The Public Lawyer

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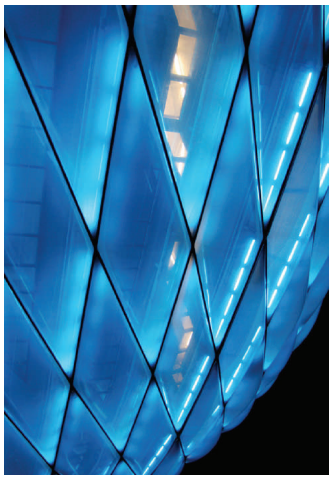
NEVADA SUPREME COURT

V & S Railway v. White Pine County, No. 49351 (July 16, 2009) "NRS 334.030 facilitates the purchase of surplus governmental property by a governmental entity from another governmental entity. Specifically, NRS 334.030(2), (3), and (4) set forth special provisions for governmental entities entering into contracts for such purchases. NRS 334.030(5) suspends any law that is inconsistent with the other NRS 334.030 provisions.

In this appeal, we consider the scope of NRS 334.030. Here, there are two parties, one that is a governmental entity and one that is not, each contesting which of them may purchase surplus governmental property from another governmental entity. The property in question is a railroad that the Los Angeles Department of Water and Power (LADWP), a governmental entity, designated as surplus property. The LADWP sought bids on the railroad, and respondent City of Ely offered to purchase the railroad for $750,000. The LADWP accepted Ely's offer, and Ely placed $250,000 in escrow. Nearly simultaneously, appellant V and S Railway, LLC (V & S Railway), a private company, sought to condemn the railroad pursuant to NRS 37.230, a statute that gives railroad companies that right. Subsequently, White Pine County and Ely brought a motion for summary judgment, claiming that NRS 334.030(5) precluded V & S Railway's ability to pursue its condemnation action under NRS 37.230, which the district court granted. The district court found that V & S Railway's condemnation action was barred because as soon as the LADWP designated the railroad as surplus governmental property, NRS 334.030(5) was triggered, thereby suspending NRS 37.230.

On appeal, V & S Railway argues that the district court erred when it granted White Pine County and Ely's motion for summary judgment. Primarily, V & S Railway contends that the district court incorrectly found that, pursuant to NRS 334.030(5), NRS 334.030 super-



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seded NRS 37.230.

We conclude that the district court incorrectly decided that NRS 334.030 was triggered by the LADWP designating the railroad as surplus governmental property. According to the plain language of NRS 334.030, the statute is triggered when governmental entities take steps demonstrating their intent to enter into a contract for the purchase and sale of surplus governmental property. NRS 334.030(5) then suspends any action brought pursuant to a law that is inconsistent with facilitating these purchases.

Therefore, we reverse and remand to the district court to determine whether the LADWP and Ely had taken steps showing their intent to enter into a contract for the purchase and sale of the railroad when V & S Railway brought its condemnation action pursuant to NRS 37.230. If the district court finds that the LADWP and Ely had taken the necessary actions to trigger NRS 334.030, then it should again conclude that NRS 334.030(5) precluded V & S Railway's ability to pursue its condemnation action."

MGM Mirage v. Nevada Ins. Guaranty Ass'n, No. 49445 (June 25, 2009) "In this appeal we must determine whether appellants, as self-insured employers under Nevada's Workers' Compensation Act, can seek reimbursement from the Nevada Insurance Guaranty Association (NIGA) for amounts that should have been paid by appellants' insolvent excess insurance carrier. Because we determine that appellants are not insurers for purposes of the Nevada Insurance Guaranty Association Act (NIGA Act), we conclude that self-insured employers under the Workers' Compensation Act, like MGM Mirage (MGM) and Steel Engineers, Inc. (SEI), are not barred from recovering payment from NIGA for their covered workers' compensation claims payable by their insolvent excess insurance carrier."

St. James Village, Inc. v. Cunningham, No. 49398 (June 25, 2009) "In this appeal, we consider whether the servient estate owner has any authority to unilaterally relocate an easement burdening its property, provided that the relocation does not materially inconvenience the dominant estate owner.

To facilitate the development of its property into a planned community, appellant St. James Village, Inc., asked the dominant estate owners if St. James Village could relocate an easement that traversed across a portion of its property. The dominant estate owners refused to consent to the relocation. Accordingly, appellant filed a declaratory action in district court, seeking authorization to unilaterally relocate the easement, alleging that the relocation would not materially inconvenience the dominant estate owners. The district court denied appellant's requested relief, reasoning that Swenson v. Strout Realty, Inc., 85 Nev. 236, 239, 452 P.2d 972, 974 (1969), mandates that the dominant estate owners consent to the relocation of the easement.

We are now asked to revisit a statement made in Swenson, that, in general, 'the location of an easement once selected, cannot be changed by either the landowner or the easement owner without the other's consent.' 85 Nev. at 239, 452 P.2d at 974. In doing so, St. James Village invites us to adopt section 4.8 of the Restatement (Third) of Property, which permits a servient estate owner to unilaterally relocate an easement so long as the relocation does not substantially affect the dominant estate's rights.

We conclude that the statement made in Swenson indicating that fixed easements cannot be moved is overbroad, and determine that

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adoption of section 4.8 of the Restatement (Third) of Property is warranted in those circumstances where the creating instrument does not define the easement through specific reference to its location or dimensions and the unilateral relocation will not materially inconvenience the dominant estate owner. Because the creating instrument in this case specifies the location and dimension of the easement, we conclude that the district court properly denied St. James Village's request for declaratory relief."

Boston fire union refuses to leave closed stations

Defiant off-duty firefighters are disobeying Fire Department orders and voluntarily staffing three Boston fire companies that were closed today as part of a new "brown out" policy aimed at reducing overtime spending.

"It's the people's firehouse. We are volunteering to staff these firehouses to make sure the public gets the protection it deserves," said Boston firefighters union President Ed Kelly, who used a department radio this morning to report that "Volunteer Engine 20 is in service."

The Fire Department "browned out" three fire companies this morning: Engine 56 in the Orient Heights section of East Boston, the first Boston engine company to respond to emergencies at Logan Airport after Mass Port's fire units; Engine 20 in the Neponset enclave of Dorchester and Ladder 18 at the D Street Station in South Boston.

