER PUNITIVE DAMAGES IS NOT PREEMPTED BY INSURANCE LAW § 2601

In an unbroken line of decisions, the New York Court of Appeals and this Court have recognized a common law right to recover punitive damages from an insurer. In enacting the administrative remedies of N.Y. Insurance Law § 2601 in 1970, ...

CRAFTING AN INTRODUCTION: EXAMPLES #4A and #4B

This introduction (#4A) has several virtues:

- In the Preliminary Statement's first paragraph, it provides a lucid, brief "big-picture" summary of the case's background. This summary isn't neutral, of course: without being argumentative, it creates a context that favors the client's position.

- It states a simple theme—"This case is an attempt to turn the bond market collapse into a litigation windfall."—but also provides enough supporting detail to make its argument factual and specific.

- It avoids becoming embroiled in the details of the other side's argument. Instead, in the Preliminary Statement's second paragraph, it adopts a much more effective technique: it re-defines the essence of the opponent's allegations. In effect, it takes control of the opponent's own terrain.

- It creates a clear structure, with separate paragraphs (the fourth and the fifth) devoted to separate, clearly defined arguments.

For the sake of contrast, look at the first paragraph of the following Example #4B -- the Introduction to the Opposing Memorandum (starting on page 39). It's largely boilerplate. As a result, it's irritating to read, and it misses an opportunity to persuade.

CRAFTING AN INTRODUCTION: EXAMPLE #4A

Defendants submit this memorandum of law in support of their motion to dismiss the consolidated class action complaints of and (attached as Exhibits 1 and 2, respectively; collectively, the "Complaint") pursuant to Fed. R. Civ. P. 12 (b) (6).

PRELIMINARY STATEMENT

This case attempts to turn the bond market collapse of 1994 into a litigation windfall. In 1993, plaintiff bought shares of defendant Term Trust 2003 ("Trust 2003"), and plaintiff bought shares of defendant Term Trust 2000 ("Trust 2000", and, collectively with Trust 2003, the "Term Trusts"). In 1994, shares of both Term Trusts declined as the Federal Reserve Board took the unprecedented action of raising interest rates six times in a single year. These serial interest rate hikes triggered the bond market's most precipitous drop in decades. Particularly hard hit was the market for mortgage-backed securities (including so-called "inverse floaters"), in which the Term Trusts had heavily invested.

Plaintiffs assert that the prospectuses for the Term Trusts failed to disclose their concentration in mortgage-backed securities, the risk of decline in the event of interest rate rises and the potential volatility of inverse floaters. But plaintiffs' allegations really boil down to a claim that defendants did not describe graphically enough the "magnitude of the interest rate risk" to the Term Trusts' portfolios—as plaintiffs now perceive that risk with the benefit of hindsight.

In fact, the prospectuses (i) disclosed that the Term Trusts planned to invest as much as 85% of their assets in mortgage-backed securities, (ii) discussed in detail the volatility and other risks of investing in such securities, (iii) explained that 25-30% of Trust 2003's assets and

25-40% of Trust 2000's would be invested in "inverse floaters," and (iv) described at length the characteristics of inverse floaters and their potential volatility in the face of interest rate shifts. The prospectuses also specifically drew attention to the risk of a decline in the Term Trusts' net asset value because of interest rate moves and other market forces. Read as a whole, and not in the selective and misleading fashion quoted by plaintiffs in the Complaint, the prospectuses "bespoke caution" about the specific risks plaintiffs say have now caused their shares to decline in value. Because nothing material was either misstated or omitted, the complaint must be dismissed. See pp. 9-22, infra.

The Complaint is also deficient because it does not set forth facts from which it could be inferred that, at the time the prospectuses were issued in 1993 (and, thus, before the 1994 bond market collapse), any defendant knew, or had any basis to believe, that the risks and characteristics of the securities in the Term Trusts' portfolios were different from what the prospectuses disclosed. Plaintiffs thus violate Fed. R. Civ. P. 9(b) and the general rule that they may not plead "fraud by hindsight." The prospectuses did not purport to predict future market conditions, and defendants' supposed failure to foresee a market crash does not violate the securities laws. See pp. 22-23, infra.

Plaintiffs further allege that the Term Trusts deviated from their stated fundamental policies with respect to investment objectives. The Term Trusts had two, and only two, fundamental policies relating to investment objectives: (i) to provide a high level of current income, and (ii) to seek to return $10 a share (the initial offering price) at the expiration of each Term Trust. Plaintiffs do not and cannot allege that either Term Trust has departed from these fundamental policies, nor do they dispute that the prospectus repeatedly explained that they were

not assured that their investment objectives would be achieved. Instead, they attempt to manufacture an additional "fundamental policy" that is not identified in the prospectus and then claim it was not followed. Such an attempt simply fails to state a claim. See pp. 23-25, infra.

BACKGROUND

The Term Trusts

The Term Trusts are "closed-end" investment companies registered pursuant to the Investment Company Act of 1940.[41] Unlike . . . .

EXAMPLE #4B

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Plaintiffs submit this memorandum in opposition to defendants' motion to dismiss the consolidated class action complaints.

INTRODUCTION

This is a class action brought by plaintiffs on behalf of all persons (the "Class") as described below, other than defendants and related parties, who purchased shares in Term Trust 2003 ("Trust 2003") during the period from its inception on or about April 22, 1993 to July 19, 1994 and/or shares in Term Trust 2000 ("Trust 2000") during the period from its inception on or about December 22, 1993 to July 19, 1994, inclusive (the "Class Period"), for violations of Sections 11, 12 and 15 of the Securities Act of 1933 (the "1933 Act") and Section 13 of the Investment Company Act of 1940 (the "1940 Act"). The gravamen of the federal securities claims is that defendants made false and misleading misrepresentations and omissions concerning the Trusts in violation of the federal securities laws in prospectuses issued on the offering of the Trusts (the "Offering Materials") and in the marketing of the Trusts.

