CASE COMMENTARIES

CONTRACT—EXCULPATORY LANGUAGE

The Tennessee Supreme Court held the exculpatory language of a contract between a medical transporting company and a patient to be unenforceable and, thus, did not bar the patient's claim. *Copeland v. HealthSouth/Methodist Rehab. Hosp., LP*, 565 S.W.3d 260 (Tenn. 2018).

Autumn Bowling

In *Copeland v. HealthSouth/Methodist Rehab. Hosp., LP*, the Tennessee Supreme Court re-examined the analysis for determining the validity of exculpatory language within certain agreements. Tennessee first used specific factors for determining the enforceability of exculpatory language in agreements in *Olson v. Molzen*, 558 S.W.2d 429 (Tenn. 1977), which was adopted from *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963).

On December 2, 2014, Frederick Copeland ("Copeland") was transported from HealthSouth Rehabilitation Hospital North Memphis ("HealthSouth") by MedicOne Medical Response Delta Region, Inc. ("MedicOne") for an appointment with his orthopedic surgeon after having knee-replacement surgery. Copeland did not choose to use MedicOne for his transportation; rather, HealthSouth had contracted with MedicOne for transportation for all of its patients. A MedicOne driver took Copeland, in his wheelchair, from Copeland's room to the hospital's entrance, where Copeland then used a walker to walk himself to the MedicOne van and get in the passenger seat. Next, the MedicOne driver gave Copeland a two-sided document including an agreement containing three paragraphs of exculpatory language providing that Copeland would release MedicOne of liability for any and all claims that would arise or involve MedicOne's transportation services.

Copeland signed the agreement before the MedicOne drive took Copeland to his appointment. Upon entering the van after his doctor appointment, Copeland fell, was injured, and eventually filed a negligence suit. The trial court granted summary judgment in favor of enforcing the exculpatory language of the agreement signed by Copeland because the agreement was not a contract of adhesion and was for transportation services, not professional service. On appeal, the exculpatory language was again found to be enforceable based on the court's finding that the rendered services classified as transportation. Furthermore, there were no major public interest concerns surrounding the subject of the agreement.

The Court began its discussion by noting Tennessee's push-and-pull between competing public policy concerns—namely, the freedom to contract with the belief that a party should not be able to escape suit. In Olson, the Tennessee Supreme Court adopted the Tunkl factors to make its decision regarding the enforceability of an exculpatory agreement designed to release the operating doctor of liability prior to surgery. Olson, 558 S.W.2d at 431. The Tunkl factors are used to assess whether an agreement pertains to public interest: (1) if the business is the type that is suited for public regulation; (2) if the service of the party pursuing exculpation is significant to the public; (3) if the party offers herself as willing to discharge her service for any member of the public who seeks it; (4) if the party pursuing exculpation has more bargaining power than the member of the public; (5) if the party pursuing exculpation provides only a contract of adhesion and no way for members of the public to pay and receive protection from negligence; and (6) whether the person or property of the purchaser becomes controlled by the seller and thus at risk of oversight by the seller's agents. Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 445-446 (Cal. 1963). Notably, the Tennessee Supreme Court held the agreement unenforceable despite the existence of prior cases finding exculpatory agreements enforceable. Olson, 558 S.W.2d at 432. The distinguishing fact in Olson was that one party was a professional working in his professional capacity for the public with an increased responsibility toward the other party. *Id.*

This distinguishing fact led to uncertainty about how to apply the Tunkl factors in future cases. In fact, in its Copeland opinion, the Court examined cases spanning fifteen years that misapplied the factors or disregarded them altogether in several contexts. The Court found its decision in Crawford v. Buckner to be particularly important. 839 S.W.2d 754 (Tenn. 1992). Specifically, when the Tennessee Supreme Court decided that case, the Court held that a landlord-tenant agreement satisfied all the Tunkl factors and thus, was unenforceable. This decision implied that the Olson factors were not only limited to professional services but encouraged the courts to consider other public policy considerations. However, misapplication of Olson continued throughout Tennessee and in federal courts. Thus, the Tennessee Supreme Court accepted the opportunity to address these misapplications in Copeland.

The Court shaped its road to resolution with an overview of approaches used to evaluate exculpatory agreements and summarized five common principles: (1) gross negligence, recklessness, and intentional wrongdoing cannot be negated by exculpatory agreements for public policy reasons; (2) the imbalance of bargaining power and public policy forbids enforcing exculpatory agreements in contract with common carriers; (3) exculpatory agreements are disfavored although found enforceable; (4) to be found enforceable, the exculpatory language must be unequivocal and clear; and (5) exculpatory agreements contrary to public policy tend to fall on the side of unenforceability. In addition, the Court noted that the adopted Tunkl factors were the minority approach to exculpatory agreements. Further, the Court considered that the precedent established in Tennessee favored the freedom to contract as opposed to preventing parties from escaping negligence suits. However, the Court recognized that not all exculpatory agreements should be held valid solely on precedent.

Following this overview, the Court reasoned an amendment to the test used to determine the validity of exculpatory agreements was necessary. The Court held that the new test was to weigh three non-exclusive factors, while considering the totality of the circumstances of that particular case. In addition, the Court declared that this test may be used for all exculpatory agreements, including non-professional service contracts.

The first non-exclusive factor analyzed is the relative bargaining power of the parties. When considering relative bargaining power, the court looks at the availability and reasonableness of substitute choices of the same service. When a party may not have an equitable alternative choice, a disparity of relative bargaining power may exist. When applied to the Copeland facts, the Court reasoned that Copeland had no authority or option to not use MedicOne to transport him to a necessary doctor appointment. Indeed, HealthSouth contracted with MedicOne for these services on behalf of its patients, without permission from the patients who would be subject to using MedicOne's services. Further, the exculpatory language was presented in the two-sided document by the driver, who had no understanding of the implications of Copeland's signature, lacked knowledge to explain the contract if Copeland asked questions, and who expected Copeland would sign the document. Moreover, if Copeland did not sign the document, he would have been unable to go to his appointment and receive proper aftercare.

Second, the clarity of the exculpatory language must be examined. Specifically, the language of exculpatory provisions must clearly express the meaning of the language and what rights the contracting party would be relinquishing. The language cannot be so broad as to exempt the drafting party from all liability, nor may it be ambiguous. In the present case, when assessing the clarity of the exculpatory language, the Court delved into the grammatical syntax, pragmatics, and style of the language in the document. While the exculpatory language was printed in bold and all capital letters, the language demonstrated a broad encompassment of release of liability that could not be enforced. The language did not specifically mention gross negligence or recklessness, and the Court posited that the terms "any and all" were ambiguous and did not properly convey the intended meaning of the provision to Copeland.

The final factor the Court created involves considering the public policy and public interest concerns surrounding the agreement. Evolving societal expectations tend to form the basis for public policy, ensuring the law is consistent with the Constitution and other legislation while protecting the people from harm. Public interest concerns stem from those who oblige their services to the public's benefit—common carriers, innkeepers, and public utilities. However, public interest may be affected outside of these foundational services. Thus, the analysis may include any service whereby an exculpatory provision may conflict with evolving societal expectations. The Court explained that Copeland presented a clear public interest concern, given his appointment was a medical necessity and not merely a recreational activity. The responsibility the MedicOne driver was entrusted with, indirectly by HealthSouth and directly by Copeland, heightened the public policy concerns. The Court further reasoned that had Copeland not signed the agreement in order to avoid releasing liability, it would have been impractical and unreasonable to expect Copeland to find transportation on his own while still under HealthSouth's care as a patient.

Finally, the Court summarized its examination of the new test and held, as a matter of law, that the exculpatory language of the agreement that Copeland signed was unenforceable. Therefore, Copeland's claim was not barred. Accordingly, the Court reversed the Court of Appeals and remanded the case to the trial court.

The Court's decision in Copeland does not necessarily set out a new evaluation of exculpatory language but rather modernizes and clarifies a time-tested, older one. As lower courts of Tennessee work to abandon and replace broken-in tests such as Olson and introduce Copeland into their wheelhouse, the lower courts may still expect hurdles. Public policy is amorphous and cannot be whittled down to one court decision. Further, ambiguous language to one court may not be ambiguous to another.

Nonetheless, Tennessee courts and practitioners alike must carefully apply Copeland, along with other precedent, so as to avoid another post-Olson like forty-two-year long period of confusion. However, this unanimous decision will allow the Tennessee bar to start off on the same page when dealing with exculpatory agreements.