The temporary closures of the three companies are part of a new plan taking effect that instructs division commanders to "brown out" up to four companies citywide, per shift, before hiring any firefighters on overtime to cover for jakes who call in sick or miss work.

Fire Commissioner Roderick Fraser said the "brown outs" were triggered by 33 firefighters calling in sick, which he called "excessive" but slightly below the normal 36 who call in sick on a typical day.

"We have a problem of sick-leave abuse in the department," Fraser said. "We will not be bullied by them. Come to work, do your job, and we will not need brown outs."
He added that the department has told the union that Boston firefighters are prohibited from volunteering to perform their jobs, a violation of federal law.

"The chief has ordered them not to get on the apparatus, not to handle the equipment and not to respond," he said.

"They've ordered us not to do it. But our union's members are saying, 'If someone's house catches on fire, I'm not going to let it burn down,' " said Richard Paris, the union's vice president, noting that some firefighters fear that the department will file charges against them for disobeying the order.

Paris pointed out that East Boston, for example, is served by only one other engine company, which carries water. Beyond that, the next nearest engine company to Engine 56, which is on the outskirts of the city, is located downtown and would have to travel through a tunnel and could take nearly 15 minutes to get to the neighborhood, he said.
"If (the ladder trucks) are without the water, you are endangering the lives of the rescue teams," Paris said.

Union members also picketed outside Engine 20 with protest signs, including one saying, "Mayor Menino is gambling with your lives."

The Menino administration has blasted the union's move as a smokescreen meant shroud the 33 firefighters collecting disability who filed for retirement this week, many in order to beat the repeal of a pension provision allowing them to retire at a higher rate if they had filled in for a higher-paid supervisor.

Kelly noted that of the three browned out fire companies, one is near his Dorchester home and the other is near South Boston City Councilor Michael Flaherty, who is seeking to unseat Menino and who has picked up the union's endorsement.

But Fraser insisted that politics had nothing to do with which companies were targeted for "brown outs" today.

"I did not take part in the decision, neither did the mayor," he said, noting they were made by a deputy chief in the field based on "logical reasons."

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North County Community Alliance, Inc. v. Salazaer, 07-36048 (July 15, 2009) "The North County Community Alliance, Inc., brought suit against the National Indian Gaming Commission , the Department of Interior, and those agencies' principal officers. The Alliance claims that the NIGC's failure to make an 'Indian lands' determination either before approving the Nooksack Indian Tribe's ('Nooksacks' ') gaming ordinance (the 'Ordinance') in 1993, or before the Nooksacks licensed and began constructing the Northwood Crossing Casino ('Casino') in 2006, violated the Indian Gaming Regulatory Act ('IGRA'). The Alliance also claims that Appellees violated the National Environmental Policy Act ('NEPA') by failing to prepare an environmental impact statement ('EIS') in connection with construction of the Casino.

We hold that the Alliance's challenge to the NIGC's 1993 approval of the Ordinance, insofar as it relates to the licensing and construction of the Casino, is not time-barred. We hold on the merits that the NIGC did not have a duty under IGRA to make an Indian lands determination in 1993 before approving the Nooksacks' non-site-specific proposed gaming Ordinance. We also hold that the NIGC did not have a duty under IGRA to make an Indian lands determination in 2006 when the Nooksacks licensed and began construction of the Casino pursuant to the approved Ordinance. Finally, we hold that there was no violation of NEPA."

"We hold that the Alliance's claim that the NIGC was required under IGRA to make an Indian lands determination for the parcel on which the Casino is located is not timebarred. We further hold that the NIGC was not required in 1993 to make an Indian lands determination as part of its approval of the Nooksacks' Ordinance, or in 2006 when the Nooksacks licensed and began construction of the Casino. Finally, we hold that Appellees did not violate NEPA. We therefore affirm the district court's dismissal of the Alliance's complaint under Rule 12(b)(6). AFFIRMED."

Trustees of the Screen Actors Guild v. NYCA, Inc., 08-55409 (July 15, 2009) "We consider whether the Employee Retirement Income Security Act of 1974 allows employee benefit plans to recover unpaid contributions from an employer who is not a party to the applicable collective bargaining agreement."

"The trustees contend that TaylorMade, which has not signed the Commercials Contract, is nonetheless liable for unpaid contributions as a 'joint employer' of Couples. 8934 TRUSTEES v. NYCA, INC. According to the trustees, 'NYCA and TaylorMade jointly exercised sufficient control over Fred Couples' employment such that NYCA and TaylorMade are 'joint employers' for purposes of federal labor law.' In support of this theory, the trustees identify analogous cases holding companies liable as 'joint employers' under the Fair Labor Standards Act of 1938 ('FLSA').

This argument presents us with a straightforward issue of statutory interpretation. We begin, as we must, with the text of the statute. ERISA requires employers to contribute to employee benefit plans in accordance with the terms of collectively bargained agreements. 29 U.S.C. § 1145. Specifically: *Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement* shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such

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plan or such agreement. *Id.* (emphasis added).

Thus, we must decide whether an alleged 'joint employer' who is not a signatory to a collective bargaining agreement may nevertheless qualify as an 'employer who is obligated to make contributions' within the meaning of § 1145."

"We need look no further than the plain language of § 1145 to reach our conclusion. In our view, § 1145 imposes no independent obligation upon employers; it merely provides a federal cause of action to enforce pre-existing obligations created by collective bargaining agreements. Indeed, § 1145, though clumsily phrased in the passive voice, nonetheless expressly locates the source of the duties imposed on employers in 'the terms of a collectively bargained agreement,' not in any independent provision of federal law. Because TaylorMade has not signed the Commercials Contract, it follows that it has not incurred any such pre-existing obligations under § 1145. The trustees' 'joint employer' theory, by seeking to impose obligations above and beyond those required by collective bargaining agreements, directly conflicts with the plain language of the statute. Therefore, we decline the invitation to extend the 'joint employer' theory to the context now before us."

