CASE COMMENTARIES

ANTITRUST

The United States Court of Appeals for the Second Circuit held that the proper market for Section 1 of the Sherman Act analysis of non-discriminatory provisions included in American Express's merchant contract includes both the market for merchant acceptance of a credit card and consumer use of such card. *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016).

By John Bobbitt

In *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016), the United States Court of Appeals for the Second Circuit addressed whether the proper market for evaluating vertical restraints in the credit card market under Section 1 of the Sherman Act, 15 U.S.C. § 1 (2012), included only the market for merchant's acceptance of a particular credit card or also included a consumer's use of such card.

In the credit card marketplace, credit card providers, such as American Express, contract with both merchants and consumers for the use of a credit card provider's services. Without these contracts, a merchant cannot accept a credit card provider's card. Credit card providers charge a contracting merchant a fee each time that the credit card provider's card is used by a consumer at the merchant's business. Credit card providers also charge the consumers for the use of the credit card provider's card in the form of interest applied to any outstanding debts on the consumer's credit card account. To entice a consumer to use their card, credit card providers often offer rewards that apply each time a consumer uses his or her card. To fund these rewards, American Express charges the merchants a higher fee each time a consumer uses an American Express card in the merchant's business. This transaction results in an increase in costs for the merchant selling the goods on a per-transaction basis when compared to alternative payment methods.

In its merchant contracts, American Express prohibited the merchants from "stat[ing] a preference for any payment-card network other than [American Express]." These non-discriminatory provisions ("NDPs") prohibited merchants from suggesting to a customer any alternative mode of payment to an American Express card, even if the use of an American Express card would increase the merchant's fees.

As a result, the Department of Justice ("DOJ") sued American Express in the United States District Court for the Eastern District of New York. The DOJ alleged that American Express's NDPs were an illegal vertical restraint of trade under Section 1 of the Sherman Act. The DOJ claimed that if American Express did not have these NDPs, merchants could encourage consumers to use alternative, less expensive, payment methods when consumers made purchases.

The district court ruled that the government "had 'shown by the preponderance of the evidence that [American Express's] NDPs create[d] an environment in which there is nothing to offset credit card networks' incentives . . . to charge merchants inflated prices for their services.'" *United States v. Am. Exp. Co.*, 88 F. Supp. 3d 143, 150 (E.D.N.Y. 2015). In reaching that conclusion, the district court cited *United States v. Visa USA, Inc.*, 344 F.3d 229 (2d Cir. 2003), and found that the relevant market for Section 1 analysis in the case of American Express's NDPs was "only the market for 'network services,'" as opposed to the market for both network services and card issuance.

The district court explained that the market for network services is the market where credit card providers compete with other providers for merchants who will accept a provider's card. The card issuance market, which the court determined was not relevant in its analysis, is the market in which American Express competes with other credit card providers who issue their own cards to consumers and those authorized card-issuing banks who issue the credit cards of companies like Visa and MasterCard to consumers. Accordingly, the district court found that American Express had "sufficient market power in the network services market to harm competition" and "that American Express's NDPs have caused actual anticompetitive effects on interbrand competition" in that market by removing the ability of merchants to promote alternative payment methods that reduced the merchant's costs. The district court issued a permanent injunction against American Express that prohibited the company from enforcing its NDPs for a period of ten years. American Express appealed the district court's ruling in the Second Circuit.

On appeal, the Second Circuit found that the district court erred in ruling that the relevant market for Section 1 analysis was only the network services market and not both the network services market and the card issuance market. The Second Circuit explained that the network services market and the card issuance market are interdependent due to the nature of the credit card marketplace. Consumers choose a credit card provider primarily based on the reward programs that providers offer to consumers. To offer better rewards, the card provider must charge the merchants a higher fee each time the merchant accepts a consumer's card in a transaction. When a merchant engages in the network services market, the merchant determines whether to accept a certain credit card as payment in a transaction based on the fee assessed to the merchant. When a consumer engages in the card issuance market, the consumer determines which credit card to use in a transaction based primarily on the rewards the consumer will receive. Because these two markets are so interdependent, the Second Circuit ruled that the proper relevant market for Section 1 analysis must include both markets.

Because the district court failed to identify the proper market for Section 1 analysis, the Second Circuit rejected the district court's rulings that American Express had sufficient market power to affect competition and that American Express's NDPs had an anticompetitive effect. The Second Circuit ruled that the district court erred in finding that American Express held market power due to evidence of merchant fee price increases with a lack of merchant attrition by American Express and consumer demand for merchants to accept American Express cards. Rather, the Second Circuit stated that the price increases were necessary for American Express to remain competitive and, without them, the number of merchants accepting American Express cards would have decreased. Further, the court found that cardholder demands on merchants to accept American Express cards were not evidence of American Express's market power. Instead, the cout suggested that this shows the competitive benefits that existed in the consumer market from American Express's use of the NDPs. As for the district court's ruling that the NDPs had an actual adverse effect on competition, the Second Circuit ruled that without looking at the competitive benefits for cardholders in the interrelated consumer market, it is impossible for a court to determine whether the NDPs had a negative impact on competition.

Accordingly, the Second Circuit held that the district court improperly determined that the card issuing market was irrelevant in a Section 1 analysis on the anticompetitive effects of American Express's NDPs. This failure tainted the district court's further findings that American Express held market power and that the NDPs had anticompetitive effects. Further, the DOJ failed to show that the NDPs had an anticompetitive effect on the relevant market that included both the merchant and consumer markets. As such, the Second Circuit ruled that the DOJ failed to carry their burden under Section 1. The Second Circuit reversed and remanded the case back to the district court, with instructions to enter judgment for American Express.

Transactional attorneys practicing in the Second Circuit, who represent either credit card companies like American Express or merchants seeking to obtain contracts to accept certain credit cards in their businesses, must keep in mind that NDPs like the one used by American Express do not conflict with Section 1 of the Sherman Act. Attorneys representing credit card companies may rest assured that NDPs are a valid way of increasing the client's business and should be advocated in negotiations. Attorneys representing merchants seeking to obtain a contract to accept a credit cards must be mindful of these provisions and their current validity in the marketplace. The merchant-client will be required to follow the provision, even if it means an increase in cost on a per-transaction basis.

BANKRUPTCY

Third-party releases of liability in a court-confirmed bankruptcy plan are rarely binding on non-voting creditors. *In re SunEdison, Inc.*, 576 B.R. 453 (Bankr. S.D.N.Y. 2017).