ZONING—RELIGIOUS LAND USE & INSTITUTIONALIZED PERSON'S ACT

The Sixth Circuit held that courts should apply the legitimate zoning criteria in cases comparing land uses among religious and nonreligious entities under the Religious Land Use and Institutionalized Persons Act's equal protection clause, and courts should administer this comparison with respect to the regulations established by local municipalities. *Tree of Life Christian Sch. v. City of Upper Arlington*, 905 F.3d 357 (6th Cir. 2018).

David Cantrell

In *Tree of Life Christian Sch. v. City of Upper Arlington*, the Sixth Circuit addressed the manner in which courts should apply the Religious Land Use and Institutionalized Persons Act's (RLUIPA) equal terms provision, and whether Tree of Life Christian School ("Tree of Life") established a *prima facie* case under the equal terms provision of the statute. Importantly, the equal terms provision of RLUIPA prevents governments from "imposing or implementing a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1) (2000). However, Congress did not provide the courts with any guidance on the meaning of "equal" in this comparison. After analyzing various methods of comparison adopted by other courts, the Sixth Circuit held that the phrase "legitimate zoning criteria" adequately represents the type of comparison RLUIPA's equal protection provision requires, and courts should administer this equal protection provision with respect to the legitimate zoning criteria established by the respective local municipal ordinance.

In 2001, the City of Upper Arlington, Ohio ("City"), adopted a Master Plan to assist the City's decisions regarding zoning. The Master Plan highlighted the City's goal of revenue maximization via business development in the small percentage of land the City allotted for commercial use, and emphasized the importance of maintaining this office district for commercial use. In furtherance of the Master Plan, the City's Unified Development Ordinance ("Development Ordinance") implemented land-use restrictions specifically for the City's office district zones, as the City intended those districts to "provide job opportunities and services to residents and contribute to the City's economic stability." Specifically, the Development Ordinance permitted the use of the office district for businesses and research centers; however, the ordinance prohibited both secular and religious schools in the office district and later barred daycares as well. Nonetheless, the Board of Zoning and Planning ("Board") had the power to grant conditional use to churches and "places of worship" if the organization received prior approval.

Tree of Life ("School") is a religious nonprofit organization that operates a private Christian school on three different campuses in Ohio. In 2009, the School signed a purchase agreement to buy a 254,000-square-foot office building ("Property") in the office district. Before acquiring the Property, the School filed a conditional-use application with the City which stated they planned to use the Property "as a church with an included school." The Board, however, rejected the School's application since the primary use of the Property would be a private school. The School filed suit against the City in United States District Court for the Southern District of Ohio, alleging that the Development Ordinance violated the equal terms provision of RLUIPA by excluding the School and treating them on less than equal terms than nonreligious institutions.

The School moved for a preliminary injunction based on its equal protection and RLUIPA equal terms claims, *see* 42 U.S.C. § 2000cc(b)(1), but the District Court denied the motion and granted the City's motion for summary judgment. Subsequently, the School appealed to the Sixth Circuit Court of Appeals and concurrently filed its first zoning-amendment application. Shortly thereafter, the School filed a second zoning-amendment application, prompting the Sixth Circuit to remand the case back to the district court. Again, on remand, the district court granted summary judgment for the City, holding that because the City excludes both secular and religious schools from the office district, the restrictions in place by the City did not violate RLUIPA's equal terms provision; the School then filed its second appeal.

Upon reevaluation, the Sixth Circuit held that the District Court erred in granting summary judgment, determining that there was a genuine dispute of material fact. Particularly, the School made unrebutted allegations that other businesses, specifically daycares and businesses using partially vacant offices, were located in the office district and were "similarly situated" to the School regarding their minimal capacity to generate revenue for the City. The Sixth Circuit once again remanded the case, and both parties filed cross-motions for final judgment. Thereafter, the District Court entered final judgment for the City, holding that the daycares were not similarly situated regarding their minimum capacity to generate tax revenue for the City. Additionally, the Court held that, when analyzing RLUIPA equal terms claims, one could not compare the full use of one institution to the partial use of another. Following the final judgment, the School filed their third appeal.

On appeal, the Sixth Circuit noted that there remained a question of how RLUIPA's equal terms provision applied and whether the School established a *prima facie* case under the equal terms provision. Ultimately, the Sixth Circuit agreed with the district court and held that the School did not establish a *prima facie* case under RLUIPA's equal terms provision. First, the Sixth Circuit adopted the statutory requirements to establish a prima facie case under RLUIPA's equal terms provision established by the Eleventh Circuit in *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty.*, requiring evidence that "(1) the plaintiff is a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the plaintiff on less than equal terms, compared with (4) a nonreligious assembly or institution." 450 F.3d 1295, 1307–08 (11th Cir. 2006).

Next, the Court noted the lack of consensus among the circuits regarding the issue of what constitutes an adequate or "equal" comparator under RLUIPA's equal terms provision. After analyzing various methods of application of RLUIPA's equal terms provision adopted by the other circuits, the Sixth Circuit adopted the majority approach, calling it the "legitimate zoning criteria." The Court adopted this approach over others because, as the District Court found, the phrase "best captures the idea that the comparison required by RLUIPA's equal terms provision is to be conducted with regard to the legitimate zoning criteria set forth in the municipal ordinance in question." Additionally, in reference to facially neutral land-use regulations, the Court adopted the majority approach "that a comparator for an equal terms claim must be similarly situated with regard to the regulation at issue." The Court observed that the policy behind this approach was clear, and Congress did not intend for RLUIPA to require municipalities to provide preferential treatment to religious institutions.

Furthermore, the Court rejected the School's argument that, as comparators, they were similarly situated to daycares and partially used offices in the district. In making this determination, the Court noted that the School presented no evidence of any other possible land uses that would generate less revenue for the City than their current operations. Further, the Court agreed with the District Court's analysis that partial use is not a valid comparator for a city to maximize revenue. A municipality seeking to maximize revenue must make projections regarding the effects that particular land use may have on the municipality. As such, the Court determined that the School may not fault municipalities for "inherent uncertainties" that arise when the municipality makes projections in good faith and with the best data available at that time.

Finally, the Court rejected the School's argument that the initial burden was on the City to prove that there is no plausible or acceptable use in the office district that is comparable to the School's proposed use. Ultimately, the Court held the School did not establish a *prima facie* case under RLUIPA's equal terms provision because they failed to proffer another permitted land use that would generate similarly nominal tax revenue for the City. As such, the School was barred from consolidating their schools into the office district.

In a dissenting opinion, Judge Thapar disagreed, holding that the School did make out a *prima facie* case by showing hospitals and daycares were permissible uses of the land that generated similar portions of tax revenue. However, in rebuttal, the majority noted that the School's expert limited their analysis to daycares and emphasized the fact that he presented the daycare idea as a hypothetical, with no evidence of any other permissible land uses that might generate similar revenue. The majority, opting instead to rely on the City's expert—who presented evidence and calculable data that the School would generate three to seven times less revenue for the City than a for-profit or nonprofit daycare would—concluded the City did not establish a *prima facie* case. According to the Court, it was better to rely on calculable statistics based on concrete data than to rely on a hypothetical example that was unlikely to exist.

The Sixth Circuit's ruling on this case is important for Tennessee practitioners for several reasons. For example, the ruling creates clearly-defined guidance for courts on the application of RLUIPA's equal terms provision, which will also aid practitioners in briefing and in everyday practice. In the future, courts will have a strict elemental guide to help them determine whether a plaintiff has made out a *prima facie* case under the RLUIPA's equal terms provision. Further, courts may use the "legitimate zoning criteria" to assist their application of the comparators required by RLUIPA's equal terms provision. Finally, regarding facially neutral land-use regulations, courts can apply the "similarly situated" analysis to determine whether comparable organizations or entities are similarly situated regarding regulatory issues.

VIOLATIONS OF STATUTORY INJUNCTIONS—TRANSFERRED BENEFICIARY STATUS

The Supreme Court of Tennessee held that (1) a trial court may consider the equities of the litigants when a party violates a statutory injunction and then dies with a divorce action pending, and that (2) Tennessee Code Annotated Section 36-6-306 only grants petitions for grandparent visitation when there is evidence of parental opposition to the visitation. *Coleman v. Olson*, 551 S.W.3d 686 (Tenn. 2018).

Gray Martin

In *Coleman v. Olson*, the Supreme Court of Tennessee addressed the question of who should recover life insurance benefits when a party in a divorce action dies after violating a statutory injunction by transferring beneficiary status from a spouse to a parent. The Court held that trial courts are permitted to resolve these matters by looking at the equitable considerations of both parties and distributing the proceeds appropriately. The Court also addressed the issue of when a petition for grandparent visitation is permitted. Upon review of Tennessee Code Annotated ("TCA") Section 36-6-306, the Court held that evidence of parental opposition is required to grant a petition for court-ordered visitation rights.