"Accordingly, the district court properly dismissed the trustees' state law causes of action. We AFFIRM the district court's grant of summary judgment to NYCA and to TaylorMade on the trustees' second, third and fourth causes of action. We REVERSE the district 8944 TRUSTEES v. NYCA, INC. court's grant of summary judgment to NYCA on the trustees' first cause of action, and REMAND for further proceedings. Each party shall bear its own costs on appeal. AFFIRMED REVERSED and REMANDED."

Harris v. Amgen, Inc., 08-55389 (July 14, 2009)
"Steve Harris and Dennis F. Ramos (collectively, 'Plaintiffs') sued Amgen, Inc. ('Amgen') and several Amgen directors and officers, alleging that the defendants breached their fiduciary duties under the Employee Retirement Income Security Act ('ERISA') in their operation of two ERISA retirement plans. The district court dismissed Harris's claims on the ground that he lacked standing as an ERISA plan 'participant' because he had withdrawn all of his assets from his plan. It also dismissed Ramos's claims, reasoning that although Ramos had standing, he did not allege any claims against defendants who were fiduciaries under the plan. The district court then denied Plaintiffs leave to amend their complaint.

We reverse the dismissal of Plaintiffs' complaint. We hold that Harris has standing as an ERISA plan participant to seek relief under ERISA § 502(a)(2), codified at 29 U.S.C. § 1132(a)(2), despite having withdrawn all of his assets from his plan. We also conclude that the district court improperly denied Plaintiffs leave to amend their complaint to add more factual allegations where necessary and to identify proper fiduciaries of the Plaintiffs' ERISA plans."

Fiduciaries of an ERISA defined contribution plan who breach their fiduciary duty might cause employees to receive fewer benefits from their plans than they would have received absent the breach. This is true even if the employees later withdraw their assets from the plan. We conclude that former employees who have voluntarily withdrawn assets from their ERISA defined contribution plans have statutory and Article III standing to assert fiduciary claims against Plan fiduciaries under ERISA § 502(a)(2), regardless

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of whether a separate remedy is available under ERISA § 502(a)(1)(B). We also conclude that any defects in Plaintiffs' Section 502(a)(2) 8834 Complaint possibly can be cured through amendment. We reverse the district court's dismissal of Plaintiffs' Complaint, and we remand for proceedings consistent with this opinion. REVERSED and REMANDED."

Sznewajs v. U.S. Bankcorp Amended and Restated Supplemental Benefits Plan, 07-16489 (July 13, 2009) "This case concerns, among other issues, the standard of review to be applied by courts in reviewing a decision by the administrator of a pension plan governed by ERISA, the Employee Retirement Income Security Act of 1974, 88 Stat. 829, as amended, 29 U.S.C. § 1001 et seq. As is commonly the case, the documents for the plan involved in this case gave the plan administrator discretionary authority to interpret the terms of the plan, which ordinarily means that a decision by the plan administrator is subject to review by a court for abuse of discretion, under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948 (1989), and *Metropolitan Life Ins. Co. v. Glenn*, ___ U.S. ___, 128 S. Ct. 2343 (2008) ('MetLife'). The plan in question here is a 'top hat' plan, an unfunded plan that is limited to key executives of the sponsoring company. That fact has led some courts to conclude that a plan administrator's decisions should be subject to de novo review. In the circumstances of this case, though, notably the fact that there was no financial conflict of interest that influenced the administrator to favor one result over another, we conclude that our review should be for abuse of discretion.

Defendant U.S. Bancorp Amended and Restated Supplemental Benefits Plan appeals the district court's entry of summary judgment directing the Plan to treat plaintiff Franciene Sznewajs as a designated surviving spouse beneficiary. Franciene is the ex-wife of counter-defendant Robert Sznewajs,1 a former executive employee of U.S. Bancorp covered by the Plan. The Plan had concluded that Robert's second wife, Virginia, should be treated as his survivor beneficiary, a determination held improper by the district court. Applying the abuse of discretion standard of review, we conclude that the plan administrator's interpretation was permissible and should be affirmed. Accordingly, we reverse and remand the district court judgment with instructions for the district court to enter summary judgment in favor of the Plan."

"We conclude that the plan administrator did not abuse its discretion in rejecting Franciene's claim based on its reasonable interpretation of the Plan document. Accordingly, we reverse and remand with instructions for the district court to grant summary judgment in favor of the Plan. REVERSED and REMANDED."

Oregon Natural Desert Association v. Locke, 06-35851 (July 8, 2009) "The Department of Commerce, National Oceanic and Atmospheric Administration Fisheries ('NOAA Fisheries') and National Marine Fisheries Services (collectively, 'Commerce') appeal the district court's order granting attorney fees and costs under the Freedom of Information Act, 5 U.S.C. § 552 ('FOIA'), in favor of Oregon Natural Desert Association ('ONDA'). The district court issued the attorney fees order after it entered judgment in ONDA's action alleging unlawful withholding of requested documents and use of unlawful processing regulations in violation of the FOIA and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ('APA').

We have jurisdiction under 28 U.S.C. § 1291. We

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affirm in part, reverse in part, and remand for recalculation of the attorney fee award. On two of its claims, ONDA was not a substantially prevailing party under *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't. of Health & Human Res.*, 532 U.S. 598 (2001). As to those claims, the defendants provided the documents ONDA requested before the district court ordered that they be turned over. ONDA was successful in obtaining the documents, but it succeeded by use of the catalyst theory of recovery, and not by either a judgment on the merits or a court-ordered consent decree as required by *Buckhannon. Id.* at 604.

The Openness Promotes Effectiveness in our National Government Act (the '2007 Amendments' to the FOIA) authorizes the payment of attorney fees when documents such as those sought by ONDA are recovered using a catalyst theory, but those Amendments were signed into law after the district court entered its attorney fees order, and they do not apply retroactively to this case. ONDA is not eligible for the recovery of attorney fees on its first two claims. Nor is
it eligible for attorney fees on its third claim, which it lost. But, it is eligible for an award of attorney fees on its fourth claim for its successful challenge to the cut-off regulation."