By Samuel Henninger

Danny owes money to his five sisters—Caroline, Catherine, Cecilia, Christine, and Clare. He can't pay them back in full, but he wants to get rid of his debts and to start over. So Danny pleads for help from their mother, Beatrice Chambers. She agrees to help only if Danny can obtain approval of a payment plan from a majority of the sisters. Tense negotiation ensues. But for a classic Chevrolet Corvette, Danny owns no assets. And unfortunately for the sisters, the proceeds from the sale of that car will not satisfy the debt. Because it is their best option, three sisters vote to approve Danny's plan to sell the car, to give the proceeds to the sisters, and to receive protection from their mother. Then Beatrice Chambers approves the plan, even though one sister votes against it and the final sister, Clare, doesn't vote.

Part of Danny's plan, however, contained a provision that released third parties from liability for any tort claim of conversion brought by the sisters. And before the mother approved the plan, Danny used the money that Clare loaned him to pay for the services of Tom Parker—who smashed her fuel-efficient Toyota Corolla with a sledgehammer. Remember that the plan, with the release of liability, was approved by the required number of creditor sisters and the mother. But Clare didn't vote. So can she now sue third-party Tom Parker for sending her import to the junkyard?

In a nutshell, that is the issue that Judge Bernstein faced in a bankruptcy case involving a giant in the renewable-energy industry.[1] As debtor Danny pleaded for help from Beatrice Chambers, debtor SunEdison pleaded for help from the bankruptcy court. As debtor Danny received confirmation of his payment plan from his mother, debtor SunEdison received confirmation of its plan of reorganization from the bankruptcy court. As debtor Danny's plan contained a third-party release for Tom Parker, debtor SunEdison's plan contained "a broad third-party release . . . in favor of numerous non-debtors." And the releasing parties in SunEdison's plan included "all Holders of Claims entitled to vote for or against the Plan that do not vote to reject [it]." So people like Clare, who held a claim against Tom Parker for his vicious treatment of her

[1] *See* Charles A. Dale III, James A. Wright III & David A. Mawhinney, *Silence Is Not Consent: SunEdison Court Rejects Third Party Releases by Passive Consent*, K&L GATES (Nov. 30, 2017), http://www.klgates.com/silence-is-not-consent-sunedison-court-rejects-third-party-releases-by-passive-consent-11-30-2017/ ("[SunEdison] was once the largest renewable-energy development company in the world.").

Toyota Corolla, could not sue him under SunEdison's plan even though she never voted to confirm it.

While no non-voting releasor, like Clare, emerged to object to the plan, "the Court *sua sponte* raised whether [the release] can and should be approved." In short, the court answered "no and no." On whether the release can be approved, the Court concluded that it did not have jurisdiction to approve the release. On whether the release should be approved, the Court concluded that it should not because no non-voting releasor "impliedly consented to [it]."

The debtors failed to demonstrate "that the Court ha[d] subject matter jurisdiction to approve the [r]elease in its current form." The test "for bankruptcy jurisdiction [over a non-debtor's claim] remains whether its outcome might have any 'conceivable effect' on the bankruptcy estate."[2] And the Court found that the indemnity obligations that the debtors owed to third parties were not enough to satisfy that test.

The non-voting releasors neither expressly consented to the release by voting to accept it nor impliedly consented to it by silence. "Absent a duty to speak, silence does not constitute consent."

In this case, the debtors argued "that the warning in the Disclosure Statement and the ballots regarding the potential effect of silence gave rise to a duty to speak." But the Court disagreed. It concluded that the release should not be approved because no non-voting releasor consented to it.

The Court also concluded that approval of the release would not be appropriate because the debtors failed to satisfy their burden under the *Metromedia* test:

> In deciding whether a third party release is appropriate, courts may consider whether the estate has received a substantial contribution, whether the enjoined claims are channeled to a settlement fund rather than extinguished, whether the enjoined claims would indirectly

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[2] *In re SunEdison, Inc.*, 576 B.R. at 461 (citing Marshall v. Picard (*In re* Bernard L. Madoff Inv. Sec. LLC), 740 F.3d 81, 88 (2d Cir. 2014) (quoting Quigley Co. v. Law Offices of Peter G. Angelos (*In re* Quigley Co.), 676 F.3d 45, 57 (2d Cir. 2012))).

> impact the debtor's reorganization through claims of indemnity or contribution, whether the plan otherwise provides for payment in full of the enjoined claims and whether the creditor has consented.[3]

Applying the test, the Court relied on several facts to decide against approving the release: no non-voting releasor consented to it; the creditor's third-party claims were "extinguished rather than channeled to a fund that will pay them"; no direct impact existed between specific third-party claims and the reorganization.

In conclusion, the Court stopped short of insisting that no third-party release could bind a non-voting releasor. One might work; just not this one. The Court gave the debtors thirty days "to propose a modified form of release that will bind the Non-Voting Releasors." And the Court added requirements for the debtors if they sought to modify the release:

> They must specify the releasee by name or readily identifiable group and the claims to be released, demonstrate how the outcome of the claims to be released might have a conceivable effect on the Debtors' estates and show that this is one of the rare cases involving unique circumstances in which the release of the claims is appropriate under *Metromedia*.[4]

This case offers many insights for bankruptcy attorneys who represent large corporate debtors. Chief among them are the added requirements for a binding release on a non-voting creditor provided in the previous block quote. Going back to the example in the introduction, debtor Danny could have increased the likelihood that Beatrice Chambers would have approved the proposed third-party release in his plan if he added some details to it. First, Danny should have named third-party Tom Parker as a releasee and stated that Tom Parker would be released from liability for a conversion tort claim brought by the sisters. Second, Danny

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3 *Id.* at 462 (citing Deutsche Bank AG v. Metromedia Fiber Network, Inc. (*In re* Metromedia Fiber Network, Inc.) 416 F.3d 136, 142 (2d Cir. 2005)).
4 *Id.*

should have demonstrated that Tom Parker's release would help the sisters obtain the highest possible return on the sale of his Chevrolet Corvette—perhaps Tom Parker had a perfected security interest in the car and agreed to cancel Danny's debt in return for the release.

While the metaphor here fails to account for the complexity of a massive bankruptcy case in the Southern District of New York with a corporation such as SunEdison, it helps to identify the main takeaway from this case. Courts were unlikely to bind non-voting releasors before, but they are even less likely to do so now. After *SunEdison*, bankruptcy attorneys who represent large corporate debtors will need to surmount an even higher burden to bind thirty-party releases on creditors who don't vote on a court-confirmed plan.