Bryan and Jessica Olson had a baby boy in 2008. On July 5, 2012, Ms. Olson filed for divorce, and a statutory injunction went into effect. The injunction prohibited the parties from changing the terms of any life insurance policy that named either party as the beneficiary unless the other party consented to the change. On July 10, 2012, Ms. Olson was diagnosed with Stevens-Johnson syndrome and confined to the hospital. Two days later, Ms. Olson changed the beneficiary of her life insurance policy from her husband to her mother, Rose Coleman ("Ms. Coleman"). Ms. Olson also named the Olsons' child as the contingent beneficiary of the policy. Ms. Olson died on July 19, 2012, and Ms. Coleman received approximately $400,000 as the beneficiary of the policy.

Mr. Olson and Ms. Coleman harbored mutual animosity for one another, but Mr. Olson believed it was in the best interest of the child to have a significant relationship with his grandmother. Ms. Coleman, however, insisted on scheduling visitation through the courts and did not communicate her desired visitation schedule to Mr. Olson. Mr. Olson was determined to cooperate and settle the matter outside of the legal system, despite his distaste for Ms. Coleman.

On February 12, 2013, Ms. Coleman filed a petition for grandparent visitation of the Olsons' child in the Montgomery County Circuit Court. Ms. Coleman argued that, under TCA Section 36-6-306, the child would be substantially harmed if the relationship with his grandmother were to end. Mr. Olson asserted that the court-ordered visitation was not permissible, because he was not opposed to Ms. Coleman having visitation rights. Additionally, Mr. Olson countersued Ms. Coleman for the money she had received from being the beneficiary of Ms. Olson's life insurance policy. He alleged that Ms. Olson violated the statutory injunction by secretly making Ms. Coleman her beneficiary—and the child a contingent beneficiary—after filing for divorce.

The trial court granted Ms. Coleman's petition for grandparent visitation, because ending the child's relationship with Ms. Coleman in the wake of his mother's death would result in substantial harm. The court also noted that the animosity between the parties would make it practically impossible to create a visitation schedule absent a court order. Additionally, the trial court denied Mr. Olson's counterclaim for the life insurance benefits. Even though Ms. Olson had violated the statutory injunction, the trial court opined that her reasons were not contemptuous or defiant because she was acting in the interests of her child, not out of spite for her husband. Accordingly, the trial court awarded the benefits to the child and instructed Ms. Coleman to deposit all benefits and repay all expenditures from the policy into a court registry for the child's use and benefit.

Both parties appealed the ruling of the lower court. Mr. Olson filed two issues on appeal. First, he contended that Ms. Olson violated the injunction, which should result in the restoration of the status quo. As such, Mr. Olson argued that he should receive the policy benefits. Second, Mr. Olson claimed that the trial court erred when awarding Ms. Coleman grandparent visitation. Ms. Coleman brought three issues on appeal. Primarily, she argued that the trial court erred in awarding the policy proceeds to the child because the child was not a party in the litigation, and neither party had requested that form of relief. Ms. Coleman's remaining two arguments alleged that the trial court erred in finding that certain expenditures from the insurance proceeds did not benefit the child and, therefore, erred in ordering the seizure of her savings account to repay those expenditures into the court registry.

The Court of Appeals applied the reasoning in *Aither v. Estate of Aither* to determine who was entitled to the insurance proceeds. 913 A.2d 376 (Vt. 2006). Under *Aither*, a trial court has the power to consider the equities of the parties when attempting to remedy a violation of an injunction after the abatement of a divorce. *Id.* at 380–81. Using this reasoning, the Court of Appeals awarded the life insurance benefits to Mr. Olson, because a look at both parties' equities showed that Mr. Olson's finances were substantially worse than Ms. Coleman's in the aftermath of Ms. Olson's death. The Court of Appeals also reversed Ms. Coleman's grandparent visitation because she had failed to prove that Mr. Olson opposed her visitation during the seven-month period between Ms. Olson's death and the filing of the petition. Ms. Coleman then filed an application with the Supreme Court of Tennessee to review the decisions regarding the allocation of the insurance proceeds and the petition for grandparent visitation.

First, the Court looked at the trial court's decision to place the insurance proceeds in a court registry. The Court determined that a constructive trust may be imposed under *Central Bus Lines, Inc. v. Hamilton National Bank*, when an actor has obtained or holds property through means of fraud or unconscionable conduct. 239 S.W.2d 583, 585 (Tenn. Ct. App. 1951). However, no such conduct occurred in this situation, as Ms. Olson was acting in the best interests of her child. Furthermore, neither party in the suit requested that a trust be established for the child. Accordingly, the Court found that the trial court erred in ordering the proceeds to be placed in a court registry for the child. Additionally, because the Court found that the trust was void, the trial court also erred when requiring Ms. Coleman to repay the expenditures to the registry from her savings account.

The Court then addressed the Court of Appeals' decision to award Mr. Olson the insurance proceeds after considering the equities of the parties. Noting that this was an issue of first impression in the state of Tennessee, the Court looked at TCA Section 36-4-106(d)(2) and interpreted the statute to mean that an injunction is no longer valid when a party to the divorce suit dies, because a death means the action has been abated. Therefore, the Court of Appeals was correct to analogize this case with the reasoning in *Aither* and allow the trial court to make equitable considerations of the parties, because Ms. Olson violated the statutory injunction but later had the divorce abated by her death. However, the Court disagreed with the application of this principle, and declared that awarding the entirety of the proceeds to Mr. Olson was not equitable. The Court determined that there was not enough evidence brought at trial to determine the equity of both parties and remanded the issue to the trial court to consider additional evidence and make a determination on the parties' equities in order to apportion the proceeds correctly.

Next, the Court considered the denial of grandparent visitation to Ms. Coleman. The Court looked to TCA Section 36-6-306 regarding grandparent visitation and concluded that in order to receive court-ordered visitation rights, there must be evidence that the custodial parent opposes the grandparent having visitation rights. This evidence must be presentable when the petition is filed, and it cannot be offered in anticipation that opposition will likely occur in the future. Based upon the evidence presented at trial, a mutual animosity between the parties was not sufficient to prove that Mr. Olson opposed grandparent visitation. The Court reasoned that this statutory interpretation, alongside the fact that Mr. Olson remained open to cooperating with Ms. Coleman, meant that the Court of Appeals did not err by determining that court-ordered visitation rights should be denied. Therefore, the denial of Ms. Coleman's petition was upheld.

In light of this decision, transactional attorneys in Tennessee should advise clients to change their life insurance beneficiaries before choosing to go forth with a divorce suit. Ms. Olson was trying to protect her child, but the Court's decision to apply the *Aither* standard in these situations means that a good faith intention to alter a beneficiary will be seen as a violation of a statutory injunction. Therefore, it is always in a client's best interest to look through their policies and make necessary changes to them prior to filing a suit that will later prevent them from doing so.

Additionally, this decision gives valuable insight into situations involving visitation rights. Transactional attorneys in Tennessee should advise their clients to always make a good-faith effort to establish visitation schedules before filing a petition in court. The judicial system wants to see that a grandparent seeking visitation rights has made an attempt to secure as much by communicating with the custodial guardian, and in the event that the guardian opposes this visitation, the court will grant visitation rights if doing so will prevent substantial harm to the child. Because evidence is critical to a court's determination, attorneys should advise their clients to transcribe some form of written communication expressing a desire to set up a visitation schedule. Anything from emails, to text messages, to hand-written letters can be easily presented to a court in the event that a guardian refuses to cooperate.

SECURITIES—DISSENTER'S RIGHTS

The Supreme Court of Tennessee overruled *Blasingame v. Am. Materials, Inc.*, 654 S.W.2d 659 (Tenn. 1983), holding that dissenters' rights statutes do not require the exclusive use of the Delaware Block valuation method for determining fair value of shares; rather trial courts have flexibility to choose the valuation that best fits the circumstances. *Athlon Sports Commc'ns, Inc. v. Duggan*, 549 S.W.3d 107 (Tenn. 2018).

Jamie Thompson

In *Athlon Sports Commc'ns, Inc. v. Duggan*, the Supreme Court of Tennessee addressed the methods in which trial courts may determine the "fair value" of the shares of dissenting shareholders under Tennessee's dissenters' rights statutes, codified at Tennessee Code Annotated sections 48-23-1-1, *et seq*. According to Tennessee law, "[a] shareholder is entitled to dissent from and obtain payment of the fair value of the shareholder's shares in the event of . . . a plan of merger." Tenn. Code. Ann. § 48-23-102. Historically, Tennessee trial courts utilized the Delaware Block method of valuation to determine the "fair value" of the shares of a dissenting shareholder. Under this method, an appraiser determines the value of a corporation under three valuation types: market value, asset value, and earnings value. However, in this case, the Tennessee Supreme Court overruled *Blasingame*, which implicitly articulated the exclusive use of the Delaware Block valuation method. In overruling *Blasingame*, the Court adopted Delaware's approach used in *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), where the Delaware Supreme Court rejected the

Delaware Block as the exclusive method in appraisal proceedings and allowed for other techniques and methods.