Plaintiffs have also asserted 1940 Act claims that allege that defendants' deviations from "fundamental policies" of the Trusts, without the shareholder approval required by the 1940 Act and the Trusts' own stated procedures, injured the Trusts' purchasers who, accordingly, have a private right of action under the 1940 Act. The non-disclosures and misrepresentations in the Prospectuses centered on the following areas:

1) Misrepresentation of the maturities of the portfolio;
2) Misrepresentations concerning the amount of borrowing by the Trusts;
3) Failure to disclose the Trusts' interest rate risk;
4) Failure to disclose the Trusts' vulnerability to rising interest rates;
5) Failure to disclose the risk of the lack of liquidity of the Trusts' investments;
6) Failure to disclose that the initial structures of the Trusts' portfolio were biased towards a declining interest rate scenario and that such bias ensured that the Trusts would suffer severe losses when interest rates rose;
7) Failure to disclose the risk that due to the lack of liquidity of the Trusts' investments and the bias of the portfolios' structure towards a declining interest scenario, a rapid rise in interest rates would trap the Trusts in investments which would suffer massive losses when interest rates rose; and
8) Failure to disclose that the price volatility of inverse floaters rises at an accelerating pace as interest rates rise.

Recently discovered admissions by a managing director of defendant Funds Management Inc., Jarvis Pendgergast, demonstrate the misleading nature of the Trusts' Offering Materials. In describing the risks of inverse floaters, a material component of each of the Trusts' portfolios, Pendergast made the following admission:

A couple of years ago, inverse floaters were among the cheapest thing in the

history of American financial markets.

....

Now, they're probably one of the best sales in history. The best case is that you get 12% or 13%. But they can only go down." [Emphasis supplied.] See, Exhibit l, Affidavit of Lee Squitieri dated March 8, 1995 (the "Squitieri Affidavit"). Barrons, November 29, 1993, "Inverse Floaters."

FACTUAL BASIS OF PLAINTIFFS' CLAIMS

The basic investment proposition marketed to investors in Trust 2000 and Trust 2003, through false and misleading prospectuses and sales brochures, was that the Trusts were . . .

CRAFTING AN INTRODUCTION: EXAMPLES #5-8

The next four introductions do an expert job of controlling situations that, in less skillful hands, could have produced chaos—either because they involve many facts and issues or because the issues lead quickly and inevitably into dense thickets of detail. These examples demonstrate the importance of stepping far enough back from the details to provide a bird's-eye view of the terrain. They also show how helpful it is to create an organization that is not just coherent, but also "visible," so that it provides an easy-to-read map of the brief's structure. For this point, see also the careful use of subheadings in the Statement of Facts in the *Tunick v. Kornfeld* (pages 54-56, *supra*).

CRAFTING AN INTRODUCTION: EXAMPLE #5

Appeal to the U.S. Fifth Circuit;
appellee's brief

I.

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear appeals from affirmances by the United States District Court for the Northern District of Texas, Dallas Division, of orders of the United States Bankruptcy Court, pursuant to 28 U.S.C. § 158(d). 28 U.S.C. § 158(a) grants jurisdiction to the district courts to hear appeals from final orders of bankruptcy courts on "core" bankruptcy matters. Orders relating to plan confirmation are "core" matters. 28 U.S.C. § 157(b)(2)(L).

II.

STATEMENT OF THE CASE

These cases began over two years ago with the filing of involuntary bankruptcy petitions on February 21, 1985 by a number of banks, including The Bank of Nova Scotia ("Scotia"), against Kendavis Holding Company ("KHC") and Kendavis Industries International, Inc. ("Kiii") (referred to collectively as the "Debtors"). The issues on appeal arise out of the affirmation by the District Court for the Northern District of Texas of orders issued by the Bankruptcy Court for the Northern District of Texas. Of particular significance is the order entered in the Bankruptcy Court on November 24, 1986 confirming the plan of reorganization proposed by the Official Unsecured Creditors Committees of KHC and Kiii (the "Committees' Plan"). As the largest creditor of the Debtors—Scotia is owed more than $67,000,000—and as a member of those Committees, Scotia was and is an active proponent of

the Committees' Plan. It is also a shareholder of the new KHC created pursuant to that Plan.

The facts and procedural history of these cases are fully and accurately stated in the brief of the Official Unsecured Creditors Committees of KHC and Kiii (the "Committees"), and the relevant portions of that brief are incorporated herein.

III.

SUMMARY OF ARGUMENT

The issues raised on this appeal fall into five categories: (i) issues relating to whether the Debtors and the Davis family have standing to appeal, (ii) issues arising out of the disqualification of Judge Robert C. McGuire as a result of his financial interest in J.P. Morgan & Company ("J.P. Morgan"), (iii) issues relating to substantive consolidation, (iv) issues relating to the classification system of the Committees' Plan, and (v) issues raised by the doctrine of mootness. Issues in category (iii) are raised only by the Debtors and issues in category (iv) are raised only by the Davis family.[5]*

Appellants' position on each of these issues is flawed. First, Appellants' arguments regarding standing ignore certain essential facts. Perhaps the most important is that the Committees' Plan provides that all claimants, except the banks, will be paid in full within two years. In fact, all of the Class 5 claims and $293,651.69 of the Class 6 claims have already been paid and KHC, as reorganized by the Committees' Plan, has moved to pay the remaining Class 6 claims, $493,964.96, as soon as possible. The Debtors, who purport to be the protectors of those creditors, proposed a plan in which those creditors would have had to wait twenty years for a full payout. Thus, the Debtors' protestations that they must have standing in order to protect the creditors of the estates ring hollow.

