CASE COMMENTARIES

BUSINESS ASSOCIATIONS

Under Sixth Circuit law, filing a suit in an attempt to settle a case does not constitute an abuse of process. *Penn, LLC v. Prosper Bus. Dev. Corp.*, 600 F. App'x 393 (Jan. 23, 2015).

By Harolda Bryson

In *Penn, LLC v. Prosper Bus. Dev. Corp.*, 600 F. App'x 393 (Jan. 23, 2015), the United States Court of Appeals for the Sixth Circuit addressed the issue of whether filing a suit in an attempt to settle a case constitutes an abuse of process, absent evidence of an improper ulterior motive.[1]

In 2000, Penn, LLC ("Penn") and Prosper Business Development Corporation ("Prosper") together formed BIGresearch, LLC ("BIGresearch"). Each party owned 50 percent of BIGresearch's shares, and its board consisted of one representative from Penn and two representatives from Prosper. Following the formation, BIGresearch sold approximately five percent of its shares to outside investors.

In 2004, Prosper purchased a portion of the sold shares, giving it a majority stake in BIGresearch, and used its newfound majority ownership to remove Penn's representative from the board. In response, Penn challenged the legality of Prosper's actions and demanded arbitration.

In 2008, the arbitrator ruled in favor of Penn and restored Penn's membership on the BIGresearch board. In addition, a third-party was appointed to determine the amount of distributions that Penn's shares should have earned during the "freeze-out" period, even though Prosper still occupied a majority of the board.

In 2009, while the third-party was preparing the report, Prosper voted to completely dissolve BIGresearch. In response, Penn filed suit in an Ohio court, seeking to enjoin the dissolution. In 2010, while the Ohio suit was pending, the third-party's financial report was finished and the arbitrator adopted the damages award of $1,488,000 in favor of Penn. Later, in 2011, the court found that the dissolution was valid.

On appeal, Prosper and Penn entered into settlement negotiations, where Prosper offered to pay Penn $1,500,000 in exchange for a release from all liability. Following the offer, Penn countered with a

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[1] The United States Court of Appeals for the Sixth Circuit also addressed other issues not covered in this synopsis.

request of $1,750,000. Weeks later, Penn's attorney called Prosper's attorney in order to remind him of the settlement and to inform him that Penn "intended to file a new complaint against Prosper . . . unless it accepted the proposal." Penn called a second time stating the same thing, but also threatened to sue Prosper's counsel as co-defendants. A month later, the Ohio court upheld the arbitrator's award and reduced it, such that Prosper only had to pay an amount of approximately$750,000 to Penn.

Penn filed suit once more against Prosper, alleging RICO violations, fraud, conversion, unjust enrichment, and breach of fiduciary duty. After filing the suit, Penn called Prosper again to talk about the settlement, offering to accept the $750,000 award as part of the $1,750,000 it previously requested. Prosper then filed a counterclaim, alleging abuse of process.

Under the applicable forum state's law, in this case Ohio, an abuse of process counterclaim requires:

> 1) that a legal proceeding has been set in motion in proper form and with probable cause; 2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and 3) that direct damage has resulted from the wrongful use of the process.

At trial, the District Court upheld Prosper's counterclaim, reasoning that Penn used threats and the suit as "bargaining chips" to leverage settlement negotiations. Penn appealed. [2] On appeal, the Court of Appeals for the Sixth Circuit reversed the district court's holding, finding that Penn did not engage in an abuse of process.

Under Sixth Circuit law, generally, it is not an abuse of process to file a suit in an attempt to settle a case. First, an abuse of process claim must show that the suit involves issues that are not properly before the court. Second, it must be shown that the proceeding has been perverted, such that the abusing party is attempting to use the court to order something that it is powerless to order. Finally, the abusive suit must have damaged the other party.

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[2] Penn only challenged the second part of the test.

The Sixth Circuit Court of Appeals found that Penn's suit did not constitute an abuse of process because: 1) Penn's claims were viable and properly before the court; 2) Penn's requested relief by the court was proper and within the court's power; and 3) Prosper failed to show how it was damaged by Penn's suit. As such, the United States Court of Appeals for the Sixth Circuit reversed the district court's ruling, holding that a party may file a lawsuit in an attempt to settle a case, as long as the party is not filing the lawsuit in an effort to achieve an improper ulterior objective.