In March 2010, Plaintiff-Appellant Athlon Sports Communications, Inc. ("Athlon") hired Defendant-Appellee Stephen Duggan ("Duggan"), a certified public accountant, to help Athlon with their financial difficulties. Duggan proposed a plan to publish a monthly sports publication called "*Athlon Sports*" in order to generate revenues through advertising sales. Duggan also invested $1.5 million in the company and received 15% of Athlon's ownership shares. Additionally, Athlon hired a CPA firm, Lattimore Black, Morgan, & Cain ("Lattimore Black"), to conduct a valuation of Athlon, in part to establish a basis for the value of the shares that Duggan now owned. Subsequently, Lattimore Black placed Athlon's enterprise value at $8.1 million. Notably, Lattimore Black's valuations were based in part on probability estimates of the success of the *Athlon Sports* project Duggan proposed. Although successful, the circulation of *Athlon Sports* did not generate the anticipated level of advertisement revenue.

After implementation of the *Athlon Sports* project, Athlon experienced a significant cash-flow deficit. In response, Duggan was permitted to pursue outside capital to address Athlon's cash flow issues. However, on November 28, 2011, Athlon terminated Duggan's employment. While Duggan resigned as CEO of Athlon, he remained on the board of directors. Following Duggan's termination, an ad-hoc committee was formed to explore options for returning Athlon to profitability. Specifically, the Committee developed a "Plan of Merger" to form a new corporation. The Plan of Merger provided that some Athlon shareholders would not be invited to the new corporation, and the Committee expected that some shareholders would dissent from the planned merger. Duggan was one such person who was not invited to participate in ownership of stock of the new corporation. In anticipation of some dissent, the Committee hired Michael Collins from 2nd Generation Capital to determine the value of the dissenting shareholders' stock.

Ultimately, the investment firm's valuation determined that Athlon's fair market value was zero. Accordingly, Mr. Collins recommended that all shares of Athlon not yet converted into shares of the new corporation under the Plan of Merger be canceled and that the owners be compensated at the rate of 1 cent per share. Athlon increased this recommendation to $.10 per share.

The merger became effective on August 10, 2012, and Athlon was required to compensate Duggan and the other non-participating shareholders for the fair value of their shares. In October 2012, Duggan was sent a fair value payment check for $.10 per share plus interest. Duggan rejected the offer and demanded $6.18 per share. However, Duggan's demand was rejected.

Athlon filed a lawsuit against Duggan for judicial appraisal of "the fair value of the shares and accrued interest" as of the date of the merger. At trial, both parties introduced experts who testified on the fair value of Athlon stock. Athlon's expert, Mr. Collins, employed the Delaware Block Method of valuation. On the other hand, Duggan's expert employed the Delaware Block Method and two other methods—the guideline companies method and the discounted cash flow (DCF) method. Ultimately, the trial court found in favor of Athlon, concluding that the fair market value of the dissenting shareholders' stock was "no greater than the $.10 per share amount paid."

On appeal, the dissenting shareholders argued that the trial court erred in relying exclusively on the Delaware Block method for determining the value of their Athlon Shares. The appellate court ultimately held that the trial court correctly followed Tennessee case precedent in utilizing the Delaware Block Method for valuation, even though Delaware no longer adhered to a strict application of that valuation method. Nonetheless, the Supreme Court of Tennessee granted the dissenting shareholder's application for permission to appeal "to address [its] holding in *Blasingame* and to consider whether the Delaware Block method should be the exclusive method for determining the fair value of stock held by dissenting shareholders."

At the Tennessee Supreme Court, the dissenting shareholders argued again that the lower courts erred in holding that *Blasingame* required exclusive use of the Delaware Block method to determine the fair value of the shares. They further argued that if *Blasingame* did hold that the Delaware Block method was the exclusive method for valuation, then it should be overruled. Instead, they argued trial courts should be permitted to allow such valuation by any generally accepted method. Because Tennessee statutes do not address the methods of valuation, the Court had to decide this issue without any guidance from the legislature.

The Court noted that the Delaware Supreme Court's decision in *Tri-Continental Corp. v. Battye*, 74 A.2d 71 (Del. 1950), created the valuation method that came to be known as the Delaware Block method. The

Tennessee Supreme Court adopted this valuation method thirty-three years later in *Blasingame*. Under this method, an appraiser determines the value of a corporation according to its market value, asset value, and earnings value. This method was eventually overturned by Delaware in 1983 after its landmark case, *Weinberger v. UOP Inc.* In that case, the court determined that the Delaware Block method was outmoded and rejected it as the exclusive method of valuation in appraisal proceedings. While *Weinberger* determined that the method was outmoded, it did not prohibit the use of the Delaware Block method. Interestingly, during the same year of the *Weinberger* decision, the Tennessee Supreme Court issued its opinion in *Blasingame*. However, the *Weinberger* decision was not addressed in the *Blasingame* opinion. While *Blasingame* did not explicitly mandate the use of the Delaware Block method as the exclusive method for valuation, it was implicit in the Court's opinion.

The Tennessee Supreme Court determined that the state's dissenters' rights statutes did not require any particular valuation method for a dissenting shareholder's stock, and therefore, neither should the courts. The Court favored, and decided to adopt, the *Weinberger* approach for two primary reasons: (1) it gives trial courts the flexibility to choose the valuation method to determine fair value that best fits the circumstances, and (2) in matters of corporate law, Tennessee courts often look to Delaware law. Furthermore, the Court recognized, "the law must change when necessary to serve the needs of the people." The Court noted that Delaware courts, as well as many other jurisdictions, have recognized the limitations of the Delaware Block method.

In sum, the Court overruled *Blasingame* to the extent that it implies that trial courts should exclusively use the Delaware Block method and adopted the more flexible approach used in *Weinberger*. Ultimately, because it was unclear whether the trial court's evaluation of the evidence was affected by its perception that *Blasingame* mandated the use of the Delaware Block method, the Court remanded for reconsideration of the valuation of the dissenting shareholders' shares.

Accordingly, corporations and dissenting shareholders can now utilize other valuation methods for "fair value," such as those that include projections of future value, where appropriate. These projections must be provable and not speculative in nature. Tennessee courts can now also consider various valuation methods, including the Delaware Block Method, though not exclusively. Appraisers can use the Delaware Block Method in Tennessee fair value determinations where it is appropriate.

PATENTS—INTER PARTES REVIEW

The Supreme Court of the United States held that *inter partes* review of an issued patent does not violate Article III or the Seventh Amendment of the Constitution. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1370 (2018).

Mason Shelton

In *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, the Supreme Court addressed the constitutionality of whether the United States Patent and Trademark Office ("PTO") could reconsider and cancel an issued patent. According to the America Invents Act, any third-party that is not the patent owner "can request cancellation of 'one or more claims of a patent' on the grounds that the claim fails the novelty or nonobviousness standards for patentability." 35 U.S.C. § 311(b) (2012 ed.). Ordinarily, when establishing administrative processes, Congress cannot confer Article III power outside of the federal judiciary. Upon review, however, the Supreme Court held that Congress can properly assign *inter partes* review to the PTO without running afoul of the Constitution.

Under the Leahy-Smith America Invents Act, the PTO is "responsible for [the] granting and issuing of patents." 35 U.S.C. § 2(a)(1) (2017 ed.). Congress previously addressed wrongly issued patents by creating processes for the PTO to "reconsider and cancel patent claims." In 1980, Congress began by establishing *ex parte* reexamination, which permitted any person to "file a request for reexamination." 35 U.S.C. § 302. Specifically, reexamination would commence if the Director of the PTO found a "new question of patentability." *Id.* § 303(a). In 1999, Congress added *inter partes* reexamination to allow the third-party challenger and the patent owner to "participate in a limited manner by filing responses and replies."

Further, in 2012, the America Invents Act "replaced *inter partes* reexamination with inter partes review." Under *inter partes* review, after the third-party files the *inter partes* review request, the Director of the PTO determines whether "there is a reasonable likelihood that the [third-party] would prevail with respect to at least 1 of the claims challenged." *See id.* § 314(a). Once the Director's decision is made, it is "final and nonappealable." *Id,* § 314(d). Upon the Director's approval, the Patent Trial and Appeal Board ("PTAB") oversees and determines whether the patent is valid. Either party displeased with the PTAB's decision may seek judicial review. *Id.* § 319.