CONTRACTS

The Tennessee Court of Appeals held that the language "legal expenses" in a contractual provision denoting awards to the prevailing party is considered broad and not specific enough to indicate attorney's fees. *Nyrstar Tenn. Mines-Strawberry Plains, LLC v. Claiborne Hauling, LLC*, 2017 Tenn. App. LEXIS 776, 2017 WL 5901017 (Tenn. Ct. App. Nov. 29, 2017).

By Lauren Hughes

The American Rule, which is typically applied by Tennessee courts, provides that each party pays its own attorney's fees. One exception exists, however, allowing the prevailing party to receive attorney's fees, when parties specifically or expressly provide for them in a contract. In *Nyrstar Tenn. Mines-Strawberry Plains, LLC v. Claiborne Hauling, LLC*, 2017 Tenn. App. LEXIS 776, 2017 WL 5901017 (Tenn. Ct. App. Nov. 29, 2017) ("*Nyrstar*"), the Tennessee Court of Appeals at Knoxville addressed whether the language "legal expenses," which was included in the "Costs" provision of a contract, was similar and as equally specific as "attorney's fees" to justify that award. The Court of Appeals considered language from the contract between the two parties, Nyrstar and Claiborne, to determine if that language clearly intended to include attorney's fees. After construing such language and comparing it with precedent, the Court of Appeals held that the language did not carry the proper specificity to constitute attorney's fees, despite the addition of the term "legal" before the term "expenses."

In an underlying action in 2016, Nyrstar prevailed on a breach of contract claim against Claiborne. Nyrstar then sought expenses incurred from the suit by filing a motion for attorney's fees and expenses based on the contractual language which provided "[t]he Customer must pay Nyrstar all costs and expenses incurred by Nyrstar in connection with enforcing its rights against the Customer under an Agreement *including legal expenses* and other costs incurred in recovering monies owed by the Customer to Nyrstar." *Nyrstar*, 2017 Tenn. App. LEXIS 776, at *2 (emphasis added). In January 2017, the trial court denied Nyrstar's motion for attorney's fees, finding the contractual language lacked specificity, but otherwise granted Nyrstar an award for its incurred expenses. The court stated that the use of "expenses" rather than "fees" has been held inadequate to support a conclusion of attorney's fees. Nyrstar appealed the trial court's judgment, claiming the court erred in finding the contractual language insufficient to allow Nyrstar, as the prevailing party, an award of attorney's fees.

The Tennessee Court of Appeals analyzed the contractual phrase "legal expenses" to determine whether it demonstrated a clear intent between parties to provide for the recovery of attorney's fees. An absence of such intent goes against the freedom to contract; it is essential that parties are aware of the language in their contract, especially when it provides attorney's fees to the prevailing party, which is contrary to the American Rule and public policy. The Tennessee Supreme Court has noted that "[t]he only way parties to a contract have been able to specifically and expressly create a right to recover attorney fees has been by incorporating the phrase 'including reasonable attorney fees' or some other similar, yet equally specific, contractual language." *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 310 (Tenn. 2009). In *Nyrstar*, the contractual provision at issue lacked such specific language, forcing the Court to examine whether the relevant contractual language was "similar, yet equally specific." Referencing the above language from the Supreme Court's *Cracker Barrel* decision, the Court of Appeals clarified that the inclusion of "legal" before "expenses" is still construed broadly, as the phrase could encompass more than just attorney's fees. Accordingly, the language "legal expenses" lacks specificity and does not demonstrate a clear intent by parties to provide for attorney's fees.

Nyrstar attempted to compare the language of its contract to that at issue in *Richey v. Motion Indus., Inc.* ("*Richey*") and *Raines Bros., Inc. v. Chitwood* ("*Raines*"), both of which the Tennessee Court of Appeals construed to include attorney's fees. In *Richey*, the court held that the language "legal fees," although more inclusive than "attorney's fees," demonstrated enough specificity to include attorney's fees in the award. In *Raines*, the court indicated that the use of "fees" in reference to litigation clearly demonstrated inclusiveness of attorney's fees. Therefore, because the language at issue in *Nyrstar* broadly provided for "legal expenses," the Court of Appeals held that the more specific language used in *Richey* or *Raines* was directly distinguishable.

The decision in *Nyrstar* clarifies that the term "legal expenses" does not necessarily include an award of attorney's fees. The holding illuminates the distinction between the uses of "fees" and "expenses"—the former being more likely to include attorney's fees because it is interpreted as a narrower term, capable of the specificity required of contractual language to support a right to attorney's fees. In light of this decision, there will be a presumption against awarding attorney's fees when the contractual language merely suggests that "expenses," rather than "fees," are to be awarded. This may prove irreconcilable for current contractual provisions that use the terms "expenses" or "legal expenses" where the parties intended at the time of contracting for there to be an award of attorney's fees to the prevailing party, should litigation ensue.

In order to avoid issues like those addressed in *Nyrstar*, transactional attorneys should be on the lookout for the inclusion of "fees" in contractual provisions, as that could likely indicate an acceptance to forego the American Rule. The mere assertion of the term "fees" into a provision is required for, but does not necessarily give, an award of attorney's fees; moreover, unless the term is stated narrowly and in reference to litigation, inclusion of the term "fees" is unlikely to signify an intent to encompass attorney's fees. In order to avoid any confusion as to their parties' intent, attorneys seeking to circumvent the American Rule should use the language "including reasonable attorney's fees" in lieu of other, less specific terms.

CORPORATE & FIDUCIARY DUTY

In a class action lawsuit between a corporation and its stockholders, the Tennessee Court of Appeals held that (1) where a stockholder-objector cannot offer non-speculative evidence that the plaintiffs had a likelihood of success on the merits of a damages claim, a disclosure-only settlement may be adequate consideration to fairly settle a class action suit; and (2) an objector is not entitled to discovery where it has not presented a colorable claim that the settlement should be disapproved. *In re Pacer International, Inc.*, No. M2015-00356-COA-R3-CV, 2017 WL 2829856 (Tenn. Ct. App. Jun. 30, 2017).

By Elizabeth Harwood

In this consolidated class action between Pacer International, Inc. ("Pacer") and its stockholders regarding a proposed merger, the Tennessee Court of Appeals addressed whether a chancery court abuses its discretion by (1) denying a stockholder's objection to a settlement when a lone objector argues speculatively that the disclosure-only settlement is unfair because there is a viable damages claim and (2) refusing to permit an objector access to discovery materials where the objector has not presented a colorable claim that the settlement should be disapproved. The court of appeals affirmed on both grounds. First, the court reasoned that the objection to the fairness of the settlement was founded on evidence of a likelihood of success on a damages claim that was merely speculative, which was insufficient to render the value of the information disclosed in the settlement unfair consideration. Second, the court held that the chancery court did not abuse its broad discretion to dictate what discovery materials the objector was entitled to access.