The Davises also lack standing because (a) to the extent their interest is that of equity holders, they have no interest because, the Debtors being hopelessly insolvent, equity has been cancelled; and (b) to the extent their interest is that of creditors, the Davises cannot appeal because they failed to raise objections to the Plan in the Bankruptcy Court.

Appellants' argument regarding Judge McGuire's disqualification also conveniently overlooks one critical fact: Judge McGuire disqualified himself as soon as he became aware of his financial interest in J.P. Morgan. Such prospective disqualification is all that is required. It is absurd to retry these cases or to permit discovery when all the relevant facts are already known. Even assuming the most damaging facts that could be adduced in discovery, there is simply no way that this situation could rise to the level of those cases where judges were disqualified retrospectively, since in each such case there was an allegation of actual knowledge and no such allegation is present here.

With respect to substantive consolidation, Appellants miss the relevant point that some need must be shown before substantive consolidation is allowed. The Bankruptcy Court clearly and specifically concluded that the Debtors had failed to prove such need.

With respect to the charge of "gerrymandering," the classification system of the Committees' Plan reaches results clearly and appropriately contemplated by the Bankruptcy Code. This classification system provides for an immediate payment, in full, to small claimants, and a full payment within two years to trade and employee claimants. The payment to the small claimants has already been made, and a motion is pending for an early

payment to the trade and employee claimants. In light of this payment schedule, it seems clear that the Appellants are dissatisfied with the classification scheme only because it acts to extinguish the interests of the Davis family. Such a result is, however, contemplated by the Bankruptcy Code and is more than appropriate here.

Finally, Appellants ignore the fact that their appeals are now moot because the effective date of the Committees' Plan, April 16, has come and gone, and irreversible steps have been taken to implement that plan.

IV.

ARGUMENT

A. THE DISTRICT COURT USED THE CORRECT STANDARD OF REVIEW

The District Court correctly used the clearly erroneous standard of review set forth in Bankruptcy Rule 8013 with respect to all factual issues in these cases. . . . . .

CRAFTING AN INTRODUCTION: EXAMPLE #6

PRELIMINARY STATEMENT

Defendants Charles Green, Richard Brown, Paul Hill, Bruce Smith, John Jones, Douglas Green, Paul Thomas, Charles Knight, Allan Gibson, Blair Hill and Mega Bionics Corporation (collectively, the "Defendants") respectfully submit this memorandum of law in support of their motion for summary judgment on the two remaining claims set forth in the Second Amended Complaint.

Mega Bionics Corporation ("Mega Bionics" or the "Company") is a Delaware corporation with its principal executive offices located in [ ]. Complaint ¶3. Mega Bionics's business consists of the development, production and marketing of [ ]. Id. Plaintiff John James, a Mega Bionics shareholder, brought this action in 1991 challenging the repurchase by Mega Bionics of 448,474 shares of it's Class A Common Stock from two members of the Mega Bionics Board of Directors (the "Board"), Thomas Green, Jr. and Thomas Green, III (collectively, the "Thomas Green Defendants") and their families (the "Repurchase").

On February 28, 1994, this Court, in its decision on Defendants' Motion for Judgment on the Pleadings (the "Opinion"), dismissed all but two of the claims in Plaintiff's Second Amended Complaint (the "Complaint"). All the claims of Count I were dismissed as to all Defendants, except the claim that the Mega Bionics Board failed to exercise due care when it approved the Repurchase.[1] Opinion at 11, 18. In declining to dismiss this claim, this Court was required to accept Plaintiff's characterization of the facts as true. As will be demonstrated below, each of Plaintiff's allegations is decisively refuted by the uncontested factual record in this case. In addition, although this Court also let stand Count II, a class action claim based upon

Defendants's alleged breach of the duty of candor arising out of voluntary disclosures by the directors to the Mega Bionics stockholders after the completion of the Repurchase in July, 1991, it noted that "[t]he well-pleaded allegations of Count II... are sufficient, (if only barely so), to state a claim upon which relief can be granted."[2] Opinion at 8.

Now that substantial fact discovery has been completed, with only two claims remaining, this action is ripe for summary judgment. Defendants produced thousands of pages of documents and Plaintiff took the depositions of many of the Mega Bionics directors involved in approving the Repurchase as well as the deposition of a representative of Deal Doers, the investment banking firm that advised Mega Bionics prior and during the course of the transaction. The factual record developed during this extensive discovery demonstrates that there is no genuine issue of material fact with respect to either of the remaining claims and that Defendants are entitled to summary judgment as a matter of law on both claims.

CRAFTING AN INTRODUCTION: EXAMPLE #7

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ELLON L. WILLIAMS, *et al.*,)
)
Plaintiffs,)
)
Case No. _____
v.)
)
NATIONAL MEDICAL ENTERPRISES,)
INC., *et al.*,)
)
Defendants.)

REPLY TO OPPOSITION TO MOTION
TO DISQUALIFY PLAINTIFFS' COUNSEL

I.

INTRODUCTION

Something is amiss when a company discloses all of its attorney-client privileged claims files to a reinsurance company's lawyers pursuant to its duty of cooperation and then is sued by the very lawyer who reviewed the files on a matter which relates to the contents of such files. Although plaintiffs try to cover up this problematic situation with their 60-page oversized brief, arguing, primarily that Mr. Allen had no attorney-client or fiduciary relationship with NME or HUG, plaintiffs failed to address the following issues:

1. How does Mr. Allen and his firm have the right to divulge attorney-client privileged

and work product privileged information that he gained as a result of NME's duty of cooperation to its current client when NME or HUG has not waived the privilege?