"As the district court correctly determined, when the complaint in this case is read as a whole, it becomes clear this is a FOIA action. The district court ruled in favor of ONDA on three out of four claims, but only after the defendants had already produced the documents requested by claims one and two. The 2007 Amendments authorizing the payment of attorney fees to a prevailing plaintiff under a catalyst theory do not apply retroactively to this case. Nor do the 1974 Amendments permit the recovery of attorney fees under the catalyst theory. *Buckhannon*, decided before the 2007 Amendments became effective, applies to this case and precludes such a recovery as to claims one and two. As the catalyst theory is the only theory under which ONDA can be said to have prevailed on claims one and two in this FOIA action, ONDA is not eligible for the attorney fees awarded to it for its success on those claims. But it is entitled to attorney fees for its success on claim four. We therefore reverse the award of attorney fees and remand to the district court for it to calculate an award of attorney fees and costs to be awarded to ONDA for its success as the prevailing party on claim four. ONDA shall recover its costs for these appellate proceedings. AFFIRMED in part, REVERSED in part, and REMANDED."

Stormans, Inc. v. Selecky, 07-36039 (July 8, 2009) "We must decide whether the district court abused its discretion by preliminarily enjoining the enforcement of new rules promulgated by the Washington State Board of Pharmacy ('Board') that require pharmacies to deliver lawfully prescribed Federal Drug Administration ('FDA')-approved medications and prohibit discrimination against patients, on the ground that the rules violate pharmacies' or their licensed pharmacists' free exercise rights under the First Amendment to the U.S. Constitution. We have jurisdiction pursuant to 28 U.S.C. § 1292. Because we conclude that the district court incorrectly applied a heightened level of scrutiny to a neutral law of general applicability, and because the injunction is overbroad, we vacate, reverse, and remand."

"We hold that the district court abused its discretion in applying an erroneous legal standard of review, failing to properly consider the balance of

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Good Lawyerin', Texas Style

Good Lawyerin', Texas Style

Our friends at Tex Parte bring us news of a good ol' fashioned Texas lawyer shout-out, courtesy an A&E reality TV show called "After the First 48." The new show documents what happens in a Texas capital murder case in the days after a suspect is arrested -- following a series of events chronicled in "The First 48."

The highlight of this episode was a spectacular shouting match between Dallas County Assistant District Attorney Marc Moffitt and Edwin V. King, a Dallas criminal defense attorney. After Tracy Holmes, judge of the 363rd District Court, asked Moffitt why one of his crucial witnesses was absent from the courtroom, he told her: "Well, that's because some lawyer told them they didn't have to come." King, thinking Moffitt was insinuating that Moffitt meant King, got in Moffitt's face and screamed "That's a [BLEEP] lie!" To which Moffitt yelled: "I didn't say it was you!"

Lawyers in Texas certainly aren't the only ones ever to raise their voices in the heat of the moment, but they're pretty damned good at it. And thankfully it sometimes gets caught on tape.

Exhibit A: Jenkens & Gilchrist's infamous pep rally video. I once read an interview with a Houston litigator who claimed Texas lawyers like him were so aggressive because they only decided to go to law school after they realized they weren't big enough to make the football team.

Exhibit B: Joe Jamail's Monsanto deposition. The "King of Torts" can't manage to control his subjects as this depo descends into chaos. "You don't run this deposition, you understand, you watch and see who does, big boy."

Exhibit C: Jim Adler, "The Texas Hammer." I know what you're thinking. It's not fair to throw in the daytime TV ads of a personal injury lawyer -- they're pretty extreme no matter where you are. But I grew up on the Hammer and my ears are still ringing.

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hardships and the public interest, and entering an overbroad injunction. On remand, the district court must apply the rational basis level of scrutiny to determine whether Appellees have demonstrated a likelihood of success on the merits. The district court must also determine whether Appellees have demonstrated that they are likely to suffer irreparable harm in the absence of preliminary relief, whether the balance of equities tips in the favor of the three Appellees, and whether the public interest supports the entry of an injunction. If the court finds in favor of Appellees, it must narrowly tailor any injunctive relief to the specific threatened harms raised by Appellees. The order granting the preliminary injunction is REVERSED; the preliminary injunction is VACATED; and the case is REMANDED to the district court for further proceedings consistent with this opinion. The claims against HRC Appellants are DISMISSED as not ripe. The motion to strike that portion of Appellees' brief that addresses the Title VII claim is GRANTED."

Vinole v. Coutnrywide Home Loans, Inc., 08-55223 (July 7, 2009) "Plaintiffs-Appellants Raymond Vinole and Ken Yoder ('Plaintiffs') appeal the district court's order granting Defendant-Appellee Countrywide Home Loans, Inc.'s ('Countrywide') motion to deny class certification. In this wage-and-hour dispute, Plaintiffs seek to represent a proposed class of current and former Countrywide employees who are or were employed as External Home Loan Consultants ('HLCs'). They allege that Countrywide misclassified HLCs as 'exempt' outside sales employees and, as a result, Countrywide impermissibly failed to pay premium overtime and other wages. In a procedural wrinkle, Countrywide filed its motion to deny certification before Plaintiffs filed a motion for certification pursuant to Federal Rule of Civil Procedure 23 ('Rule 23') and prior to the pretrial motion deadline and discovery cutoff.

On appeal, we consider whether the district court abused its discretion by (1) considering Countrywide's motion to deny class certification before Plaintiffs had filed a motion to certify and prior to the pretrial and discovery cutoffs, and (2) denying class certification based on its reasoning that individual issues predominate over common issues. See Fed. R. Civ. P. 23(b)(3). We affirm. First, no rule or decisional authority prohibited Countrywide from filing its motion to deny certification before Plaintiffs filed their motion to certify, and Plaintiffs had ample time to prepare and present their certification argument. Second, the district court did not abuse its discretion by denying certification under Rule 23(b)(3) because the record supports its conclusion that individual issues predominate over common issues."

"We decline to adopt Plaintiffs' proposed rule that a defendant may not move to deny class certification under Rule 23(b)(3) unless and until the plaintiffs have affirmatively moved to certify a class. In addition, we conclude that the district court did not abuse its discretion by considering Countrywide's motion where Plaintiffs had a sufficient opportunity to present its case in favor of class certification. Finally, consistent with our decision in In re Wells Fargo Home Mortgage Overtime Pay Litigation, issued today, we decline to adopt a rule that a Rule 23(b)(3) class is presumptively proper where an employer uniformly classifies a group of employees as exempt. Here, the district court conducted a proper inquiry considering the relevant factors and, accordingly, its order denying class certification is AFFIRMED."