In 2001, Oil States Energy Services, LLC ("Grantee") received a patent "relating to an apparatus and method for protecting wellhead equipment used in hydraulic fracturing." Eleven years later, Grantee sued Greene's Energy Group, LLC ("Greene's Energy") in federal court for patent infringement. Greene's Energy responded by filing a patentability challenge with the PTAB arguing that Grantee's patents were invalid because they were (1) "anticipated by prior art" and (2) not mentioned in the original patent application. The two actions proceeded concurrently.

Following a bench trial, the District Court issued a claim-construction order and ruled in favor of Grantee in June 2014 because prior art foreclosed the challenged claims. Within a few months of that ruling, however, the PTAB found Grantee's claims unpatentable, because they were "anticipated by prior art" and—contrary to the District Court's decision—revoked the patent. Grantee appealed to the Federal Circuit, which subsequently affirmed the PTAB's decision. Grantee appealed again and argued that *inter partes* review violated both Article III and the Seventh Amendment of the Constitution because the PTAB allegedly wielded judicial power and the patent redetermination process precluded Grantee's right to a jury trial.

Ultimately, on appeal, the Supreme Court rejected Grantee's argument that *inter partes* review violated Article III. The Court noted that the Article III consideration hinged on whether public rights or private rights were at issue. First, the Court stated that "Congress [has] significant latitude to assign adjudication of public rights to entities" outside of the federal judiciary. The Court then explained that public rights concern matters "arising between the government and others." Because the grant of a patent involves granting a public franchise, the Court recognized *inter partes* review as falling "squarely within the public-rights doctrine." Furthermore, the Court stated that *inter partes* review "is simply a reconsideration of that grant."

Next, the Court explained that the timing of the process was one of the primary distinctions between *inter partes* review and the initial grant of a patent. This distinction, however, made little difference for the Court, because the PTO granted patents *subject to* the qualification that they may be reexamined or cancelled in an *inter partes* review. The Court found the reexamination qualification to be consistent with Congress's Article I power to issue patents because Congress authorized the Executive Branch to grant patents and, thus, review its own decisions of patentability. Therefore, patents "remain . . . outside of an Article III court" and may be adjudicated before an executive board. In making its determination, the Court pointed to past cases where Congress had granted a franchise but reserved its authority to revoke. *See, e.g.*, *Louisville Bridge Co. v. United States*, 242 U.S. 409, 421 (1917).

The Court also rejected Grantee's argument that its patent rights should be recognized as private property. The Court explained that patents only entitle protection as far as the relevant statute prescribes. Furthermore, the Court focused on the fact that the Patent Act "qualifies any property rights . . . subjecting them to the express provision," including *inter partes* review.

In addition, the Supreme Court also rejected Grantee's argument that *inter partes* review violates the principle that Congress may not prevent judicial review of any matter that is subject to a suit under common law, equity, or admiralty. The Court pointed to the 18th-Century Privy Council in England as a "prominent feature of the English system . . . [that had] concurrent jurisdiction with the courts." Because the Patent Clause of the Constitution "'was written against the backdrop' of the English system," the Court concluded that, from the founding, patents were understood to be subject to cancellation by an executive body similar to the Privy Council. *See Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966).

Moreover, the Court rejected Grantee's argument that *inter partes* review violated Article III, because the PTAB shared too many similarities with a court. Grantee argued that characteristics like "motion practice . . . discovery, depositions, and cross-examination of witnesses; introduction of evidence and objections based on the Federal Rules of Evidence" proved that the PTAB exercised judicial power that is only reserved for a court. The Court, however, dismissed this argument because the Grantee attempted to utilize a test that the Court had never previously adopted—specifically, a "looks like" test. The Court explained that "[t]he fact that an agency uses court-like procedures does not necessarily mean it is exercising judicial power . . . [n]or does the fact that an administrative adjudication is final and binding . . . make it an exercise of the judicial power." The Court identified the Treasury Department's "final and binding audits" as support for "adversarial litigation" in tribunal proceedings. Furthermore, the Court concluded that *inter partes* review did not make the necessary "binding determination regarding 'liability' under the law." Indeed, the fact that the

PTAB would not be making a determination of whether Greene's Energy had liability to Grantee became the key distinction for the Court.

Finally, the Supreme Court summarily dismissed Grantee's argument that *inter partes* review violated the Seventh Amendment's right to a jury trial in civil cases. Notably, the Court stated that the Seventh Amendment is not at issue "when Congress properly assigns a matter to adjudication in a non-Article III tribunal." Thus, the Court's rejection of Grantee's Article III argument also "resolves its Seventh Amendment challenge."

In a concurring opinion, Justice Breyer agreed that *inter partes* review sufficiently involved public rights "to show that it violate[d] neither Article III nor the Seventh Amendment." He cautioned, however, that circumstances may arise where private rights could be "adjudicated other than by Article III courts," such as executive agencies. Justice Breyer closed his opinion by noting that "[t]he presence of 'private rights' does not automatically determine the outcome of the question." Thus, he indicated that future inquiries could examine relevant factors when adjudicating private rights.

In his dissent, Justice Gorsuch took exception that "a political appointee . . . instead of an independent judge, [could] resolve the dispute." Further, he identified concerns that dated as far back as to the Nation's founding about the influence that unaccountable powerful interests and political actors could have on a court's decision. Specifically, Justice Gorsuch compared the present-day administrative arbiters to the "colonial judges" that the founders cited in the Declaration of Independence. In closing, he posited that the majority signaled "a retreat from Article III's guarantees . . . in the name of efficient government."

Ultimately, the Supreme Court affirmed the Court of Appeals and the decision of the PTAB, thereby invalidating the Grantee's patent. Importantly, the Court stressed the "narrowness" of its ruling by saying it only addressed *inter partes* review. In fact, the Court noted that nothing in its holding considered whether patents are "property for purposes of the Due Process Clause or the Takings Clause."

The Court's holding, however narrow, does affect Tennessee patent practitioners. Specifically, the holding indicates that administrative adjudication will remain a viable option for opponents of a particular patent claim. Innovators and inventors should take note that even after the initial patent grant, the PTO reserves its authority to revoke the patent upon reexamination. Although these proceedings may seemingly mimic a trial court, the administrative agency will have the congressionally approved latitude to correct errors in the patent granting process. Practicing transactional attorneys must take note of this process and make efforts to ensure that their patent applications can withstand reexamination and review from the PTAB. Without Congress rewriting the legislation, the Supreme Court has given *inter partes* review its stamp of approval. The Court's narrow holding does, however, leave unanswered the question concerning whether or not "retroactive application of *inter partes* review" is constitutional.

LIQUOR LICENSING LAWS

The Sixth Circuit held that Tennessee Code Annotated Section 57-3-204(b)(2)(A), (3)(A)–(B), and (3)(D) violated the dormant Commerce Clause and, therefore, severed the provisions from the statute. However, the Supreme Court granted certiorari to address this issue. *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 52 (2018).

Morgan Kain

In *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, the Sixth Circuit addressed whether the provisions found within Tennessee Code Annotated ("TCA") Section 57-3-204(b) violated the Dormant Commerce Clause by considering whether the provisions were discriminatory and whether the purpose of the statute could be satisfied through a nondiscriminatory method. The Executive Director of the Tennessee Alcoholic Beverage Commission ("TABC"), along with Tennessee Fine Wines and Spirits, LLC, d/b/a Total Wine Spirits Beer & More ("Fine Wine") and Affluere Investments, Inc., d/b/a Kimbrough Fine Wine & Spirits ("Affluere") filed suit against the Tennessee Wine & Spirits Retailers Association ("The Association") to determine the constitutionality of the statute's provisions. In assessing whether the provisions were constitutional, the Court looked to the Twenty-first Amendment and the Constitution's Commerce Clause. After review, the Sixth Circuit determined that the Tennessee statutory provisions violated the Commerce Clause. Because these violations made the provisions unconstitutional, the Court ultimately severed the provisions from the statute.