This case arose out of a proposed merger between Pacer and a subsidiary of XPO Logistics, Inc. ("XPO"). In July of 2013, Morgan Stanley presented several potential buyers to Pacer's board of directors. The board authorized Morgan Stanley to contact fourteen potential buyers, three of whom ultimately submitted indications of interest to acquire Pacer. Morgan Stanley had a prior relationship with potential buyer XPO; Morgan Stanley disclosed this fact to Pacer's board, and the board agreed that, should XPO become a leading bidder, a second financial advisor would be consulted.

Later in 2013, the price of Pacer's stock rose from $6.98 to $8.95 per share. This, in part, influenced the other two bidders to withdraw, leaving XPO as the sole bidder. XPO offered to purchase Pacer for $9.00 per share. Pacer's board discussed the offer with Morgan Stanley. The meetings concluded with the board instructing Morgan Stanley to negotiate a higher purchase price from XPO, and the board decided to consult Houlihan Lokey, a second financial advisor.

In December of 2013, another entity expressed an interest in potentially acquiring Pacer. On advice of Morgan Stanley and Houlihan Lokey, negotiations with this entity did not move forward. Negotiations with XPO continued, resulting in a firm offer of $9.00 per share. Pacer stockholders would receive, per share of Pacer stock, $6.00 in cash and a fraction of a share of XPO stock equal to $3.00. During a board meeting on January 5, 2014, Morgan Stanley and Houlihan Lokey advised the board that the deal was fair to stockholders. The board approved the deal and the merger agreement was executed that same day. Over 6,000 holders of Pacer stock sued to enjoin the merger through various class action lawsuits that were ultimately consolidated into one case.

Following expedited discovery, settlement negotiations began in March of 2014. The parties agreed to settle if the board disclosed additional information about the merger before the stockholder vote. The board complied and the stockholders approved the merger. The chancery court preliminarily approved the proposed settlement, set a deadline for class members to file objections, and scheduled a fairness hearing.

Black Oak Investments LLC ("Black Oak"), one of Pacer's largest shareholders with three percent of its stock, objected to the settlement. Black Oak challenged the fairness of the settlement, and requested the court to allow it access to sensitive discovery materials to prepare to make its case. Black Oak asserted that the board breached its fiduciary duty by not entertaining all credible offers to get a higher purchase price and argued that the $9.00 per share purchase price was below market value.

At the fairness hearing, Black Oak supported its position by arguing that Pacer should have known that HIG Capital (a Pacer competitor in which Black Oak owned stock) would have made a higher offer based on an attractive offer HIG Capital had made to purchase Pacer in 2012.

The chancery court denied Black Oak's objections. The court held that plaintiff's lead counsel had sufficiently investigated any damages claim and that the proposed settlement was fair and reasonable. Also, the court refused to order the parties to provide Black Oak with the entirety of the parties' discovery materials, stating that it was only entitled to discovery if there was a colorable claim that the settlement should be disapproved.

On appeal, the Tennessee Court of Appeals first reached the question of whether the chancery court abused its discretion in approving the settlement. The court largely confined its analysis to the rule of law set forth *Denver Area Meat Cutters & Emp'rs Pension Plan v. Clayton*, 209 S.W.3d 584 (Tenn. Ct. App. 2006), which focused the inquiry on the fairness of the proposed settlement. In evaluating the fairness, Tennessee courts must weigh "the strength of the plaintiffs' case on the merits . . . against the amount offered in settlement." *Id.* at 591. Tennessee common law also provides that the court is to focus on other factors, including the level of investigation of the plaintiff's claims, whether the negotiations were at arm's length, the number of objectors, the objector's access to information, and the experience of the parties' counsel. *In re High Pressure Laminate Antitrust Litig.*, No. M2005-01747-COA-R3-CV, 2006 WL 3681147, at *4-5 (Tenn. Ct. App. Dec. 13, 2006).

In evaluating the strength of the case on the merits, the court of appeals noted the uphill battle the plaintiffs would face in litigating the class action. Courts presume that a corporation's directors act in good faith and in the best interests of the corporation, and discovery revealed no evidence of bad faith. Further, in addressing Black Oak's argument that the board's duty of loyalty required them to obtain the best possible price, the court noted that this argument highlighted the plaintiffs' burden to prove the board could have obtained a better price for its stockholders. The court dismissed Black Oak's claim that Pacer's board had the opportunity to solicit and acquire a better offer (from HIG) as merely speculative.

Turning to the value of the proposed settlement, the court recognized that while disclosure-only settlements are not necessarily favorable, they can provide valuable consideration to plaintiffs, as in the instant case. Moreover, other relevant factors, including the expertise of the plaintiffs' lead counsel and Black Oak's being the sole objector out of a class of over 6,000, influenced the court to conclude that the chancery court did not abuse its discretion in finding the settlement was fair.

Next, the Tennessee Court of Appeals addressed whether the chancery court abused its discretion in denying Black Oak access to discovery materials. The court stated that the trial court's broad discretion in controlling an objector's participation in a fairness hearing is well established in precedent. It also dispelled due process concerns by emphasizing that satisfying an objector's rights does not mandate "unfettered access to an existing and voluminous discovery record." *Hershey v. ExxonMobil Oil Corp.*, No. 07-1300-JTM, 2012 WL 4758040, at *1 (D. Kan. Oct. 5, 2012). Moreover, Black Oak, which owned stock in Pacer's competitor, was requesting discovery materials that included competitively sensitive information. The court affirmed the chancery court's decision, concluding that to access confidential discovery materials, Black Oak needed to first present a colorable claim that the settlement was unfair. Based upon the record, Black Oak failed to explain how the discovery materials would aid their ability to challenge the settlement.

Overall, the court repeatedly emphasized that the law favors settlement. The preference for settlement is matched by the immense burden on a plaintiff to overcome a presumption of good faith on the part of the directors of a corporation and the difficulty in obtaining evidence that a better offer would have been made. These barriers to successfully objecting to a settlement are formidable, but the court does appear to provide some leeway to tackle these obstacles.