Herrera v. U.S. Citizenship and Immigration Ser-

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vices, 08-55493 (July 6, 2009) "The United States Citizenship and Immigration Services ('agency') may revoke its previous approval of a visa petition 'at any time' for 'good and sufficient cause.' 8 U.S.C. § 1155. We must determine whether the enactment of 8 U.S.C. § 1154(j) altered the agency's revocation authority. We hold that it did not. Because the agency's decision is otherwise free of legal error and supported by substantial evidence, we affirm the district court's grant of summary judgment to Defendants."

Marlyn Nutraceuticals, Inc. v. Mucos Pharma GMBH & Co., 08-15101 (July 2, 2009) "This appeal presents the question, among others, as to the appropriate criteria that a district court should apply in considering a motion to enter a preliminary injunction requiring a product recall in a trademark infringement case. We join the Third Circuit in requiring that a district court must find a substantial risk of danger to the public or other special circumstances in order to enter an interlocutory order recalling a product in a trademark infringement case."

"The Third Circuit has considered similar circumstances and concluded that a district court considering a motion for a preliminary injunction directing recall of a product in a trademark infringement case should consider additional factors in assessing the request. *Gucci Am., Inc. v. Daffy's, Inc.*, 354 F.3d 228, 233 (3d Cir. 2003); *see also United States v. Spectro Foods Corp.*, 544 F.2d 1175, 1181 (3d Cir. 1976); *Theodore C. Max, Total Recall: A Primer on a Drastic Form of Equitable Relief*, 84 Trademark Rep. 325, 327 (1994). Under the Third Circuit's formulation, to justify a recall, the infringed company must first satisfy the traditional standard for a prohibitory preliminary injunction. In addition, the district court must consider three further factors: (1) the willful or intentional infringement by the defendant; (2) whether the risk of confusion to the public and injury to the trademark owner is greater than the burden of the recall to the defendant; and (3) substantial risk of danger to the public due to the defendant's infringing activity. Gucci, 354 F.3d at 233.

Given the nature of the requested remedy, we conclude that the Third Circuit's formulation is sound, and we join it in requiring the district court to consider these factors before granting a preliminary injunction directing product recall in a trademark infringement case. If the district court makes a finding that the infringing product causes a substantial risk of danger to the public, it should order a recall.

As the district court did not have the benefit of this decision when deciding this case, it did not analyze these additional factors. It did, however, rest its recall decision in part on the third factor—substantial risk of danger to the public due to the defendant's infringing activity—in concluding that there was a public health hazard in allowing the product to remain on the market. However, the record does not support the existence of a public health risk necessary to invoke the interlocutory remedy of product recall. The only record support for the proposition that Marlyn's Wobenzym is unsafe for public consumption is the testimony of Dr. Scavetta that the proteolytic activity in some batches of Marlyn's Wobenzym was 250% greater than what it should have been. However, Scavetta did not testify that this formulation was unsafe for human consumption. Moreover, the district court stated that it did not find Dr. Scavetta's testimony to be credible. There was no other testimony or evidence upon which the district court

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could make its conclusion that the product was hazardous for public consumption.

Therefore, we must vacate the district court's order insofar as it requires product recall and restitution and remand the issue for the district court's further consideration in light of this opinion."

"For the foregoing reasons, we AFFIRM the district court's grant of a preliminary injunction and its denial of Marlyn's motion to reconsider. We VACATE the district court's imposition of recall and restitution and REMAND for further proceedings consistent with this opinion. Each party shall bear its own costs on appeal. AFFIRMED IN PART; REVERSED IN PART; REMANDED."

Cadkin v. Loose, 08-55311 (June 26, 2009) "This appeal concerns whether a defendant is entitled to attorney's fees as a prevailing party under § 505 of the Copyright Act, 17 U.S.C. § 505, when a plaintiff voluntarily dismisses without prejudice a lawsuit containing copyright claims. In *Corcoran v. Columbia Broadcasting System, Inc.*, 121 F.2d 575, 576 (9th Cir. 1941), we held a defendant in a copyright suit was a prevailing party and was entitled to attorney's fees when the plaintiff voluntarily dismissed the complaint without prejudice after the district court granted defendant's motion for more definite statement. The Supreme Court, in the context of the Fair Housing Amendments Act (FHAA), has since held prevailing party status turns on whether there has been a 'material alteration of the legal relationship of the parties,' *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (internal quotation marks omitted), and we have held dismissal without prejudice does not alter the legal relationship of parties for the purposes of entitlement to attorney's fees under a comparable fee shifting statute, *see Oscar v. Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978, 981 (9th Cir. 2008).

We conclude *Corcoran* is clearly irreconcilable with *Buckhannon* and no longer good law. We therefore overrule Corcoran and hold *Buckhannon's* material alteration test applies to § 505 of the Copyright Act. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (holding thee-judge panel can reject prior panel opinion that is 'clearly irreconcilable' with intervening Supreme Court authority). Because the plaintiffs in this lawsuit remained free to refile their copyright claims against the defendants in federal court following their voluntary dismissal of the complaint, we hold the defendants are not prevailing parties and thus not entitled to the attorney's fees the district court awarded them."

Miles and Oscar, taken together, compel the conclusion that a defendant is a prevailing party following dismissal of a claim if the plaintiff is judicially precluded from refiling the claim against the defendant in federal court. That is not the circumstance here, so the Trust and May-Loo are not prevailing parties and the district court erred in awarding them attorney's fees. REVERSED."

Zango v. Kaspersky Lab, Inc., 07-35800 (June 25, 2009) "We must decide whether a distributor of Internet security software is entitled to immunity under the safe harbor provision of the Communications Decency Act of 1996, 47 U.S.C. § 230, from a suit claiming that its software interfered with the use of downloadable programs by customers of an online media company.