In light of this decision, transactional attorneys in the Sixth Circuit should know that federal courts apply the forum state's law on filing an abuse of process claim, and that filing a suit or threatening to file a suit in an attempt to settle a case, does not constitute an abuse of process, unless the suit alleges violations that are improperly before the court. Further, for an abuse of process claim to be upheld, the claiming party must provide evidence showing an ulterior motive to filing the suit. Courts have found ulterior motives where the party who initiated the lawsuit asked the court to reach beyond its authority, or where the party alleges invalid claims or claims unrelated to the subject matter of the suit.

CONTRACTS

The Supreme Court of the United States held that courts shall interpret welfare plans contained in employee collective-bargaining agreements using ordinary principles of contract law. *M & G Polymers USA, L.L.C. v. Tackett*, 135 S. Ct. 926 (2015).

By Spencer Cook

In *M & G Polymers USA, L.L.C. v. Tackett*, 135 S. Ct. 926 (2015), the United States Supreme Court addressed whether ordinary principles of contract law permit an inference, drawn from extraneous knowledge of labor bargaining, that absent a specific durational clause, retiree health care benefits vest for life. In *Tackett v. M & G Polymers USA, Inc.*, 561 F.3d 478 (6th Cir. 2009) ("*Tackett I*"), the Court of Appeals for the Sixth Circuit applied the holding from its previous decision in *International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America (UAW) v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983) ("*Yard-Man")* and its progeny, requiring courts to infer the external context of labor negotiations when considering whether collective-bargaining agreements create a vested right to lifetime welfare plans. In *M & G Polymers USA, L.L.C. v. Tackett*, the United States Supreme Court held that courts shall interpret welfare plans contained in employee collective-bargaining agreements using ordinary principals of contract law, abrogating *Yard-Man* and its progeny.

This case arose out of a collective-bargaining agreement between M & G Polymers USA, L.L.C. ("M & G") and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("the Union"). In 2000, M & G purchased the Point Pleasant Polyester Plant ("Plant") and entered into a collective-bargaining agreement with the Union that represented the Plant's employees. This collective-bargaining agreement ("C.B.A") promised that qualifying retirees, along with their surviving spouses and dependents, would receive a fully company-funded welfare plan for the duration of the C.B.A., which provided for renegotiation in three years. In 2006, M & G began requiring that all retirees contribute to the costs of their welfare plan, stripping the retirees of their rights to the previously company-funded welfare plans.

After M & G ended the employee-funded welfare plan, retirees of the Plant, their spouses, and their dependents ("Retirees"), brought a class action suit against M & G, asserting claims under the Labor Management Relations Act of 1947 ("LMRA") and the Employee Retirement Income Security Act of 1974, 88 Stat. 891 ("ERISA"). The Retirees alleged that M & G, through the terms of the C.B.A., vested its Plant retirees, their surviving spouses, and their dependents with a right to lifetime contribution-free health care benefits.

The district court dismissed the Retirees claims, holding that the language contained within the C.B.A. unambiguously did not create a vested right to retiree benefits. *Tackett v. M & G Polymers USA, L.L.C.*, 523 F. Supp. 2d 684 (S.D. Ohio 2007).

On appeal, the Sixth Circuit Court of Appeals held that the Retirees' stated a plausible claim based on collective-bargaining inferences established in *Yard-Man*. *Tackett v. M & G Polymers USA, Inc.*, 561 F.3d 478 (6th Cir. 2009). The court of appeals' previous decision in *Yard-Man,* and its progeny, required courts to infer "that parties to collective bargaining intend[ed] retiree benefits to vest for life because such benefits are 'not mandatory' or required to be included in collective-bargaining agreements, are 'typically understood as a form of delayed compensation or reward for past service,' and are keyed to the acquisition of retirement status." The court of appeals reversed and remanded the district court's dismissal of Retirees' claims.