2. How can a situation such as this comport with the institutionalized duty of cooperation in the insurance industry, public notions of fair play and substantial justice, and the duty to avoid the clear conflict of interest between an attorney's ethical obligation to defend his client vigorously and the obligation to maintain the confidence of privileged information?
3. How can plaintiff's counsel maintain that there needs to be a former attorney-client relationship in order to be bound by the conflict of interest rules when this very court has held otherwise?
4. How can plaintiffs defend the logical extension of their position, which is that Mr. Allen has no obligation to protect the confidentiality of the files he audited? Following this logic, can Mr. Allen share that information with any other party? Can he sell the information? Can he publish the information anywhere and everywhere for all the world to see?

Instead of answering the above questions, plaintiffs' counsel has filed a brief which exceeds this court's page limit by 25 pages, submitted a declaration of a hired "expert" of the law which similarly does not address the true issues, and requested and received a three-week extension to do so. Methinks plaintiffs' counsel doth protest too much—and apparently so does the Honorable Cruz Reynoso (retired), also a legal ethics expert who disagrees with Plaintiffs' "expert" opinion.

Certainly plaintiffs' counsel has a lot to lose monetarily by being disqualified.

Although this is unfortunate, this is not a factor that the court must weigh when deciding whether or not to disqualify counsel. Plaintiffs' counsel makes much of the fact that to disqualify his firm would effectively prevent him from representing medical malpractice plaintiffs. However, this was a risk he took. One would not expect a lawyer who specializes in representing insurance companies and/or healthcare providers also to represent the very plaintiffs that are suing such companies. This is because to do so would often create a conflict of interest. Accordingly, it is not surprising that when plaintiffs' counsel chose to represent medical malpractice plaintiffs, a conflict of interest arose. This hardly sends "shock waves" throughout the legal system.

CRAFTING AN INTRODUCTION: EXAMPLE #8 – OPENING BRIEF

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

No. _____

Chemco, Inc.,

Appellant

v.

Ace Plant Nursery, *et al.*,

Appellees

APPELLANT'S BRIEF

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The Supreme Court has long warned that the inherent contempt powers of the courts are "uniquely . . . 'liable to abuse.'" International Union, United Mine Workers v. Bagwell, 114 S. Ct. 2552, 2559 (1994) (quoting Ex parte Terry, 128 U.S. 289, 313 (1888)). That potential for abuse was fully realized in this case.

In August 1993, a consolidated product-liability action against Chemco (known as Smith Ranch) settled during jury deliberations and was dismissed with prejudice. Well over a year later, in the spring of 1995, appellees (several of the former Smith Ranch plaintiffs) filed a "Petition" asking the District Court to sanction Chemco for alleged discovery misconduct in Smith Ranch. Appellees disclaimed any interest in challenging the settlement or otherwise seeking damages; rather, they asked the District Court to assert jurisdiction in the exercise of its "inherent power" to vindicate its own dignity and authority. The District Court agreed and, after conducting a "show-cause" hearing, imposed fines of more than $114 million on Chemco.

The entire proceeding was unlawful and unconstitutional. A court's "inherent powers" do not place it above the law. A court cannot impose avowedly punitive (hence criminal) contempt sanctions without affording a litigant the fundamental procedural protections guaranteed by the Fifth and Sixth Amendments. By conducting the proceeding below as if it involved civil, not criminal, contempt, the District Court denied Chemco those protections.

Merely vacating the District Court's Opinion and the Order because of its procedural defects,

however, would leave unredressed much of the injury it has wrought. The Court followed the unconstitutional "show cause" hearing with a 79-page diatribe excoriating Chemco, its trial counsel, and its experts for (supposedly) engaging in a "fraud on the court" by concealing scientific data from the Smith Ranch plaintiffs in discovery and misrepresenting the substance of the data at trial. Those charges have no basis in law or fact. Chemco was under no obligation to produce the testing documents in question, and accurately described the test results at trial.

Although this case involves a number of complex legal and factual issues, at bottom it is very simple. This case is about whether a district court is bound by the rule of law. Even when faced with grave allegations of misconduct, a court must always abide by the rules. "Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but the firm administration of the law through those institutionalized procedures which have been worked out over the centuries." Bagwell, 114 S. Ct. at 2563 (internal quotation omitted). "Inherent power" is not a license to disregard those procedures. The rule of law does not tolerate the assumption that the ends justify the means. Because both the ends and the means pursued below were invalid, this Court should reverse the District Court's Opinion and Order in its entirety.

EXAMPLE #8 – REPLY BRIEF

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

No. _____

Chemco, Inc.,

Appellant

v.

Ace Plant Nursery, *et al.*,

Appellees

APPELLANT'S REPLY BRIEF

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Appellees' brief is not so much a response as a retreat. Rather than engaging Chemco on any of the genuine issues on appeal, appellees simply insist that the District Court had "jurisdiction" to impose "civil sanctions," that such sanctions are justified here in light of the Court's "findings of fact," and that the sanctions chosen are "within the power and discretion of the Court." App. Br. at 14. None of those arguments addresses Chemco's core complaint—that, on both procedural grounds and the merits, the proceeding below was an unlawful exercise of the District Court's contempt powers. Those powers have long been limited to protect against judicial tyranny. The unjust proceeding below underscores the vital importance of those limitations.

INTRODUCTION EXERCISE

UNITED STATES DISTRICT COURT
DISTRICT OF LOUSIANA

UNITED STATES OF AMERICA

V. CAUSE NO. SA89CR83

MARIO BAUZA

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS WITH PREJUDICE

MAY IT PLEASE THE COURT:

Defendant Mario Bauza respectfully submits that, under the provisions of the Speedy Trial Act, the information against him should be dismissed with prejudice.

I

The Speedy Trial Act provides, in pertinent part, that

> (b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

18 U.S.C. § 3161 (b) (emphasis added). If this time limit not be met, the mandatory sanction is clear:

> If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped.