Zango, Inc. (Zango) is an Internet company that

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Ban Upheld on State Troopers Practicing Law

Ban Upheld on State Troopers Practicing Law

New Jersey state troopers with law degrees have lost their suit charging that an ethics-code provision banning them from practicing law violates constitutional equal protection and due process guarantees.

U.S. District Judge Freda Wolfson in Trenton, N.J., held that preventing conflicts of interest between the private practice of law and the obligations of a state trooper is a legitimate objective that is reasonably related to the government's interest in ethics reform.

The outright proscription, though it took a meat cleaver rather than a scalpel to the problem, nonetheless met the rational-basis test, Wolfson wrote in *State Troopers Non-Commissioned Officers Association of New Jersey v. State of New Jersey*, 08-CV 5326, a ruling entered on Thursday.

The ethics code in question was adopted on May 20, 2007, by the Department of Public Law & Safety, which includes the state police, in response to a Sept. 11, 2006 mandate from the State Ethics Commission, newly created by the Legislature as part of a sweeping effort at ethical reform in the executive branch.

Previously, deputy attorneys general and assistant attorneys general were the only department employees forbidden to practice law on the side. The new code extended the prohibition to troopers.

Now, the only legal work they are allowed is continuing a representation that began before the code took effect or providing pro bono help for family members in non-adversarial matters that do not involve criminal law, appearing before a state licensing or regulatory board or acting adversely to the state's interest. They must also obtain express prior approval form the attorney gheneral.

Prior to the imposition of the ban, the 21 trooper-lawyers involved in the federal suit had been carrying on noncriminal law practices, handling wills, real estate closings and transactional work.

In September 2007, they obtained an advisory opinion from the Supreme Court Advisory Committee on Professional Ethics, Opinion No. 16-2007, stating, "As the proposed representation is limited to matters that are not criminal and not pertaining to a regulated industry, there would be no per se prohibition of such representation under the Rules of Professional Conduct, though recusal may be necessary on a case-by-case basis under RPC 1.8(k)."

Nevertheless, the attorney general continued to enforce the ban, and the trooper-lawyers, through their union, filed the suit in October last year.

Wolfson said the ethics opinion did not help because it did not "declare the revised Code of Ethics superfluous, or alternatively, an executive act that breaches the separation of powers between the different branches of New Jersey government."

The prohibition on practicing law was "rationally related to the State's interest in preserving the public trust and insuring that its employees do not place themselves in difficult ethical situations," Wolfson concluded.

She also rejected the notion that there was a

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property or liberty interest protected by due process. The troopers argued the ban was a de facto taking of their licenses.

She called it "abundantly clear that Plaintiffs did not retain a property right in secondary employment in the practice of law" nor was there a liberty right to a second job.

Nor does the ban infringe on the Court's power to regulate the practice of law because the new ethical rules supplement the Court's rules rather than supplanting them, held Wolfson.

The troopers' lawyer, Michael Bukosky of Locke & Correia in Hackensack, N.J., is considering an appeal or a motion for reconsideration. He says the decision will deter troopers from becoming lawyers, resulting in a less qualified force. Moreover, all lawyers should be concerned with Wolfson's narrow construction of the property interest in a law license, he says. David Wald, a spokesman for Attorney General Ann Milgram, issued a statement saying the revised code of ethics was meant "to insure the highest ethical standards are applied to all employees" and that in "rejecting the State Troopers' challenge to that rule, Judge Wolfson recognized the potential for conflicts between a private attorneys' responsibilities to their clients and the Department's law enforcement responsibilities" and "concluded that the prohibition on the private practice of law by State Troopers was an appropriate means to 'preserve the public trust.'"

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provides access to a catalog of online videos, games, music, tools, and utilities to consumers who agree to view advertisements while they browse the Internet. It brought this action against Kaspersky Lab, Inc., (Kaspersky) which distributes software that helps filter and block potentially malicious software, for improperly blocking Zango's software. Kaspersky invoked the protection of § 230(c)(2)(B)1 for 'good samaritan' blocking and screening of offensive material. The district court granted summary judgment in Kaspersky's favor, holding that it is a provider of an 'interactive computer service' entitled to immunity for actions taken to make available to others the technical means to restrict access to objectionable material. We agree, and affirm."

"The district court correctly held that Kaspersky is a provider of an 'interactive computer service' as defined in the Communications Decency Act of 1996. We conclude that a provider of access tools that filter, screen, allow, or disallow content that the provider or user considers obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable is protected from liability by 47 U.S.C. § 230(c)(2)(B) for any action taken to make available to others the technical means to restrict access to that material. As its software qualifies, Kaspersky is entitled to good samaritan immunity. AFFIRMED."

Berger v. City of Seattle, 05-35752 (June 24, 2009) "In 2002, the City of Seattle promulgated a set of rules governing the conduct of visitors to one of its major attractions, an 80-acre public park and entertainment complex known as the Seattle Center. The new rules regulated for the first time the behavior of the Center's street performers. We consider today the constitutional validity of some of those rules.
Among other provisions, the new rules required street performers at the Seattle Center to obtain permits before performing; set out specified locations for street performances and established a first-come, first-served rule for using the locations; allowed only passive solicitation of funds by street performers; and prohibited any communication, by street performers or anyone else, within thirty feet of visitors to the Seattle Center who are waiting in line, attending an event, or sitting in a spot available for eating or drinking. Following the rules' publication, 'Magic Mike' Berger, a balloon artist and frequent Seattle Center performer, filed a lawsuit challenging the new regulations just outlined on the grounds that they violate his First Amendment rights. The district court agreed with Berger and so invalidated all five of the challenged rules. The City now asks us to reverse, asserting that all the regulations impose valid 'time, place, or manner' restrictions on the actions of street performers and other park-goers.

For the reasons discussed below, we decline to do so. The government bears the burden of justifying the regulation of expressive activity in a public forum such as the Seattle Center. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The City of Seattle has failed to meet this burden with respect to any of the rules challenged by Berger. We therefore affirm the district court's grant of summary judgment to Berger, except that we remand for further factual development concerning the validity of the locational regulation."