On remand, the district court conducted a bench trial and ruled in favor of the Retirees. The district court declined to answer whether the C.B.A. created a vested right to retiree benefits, "concluding that the [c]ourt of [a]ppeals had definitively resolved that issue." *Tackett v. M & G Polymers USA, L.L.C.*, 853 F. Supp. 2d 697 (S.D. Ohio 2012). The Sixth Circuit Court of Appeals affirmed in favor of the Retirees, holding that "although the [d]istrict [c]ourt had erred in treating *Tackett I* as a conclusive resolution of the meaning of the [C.B.A.], it had not erred 'in presum[ing]' that, 'in the absence of extrinsic evidence to the contrary, the [C.B.A.] indicated an intent to vest lifetime contribution-free benefits'." *Tackett v. M & G Polymers USA, L.L.C.*, 853 F.3d 589 (6th Cir. 2013) ("*Tackett II*").

On a grant of certiorari, the Supreme Court held that the Sixth Circuit Court of Appeals' "decision [in *Tackett II*] rested on principles that are incompatible with ordinary principles of contract law." The Court vacated and remanded the Sixth Circuit's decision in *Tackett II*. The Supreme Court explained that while "ERISA imposes elaborate minimum funding and vesting standards for pension plans . . . it explicitly exempts welfare benefit plans from those rules." Because welfare plans are required by ERISA to be established and maintained pursuant to a written instrument, the Supreme Court observed that "contractual provisions ordinarily should be enforced as written . . . especially when enforcing an ERISA [welfare benefits plan].'"

The Supreme Court noted that the Sixth Circuit Court of Appeals, which relied on its previous decision in *Yard-Man*, incorrectly applied ordinary contract law in *Tackett II*. The Supreme Court declared that *Yard-Man* "violate[d] ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective bargaining agreements." The Supreme Court concluded that *Yard-Man*'s holding allowed for courts to ascertain the intentions of the parties "not from the record evidence, but instead from its own suppositions about the intentions of employees, unions, and employers negotiating retiree benefits."

Furthermore, the Supreme Court added that the holding in *Yard-Man*, as applied in *Tackett II*, violated other fundamental contract laws, such as: 1) applying external inferences when construing durational clauses in provisions governing retiree benefits; 2) the misapplication of the illusory promises doctrine, which "instructs courts to avoid constructions of contracts that would render promises illusory because such promises cannot serve as consideration;" 3) the traditional principle that courts should not construe ambiguous writings to create lifetime promises; and 4) the traditional principle that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." The Sixth Circuit's misapplication of ordinary contract laws required the Supreme Court to abrogate *Yard-Man* and its progeny. On remand, the Supreme Court mandated that the Sixth Circuit apply ordinary principles of contract law when it reexamines *Tackett*.

The Court's decision in *Tackett v. M & G Polymers USA, L.L.C.*, drastically departs from prior Sixth Circuit precedent. With the abrogation of *Yard-Man* and its progeny, the Sixth Circuit must begin a new chapter in interpreting the intent of the contracting parties in welfare plans contained in collective-bargaining agreements. The Sixth Circuit may no longer apply its own external knowledge of labor negotiations to infer the intent of the contracting parties. Additionally, the Court's abrogation of *Yard-Man* changes the status quo of collective-bargaining agreements in favor of employers. It may become more difficult, if not impossible, for unions to negotiate for or maintain employer contributed welfare plans without conceding other important terms in a collective-bargaining agreement.

To ensure that courts can easily interpret the terms of a collective-bargaining agreement, practitioners should strive to have each party's intent easily discerned within the "four corners of the document." Furthermore, *Tackett v. M & G Polymers USA, L.L.C.*, dictates that all parties engaged in collective-bargaining should, now more than ever, be aware of the ordinary laws and principles of contract law when drafting a collective-bargaining agreement.

COPYRIGHT

The Supreme Court held that the equitable defense of laches does not bar relief on a copyright infringement claim brought within the three-year statute of limitation period. *Petrella v. MGM Inc.*, 134 S. Ct. 1962 (2014).

By Danielle Knight

In *Petrella v. MGM Inc.*, 134 S. Ct. 1962 (2014), the Supreme Court addressed the issue of whether the equitable defense of laches may bar relief on a copyright infringement claim brought within 17 U.S.C. § 507 (b)'s three-year limitations period.

Frank Petrella ("Mr. Petrella") and Jake LaMotta ("LaMotta") collaborated in writing two screenplays and a book.[3] In 1976, Mr. Petrella and LaMotta assigned their rights to all three works to Chartoff-Winkler Productions. Two years later, Metro-Goldwyn-Mayer ("MGM") acquired the motion picture rights to the screenplays. The rights were stated to be "exclusive and forever, including all periods of copyright and renewals and extensions thereof." In 1980, MGM released the film Raging Bull, based off the acquired screenplays and book, which is still in circulation today.