Specifically, objectors clearly have power in numbers. Practitioners advising objectors should view a very small number of objectors as a red flag and (subject to applicable ethics rules) should explain to other class members the aspects of the settlement that are unfair or negative. Also, the court did not entirely dismiss Black Oak's argument that Pacer had a duty to obtain the best possible price for stockholders. Rather, the court found issue with Black Oak's lack of evidence of a better offer. Thus, evidence of an alternative offer to purchase that is more than speculative would be helpful in demonstrating to the court a likelihood of success on the merits.

Further, to secure access to discovery materials, practitioners should persuasively articulate why those materials will be useful in challenging the fairness of the settlement. The court emphasized that an objector's equity in a competing corporation creates a serious problem when requesting confidential, competitively valuable discovery materials. Practitioners could propose that requested discovery documents be limited to exclude particularly sensitive materials, and at the very least, they should avoid emphasizing the objector's ownership of stock in a competitor of the defendant corporation. Thus, while *In re Pacer International, Inc.* makes it clear that successfully objecting to a settlement will continue to be a significant challenge for minority objectors, the opinion provides some potential strategies for future objectors.

LABOR & EMPLOYMENT

The Tennessee Court of Appeals held that (1) a non-compete agreement governed by New Jersey law is enforceable to temporarily prohibit an ex-employee from competition in a former work territory and (2) that the agreement's ban on indirect competition was breached where the ex-employee shared commissions with subordinates that solicited his former employer's clients. ADP, LLC v. Manchir, No. M2016-02541-COA-R3-CV, 2017 Tenn. App. LEXIS 737, at *1-2, 2017 WL 5185458, at *0 (Tenn. Ct. App. Nov. 8, 2017).

By Kelsey Jones

In *ADP v. Manchir*, No. M2016-02541-COA-R3-CV, 2017 Tenn. App. LEXIS 737, at *1-2, 2017 WL 5185458, at *0 (Tenn. Ct. App. Nov. 8, 2017), the Tennessee Court of Appeals considered three main issues regarding an agreement governed by New Jersey law: (1) whether non-compete agreements may prohibit ex-employees from competing for one year in a former employer's territory; (2) whether an ex-employee breaches an ex-employer's agreement barring indirect competition when the ex-employee takes on subordinates who subsequently sell similar products to the ex-employer's clients in the ex-employer's territory, even if the ex-employee does not personally solicit the clients; and (3) whether specific performance is appropriate when it prohibits competition in a former area of business.

In 2011, 2012, and 2013, appellant Eric Manchir ("Manchir"), a sales manager for ADP, LLC ("ADP"), electronically consented to a restrictive agreement with ADP in exchange for stock options. This agreement with ADP ("the ADP agreement") prohibited Manchir from directly or indirectly soliciting or receiving business from ADP clients (1) for services substantially similar to those Manchir had sold via ADP, (2) in the territory assigned to Manchir by ADP, and (3) for one year following departure from ADP. In 2014, Manchir left ADP to manage a sales team for ADP competitor Paycor, Inc. ("Paycor"). Manchir supervised a Paycor team that solicited in a geographic area that overlapped the area that Manchir had been assigned during his time at ADP. Within the year, Manchir's Paycor team also made sales that included services substantially similar to services offered by ADP, and a number of ADP clients switched to Paycor as a result. Manchir did not directly contact ADP clients and did not specifically order his team to do so. However, Manchir received a commission on his team's sales, including the sales to ADP clients. Further, Manchir knew that some of his team's sales had been made to current or former ADP clients.

ADP sued Manchir for breach of contract in July 2014, and the court granted ADP's motion for summary judgment in August 2016. The trial court carved-out a clause prohibiting solicitation of prospective ADP clients, but found the rest of the ADP agreement enforceable, reasoning that the ADP agreement's geographic restrictions upon competition (which Manchir alleged to be overbroad) were typical of restrictions upheld by New Jersey courts. The trial court also found that Manchir's lack of personal contact with ADP clients was no defense to breach because the ADP agreement prohibited indirect solicitation and because the trial court considered Manchir to have indirectly solicited ADP customers by managing and sharing commissions with a team that sold competing products to ADP customers. The trial court further ordered specific performance of the modified ADP agreement, and awarded costs and attorney's fees to ADP. Manchir appealed, and filed a motion to stay enforcement pending appeal. Neither party disputed the facts, so the Tennessee Court of Appeals reviewed the summary judgment *de novo*.

The Tennessee Court of Appeals first looked to the issue of whether the ADP agreement was enforceable. Since the ADP agreement is governed by New Jersey law, the court relied heavily upon a leading New Jersey case, which found that a non-compete provision is enforceable if it "protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public." *Solari Indus., Inc. v. Malady,* 264 A.2d 53, 56 (N.J. 1970). The appellate court found that ADP had a legitimate and reasonable interest in temporarily preventing departing employees from taking ADP customers to a competitor. The court next considered Manchir's claim that the ADP agreement would cause him undue hardship by forcing him to move hundreds of miles to continue his practice. The court found no undue hardship where a majority of Manchir's current Paycor-assigned territory did not overlap with areas barred by the ADP agreement. Finally, the court found no evidence that the ADP agreement would injure the public. Therefore, the court held the ADP agreement enforceable under New Jersey law.

The court next considered whether Manchir had breached the ADP agreement. Manchir argued that he was not in breach because he had not personally solicited ADP clients during his time at Paycor. The court rejected this argument by stating that the ADP agreement prohibited indirect competition and that accepting Manchir's argument would permit Manchir to actively direct his team to target ADP customers, thereby rendering the ADP agreement hollow.

The court's hypothetical, however, does not explain *why* it determined that Manchir's actions constituted indirect competition. In part, this may be because Manchir's appeal did not directly question the definition of "indirect." But the trial court decision on this issue suggests an explanation: Manchir's duties, territory, and products under Paycor were substantially similar to those he had at ADP, and Manchir trained his Paycor team and shared their commissions.

The Tennessee Court of Appeals, having found enforceability and breach, considered the appropriateness of specific performance as a remedy. Looking to New Jersey law, the court noted that specific performance may be ordered as a remedy for breach of an enforceable contract where the court can determine the duties of parties and conditions of performance with reasonable certainty, and where performance would not be harsh or oppressive. *See Marioni v. 94 Broadway, Inc.,* 866 A.2d 208, 214-215 (Super. Ct. App. Div. 2005)(collecting cases). The court made no further comment here on enforceability of the ADP agreement, or determination of the duties and conditions of the ADP agreement's terms, presumably considering both to have been laid out in its findings of enforceability and breach. However, the court did find that specific performance would not be harsh or oppressive because Manchir had voluntarily consented to the ADP agreement in exchange for stock options and because specific performance would still leave Manchir free to solicit in most of his assigned territories. In light of the above facts and because ADP would find it difficult to determine how much business they had lost to Manchir's team in order to accurately estimate their damages, the appellate court affirmed the trial court's order of specific performance. Having affirmed all of the trial court's other decisions, the appellate court affirmed the award of attorney's fees to ADP because Manchir's only argument against the award relied on reversal of the trial court's grant of summary judgment.