Mission Bay Jet Sports, LLC v. Colombo, 08-56142 (June 24, 2009) "We must decide whether admiralty jurisdiction exists over tort claims by two women who were seriously injured when thrown off a jet-propelled Sea-Doo personal watercraft, allegedly operated negligently, on navi-

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gable waters in an area of San Diego's Mission Bay that is reserved for the use of such vessels. The district court thought not, but we believe both the location of the accident and its connection to traditional maritime activity sustain admiralty jurisdiction. Accordingly, we reverse and remand."

"Because it thought that admiralty jurisdiction was lacking, the district court understandably never reached the issue of whether a claim could proceed under the Shipowners Limitation of Liability Act. This inquiry may involve factual questions on which the record is undeveloped. For these reasons, we prefer not to decide issues arising under the Act ourselves. Instead, we leave them for the district court to consider in the first instance. Accordingly, having determined that the court's admiralty jurisdiction was properly invoked, we remand for further proceedings. REVERSED AND REMANDED."

Friedman v. Boucher, 05-15675 (June 23, 2009) "Las Vegas Metropolitan Police Detective Dolphus Boucher, with the approval of Clark County Deputy District Attorney Elissa Luzaich, forcefully extracted a DNA sample from Kenneth Friedman. The officer did not have a warrant or a court order authorizing the taking of the sample, nor was Friedman under any suspicion of a crime for which a DNA sample might be justified. The extraction occurred simply because the deputy district attorney wanted to put Friedman's DNA sample in a cold case data bank. Friedman alleges that the forcible extraction occurred after he was shackled and chained to a metal bar.

Friedman brought suit against Boucher and Luzaich ('Defendants') under 42 U.S.C. § 1983 on the ground that they violated his Fourth Amendment rights by taking the sample. The district court held that Boucher and Luzaich are entitled to qualified immunity and granted Defendants' motion to dismiss. Because the forcible taking of the DNA sample under these circumstances violated Friedman's clearly established Fourth Amendment rights, we reverse."

"Shackling a detainee, chaining him to a bench, and forcibly opening his jaw to extract a DNA sample without a warrant, court order, reasonable suspicion, or concern about facility security is a violation of the detainee's clearly established rights under the Fourth Amendment. Because the forcible taking of the DNA sample violated Friedman's clearly established constitutional rights, neither Boucher nor Luzaich is entitled to qualified immunity. We need not, and do not, reach any other issue urged by the parties on appeal. REVERSED AND REMANDED."

Kessee v. Mendoza-Powers, 07-56153 (June 23, 2009) "What is the scope of the 'prior conviction' exception to the general rule that a sentencing judge may not make factual findings that increase the statutory maximum criminal penalty? The Supreme Court has not yet answered that question. Accordingly, the answer depends on what level of scrutiny we apply to the sentencing decision. When we review de novo, we make an independent determination of the scope of the prior conviction exception, using our normal interpretative methods. When our review is constrained by the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA'), though, we cannot grant habeas relief unless the state court's decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.' 28 U.S.C. § 2254(d)(1). Thus, under AEDPA, even if this court has reached a particular conclusion about the scope of the prior conviction exception, our view may not be the only reasonable one; if the state court's in-

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terpretation is also reasonable, we must deny habeas relief."

"Because the Supreme Court has not given explicit direction and because the state court's interpretation is consistent with many other courts' interpretations, we cannot hold that the state court's interpretation was contrary to, or involved an unreasonable application of, Supreme Court precedent. REVERSED and REMANDED with instructions to deny the writ of habeas corpus."

Lahr v. National Transportation Safety Board, 06-56717 (June 22, 2009) "Trans World Airlines Flight 800 ('TWA Flight 800') exploded in midair off the coast of Long Island on July 17, 1996, killing all 230 people aboard. The cause of this dramatic and tragic event remains, for some, in dispute, and that dispute underlies this lawsuit brought under the Freedom of Information Act ('FOIA'), 5 U.S.C. § 552.

The government, after an extensive investigation, concluded that the accident was caused by an explosion in one of the aircraft's fuel tanks, initiated by an electrical short circuit. Ray Lahr is, to put it mildly, not convinced. He maintains that the government has engaged in a massive cover-up of the real cause, which he suspects is most likely a strike by a missile launched offshore by the U.S. Navy. In an attempt to prove his theory, Lahr initiated more than two hundred FOIA requests for documents and data to federal agencies involved in the investigation. When the agencies gave him only some of the information he asked for, Lahr filed this lawsuit. On summary judgment, the district court ordered the government to release some documents in compliance with his requests but authorized it to withhold others, as exempt from disclosure pursuant to several of FOIA's enumerated exemptions. Lahr appeals several of the district court's rulings authorizing nondisclosure; the government appeals only one of the district court's rulings adverse to it. We affirm in part, reverse in part, and remand. AFFIRMED in part, REVERSED in part, and REMANDED."

Schroeder v. United States, 07-36073 (June 22, 2009) "Plaintiff-Appellant Alberta Schroeder appeals a grant of summary judgment for the United States in her suit seeking to quiet title in an apartment complex she owns and operates. Under the National Housing Act loan program into which she entered in 1984, Schroeder was required to use her property exclusively as low-income housing until she fully repaid her loans. Schroeder argues that, although the loans have not yet come due, the government must now accept payment in full on her loans, thereby allowing her to terminate her participation in the National Housing Act program. The district court ruled that the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA) forecloses Schroeder's arguments and declined to grant equitable relief. We affirm the decision of the district court. AFFIRMED."

Satterfield v. Simon & Schuster, Inc., 07-16356 (June 19, 2009) "Laci Satterfield, individually and on behalf of those similarly situated, appeals the district court's grant of summary judgment in favor of Simon & Schuster, Inc. and ipsh!net Inc. ('ipsh!').1 Satterfield alleges a violation of the Telephone Consumer Protection Act ('TCPA'), 47 U.S.C. § 227, arising after Satterfield received an unsolicited text message. We hold that there is a genuine issue of material fact concerning whether the equipment used by Simon & Schuster has the capacity to both (1) store or produce numbers to be called using a random or sequential number generator and (2) to dial such numbers. Giving deference to the Federal Com-

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munications Commission ('FCC'), see Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984), we hold that it is reasonable to interpret 'call' under the TCPA to include both voice calls and text messages. We also conclude that Simon & Schuster is not an affiliate or brand of Nextones and therefore Satterfield did not expressly consent to receive this text message from Simon & Schuster. Accordingly, we reverse the district court and remand."