In 1981, Mr. Petrella died during the initial copyright term, and his renewal rights reverted to his daughter Paula Petrella ("Ms. Petrella"). In 1991, Ms. Petrella renewed the 1963 copyright and became the sole owner of the copyright. Over the next eighteen years, Ms. Petrella's attorney notified MGM that she owned the 1963 copyright and was threatening legal action for copyright infringement.

In 2009, Ms. Petrella took action and filed a copyright infringement suit in the United States District Court for the Central District of California, alleging MGM's violation of her 1963 copyright.[4] MGM moved for summary judgment based on the equitable defense of laches. The district court granted MGM's motion for summary judgment, finding that Ms. Petrella's eighteen-year delay in commencing the suit was unreasonable and prejudicial to MGM. The United States Court of Appeals for the Ninth Circuit affirmed the dismissal, finding that Ms. Petrella was aware of her rights for many years and delayed her suit because "the film hadn't made money."

On certiorari, the Supreme Court of the United States sought to resolve: 1) how the equitable defense of laches applies to copyright claims; and 2) the irreconcilable outcomes of circuit splits.

The Copyright Act of 1976 (the "Act") protects an author's original works from infringement by unauthorized parties. Copyright owners may transfer ownership to a third-party, reproduce and distribute the copyrighted work, and are protected for a predetermined time based on the date of publishing. Copyrighted works published before 1978, as in this case, are initially protected for twenty-eight years, with the option

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[3] The first screenplay was registered in 1963, the second screenplay was registered in 1973, and the book was registered in 1970.

[4] Ms. Petrella only sought recovery of damages for the time-period on and after January 6, 2006, because the statute of limitations for copyright claims requires a suit to be brought within three years of the infringing action.

of renewal up to sixty-seven years. Additionally, for pre-1978 works, the Act allows an heir to inherit the renewal rights.

Civil actions brought under the Act must be filed within three years of the infringing action. Copyright statutes of limitation follow the separate-accrual rule: each infringing action starts a new three-year limitations period.

First, the Supreme Court held that the defense of laches was improperly used because its use should be limited to cases in which no statute of limitations applies. Here, the copyright statute of limitations provides for a three-year look-back period, arising from the date of the infringing action.

Second, the Supreme Court held that the defense of laches does not prevent a copyright owner from "sitting still," in order to determine the likely outcome of an infringing action (also known as an expectations-based delay). The separate-accrual rule allows copyright owners to defer a suit "until she can estimate whether litigation is worth the candle."

In light of this decision, transactional attorneys should be aware that each copyright-infringing action begins a new three-year statute of limitations period. The defense of laches should not be used to defend copyright claims and should only be used when a statute of limitations is non-existent. Finally, such suits may be delayed, allowing the potential plaintiff to see the result of the infringing action, but any profits earned by a defendant, outside of the three-year look-back period, are not recoverable.

LABOR AND EMPLOYMENT

Under Tennessee law, employees who fail to take all reasonable and necessary steps to protect their employment, voluntarily terminate their employment, disqualifying themselves from receiving unemployment benefits, absent good cause. *Practical Ventures, LLC v. Neely*, No. W2013–00673–COA–R3–CV, 2014 WL 2809246, 2014 Tenn. App. LEXIS 348 (Tenn. Ct. App. June 19, 2014).

By Sonali Arora

In *Practical Ventures, LLC v. Neely*, No. W2013–00673–COA–R3–CV, 2014 WL 2809246, 2014 Tenn. App. LEXIS 348 (Tenn. Ct. App. June 19, 2014), the Tennessee Court of Appeals addressed the issue of whether an employee voluntarily terminated her employment, where the employee was suspected of fraud, was temporarily suspended from her employment, responded by stating that she was planning on resigning anyway, and did not cooperate with the employer's internal investigation. The addressed issues were key in determining whether the employee was eligible for unemployment benefits or not.