18 U.S.C. § 3162(a)(1). Where the thirty-day filing provision is violated, dismissal is mandatory, and the only determination to be made is whether the dismissal must be with prejudice:

> In determining whether to dismiss the case with or without

> prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances which led to the dismissal; and the impact of a reprosecution on the administration of justice.

Id.

II

The factors in § 3162 as they apply here are as follows:

1. Seriousness of the offense. Mr. Bauza is charged with theft of $26 worth of merchandise from the Base Exchange at Brooks Air Force Base. The offense is a misdemeanor. It is not a serious offense. Defendant does not claim he should not be prosecuted, but merely that he should have been prosecuted in a timely fashion and the government should not be allowed a cavalier disregard of the clear requirements of the statute.

2. The facts and circumstances surrounding the delay. There is no explanation given for the delay in the filing of this case. Defendant appeared before the Magistrate on the complaint on December 27, 1988. Counsel was appointed and the undersigned first met Mr. Bauza in the Public Defender Office on January 6, 1989. On January 9, 1989, the date scheduled for the preliminary examination, the undersigned contacted the Special Assistant U.S. Attorney at Brooks Air Force Base, advised that the preliminary examination had been waived, and suggested that the case be resolved by Pretrial Diversion. Two days later, the undersigned was informed that the case would not be recommended for Pretrial Diversion. Nothing more was heard from the government until the motion to dismiss count one of the complaint. In that motion, the government conceded that more than thirty days had elapsed since the summons was served and implied that the date of the initial appearance was somehow relevant to the determination of the motion. Even so, the dismissal was not entered until more than thirty days

had elapsed following the initial appearance. The only reference in the Speedy Trial Act to an appearance by a defendant before a judicial officer's being a factor in calculating time, is in calculating the time for trial to begin after an indictment or information has been filed. 18 U.S.C. § 3161(c)(1). The government supported its plea for a dismissal without prejudice by stating a need for "effective plea negotiations" to continue. However, the undersigned had informed the government that there would not be a plea of guilty on January 11, 1989, when the Special Assistant U.S. Attorney advised that there would not be a Pretrial Diversion recommendation. There was no further contact from the government until March 3, 1989, when, again, the Special Assistant U.S. Attorney asked if a plea agreement could be reached and was informed that one could not. Even so, it was one month later that the government got around to filing the Information. Any failure to comply with the Speedy Trial Act is due entirely to the failure of the government to act. Where it is the government that has failed to accord the defendant his rights under the Speedy Trial Act, that fact should weigh against the government and in favor of the defendant, requiring that the dismissal should be with prejudice.

3. Impact of reprosecution on the administration of the Act and the administration of justice. In determining whether a dismissal for violation of the Speedy Trial Act should be with or without prejudice, the legislative history is instructive. In the legislative process, there was much concern over possible abuse in the dismissalwithoutprejudice option:

> The Committee believes that permitting the reprosecution of a defendant whose case has been dismissed for failing to meet the speedy trial limits could result in unnecessary expenses and may have a detrimental impact on the grand jury system, particularly in districts where criminal filings are high. This danger was highlighted by Judge Feikens in his remarks to the Subcommittee:
>
> > Another area of doubt is that engendered by a consideration of the technique of the bill's (S. 754)

> dismissal "without prejudice." I would think if I were you, of the impact on the grand jury systems of reindictments and the time requirements of reindictment.
>
> Although the Committee believes that under the Senate version it would be unlikely that a great many cases would be reprosecuted, the potential for such occurrences exists.
>
> * * *
>
> With respect to the propriety of requiring a permanent bar to future prosecutions, the Committee adopts the position of the American Bar Association as stated by the Advisory Committee in their Commentary on Standards Relating to Speedy Trial.
>
> The position taken here is that the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay.
>
> Finally, the Committee notes that the spokesman for the Judicial Conference, Judge Zirpoli, endorsed the ABA position . . . .

1974 U.S. Code Cong. & Admin. News 7401, 7430. While it can no longer be argued that the "with prejudice" dismissal is presumptively favored, United States v. Taylor, 108 S. Ct. 2413, 2418 (1988), where the avowed purpose of the dismissal without prejudice is to coerce a plea by threat of reprosecution, dismissal without prejudice will simply send a message that the courts are determined to ignore the "with prejudice" sanction. That message can only lower the public's esteem for a judicial system by reinforcing the current perception that the system is "rigged."

III

In United States v. Angelini, 553 F. Supp. 367 (D. Mass. 1982), a prosecution was not brought to trial within the seventy-day limit of § 3161 (c)(1), plus exclusions. The defendant's motion to dismiss was granted 25 days after the expiration of the time for trial.

Although Angelini's holding that dismissal is presumptively with prejudice, has been rejected in United States v. Taylor, supra; see also United States v. Caparella, 716 F.2d 976 (2d Cir. 1983); United States v. Russo, 741 F.2d 1264 (11th Cir. 1984), some courts have nonetheless implied a certain preference for such dismissal, even where the offense is a serious one, where the government failed to act through negligence.

> . . . unlike the speedy trial rights of an accused under the Sixth Amendment, see Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2191, 3 L.Ed.2d 101 (1972), the Act's purpose was to fix specific and arbitrary time limits within which the various stages of a criminal prosecution must occur.

United States v. Caparella, 717 F.2d at 981 (emphasis added), citing United States v. Iaquinta, 674 F.2d 260, 264 (4th Cir. 1982).