Although the agreement in question here was governed by New Jersey law, Tennessee attorneys should note that both the Tennessee trial and appellate courts in this case probably would have reached similar decisions under Tennessee law. Tennessee courts have upheld time restrictions of at least three years so long as the geographic territory barred by such an agreement only extended so far as was necessary to protect an employer's business interests. *See Money & Tax Help, Inc. v. Moody*, 180 S.W.3d 561 (Tenn. Ct. App. 2005) (citing *Allright Auto Parks, Inc. v. Berry*, 409 S.W.2d 361, 363 (Tenn. 1966)).

In this case, the Tennessee Court of Appeals noted that ADP's agreement reflected a legitimate business interest in protecting its customers in Manchir's former area of responsibility. Neither the trial nor the appellate decision provides a list of weighted factors, much less a clear definition to indicate how far a noncompete agreement requires a former employee in Manchir's position to be removed from competitive actions of subordinates placed under his charge by a new employer. But the trial court at least hints at the importance of such an employee's similar duties for both the former and present employer, as well as receipt of subordinates' commissions on competing sales. The safest advice for a client in Manchir's position likely would be to retask, reassign or otherwise avoid responsibility for subordinates that operate in areas that overlap regions barred by a non-compete agreement.

REAL ESTATE & DISCLOSURE

Under the Tennessee Consumer Protection Act, the Tennessee Residential Property Disclosure Act, and the Tennessee Real Estate Broker License Act, a real estate licensee cannot be liable unless the licensee failed to disclose an adverse fact for which he had actual knowledge or notice. *Haynes v. Lunsford*, No. E2015-01686-COA-R3-CV (Tenn. Ct. App. Feb. 2, 2017).

By Kendria Lewis

In *Haynes v. Lunsford*, No. E2015-01686-COA-R3-CV (Tenn. Ct. App. Feb. 2, 2017), the Tennessee Court of Appeals addressed whether a real estate licensee has a duty to investigate or inspect a property to ensure that statements provided by the buyer are not misleading or false. This case arose out of the purchase and sale of a cabin in Gatlinburg, Tennessee.

On April 30, 2010, James R. Haynes, III ("Haynes") entered into a contract (the "Contract") with Leslie Lunsford ("Seller") to purchase a cabin (the "Cabin") for his ex-wife Sharon Hirschfield ("Hirschfield"). Haynes and Hirschfield learned about the Cabin after employing Lynn Chalache ("Chalache"), a licensed affiliate broker employed at Century 21 Four Seasons Realty ("Century 21"). Chalache first learned about the Cabin while browsing Multiple Listing Service ("MLS"), a platform where authorized listing brokers can obtain information on properties for sale. David Dixon, the listing agent, was responsible for preparing the MLS listing. Chalache, relying solely on the information from the MLS listing, shared the information with Hirschfield.

Upon visiting the Cabin with Chalache, Hirschfield was satisfied with the "new" look and smell of the cabin and decided to move forward with the purchase. Prior to the closing, however, Hirschfield and Haynes scheduled a home inspection. The home inspection revealed several areas of the home that would need repair, attention, or monitoring. Specifically, the inspection report noted "cracks in the walls, carpenter bee holes, gaps in the trim, signs of poor drainage, foundation and roof issues, and floors that were not level." Both Haynes and Hirschfield reviewed the inspector's report, but neither asked for any repairs to be made before closing on the Cabin. Haynes funded the purchase of the Cabin, and Hirschfield moved into the Cabin on June 28, 2010.

Approximately five months after moving into the Cabin, Hirschfield noticed the odor of mildew. Within the next couple of months, Hirschfield contacted multiple inspectors who collectively found moisture in the walls, dead mold spores on the kitchen cabinets and ceiling fans, water damage to the walls, and mold growth in several areas within the Cabin. In June 2011, Hirschfield and Hayes filed an action against the Seller, Chalache, and Century 21 (collectively, "Defendants") for "fraudulent misrepresentation, breach of duty to disclose adverse facts related to the purchase of the property, and violations of the Tennessee Consumer Protection Act (the "TCPA")." TENN. CODE ANN. § 47-18-101. Specifically, Hirschfield and Haynes argued that Chalache failed to exercise the reasonable care required of realtors pursuant to the Tennessee Residential Property Disclosure Act ("TRPDA"), TENN. CODE ANN. § 66-5-201, and the Tennessee Real Estate Broker License Act ("TREBLA"), TENN. CODE ANN. § 62-13-101. Furthermore, Haynes and Hirschfield alleged that Chalache failed to inform them that the Cabin was not brand new, as presented, had previously been involved in a foreclosure sale, and contained a mold problem which the Defendants knew or should have known.

On July 28, 2014, Chalache and Century 21 filed a motion for summary judgment, arguing that they had no knowledge of the Cabin's existence prior to the sale or the Cabin's mold issue. Chalache further contended that she provided to Plaintiffs the Seller's warranty deed, the MLS listing, the CRS Property Report, the Buyer's home inspection report, the bank appraisal and Seller's disclosures, which cumulatively represented all the information available to Chalache. The trial court granted Chalache and Century 21's motion for summary judgment, finding that Century 21 and Chalache had disclosed everything they knew about the Cabin prior to the sale.

In December 2014, Hirschfield and Haynes filed a motion to reconsider, which was later denied by the trial court. An order affirming the trial court's original decision was entered, and Hirschfield and Hayes filed an appeal.

On appeal, the Tennessee Court of Appeals held that the trial court did not abuse its discretion in denying the motion for reconsideration, finding that there was no evidence that Chalache "violated her duty as a realtor or is liable under the TCPA for 'unfair or deceptive acts or practices.'" Specifically, the court interpreted provisions from the TRPDA, codified at Tennessee Code Annotated § 66-5-206, and the TREBLA, codified at Tennessee Code Annotated § 62-13-403, which contains similar language regarding the licensee's duty to disclose adverse facts.