Gordon Ballenger ("Ballenger"), the owner and general manager of Practical Ventures, owned and operated AAA Cash Fast ("Cash Fast"). Cash Fast was in the business of providing cash advances and title loans. Danyelle McCullough ("McCullough") was the manager of Cash Fast's Memphis, Tennessee branch, and was responsible for managing customers' loans and Cash Fast's accounting.

On January 25, 2010, McCullough submitted a closing report that included a summary of the store's loans and transactions for that day to Ballenger. While Ballenger was reviewing the report, he noticed the information in the copy of a check was blank, except for the amount. After investigating, Ballenger found $15,468 worth of accounting discrepancies.

Two days later, Ballenger spoke to McCullough over the phone and told her that an investigation was under way regarding the financial discrepancies in her reports, that her security code had been changed, that she was suspended until further notice, and that she needed to return her copy of the store key. McCullough told Ballenger that she was not concerned about her job because she was planning on quitting on the following Saturday. McCullough never returned to the store to drop-off the keys or contacted Ballenger again. McCullough was charged with seventeen criminal offenses, of which sixteen were dropped. The remaining criminal charge was for forging financial documents.

Several months later, McCullough filed an application for unemployment compensation with the Tennessee Department of Labor and Workforce ("Department"). The Department denied McCullough's application, stating that McCullough was disqualified from receiving benefits because she was terminated for misappropriation of company funds. McCullough appealed to the Department's Appeals Tribunal.

On appeal, the tribunal reversed the prior denial of benefits, finding that McCullough was qualified for benefits. The tribunal found that McCullough was constructively discharged because Ballenger, by suspending McCullough before she told him she was quitting, denied McCullough the right to work first.

Ballenger appealed the decision to the Department's Board of Review, which affirmed the tribunal's holding. Ballenger then filed for judicial review in the Chancery Court of Shelby County, Tennessee. The trial court upheld the Department's decision, holding that McCullough was effectively terminated, supported by substantial and material evidence, and that the Department did not act arbitrarily and capriciously. Ballenger appealed once more.

On appeal, the Tennessee Court of Appeals held that McCullough was not constructively discharged[5], and that she was ineligible for unemployment benefits. Tennessee unemployment statutes were enacted to improve the economic effects of involuntary unemployment on workers and their families. Workers, who leave their job voluntarily and without any good cause, are not

entitled to unemployment benefits. "Courts will find that an employee has voluntarily terminated her employment if the employee fails to take all necessary and reasonable steps to protect his or her employment." *McPherson v. Strokes*, 954 S.W.2d 749 (Tenn. Ct. App. 1997).

The appellate court reversed the trial court's decision, holding that McCullough voluntarily terminated her employment because she failed to take all necessary and reasonable steps to protect her employment. Specifically, McCullough failed to cooperate with the investigation, did not return the store key, stated that she was planning on resigning, and never returned to work. Thus, McCullough was ineligible to receive unemployment benefits because she voluntarily terminated her employment after Ballinger notified her that she was only being suspended.

In light of this decision, transactional attorneys in Tennessee should be aware that if an employee voluntarily terminates their job without good cause, they are be ineligible for unemployment benefits. The voluntary termination of unemployment benefits occurs when an employee fails to take all reasonable and necessary steps to protect their employment. Although this is a fact-intensive inquiry, employee actions before, during, and after the conduct in question should be taken into account.

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[5] The doctrine of constructive discharge was improperly applied in this case because it is inapplicable in an administrative unemployment compensation proceeding. The doctrine of constructive discharge is applicable under state and federal laws prohibiting discrimination on the basis of race, color, religion, sex, or national origin. *Practical Ventures, LLC*, 2014 Tenn. App. LEXIS 348, at *26.

PROPERTY

Under Tennessee Law, the applicable statute of limitations is determined by utilizing the *Vance* two-step approach to analyze the gravamen of the claim. *Benz-Elliott v. Barrett Enter. LP*, 456 S.W.3d 140 (Tenn. 2015).

By Zachary Campbell

In *Benz-Elliot v. Barrett Enter. LP*, *LP*, 456 S.W.3d 140 (Tenn. 2015) the Tennessee Supreme Court clarified the two-step *Vance* approach, used to determine the gravamen of a case, in order to apply the proper statute of limitations. In clarifying the *Vance* two-step approach, the Tennessee Supreme Court addressed the issue of whether *Benz-Elliott* should be governed by a three-year statute of limitations for injuries to property, or a six-year statute of limitations for breach of contract.