In United States v. Caparella, supra, cited approvingly in Taylor, 108 S. Ct. at 2418, the Second Circuit discussed the policy implications inherent in the Speedy Trial Act in order to determine whether a criminal complaint, charging the defendant with the misdemeanor offense of opening mail without authority, should have been dismissed with or without prejudice. After a lengthy discussion of the legislative history of the Act, the Court balanced the § 3162 factors and determined that the dismissal should have been with prejudice. The Court found first that the misdemeanor offense was not a serious one and, second, that the prosecutor's negligence was the sole cause of the delay. Focusing primarily in this case on the impact on the administration of the Speedy Trial Act, and on the administration of justice, the Court took the

view that a violation of any of the Act's time limitations negatively impacted on the administration of the Act. Id. at 981. As to the effect of dismissal of a prosecution on the administration of justice, the Court found it greatly significant to reaffirm Congress's basic purpose in enacting the Speedy Trial Act. Quoting then Assistant Attorney General William Rehnquist, the Second Circuit stated as follows:

> . . . it may well be Mr. Chairman, that the whole system of federal criminal justice needs to be shaken by the scruff of its neck and brought up short with a relatively peremptory instruction to prosecutors, defense counsel, and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill.

Id. This case closely parallels the Caparella case in that it involves a nonserious misdemeanor and the cause of the violation is solely negligence on the part of the government. The result should be the same.

In United States v. Russo, supra, the Eleventh Circuit in a serious drug case dismissed with prejudice for violation of the Speedy Trial Act's timetotrial provision, citing the reasoning the rationale of Caparella as authority. Finding that delay in the case was the result of the simple negligence of the prosecution, the Eleventh Circuit held that the case should have been dismissed with prejudice although the underlying offenses were of a very serious nature.

The Fifth Circuit considered the withorwithout prejudice issue in United States v. SalgadoHernandez, 790 F.2d 1265 (5th Cir) cert. denied, 107 S. Ct. 463 (1986), and United States v. Melquizo, 824 F.2d 320 (5th Cir. 1987). A dismissal without prejudice was upheld in both cases. However, mentioned in both Melquizo and SalgadoHernandez, is the factor of whether the government "regularly or frequently fails to meet the time limits." Melquizo, 824 F.2d at 372.

The record in this district is replete with such failures, starting with the SalgadoHernandez case. A cursory examination of cases in the office of the Federal Public Defender reveals the following: Most recently this court dismissed without prejudice United States v. Small, SA89CR16 (driving while intoxicated). Cases filed by complaint and still pending, with no information or indictment filed by the government, include United States v. Cano, SA88421M1 (driving while intoxicated, complaint filed October 21, 1988); United States v. Rodriguez, SA87605M1 (driving while intoxicated, complaint filed December 17, 1987); United States v. Hernandez, SA88337M1 (driving while intoxicated, complaint filed August 18, 1988); United States v. Buchanan, SA88515M1 (driving while intoxicated, complaint filed December 23, 1988); United States v. Ayala, SA88109M1 (driving while intoxicated, complaint filed March 18, 1988); United States v. Austin, SA8834M1 (misdemeanor theft, complaint filed February 4, 1988); United States v. Ritter, SA88500M1 (driving while intoxicated, complaint filed December 7, 1988); United States v. Salas, SA89-2M-1 (felony theft, complaint filed January 5, 1989); United States v. Runkle, SA88222M-1 (driving while intoxicated, complained filed June 7, 1988); United States v. Barreda, SA88340M1 (driving while intoxicated and felony destruction of government property, complaint filed August 18, 1988); United States v. Tucker, (driving while intoxicated, complaint filed October 25, 1988); United States v. Ramirez, SA88230M1 (driving while intoxicated, complaint filed June 7, 1988); United States v. Martinez , SA88438M1 (driving while intoxicated, complaint filed October 25, 1988); United States v. Knight, SA88-482M-1 (driving while intoxicated, complaint filed December 1, 1988); United States v. Asebedo, SA88422M1 (driving while intoxicated, complaint filed October 21, 1988); United States v. Acuna, SA88436M1 (driving while intoxicated, complaint filed October 25,

1988); United States v. Delgado, SA88385M1 (driving while intoxicated, complaint filed September 29, 1988); United States v. Esparza, SA88315M1 (driving while intoxicated, complaint filed August 1, 1988); United States v. Esquivel, SA88221M1 (driving while intoxicated, complaint filed June 7, 1988); United States v. Flores, SA87398M-1 (driving while intoxicated, complaint filed August 18, 1987); United States v. Heinrich, SA8865M1 (passing insufficient check, complaint filed March 3, 1988); United States v. Rodriguez, SA87268M1 (driving while intoxicated, complaint filed June 8, 1987); United States v. Moore, SA87400M1 (driving while intoxicated, complaint filed August 20, 1987); United States v. Martinez, SA87439M1 (case dismissed a year after filing when defendant made restitution); United States v. Meye, SA87552M1 (driving while intoxicated, complaint filed November 10, 1987); United States v. Maldonado, SA88130M-1 (misdemeanor theft, complaint filed April 5, 1988); United States v. Perry, SA88220M-1 (uttering worthless checks, complaint filed June 7, 1988); United States v. Lacy, SA88220M1 (driving while intoxicated, complaint filed June 7, 1988). A more thorough search of the files in the Public Defender's office, not to mention a general search of the clerk's files, will doubtless reveal many, many more cases still pending in which no indictment or information has been returned within the thirty-day time requirement, revealing a continuing pattern of failure to bring formal charges within the time permitted by the Act. The government in this district does indeed "frequently fail to meet the time limits." . . .

REVISION

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS WITH PREJUDICE

[Introductory sentence or two, as required by the rules or conventions of the jurisdiction.]

After charging Mr. Bauza with the theft of merchandise worth $26, a misdemeanor, the government failed to indict him within the Speedy Trial Act's 30-day time limit. That failure resulted solely from the government's procrastination and negligence, not from plea bargaining or any action by the defense. The Court should therefore dismiss this case with prejudice, a result dictated by the Act's language and legislative history, and by relevant case law.