Under the current statute, Tennessee requires that licenses for alcohol distribution be allocated to three levels of distribution—manufactures and distillers, wholesalers, and liquor retailers—known as the "three-tier system." The TABC distributes the licenses to various entities and individuals. Prior to this decision, for an individual to receive a license, TCA Section 57-3-204(b)(2)(A) required that the individual be "a bona fide resident of [Tennessee] during the two-year period immediately preceding the date upon which application is made to the commission." Additionally, to renew a license, the individual must remain a resident of Tennessee for at least ten years. *Id.*

When assessing corporations, the TABC would not grant a corporation a license "if any officer, director, or stockholder owning any capital stock in the corporation, would be ineligible to receive a retailer's license for any reason specified in subdivision (b)(2)" and "all of [a corporation's] capital stock must be owned by individuals who are residents of [Tennessee] and [] have been residents of the state for the two (2) years immediately preceding the date application is made to the commission." Tenn. Code Ann. § 57-3-204(b)(2)(A) (2018). For renewal of the license, the owners of stock must have "at any time been a resident of [Tennessee] for at least ten (10) consecutive years." *Id.* § 57-3-204(b)(3)(B).

Fine Wine and Affluere did not comply with the requirements for residency needed within Tenn. Code Ann. Section 57-3-204 because both principal addresses were not located within Tennessee, and the members of Fine Wine did not reside in Tennessee. Due to these statutory deficiencies, the TABC decided to withhold voting on Fine Wine and Affluere's license applications. Because both Fine Wine and Affluere's applications were pending, the Association—who represents business owners within Tennessee and is the defendant in this manner—discussed the possibility of litigation with the TABC. Following these discussions, Tennessee's Attorney General entered suit on behalf of Clayton Byrd, the Executive Director of the TABC, to determine if the durational-residency requirements found within the Tennessee statute were constitutional.

The United States District Court for the Middle District of Tennessee held that the durational residency requirements were unconstitutional by examining the language found within the statute. Following that decision, the Sixth Circuit reviewed the judgment of the district court *de novo*. To determine whether the Tennessee statutory provisions were unconstitutional, the court looked to the Twenty-first Amendment and the Commerce Clause of the United States Constitution.

Specifically, section two of the Twenty-first Amendment prohibits "the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof." U.S. Const. amend XXI, § 2. Therefore, the Twenty-first Amendment allows states to regulate alcohol distribution within the state and its surrounding borders. Alternatively, the Commerce Clause allows for Congress to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. However, the Court noted that the Commerce Clause "cannot impede Congress's power by 'unjustifiably . . . discriminat[ing] against or burden[ing] the interstate flow of articles of commerce.'" Essentially, the Court held that the Dormant Commerce Clause precludes "a state protecting in-state economic interests by burdening out-of-state economic interests." *Id.*

In its evaluation of the case, the Sixth Circuit considered two previous cases concerning the constitutionality of laws surrounding the Twenty-first Amendment and the Commerce Clause. The Court considered the finding in *Bacchus Imps., Ltd. v. Dias*, which held a law to be unconstitutional because the law "violate[d] a central tenant of the Commerce Clause but is not supported by any clear concern of the Twenty-first Amendment." 468 U.S. 263, 276 (1984). Additionally, the Court considered *Granholm v. Heald,* which stated "[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Supreme Court has] generally struck down the statute without further inquiry." 544 U.S. 460, 487 (2005). The Court used these cases as guidance to determine how the Twenty-first Amendment and the Commerce Clause interacted with the targeted Tennessee statutory provisions.

First, the Sixth Circuit found that the durational-residency requirements within the Tennessee statutory provisions governed the individuals and corporations who try to interact within the economic environment *rather* than governing the stream of alcoholic beverages throughout Tennessee. The Court reasoned that the statute's provisions focused on who can *sell* alcohol as opposed to the distribution of alcohol itself. Therefore, the Sixth Circuit determined that the "Twenty-first Amendment does not immunize[] Tennessee's durational-residency requirements from scrutiny under the [D]ormant Commerce Clause."

Next, the Sixth Circuit considered whether the provisions violated the Commerce Clause. To determine whether a violation occurred, the Sixth Circuit, turned to its decision in *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d

423 (6th Cir. 2008), to determine whether the statutory provisions were discriminatory against out-of-state economic interactions, and, if the provisions were deemed discriminatory, the statute could achieve its goal through other nondiscriminatory manners. The Sixth Circuit found that the requirements for residency negatively impacted out-of-state residents by inhibiting their ability to obtain licenses and beneficially impacted in-state residents by protecting them from out-of-state business entering into the state. Therefore, the provisions were, in fact, discriminatory.

Because the Court found the provisions to be discriminatory, the Sixth Circuit then looked to determine whether the statute could meet its goal through another method after excluding the provisions. The Court identified that the goals of the residency requirements as: (1) "protecting 'the health, safety, and welfare' of Tennessee's citizens" and (2) "using a higher level of oversight and control over liquor retailers." Neither side presented the court with a nondiscriminatory method. Therefore, because the statute also included other provisions that did not relate to the requirements surrounding residency, the Sixth Circuit severed only the offending provisions. *See* Tenn. Code Ann. § 57-3-204(b)(2)(A), (3)(A), (3)(B), (3)(D).

In addition to the majority decision, Judge Sutton concurred by agreeing that the full residency requirement for stockholders and the ten-year residency requirement for renewal were unconstitutional; however, he also dissented and opined that the two-year residency requirement did not violate the Constitution. Judge Sutton noted the precedent set by *Granholm v. Heald*, 544 U.S. 460, 488 (2005) by stating that "[t]he States retain 'virtually complete control' over 'how to structure the[ir] liquor distribution system[s].'" States, therefore, should be allowed the opportunity to monitor the distribution how they please. The judge indicated that the three-tier method found within Tennessee's alcohol distribution system must be considered valid, and therefore, the State has the power to control that "retailers and wholesalers to reside within [its] borders," and the two-year provision is an appropriate means for Tennessee to do so.

Moreover, after the Sixth Circuit's decision, the Association appealed to the Supreme Court of the United States, and the Supreme Court granted certiorari on September 27, 2018 and held oral arguments on January 16, 2019. *See Byrd v. Tenn. Wine & Spirits Retailers Ass'n*,, 139 S. Ct. 52 (2018).

On June 26, 2019, the Supreme Court of the United States affirmed the Sixth Circuit's decision and found the provisions to be unconstitutional. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas,* 139 S.Ct. 2449 (2019). Justice Alito delivered the opinion of the Court. The Court noted that the Sixth Circuit "struck down the provisions [concerning the ten-year resident requirement for renewal and the resident requirement for corporation stockholders] as blatant violations of the Commerce Clause . . ." and "invalidated a provision requiring applicants for an initial license to have resided in the State for the prior two years." *Thomas*, 139 S. Ct. 2449, 2457. Expanding upon the Sixth Circuit's ruling, the Court not only found the provisions to be unconstitutional but also elaborated further upon the two-year residency requirement for an initial license by stating the provision "violates the Commerce Clause and is not shielded by §2 of the Twenty-First Amendment." *Id.*

Throughout their analysis, the Court examined the Dormant Commerce Clause and the Twenty-first Amendment, specifically §2, alongside Tennessee's residencies provisions demonstrating how the provisions are, in fact, unconstitutional. *Id.* at 2459. The Court began by illustrating the history of the Dormant Commerce Clause. *Id.* at 2459–60. Through its examination of the Commerce Clause, the Court established that the clause "by its own force restricts state protectionism . . . ," and because of this purpose, the two-year requirement found within the code could not be upheld since it "plainly favors Tennesseans over nonresidents . . . " enforcing exactly what the clause aimed to preclude. *Id.* at 2460, 2462. One key distinction made by the Court included the fact that the Court was not examining or undercutting the three-tier distribution system established by Tennessee, but rather, the Court was solely focused on the residency requirements that must have been satisfied to obtain a license. *Id.* at 2471.

After examining the Dormant Commerce Clause, the Court turned to the Twenty-first Amendment which the Association primarily relied upon during its argument. *Id.* at 2462. The Court regarded the plain language of the provision while also considering the interpretation that has been established throughout the Court's history and case law. *Id.* The interpretation that the Court applied states that §2 "was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens. . . ." *Id.* at 2474. The Court emphasized that §2 cannot be read independently but must be read alongside the rest of the constitutional principles. *Id.* at 2462, 2468.

Moreover, the Court found that the residency requirements could not be covered under §2 of the Twenty-first Amendment because the record established no proof that the requirements really do "promote public health and safety," and there was no proof that nondiscriminatory means would be insufficient to promote said interests. *Id.* at 2475. Therefore, the Court affirmed the Sixth Circuit's decision finding the provisions unconstitutional and severed. *Id.* at 2476.