In *Vance v. Schulder*, the Tennessee Supreme Court outlined a two-part analysis to identify the gravamen of a complaint. *Vance v. Schulder*, 547 S.W.2d 927 (Tenn. 1977). The *Vance* court sought to correct the problems associated with prior decisions by requiring the "consideration of both *the basis of the claim* and the *type of injuries* for which damages are sought." *Vance*, 547 S.W.2d at 932 (emphasis added).

In *Benz-Elliott*, Brenda Benz-Elliott ("Ms. Elliott") brought suit against Ronnie Barrett ("Defendant") and Barrett Enterprises, LP (collectively "Defendants"). Ms. Elliott owned ninety-one acres in Rutherford County. The Defendant owned four acres located on Miller Road, adjacent to Ms. Elliott's property. In 2004, Defendant approached Ms. Elliott about purchasing a portion of her property. Ms. Elliott initially sold five acres to Defendant, with the condition that she would retain access to a sixty-foot wide strip along Miller Road to connect her remaining property to the public road. Further, Defendant agreed to extend Miller Road according to county specifications along I-24. The sale was then finalized on March 25, 2005. The warranty deed, however, failed to include the contractually-required reservation to provide the sixty-foot strip. Both parties relied on a letter from the Tennessee Department of Transportation ("TDOT") that the required reservation would be available.

On September 22, 2008, Ms. Elliott filed suit against Defendants. She later amended her complaint on October 21, 2008, alleging claims for breach of contract, intentional misrepresentation, and negligent misrepresentation. Ms. Elliott requested specific performance and money damages. The Defendants filed an answer to the amended complaint and, pursuant to an agreed order, later amended their answer to include the three-year statute of limitations provided in Tennessee Code Annotated § 28-3-105, among five other affirmative defenses.

At trial, the court dismissed Ms. Elliott's claims of intentional and negligent misrepresentation, finding that Ms. Elliott had failed to prove her claims. In determining whether there was a breach of contract, the trial court focused first on the road, finding that Defendant did not build the promised road. Next, the trial court found that the sixty-foot reservation to connect Ms. Elliot's land did not exist. In light of these two facts, the trial court ruled in favor of Ms. Elliott for the breach of contract claim. The trial court determined that Defendant failed to establish the defenses of estoppel, waiver, laches, statute of limitations, and modified comparative fault. The trial court declined to order specific performance for Ms. Elliott because the defendant had already constructed buildings on the purchased land. Instead, the trial court awarded Ms. Elliott $850,000 in damages for the diminution in value of her remaining property, as a result of not having access to a connecting public road.

At the November 1, 2012 hearing on remand, maps introduced into evidence showed that Miller Road was relocated behind Defendant's property, and that the road extended to the southwest corner of Ms. Elliott's property, giving her access to a public road. Russell Parrish, an appraiser testifying on behalf of Ms. Elliott, stated that the diminution in value of Ms. Elliott's remaining property from the lack of an ingress and egress along I-24 was valued at $1,066,496. Johnny Sullivan, an appraiser testifying on behalf of Defendants, stated that in light of the new access road, Ms. Elliott sustained no diminution in value of her remaining property. The trial court reduced Ms. Elliott's award for diminution of value by $200,000.

On appeal, the Court of Appeals held that the gravamen of the claim for which Ms. Elliott prevailed was based on damages to real property, and concluded that her claim was barred by the three-year statute of limitations. Subsequently, Ms. Elliott's application for permission to appeal was granted pursuant to Tennessee Rules of Appellate Procedure 11.

The Tennessee Supreme Court, exercising *de novo* review, held that Ms. Elliot's claims are to be governed by the six-year statute of limitations for breach of contract claims. The Tennessee Supreme Court acknowledged that the *Vance* two-step approach had resulted in irreconcilable differences, and clarified it in the case at hand. The court held that in order to determine the applicable statute of limitations, courts should determine the gravamen of the claims by: first, considering the legal basis for the claim; and second, considering the type of injuries for which damages are sought.

In applying the *Vance* two-step approach, the Tennessee Supreme Court found that the legal basis of Ms. Elliot's claim was breach of contract, and that the damages sought were remedies for breach of contract. Thus, the court held that Ms. Elliot's claims are to be subject to a six-year statute of limitations for breach of contract, instead of the three-year statute of limitation for real property damages.