The Act requires dismissal *with prejudice* when, as in this case, the offense is minor, the delay was caused solely by the government, and reprosecution would not contribute to the administration of justice. This remedy is further justified by the Act's legislative history, which warns that routine dismissal of cases by the government *without* prejudice will undermine the Act's effectiveness.

Courts have consistently ordered dismissal with prejudice when, as in this case, delay results from the government's negligence. Although the Fifth Circuit has not confronted this precise issue, it has noted that dismissal with prejudice would be appropriate when the government regularly violates the Act's time limits. Prosecutors in this District have indeed regularly done so.

I. All three of the Speedy Trial Act's elements for dismissal – non-seriousness of the offense, prosecutorial misconduct, and the administration of justice – are evident in this case.

The Speedy Trial Act not only requires charges to be dismissed if no information or indictment is filed within thirty days from the date on which an individual is arrested or served with a summons. 18 U.S.C. 3161(b). Even for charges that are timely filed, dismissal with prejudice can be ordered on the basis of a court's consideration of three factors:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances which led to the dismissal; and the impact of a reprosecution on the administration of justice.

Id.

In this case, all three of these factors weigh in favor of dismissal with prejudice.

A. The charges against Mr. Bauza are minor. ....

B. Delay has been due to prosecutorial procrastination.

The record demonstrates that the government has failed to take further action for at least a month after each of its contacts with the defense. It offers no explanation for these delays. Although it refers to a need for continued plea negotiations, it has known since January 11, 1989, almost three months before it filed an information, that Mr. Bauza would not plead guilty.

....

C. Reprosecution would be inconsistent with the administration of justice.

In deciding whether dismissal should be with or without prejudice, the Speedy Trial Act's legislative history is instructive. It reflects much concern that dismissal without prejudice would overburden the grand jury system and, more important, would diminish or destroy the Act's effectiveness as a sanction against unjustified prosecutorial delays.

....

II. Case law supports dismissal with prejudice when a delay results from the Government's negligence or when prosecutors regularly fail to meet time limits.

Although courts have generally rejected a presumption that a dismissal for violating the Speedy Trial Act should be with prejudice, several courts have held that dismissal with prejudice is required when the government fails to act through negligence, as occurred in this case. In addition, two Fifth Circuit opinions have stated in dicta that dismissal with prejudice is appropriate when the government "regularly or frequently fails to meet the time limits." [Citation] Federal prosecutors in this district have an established pattern of failing to meet the limits.

A. Other Circuits routinely approve dismissal with prejudice when, as in this case, a delay results from government negligence.

Both the Second and Eleventh Circuits have held that such government negligence justifies dismissal with prejudice—even though, in the Eleventh Circuit case, the underlying offenses were serious.

[DISCUSSION OF CAPERELLA AND RUSSO]

B. This Circuit's reasoning supports dismissing cases with prejudice

where the government frequently fails to comply with the Act.

The government's negligence warrants dismissal with prejudice, especially in a case involving the theft of $26 of merchandise, even if no other factors did. In addition, however, the Fifth Circuit has said in dicta that courts should look to whether the government "regularly or frequently fails to meet the time limits."

[EXPANDED DISCUSSION OF SALGADO-HERNANDEZ AND MELQUIZO]

[Note: in the original, this discussion is too sketchy to be helpful or persuasive. Either the cases and the dicta that resulted should be discussed in more detail, or—if they will not bear closer examination—dropped from the brief or, at most, relegated to a footnote.]

The record in this case is replete with such failures, starting with the Salgado-Hernandez case. A cursory, incomplete examination of cases in the Federal Public Defender's office reveals 29 instances in which the government has failed to prosecute within the time limits of the Speedy Trial Act. While most of the cases involve charges of drunk driving, several involve fraud and theft charges similar to those in the present case.

Most recently....

A more thorough search of the files in the Public Defender's office, not to mention a general search of the clerk's files, will doubtless reveal many more cases still pending in which no indictment or information has been returned within the thirty-day time requirement. Such a continuing pattern of failure to bring formal charges within the time permitted by the Act justifies . . .

1* Cites to ("Pl. Br. __") are to plaintiffs' brief on this motion. Deposition exhibits are cited as "PX __" and "PX (Megacorp) __." "Pl. Br. Ex. __" refers to additional exhibits filed with plaintiffs' brief. "Jones Aff. Ex. __" refers to exhibits to the accompanying affidavit of C. B. Jones. Deposition transcripts are cited by the name of the deponent followed by the page number.

2 These figures are derived from Super's Form 10-Q for the third quarter ending on September 28, 1990, its Form 10-K for the fiscal year ending December 28, 1990, its 1990 Annual Report, its Form 10-Q for the first quarter ending March 29, 1991, and its Form 10-Q for the second quarter ending on June 28, 1991. These documents are attached to the accompanying Declaration of [ ] as Exhibits A-E, and are referred to as "Ex. _." Because allegations concerning the content of these documents form the basis for the Complaint, the Court may consider their contents on this motion to dismiss. [cites]

3* It also sharply contrasts with the solid support for the position of the defendants, who have named three preeminent experts -- including the author of the catalogue raisonné of Picasso's prints and Picasso's daughter all of whom will testify that the Signature was indeed written by the hand of Picasso.

41 For purposes of this motion only, we take the allegations of the Complaint as true. In addition, because the Complaint relies on and quotes the prospectuses, the Court may also

consider the prospectuses as a whole on a motion directed to the pleadings. I. Meyer Pincus & Assocs. v. Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991) ("Pincus"); Cortec Indus. v. Sun Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991), cert. denied, 112 S. Ct. 1561 (1992). The prospectuses for the two Term Trusts are substantially similar. Page references herein are to the final prospectus for Trust 2003. Copies of the final prospectuses for Trust 2003 and Trust 2000 are attached as Exhibits A and B, respectively, to the accompanying affidavit of sworn to January 13, 1995 (' - Aff.").