Following the majority's opinion, Justice Gorsuch, joined by Justice Thomas, dissented and contended that "[s]tates may impose residency requirements on those who seek to sell alcohol within their borders to ensure that retailers comply with local laws and norms." *Id.* at 2477. In reaching this conclusion, Justice Gorsuch noted that throughout history—in fact close to over a span of 150 years—states have utilized residency requirements to control alcohol distribution throughout their own states. *Id.* Justice Gorsuch specified that residency requirements began appearing within state laws as early as 1834 and have continued to exist since. *Id.* at 2478. Additionally, he described a tug of war of sorts between the Court and Congress in regards to these state laws and their interaction with the Dormant Commerce Clause. *Id.* at 2478–79. Ultimately, while the majority found that these provisions could not be deemed constitutional, the dissenting justices stood firm that history and precedent set forth a standard that states *should* be given the freedom to monitor alcohol sales within their own borders. *Id.* at 2477.

In light of the Court's recent decision, attorneys should be aware that provisions severed by the Sixth Circuit still remain, and will continue to remain, severed. *See* Tenn. Code Ann. § 57-3-204(b)(2)(A), (3)(A), (3)(B), (3)(D). Attorneys and those seeking to gain liquor licenses no longer have to abide by the residency requirements set forth in the Tennessee statute. Instead, they must satisfy the rest of the statutory provisions without taking into account how long the applicant has lived within the state of Tennessee or how many stockholders reside within the state.

WILLS & TRUSTS

The Tennessee Court of Appeals held that the nomination of a person as executor was a sufficient benefit to trigger a presumption of undue influence over a decedent's Last Will and Testament. *In re Estate of Land*, No. E2017-01429-COA-R3-CV, 2018 WL 3854042, 2018 Tenn. App. LEXIS 466 (Tenn. Ct. App. Aug. 13, 2018).

Patrick Hogan

In *In re Estate of Land*, the Court of Appeals addressed whether the naming of a person as executor is a sufficient benefit to trigger a presumption of undue influence over a decedent's Last Will and Testament. Judy Allen ("Allen") filed suit contesting the Last Will and Testament of Ida Land (the "Decedent") dated May 9, 2011 and later admitted to probate in October of 2015. At trial, the jury found that a presumption of undue influence arose from the confidential relationship between Kenneth Hill ("Hill") and his wife, Pauline Hill, and the Decedent.

The Decedent died in August of 2015 with no surviving spouse or children. Hill's wife was the sister of the Decedent's second husband, Charles Land, who was also deceased. According to the record, Land and the Decedent were married in 1986 or 1987. Allen was the maternal niece of Decedent and had a lifelong relationship with her. In 2009, Decedent fell and broke her pelvis, prompting Allen to begin providing care for her. Following Allen's retirement in 2010, the Decedent asked her to provide care for her for the remainder of Decedent's life. Allen then took over preparing meals, administering medications, and other basic functions of care on a daily basis. Further in 2010, Decedent asked Allen to take her to see an attorney, wishing to prepare a will that her then-alive husband would not have knowledge of.

Although Decedent had a shared checking account with her husband Charles Land, she kept a separate savings account without his knowledge. Decedent had Allen's name put on this savings account so Allen could further help manage her care. At this time, the account held approximately $30,000 and the balance remained approximately the same until Allen was ousted from control of the account. Additionally, Allen testified that Decedent was in good health overall but was diagnosed with dementia in April of 2011.

In April of 2011, Charles Land discovered the secret account. Tensions quickly began to rise, coming to a head on May 5, 2011. On that day, an altercation occurred that led Charles Land's side of the family to call the police on Allen, her husband, and her father while they were at the Decedent's home. While no arrests were made, Charles Land's family, including Hill and his wife, soon cut Allen off from any contact with Decedent. Before this event, Allen had been Decedent's attorney-in-fact, but on May 12, 2011, she received cancellation of the power of attorney from the Hills' lawyer. Pauline Hill was then appointed Decedent's attorney-in-fact and gained control over the savings account.

The record reflected that when Mrs. Hill took over control of the account, its balance was reduced from $32,000 to $7,000. Moreover, the record further showed that Mrs. Hill made loans to family members unrelated to Decedent from this account. Ultimately, on May 9, 2011, a new will was made for Decedent, and Decedent was placed in a nursing home.

Following the death of Decedent, Allen filed suit contesting the new will. After trial, the jury returned a verdict stating that Allen proved by a preponderance of the evidence that there was undue influence arising from the confidential relationship between the Hills and the Decedent. The jury also found that Allen proved that Kenneth Hill and Pauline Hill unduly profited from the will of the Decedent and that they did not prove by clear and convincing evidence that the transaction was fair. Kenneth Hill then appealed to the Tennessee Court of Appeals.

According to the Tennessee Supreme Court, a party may challenge a will when the executor subjects the decedent to undue influence. Specifically, a presumption of undue influence arises when a confidential relationship is established that is then followed by a transaction benefitting the dominant party. *Matlock v. Simpson*, 902 S.W.2d 384, 386 (Tenn. 1995). The Court held that confidential relationship is defined as any relationship that gives one person dominion and control over another. Notably, the Court held that a presumption of undue influence can only be rebutted by clear and convincing evidence of the fairness of the transaction. *Id.*

The burden of proof concerning the confidential relationship first rests on the party claiming its existence. *Brown v. Welk*, 725 S.W.2d 938, 945 (Tenn. Ct. App. 1983). Once shown, a confidential relationship gives rise to a presumption of undue influence. *Matlock*, 902 S.W.2d at 386. The Court held that the burden then rests with the dominant party to rebut the presumption by proving the transaction was fair with clear and convincing evidence. *Id.*

However, a confidential relationship alone is insufficient to give rise to the presumption of undue influence. This is so because it is not the relationship itself that concerns the courts but the abuse of such a relationship. *In re Estate of Maddox*, 60 S.W.3d 84, 89 (Tenn. Ct. App. 2001). Thus, proof of the existence of a confidential relationship must be supplemented with evidence of other suspicious circumstances. *Id.* A party "must prove the existence of suspicious circumstances warranting the conclusion that the person allegedly influenced did not act freely and independently." *Id.* at 88. The *Maddox* court listed three suspicious circumstances that are frequently paired with a confidential relationship that give rise to a presumption of undue influence: (1) the confidential relationship itself; (2) the decedent's physical and mental deterioration; and (3) the beneficiary's active involvement in procuring the will. *Id.* at 89. Supplementing these factors, the Court listed eight other commonly-recognized suspicious circumstances surrounding a confidential relationship such as: (1) secrecy concerning the will's existence; (2) the testator's advanced age; (3) the lack of independent advice in preparing the will; (4) the testator's illiteracy or blindness; or, (5) the unjust or unnatural nature of the will's terms. The Court explained that the list, however, was non-exhaustive.

The Court held a that confidential relationship existed between Hill and his wife and the Decedent due to their roles as executor of the estate and attorney-in-fact, respectively. The issue raised by Hill on appeal concerned whether being named executor was too uncertain to constitute a benefit, as it was dependent on whether there were sufficient funds in the estate to properly pay for services provided by the executor. Further, Hill argued that the benefit was too uncertain because the testator could revoke the nomination, and the nominated executor could predecease the testator. In rejecting Hill's arguments, the Court reasoned that this argument could also be made for a beneficiary of the will; thus, "being named as an executor is no more uncertain a benefit than being named as a beneficiary in the will."

Hill then argued that to prove undue influence, Allen had to show that the benefit derived to him was "direct and pecuniary." The Court instead held that the benefit only need be "to the advantage of the dominant party" and does not need to be accrued directly. Importantly, in addition to being named executor, Hill's nieces and nephews were the beneficiaries of the Decedent's estate. As such, Hill was indirectly benefitting from the will. The Court's decision was also influenced by the realization that if a party could escape a presumption of undue influence by having benefits conferred on close family members, then a loophole would be created that would encourage the use of undue influence.

Accordingly, the Court held that the nomination of someone as the executor of an estate was a sufficient benefit to prompt a presumption of undue influence. In doing so, the Court upheld the jury verdict in favor of Allen in the will contest.

In light of this decision, transactional attorneys in Tennessee should be aware of the closing of an apparent loophole in wills. Specifically, the executor of an estate does not have to benefit directly in order for the courts to find a benefit derived. As long as the benefit is "to the advantage" of a dominant party in a confidential relationship, then it is easier to prompt a presumption of undue influence and challenge the will. This decision means attorneys in Tennessee should be careful when a party looks to gain benefits from a will for third-parties unrelated to the decedent. Going forward, this holding will make it easier to challenge a will, especially when a confidential relationship can be found, as the parameters of what a benefit is has been expanded.

BANKRUPTCY—POWERS OF BANKRUPTCY TRUSTEE

The Supreme Court of the United States held that for the purposes of the safe-harbor provision under 11 U.S.C. § 546(e), the relevant transfer is the overarching transfer. *Merit Mgt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018).