To begin, the court acknowledged that the TREBLA and TRPDA both require a licensee to disclose any adverse facts that the licensee has actual knowledge or notice. In its analysis, the court concluded that the present facts did not demonstrate that Chalache had actual notice or knowledge of the alleged misrepresentations. Furthermore, the acts did not require the licensee to conduct a private investigation of the property. As such, the court held that "Chalache did not have knowledge of adverse facts within the meaning of the applicable statutes."

Next, the court briefly discussed the misrepresentation claim. The court explained that "the information concerning the history, condition, and value of the Cabin and the property came through the MLS listing, the CRS Property Report, Seller's disclosures, bank appraisal, Buyers home inspection, and Seller's warranty deed." Additionally, Chalache, Hirschfield, and Haynes each had access to all of this information. Chalache was not responsible for listing the Cabin. Therefore, the court of appeals held that she did not misrepresent facts to which both parties had access. Additionally, the court of appeals did not attribute any failure of Hirschfield and Haynes to adequately review the information provided to Chalache or Century 21.

Lastly, the Tennessee Court of Appeals reviewed the merits of the claim regarding the TCPA. The TCPA forbids "unfair or deceptive acts or practices affecting the conduct of any trade or commerce." Tenn. Code Ann. § 47-18-104(b). A plaintiff's recovery under the TCPA is dependent upon the plaintiff's ability to prove deception and resulting injury. Hirschfield and Haynes asserted that Chalache and Century 21 engaged in deceptive acts when they represented that the Cabin was newly built and of high quality. The Tennessee Court of Appeals reiterated that there was no evidence on record to establish the truth of these claims.

In light of this decision, transactional attorneys practicing in Tennessee should advise their clients that due diligence is necessary when purchasing property. The court essentially disregarded each claim because the buyers had equal access to the information possessed by the real estate licensee. By ruling in this manner, the Tennessee Court of Appeals makes it more difficult for buyers to obtain relief.

REAL ESTATE & PARTITIONING

The Tennessee Court of Appeals upheld an order partitioning, partially in kind and partially by sale, real property owned by multiple tenants in common. *Breen v. Sharp*, No. M2016-02415-COA-R3-CV, 2017 Tenn. App. LEXIS 742, 2017 WL 5462189 (Tenn. Ct. App. Nov. 14, 2017).

By Brennan Foy

Under Tennessee law, any person who owns property as a tenant in common may seek either a partition in kind, which divides the actual property among its owners, or partition by sale, which sells the property and divides the proceeds among the sellers, to terminate the tenancy in common. *See Crawford v. Crawford*, No. E2002–00372–COA–R3–CV, 2002 Tenn. App. LEXIS 814, 2002 WL 31528504 (Tenn. Ct. App. Nov. 14, 2002); *Nicely v. Nicely*, 293 S.W.2d 30 (Tenn. Ct. App. 1956). However, Tennessee law generally favors a partition in kind, unless certain conditions make doing so infeasible or impossible. Tennessee statute allows for partition by sale "(1) if the premises are so situated that partition thereof cannot be made; or (2) [w]here the premises are of such description that it would be manifestly for the advantage of the parties that the same should be sold instead of partitioned [in kind]." Tenn. Code Ann. § 29-27-201. In *Breen v. Sharp*, No. M2016-02415-COA-R3-CV, 2017 Tenn. App. LEXIS 742, 2017 WL 5462189 (Tenn. Ct. App. Nov. 14, 2017), the Tennessee Court of Appeals addressed whether it was appropriate to order the partial partition in kind and partial partition by sale of three tracts of land owned by tenants in common.

Following the death of Doxie Crutcher in January 2012, Crutcher's trust divided her estate between her daughter, Janice Sharp ("Sharp"), and her grandsons, Caleb Breen ("Caleb") and Travis Breen ("Travis"). The relevant portion of the trust stated that Crutcher's estate should be divided "into two equal shares," with one share distributed to Sharp, one-half share to Caleb, and one-half share to Travis. The estate consisted of three tracts of land ("Tract 1," "Tract 2," and "Tract 3"), in Stewart County, Tennessee. The combined tracts totaled approximately 238 acres.

On July 24, 2014, Mike Breen, acting in his role as trustee of his sons' shares of the property, brought an action to partition the three tracts by sale and distribute the proceeds between Sharp, Caleb, and Travis. In response, Sharp requested the property be partitioned in kind, particularly because of her sentimental attachment to an old schoolhouse located on Tract 2 where her grandmother taught and mother, Crutcher, attended. The court referred this action to a special clerk and master to determine the ownership rights of all parties to the property and whether the land was capable of being partitioned in kind. Prior to the special master's report, Sharp filed a motion for summary judgment, which the court declined to rule on.

The special master's findings determined that Sharp owned a one-half interest in the property, Caleb and Travis each owned a one-fourth interest in the property, and that the topography and location of the properties "would make it 'virtually impossible to partition the property in kind so as to give each cotenant an equal share by value and acreage.'"

As the result of these findings, the court ordered the partition by sale of the properties with the proceeds to be divided between Sharp, Caleb, and Travis, with one exception. Because of Sharp's sentimental attachment to the old schoolhouse, the court ordered a partial partition in kind of Tract 2, where the schoolhouse was located. This allowed Sharp to maintain her one-half interest in the 54 acres of Tract 2 where the school house was located and also buy Caleb and Travis's interest in the property by paying each one-fourth of the property's value.

Despite receiving full ownership of the western half of Tract 2, Sharp appealed the court's decision to order the partition by sale. Specifically, Sharp appealed the rulings that Caleb and Travis each held a one-fourth interest in the properties and that a partition in kind was not possible. Sharp also appealed the court's valuation of the half of Tract 2.

On appeal, the court affirmed the ruling that Caleb and Travis each had a one-fourth interest in the properties, relying on the clear intent of Crutcher in the trust document. The court held the trust unambiguously gave Sharp a one-half interest and Caleb and Travis each a one-fourth interest because Caleb and Travis each received half of the share granted to them and "[o]ne-half of one-half is one-fourth."

The court also affirmed the ruling that, aside from the western half of Tract 2, a partition in kind was not possible. Although Sharp argued that Caleb and Travis failed to prove one of the conditions of Tenn. Code Ann. § 29-27-104 existed, the court relied on the findings by the special master and trial court that Tract 1, Tract 3, and the other half of Tract 2 could not be partitioned in kind in a way that would "give each cotenant an equal share by value and acreage." This was because the tracts of land were "of significantly different acreage, shape, topography, and value" and a partition in kind would "result in some tracts having limited, if any, public access without ingress and egress easements. . . " – dramatically reducing the value of the divided properties.