5*"Appellants" shall refer to all parties purporting to appeal here. "Debtors" shall refer to KHC and Kiii. The "Davises" or the "Davis family" shall refer to K.W. Davis, Jr., T.C. Davis, Alana Lawler, Alana Lawler Trust "A", A.T. Davis, A.T. Davis Trust "A", Kay Davis, Kay Davis Trust "A", Tricia, Kae Lawler, Alana Lawler Children's Trust, Allen Kenneth Davis, Janiece Breanne Davis, A.T. Davis Children's Trust, Kay Davis Children's Trust, T.C. Davis, II, T.C. Davis, II Trust, T.C. Davis, II Trust "A", T.C. Davis, II Trust "A" Dated January 15, 1982, Brian Keith Davis, Brian Keith Davis Trust, Brian Keith Davis Trust "A", Brian Keith Davis Trust Dated January 15, 1982, Chesley Davis, Chesley Davis Trust, Trey Davis, Trey Davis Trust, and Ken W. Davis Foundation.

1 The Court dismissed claims for breach of the duty of loyalty, entrenchment and corporate waste but found that the allegations in the Complaint, if true, sufficiently state a claim of breach of the duty of care and, therefore, create a reasonable doubt that the transaction is protected by the business judgment rule. Opinion at 11-17. The Thomas Green Defendants also made a Motion for judgment on the Pleadings. The Court granted their motion as to Count I. Opinion at 10-11.

2 The Motion for Judgment on the Pleadings of the Thomas Green Defendants on Count II was also denied. Opinion at 9.

Supreme Court: October Term 2013

Eighth Circuit Judicial Conference
Omaha, Nebraska
August 7, 2014

Erwin Chemerinsky
Dean and Distinguished Professor of Law
Raymond Pryke Professor of First Amendment Law
University of California, Irvine School of Law

I. Criminal Procedure

A. Fourth Amendment

Fernandez v. California, 134 S.Ct. 1126 (2014). Under Georgia v. Randolph, a defendant must be personally present and objecting when police officers ask a co-tenant for consent to conduct a warrantless search.

Navarette v. California, 134 S.Ct. 1683 (2014). The Fourth Amendment does not require an officer who receives an anonymous tip regarding a drunken or reckless driver to corroborate dangerous driving before stopping the vehicle.

Riley v. California, 134 S.Ct. 2473 (2014). The contents of a cell phone cannot be searched as part of a search incident to arrest without a warrant unless there are exigent circumstances.

B. Capital punishment

Hall v. Florida, 134 S.Ct. 1986 (2014). The Florida scheme for identifying intellectually disabled defendants in capital cases as those with IQs below 70 violates *Atkins v. Virginia.*

II. First Amendment

A. Freedom of Speech

McCutcheon v. Federal Election Commission, 134 S.Ct. 1434 (2014). The aggregate contribution limits of the Bipartisan Campaign Finance Reform Act -- an individual contributor cannot give more than $46,200 to candidates or their authorized agents or more than $70,800 to anyone else per two year election cycle (and within the $70,800 limit a person cannot contribute more than $30,800 per calendar year to a national party committee) -- violate the First Amendment.

McCullen v. Coakley, 134 S.Ct. 2518 (2014). The First Amendment is violated by a Massachusetts law which makes it a crime for speakers other than clinic "employees or agents . . . acting within the scope of their employment" to "enter or remain on a public way or sidewalk" within 35 feet of an entrance, exit, or driveway of a "reproductive health care facility."

B. Religion

Town of Greece v. Galloway, 134 S.Ct. 1811 (2014). A Town Board does not violate the Establishment Clause if over a long period virtually every meeting is begun with an explicitly Christian prayer.

Burwell v. Hobby Lobby, 134 S.Ct. ___ (June 30, 2014). The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb et seq., which provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest, is violated by a requirement that closely held for-profit corporations that provide insurance to employees must include contraceptive coverage for women.

III. Civil rights litigation

A. Constitutional equality

Schuette v. Coalition to Defend Affirmative Action, 134 S.Ct. 1623 (2014). An initiative that prohibits affirmative action by prohibiting the discrimination or preferences based on race or gender does not violate equal protection.

B. Qualified immunity

Plumhoff v. Rickard, 134 S.Ct. 2012 (2014). Police did not violate the Fourth Amendment through the use of deadly force to stop a high speed chase and may continue to shoot until the car they are chasing has been stopped. Also, officers were protected by qualified immunity.

Wood v. Moss, 134 S.Ct. 2056 (2014). Secret service agents were protected by qualified immunity when they moved anti-Bush demonstrators further and allowed pro-Bush demonstrators to be closer to the President.

Lane v. Franks, 134 S.Ct. 2369 (2014). A government employee's First Amendment rights are violated when he is fired for truthful testimony given pursuant to a subpoena, but the defendant is protected by qualified immunity.

IV. Separation of powers

A. Recess appointments

National Labor Relations Board v. Noel Canning, 134 S.Ct. 2550 (2014). The President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.

B. Authority of bankruptcy judges

Executive Benefits Insurance Agency v. Arkison, 134 S.Ct. 2165 (2014). De novo review by an Article III court is sufficient to permit a decision by a bankruptcy court on a state law claim.

Wellness Intern. Network Ltd. v. Sharif, 376 F.3d 720 (7th Cir. 1013), *cert. granted,* 134 S.Ct. ___ (July 1, 2014). Is a constitutional objection based on *Stern v. Marshall* waivable?

Hes omitg the IP cases - 10 cases.
Federal Cuut getg reversed moo.
2 8th Cuut reversals -
No major 5th or 6th Amendmt Crim proceduu cases.