Trevor Torres

In *Merit Management Grp., LP v. FTI Consulting, Inc.*, the Supreme Court addressed whether the U.S.C.'s Section 546(e)'s securities safe-harbor provision bars avoidance of overarching transfers (e.g., A → D), or its component parts of a transfer (e.g., A → B → C → D). Specifically, Sections 544 through 553 detail circumstances under which a trustee may avoid completing a transaction, known as "avoiding powers." Section 548 was relevant to this case, which provides that a trustee may avoid constructively fraudulent transfers if the debtor was insolvent on the date that the transfer or obligation was made or incurred, or if the debtor became insolvent as a result of the transfer or obligation. 11 U.S.C. § 548(a)(1)(B).

However, there are limits placed on the trustee's power to pursue an avoidance action under certain circumstances. The relevant language states:

> Notwithstanding Sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a . . . settlement payment . . . made by or to (or for the benefit of) a . . . financial institution . . . or that is a transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract . . . , except under Section 548(a)(1)(A) of this title.

11 U.S.C.S. § 546(e). As such, the Supreme Court held that Section 546(e) indicated that the only relevant transfer under the safe-harbor provision is the overarching transfer, which the trustee in this case sought to avoid. The intermediate transfers, which may include financial institutions or other covered entities, are irrelevant for the purpose of determining if a transaction is protected by the avoiding powers.

In 2003, Valley View Downs, LP ("Valley View") and Bedford Downs Management ("Bedford Downs") were competing for a license to operate a harness racing track. Both parties had intentions of opening a "racino"— a horse racing facility with slot machines. The Pennsylvania State Harness Racing Commission grants a limited number of licenses to applicants for operation of these venues. With only one license remaining, the Commission denied both applicants in 2005. After obtaining permission to reapply, Valley View and Bedford Downs entered into an agreement making Valley View the sole applicant. In exchange, Valley View agreed to purchase all of Bedford Downs' stock for $55 million upon obtaining the license. After procuring the final license, Valley View arranged for Credit Suisse to finance the purchase price. Credit Suisse wired $55 million to Citizens Bank, which agreed to serve as a third-party escrow agent. Bedford Downs' shareholders, including Merit Management Group, LP ("Merit"), then deposited their stock certificates into escrow.

From October 2007 to October 2010, Citizens Bank disbursed $16.5 million to Merit for the stock. Shortly after, however, Valley View learned they would be unable to open their racino due to difficulties in obtaining a gaming license. As a result, Valley View and its parent company filed for Chapter 11 bankruptcy. The Bankruptcy Court confirmed a reorganization plan and FTI Consulting, Inc. ("FTI") was appointed to serve as the trustee. FTI filed suit against Merit to avoid the $16.5 million transfer, arguing that the deal was constructively fraudulent because Valley View was insolvent at the time of the purchase. Merit then moved for a judgment on the pleadings, claiming that Section 546(e) barred avoidance. They alleged that the safe-harbor provision applied because the transfer was a settlement payment between two financial institutions—Credit Suisse and Citizens Bank.

The District Court granted the motion, holding that the safe-harbor applied because financial institutions transferred or received funds in relation to a settlement payment or securities contract. Subsequently, the Seventh Circuit reversed that decision, stating that Section 546(e) did not apply to transfers in which financial institutions were only conduits or "middle men." The Supreme Court granted certiorari to determine whether the transfer between Valley View and Merit was "made by or to (or for the benefit of) a financial institution."

The Court first needed to identify which transfer was relevant. Merit pled that the Section 546(e) safe-harbor provision was applicable to the intermediate transactions involving Credit Suisse and Citizens Bank. FTI, however, claimed that the only relevant transfer is the main, overarching transfer of $16.5 million from Valley View to Merit. Because that overarching transfer was not made by, to, or for the benefit of a financial institution, FTI argued, it would not fall under the scope of Section 546(e). The Supreme Court agreed with FTI, holding that the overarching transfer is the only one of relevance; therefore, the transfer in question was not subject to the safe-harbor provision.

First, the Court analyzed the language and context of Section 546(e). The Court reasoned that by beginning with "notwithstanding," the Code indicates that the safe-harbor provision is an exception to typical avoiding powers. Accordingly, Section 546(e) is concerned only with transactions seeking avoidance under those powers. Furthermore, the Court found that the last clause of Section 546(e) indicated the transfer of concern is the one the trustee sought to avoid. This Section is an "exception to the exception" of avoiding transactions, meaning that a trustee may not avoid a transfer that falls under the safe-harbor unless it is actually fraudulent. The Court opined that the Code's language was referencing a specific transfer named by the trustee. Here, FTI was concerned with the Valley-View-to-Merit transfer, not the ones in between. This transfer did not include Credit Suisse or Citizens Bank, which established that a transaction had not been made by to or for the benefit of a financial institution.

In addition to the language of this Section, the Court also examined the Section headings involving the powers of avoidance. Notably, in Section 546(e), the language "Limitations on Avoiding Powers" is used, tying it to Sections 544 through 553, which describe the avoiding powers of a trustee. The Court found these headings to be particularly instructive because each of these Sections include language about what "the trustee may avoid"—in comparison to the safe-harbor provision describing what "the trustee may not avoid." According to the statute, the transfer that "the trustee may not avoid" is specified to be a transfer that *is* either a settlement payment or made in connection with a securities contract. Importantly, it does not include a transaction that merely involves a settlement payment or securities contract, which led the Court to conclude that the transfer of importance was the one the trustee sought to avoid—not the intermediary ones.

Although the Court determined that the safe-harbor provision must be applied to the transfer the trustee sought to avoid, the trustee was not permitted to freely define that transfer. In fact, the transfer was defined by the Code. Merit was then allowed to argue that FTI failed to demonstrate an avoidable transfer. However, if FTI could show that the transfer was avoidable, the Court would not need to analyze the pieces of the transfer. Merit's argument focused on the idea that FTI could not merely ignore the use of Credit Suisse and Citizens Bank. Without any rebuttal about the appropriate transfer for scrutiny, Merit's concern about ignoring the conduits was irrelevant, and the overarching transfer was the only one of importance.

Further, Merit argued that the 2006 addition of "or for the benefit of" to the requirement that a transfer be "made by or to" a protected entity was done to repeal a previous decision by the Eleventh Circuit. That court held that the Section 546(e) safe-harbor provision did not apply to transfers when a financial institution was only an intermediary. Merit contended that by adding "or" to the statute, it became unnecessary for the financial institution to have a beneficial interest when applying the safe-harbor provision. However, the Supreme Court explained that the language was added to match the language of the avoidance provisions. Simply put, the addition of "or for the benefit of" ensured that the scope of the safe-harbor provision matched the scope of the avoiding powers.

Merit then referenced the inclusion of securities clearing agencies under Section 546(e) in an attempt to argue that the safe-harbor provision needed to be read to protect intermediaries without reference to their beneficial interest. This argument was raised because a clearing agency primarily lives in the grounds of intermediate transactions—rather than being the initial instigator or final recipient. In rebuttal, the Court first recognized that Merit's description of the role of clearing agencies was disputable because despite their intermediary role in a transaction, they may have a significant beneficial interest. This Court then explained that the real question was whether the transfer was made by, to, or for the benefit of a covered entity—including a securities clearing agency. If the transfer seeking avoidance was made by, to, or for the benefit of a securities clearing agency, then avoidance must be barred. Here, the transfer the trustee sought to avoid (Valley View to Merit) did not involve securities clearing agencies and thus could not be avoided.

Finally, Merit argued that Section 546(e) used broad, encompassing language and should not be used as an absolute measure. Merit claimed that the Section is framed in a way to allow courts to advance the parties' interests. However, the Court opposed this position, stating that the safe-harbor provision did not mention anything about transfers "through" a covered entity, but instead referenced the beginning and ending point of the transaction with "made by" and "to the benefit of" covered entities. Here, the transfer was "made by" Valley View "to" Merit "through" Credit Suisse and Citizens Bank. Accordingly, because the Supreme Court found that the relevant transfer under Section 546(e) was the overarching transfer, the Seventh Circuit's decision prohibiting the trustee from applying the safe-harbor provision to avoid the transfer was affirmed.

In light of this decision, attorneys should be mindful when using a financial institution or covered entity to complete a transaction, regardless of what end of the transfer they are on. If their client falls under the definition of a financial institution or covered entity, they need to determine which part of the transaction the client is involved. If they are one of the parties that the transfer is "made by, to or for the benefit of," they will not be able to utilize an avoiding power unless it is actually fraudulent under § 548(a)(1)(A).