However, the court did agree with Sharp that the trial court erred in its valuation of the western half of Tract 2. The trial court held that the value of the land was $3,600 per acre. This valuation resulted in Sharp having to pay Caleb and Travis a total of $195,948 for their combined one-half property interests. This figure was based on the valuation determined by James Settles, a land consultant, that testified during the initial trial. The court of appeals concluded that Mr. Settles was qualified to render an opinion as to the value of the property, despite not being a licensed appraiser, as long as it was not an appraisal. However, Settles's "opinion of the value of the tract was not sufficiently competent to be admissible" because he had not inspected the property. Instead, he relied solely on topographical maps and sales of considerably smaller tracts. Another witness, Teresa Howell, a licensed real estate broker, testified that the value was $2,500 per acre. She had had recently done research into comparable sales in the same area and there were no objections to her testimony. Therefore, the court of appeals agreed that the value was $2,500 and remanded the issue to the trial court to set the value of the western half at $2,500, which substantially reduced the amount Sharp was required to pay Caleb and Travis for their interests in the property.

Overall, *Breen* further clarifies Tenn. Code Ann. § 29-27-104 and existing case law regarding the circumstances that make a partition by sale appropriate. Although a partition in kind is the generally preferred solution when a tenant in common seeks to divide a piece of real property, *Breen* illustrates that a partition by sale, or a partial partition in kind and partial partition by sale, may be the only option that allows the property to be partitioned without unjustly disadvantaging a party with ownership interests. In light of this decision, attorneys engaged in real estate transactions should be aware of this holding and anticipate issues that may make it impossible to partition their client's property in kind.

Similarly, Tennessee estate planning attorneys should take note of the issues presented in *Breen* when drafting trust instruments to reduce the likelihood of similar conflicts arising. Estate planning attorneys should carefully discuss with their clients the potential conflicts that may arise out of an estate plan that creates tenants in common, particularly when there is a sentimental connection to the property such as the schoolhouse in *Breen*, and work to better address their wishes in the will or trust instrument. While clients with smaller estates may be unable to avoid creating tenants in common while also providing for all their intended beneficiaries, clients with larger estates may be better able to carry out their wishes by specifically dividing their property among their intended beneficiaries in the will or trust, which would eliminate tenants in common and prevent potential claims for partition.

TAX

The United States Court of Appeals for the Third Circuit held that a taxpayer group that files a consolidated return cannot take a double deduction unless there is a statute or regulation that definitively allows it, upholding and sustaining the *Ilfeld* doctrine. *Duquesne Light Holdings, Inc. & Subsidiaries v. Comm'r of Internal Revenue,* 861 F.3d 396, 399 (3d Cir. 2017) [hereinafter, *Duquesne*].

By Chuck Sharrett

In *Duquesne*, the United States Court of Appeals for the Third Circuit addressed whether a taxpayer could take a double deduction for a transaction that occurred between the holding in *Rite Aid v. United States* and subsequent regulations which clearly disallowed the double deduction taken by the taxpayer. *See Rite Aid Corp. v. United States*, 255 F.3d 1357 (Fed. Cir. 2001). A double deduction occurs when a parent "uses stock sales to claim a second deduction for a single loss at the subsidiary (such as a loss on the subsidiary's sale of an asset)."

During the period between *Rite Aid* and Treas. Reg. § 1.1502-35, it was not clearly established whether a double deduction could be taken on the sale of subsidiary stock followed by a loss on the subsidiary selling assets. In *Duquesne*, a taxpayer group made up of several entities including Duquesne ("Parent") and AquaSource ("Subsidiary"), which filed as a consolidated group, took deductions for losses beginning in 2001 on the sale by Parent of Subsidiary stock. In the following years, Subsidiary sold stock in its own subsidiaries, resulting in even more losses that the taxpayer group deducted. After initially refusing to challenge the deductions taken, the IRS determined that $199,000,000 of those losses were prohibited deductions based on the *Ilfeld* doctrine. Parent filed first with the Tax Court and petitioned for relief. The taxpayer group and the IRS decided to simply move forward to summary judgment motions, foregoing discovery, to determine whether the *Ilfeld* doctrine was applicable. The Tax Court determined that it was applicable and that the taxpayer group had taken double deductions which were prohibited and assessed a $36,900,000 refund due to the IRS. The taxpayer group appealed, arguing, among other things, that *Ilfeld* should not have been applied to the transaction.

The United States Court of Appeals for the Third Circuit ("Court") began its analysis with the history and current state of the *Ilfeld* doctrine. This doctrine essentially holds that a double deduction will not be allowed to a taxpayer unless a statute or regulation explicitly delineates that as an option. This doctrine also creates a presumption that double deductions will not be allowed for a single economic loss. *Duquesne*, 861 F.3d at 409 (citing *United Telecomm. v. Comm'r of Internal Revenue*, 589 F.2d 1383, 1387–88 (10th Cir. 1978)). There had been some question as to whether the doctrine was still good law based on several cases not explicitly overturning it; however, the Court decided to treat it as good law.

The Court took this doctrine to mean that the taxpayer group, when filing as a consolidated group, is treated "as a single taxpayer and 'reduce[s] the significance of each member's separate existence.'" *Id.* at 413 (quoting Don Leatherman, *Why Rite-Aid is Wrong*, 52 Am. L. Rev. 811, 815–16 (2003)). The group is then prevented from taking a double deduction that might be allowed if the entities were considered separate for tax purposes.

The taxpayer group attempted to argue that I.R.C. § 165 explicitly allowed the double deduction. The Court disagreed with them, determining that § 165 was a "general allowance" for general deductions, with no definite allowance for double deductions. In addition, the *Ilfeld* court, while not explicit, signaled that § 165 was not a double deduction provision.

The taxpayer group next attempted to argue that, because it followed the regulations for each separate loss it deducted, the deductions should be permitted. The Court rejected this argument as well, determining that at no time did any of the regulations explicitly say that a double deduction was allowable.

Accordingly, the Court affirmed the Tax Court's findings and upheld application of the *Infeld* doctrine. The Court established that "implied authorizations" will not work for double deductions.

Tax attorneys handling consolidated returns for complicated corporate entity structures should use caution when determining whether a deduction should be taken on transactions that may relate to a single economic loss. The Court was clear that, unless there is a statute or regulation which specifically says a double deduction is allowed, the double deduction is not allowed. Practitioners need to make sure that deductions taken with respect to several transactions are either explicitly allowed as double deductions or that the deductions could not be strewn as reflecting the same economic loss.