In light of this decision, transactional attorneys in Tennessee should be aware of the *Vance* two-step approach, as clarified by the Tennessee Supreme Court in this case. In determining the applicable statute of limitations for each claim brought, the gravamen of the claim should be determined by analyzing the legal basis of the claim, followed by the types of damages sought.

SECURITIES

Under the Securities Litigation Uniform Standards Act of 1998, a misrepresentation or omission of material fact must be material to a decision to buy or sell a "covered" security, in order to be made "in connection with" that purchase or sale. *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014).

By Luke Smith

In *Chadbourne & Parke LLP*, 134 S. Ct. 1058 (2014), the United States Supreme Court determined how broadly to construe to language of the Securities Litigation Uniform Standards Act of 1998 (the "Act"), which requires fraudulent misrepresentation to be made "in connection with" the purchase or sale of a covered security.

Prior to *Chadbourne*, Allen Stanford ("Stanford") and his companies sold certificates of deposit ("CDs") in Stanford International Bank ("the Bank") to four groups of private investors ("Plaintiffs"), promised a fixed rate of return, and promised that the CDs were secure because they were backed by the Bank's significant holdings in covered securities. Plaintiffs' CDs were not in fact invested, or backed by covered securities, but were part of an elaborate Ponzi scheme. The funds were used to repay previous investors and to provide a lavish lifestyle for Stanford, among other things.

In *Chadbourne*, Plaintiffs brought separate civil class action suits against the firms and individuals who helped the Bank sell its CDs by working as investment advisers, attorneys, or insurance brokers for the Bank (collectively "Defendants"). Two groups of Plaintiffs filed actions in Louisiana state court, claiming that Defendants helped perpetrate fraud, thereby violating Louisiana state law. Defendants had their cases removed to federal court. Two other groups of Plaintiffs filed their actions in the federal court for the Northern District of Texas, claiming that Defendants helped the Bank perpetrate securities fraud or hide it from regulators, thereby violating Texas law. The cases were consolidated in the District Court for the Northern District of Texas.

The district court dismissed all four actions under the Act, reasoning that the CDs were not covered securities because they were not traded nationally or listed on a regulated exchange. Further, the court found that the Bank's misrepresentations did not provide a sufficient "connection" with the purchase or sale of a covered security to trigger the Act and dismiss the cases.

On appeal, the Court of Appeals for the Fifth Circuit reversed, concluding that the Bank's misrepresentations were "tangentially related" to the "crux" of the fraud claims, triggering the Act. The Supreme Court granted certiorari in order to determine the scope of the Act's phrase "misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security."

Under the Act, securities class action suits are not permitted on state law claims based on " a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." A "covered" security is one that is "listed, or authorized for listing, on a national securities exchange."

The Court held that a fraudulent misrepresentation or omission is made "in connection with" the "purchase or sale of a covered security" when it is material to a consumer's decisions to buy or sell a "covered security." "In connection with" refers to those who maintained or divested an ownership interest in the covered security.[6] Thus, the

[6] The Court showed concern that a broader interpretation would prohibit states from being able to provide remedies for victims of more garden-variety fraud. Under a broader interpretation, the Act would prohibit a suit brought by creditors of a business that falsely represented that it was creditworthy, in part because it owns or intends to own a covered security.

Court held that Plaintiffs' allegations failed to state misrepresentations that were "in connection" with the purchase or sale of a "covered security," because the misrepresentations alleged were solely about the Bank's fraudulent assurances. Consequently, the necessary connection between the materiality of the misstatements and the purchase or sale of a covered security did not exist.

In light of this decision, transactional attorneys should know that the Court intends for the phrase "in connection with" to be broadly construed, in order to allow flexibility in a court's choice of remedies. Also, in determining whether or not a fraudulent misrepresentation has been made, it is important to show that the consumer's decision to purchase or sell a covered security was influenced by a material misrepresentation.

TRADEMARK

The Food, Drug and Cosmetic Act (the "FDCA") does not preclude commercial entities from bringing lawsuits against their competitors, under the Lanham Act, for allegedly deceptive labeling of a product, even if the challenged aspects of the labeling are specifically required or authorized by the FDCA. *POM Wonderful LLC v. Coca-Cola Co.,* 134 S. Ct. 2228 (2014).

By Rebekah Raymond

In *POM Wonderful LLC v. Coca-Cola Co.,* 134 S. Ct. 2228 (2014), the Supreme Court addressed the issue of whether a private party may bring suit under the Lanham Act, challenging a label regulated by the Food, Drug, and Cosmetic Act (the "FDCA"). The unanimous Court held that the Lanham Act and the FDCA are complementary, and that a private party is not precluded by the FDCA from bringing suit under the Lanham Act.

POM Wonderful LLC ("POM") produces, markets, and sells a variety of pomegranate products, including a pomegranate-blueberry juice blend. POM competes in the pomegranate-blueberry juice market with Coca-Cola's Minute Maid brand. POM sued Coca-Cola under the Lanham Act for unfair competition arising from false or misleading product descriptions, which allegedly deceived consumers, and injured POM as a competitor. POM alleged that Coca-Cola's product name, label, marketing, and advertising misled consumers into believing that the product consisted predominately of pomegranate and blueberry juice, when it only consisted of 0.3 percent pomegranate juice and 0.2 percent blueberry juice.

Congress enacted the Lanham Act nearly seven decades ago in order to protect commercial entities from unfair competition. The Lanham Act allows a competitor to sue another competitor for unfair competitive advantages, arising from false or misleading product descriptions.

The FDCA regulates foods, drugs, and cosmetics, in order to protect public health and public safety. In doing so, the FDCA relies solely on the United States government for its enforcement, as there are no private rights of action provided for by the FDCA. Under the FDCA, misleading labels for foods and beverages are prohibited. A food or beverage is deemed misbranded if: 1) its labeling is false or misleading; 2) the information required to appear on its label is not conspicuously displayed; or 3) its label does not bear the common or usual name of the food. Under the FDCA, the Food and Drug Administration (the "FDA") has regulatory authority over food and beverage label claims. To implement the above stated provisions, the FDA promulgated regulations regarding food and beverage labeling, one of which states: "[i]f a juice blend label does not name all the juices it contains and mentions only juices not predominant in the blend, it is misleading unless it either declares the percentage content of the named juice or indicates that the named juice is present as a flavor or flavoring."

The United States District Court for the Central Division of California granted partial summary judgment to Coca-Cola on POM's Lanham Act claim, ruling that the FDCA and its regulations preclude challenges to the name and label of Coca-Cola's juice blend. The court reasoned that since the FDA had not prohibited, but rather in some instances expressly permitted, aspects of Coca-Cola's label, it would, in this instance, be inconsistent with FDA regulations to allow a Lanham Act claim.

The Court of Appeals for the Ninth Circuit affirmed in relevant part, and "out of respect for the statutory and regulatory scheme barred POM's Lanham Act claim." The court reasoned that: 1) Congress had entrusted matters of juice beverage labeling to the FDA; 2) the FDA had promulgated comprehensive regulation of that labeling; and 3) the FDA apparently had not imposed the requirements on Coca-Cola's label that POM sought. The Court of Appeals further explained that for a court to act when the FDA had not, despite regulating extensively in this area, would risk undercutting the FDA's expert judgments and authority.

The Supreme Court held that the FDCA does not preclude Lanham Act claims, reasoning that the two federal laws at issue are complementary. Further, the Lanham Act's purpose is to protect commercial entities from unfair competition, while the FDCA's purpose is to protect consumer health and safety. Finally, neither the FDCA nor the Lanham Act contain limiting language with respect to unfair competition claims. If the FDCA was intended to bar certain claims brought under the Lanham Act, Congress could have added a provision addressing this issue during the seventy year existence of the Lanham Act.

In light of this decision, attorneys should know that the Lanham Act and the FDCA are complementary federal laws with the same overall goal: to prevent companies from misleading consumers and creating unfair competitive advantages. It is not enough for a company to be in compliance with the FDCA's regulations because: 1) being in compliance with FDCA regulations will not preclude a Lanham Act claim; and 2) compliance with FDCA regulations is not a defense to a Lanham Act claim. Companies regulated by the FDCA must be careful to ensure that they are properly following FDCA regulations, while not engaging in misleading or deceptive marketing practices.