"Summary judgment was inappropriate, because there is a genuine issue of material fact concerning whether the equipment utilized by Simon & Schuster has the requisite capacity under the TCPA. The FCC has reasonably interpreted 'call' under the TCPA to encompass both voice calls and text calls. This interpretation is reasonable and is therefore entitled to deference. *See Chevron, 467 U.S. at 843-44*. Satterfield did not consent to receive the text message. We therefore reverse and remand. REVERSED and REMANDED."

Warren v. Wirum, 07-17226 (June 18, 2009) "This appeal requires us to interpret the interplay between two subsections of the Bankruptcy Code, 11 U.S.C. § 521(a)(1) and (i)(1). Under § 521(a)(1), a debtor is required to file a list of creditors and, 'unless the court orders otherwise,' certain financial information. 11 U.S.C. § 521(a)(1). Under § 521(i)(1), if the debtor fails to file the financial information required by § 521(a)(1) within forty-five days of filing the bankruptcy petition, the case 'shall be automatically dismissed effective on the' forty-sixth day. 11 U.S.C.§ 521(i)(1).

The issue before us is whether the bankruptcy court has discretion to 'order[ ] otherwise' and thereby waive the § 521(a)(1) filing requirement by entering an order after the forty-five day filing deadline in § 521(i)(1) has passed. The bankruptcy court found it did have such discretion and therefore entered an order waiving the § 521(a)(1) filing requirement after the forty-five day filing deadline had passed. The district court reversed, finding dismissal of the case was mandatory under § 521(i)(1).

We have jurisdiction over this appeal under 28 U.S.C. §§ 158(d) and 1291. We hold that the bankruptcy court acted within its discretion in entering the order waiving the § 521(a)(1) filing requirement even though the forty-five day filing deadline set forth in § 521(i)(1) had passed. We therefore reverse and remand to the district court with instructions to remand the case to the bankruptcy court for further proceedings. REVERSED AND REMANDED."

Sea Hawk Seafoods v. Gutierrez, 07-35754 (June 17, 2009) "Sea Hawk Seafoods, Inc. ('Sea Hawk') and the Non-AFA Processors Association (collectively, 'Plaintiffs') appeal the 7224 SEA HAWK SEAFOODS v. LOCKE district court's dismissal of their claims against the United States Secretary of Commerce ('Secretary'), United States Department of Commerce ('Commerce Department'), National Oceanic and Atmospheric Administration ('NOAA'), and National Marine Fisheries Service ('NMFS'). We consider whether the Magnuson-Stevens Fishery Conservation and Management Act's ('MSA') thirty-day statute of limitations, 16 U.S.C. § 1855(f), or the Administrative Procedures Act's ('APA') general six-year limitations period applies to Plaintiffs' challenge to regulations promulgated to implement amendments to fishery management plans. These amendments were prompted by passage of the American Fisheries Act ('AFA').1 We also consider whether Plaintiffs have adequately al-

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leged a 'failure to act' claim under the APA against NMFS and the North Pacific Council, which is not a party here, related to the promulgation of the challenged regulations. We conclude that the MSA's thirty day limitations period applies to bar Plaintiffs' direct challenge to the regulations and that Plaintiffs' failure to act claim is an impermissible attempt to recast its direct challenge to the regulations so as to avoid the MSA's shortened limitations period. Accordingly, we affirm the district court's dismissal of Plaintiffs' claims. AFFIRMED."

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Ricci . v. Destefano, No. 07–1428 (June 29, 2009) New Haven, Conn., uses objective examinations to identify those firefighters best qualified for promotion. When the results of such an exam to fill vacant lieutenant and captain positions showed that white candidates had outperformed minority candidates, a rancorous public debate ensued. Confronted with arguments both for and against certifying the test results—and threats of a lawsuit either way—the City threw out the results based on the statistical racial disparity. Petitioners, white and Hispanic firefighters who passed the exams but were denied a chance at promotions by the City's refusal to certify the test results, sued the City and respondent officials, alleging that discarding the test results discriminated against them based on their race in violation of, *inter alia,* Title VII of the Civil Rights Act of 1964. The defendants responded that had they certified the test results, they could have faced Title VII liability for adopting a practice having a disparate impact on minority firefighters. The District Court granted summary judgment for the defendants, and the Second Circuit affirmed.

Held: The City's action in discarding the tests violated Title VII. Pp. 16–34.

(a) Title VII prohibits intentional acts of employment discrimination based on race, color, religion, sex, and national origin, 42 U. S. C. §2000e–2(a)(1) (disparate treatment), as well as policies or practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities, §2000e–2(k)(1)(A)(i) (disparate impact). Once a plaintiff has established a prima facie case of disparate impact, the employer may defend by demonstrating that its policy or practice is "job related for the position in question and consistent with business necessity." If the employer meets that burden, the plaintiff may still succeed by showing that the employer refuses to adopt an available alternative practice that has less disparate impact and serves the employer's legitimate needs.

(b) Under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action. The Court's analysis begins with the premise that the City's actions would violate Title VII's disparate-treatment prohibition absent some valid defense. All the evidence demonstrates that the City rejected the test results because the higher scoring candidates were white. Without some other justification, this express, race-based decisionmaking is prohibited. The question, therefore, is whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination. The Court has considered cases similar to the present litigation, but in the context of the Fourteenth Amendment's Equal Protection Clause. Such cases can provide helpful guidance in this statutory context. See *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 993. In those cases, the Court held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a "strong basis in evidence" that the remedial actions were necessary. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 500; see also *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 277. In announcing the strong-basis-in-evidence standard, the *Wygant* plurality recognized the tension be-

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tween eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other. 476 U. S., at 277. It reasoned that "[e]videntiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees." *Ibid.* The same interests are at work in the interplay between TitleVII's disparate-treatment and disparate-impact provisions. Applying the strong-basis-in-evidence standard to Title VII gives effect to both provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. It also allows the disparate-impact prohibition to work in a manner that is consistent with other Title VII provisions, including the prohibition on adjusting employment-related test scores based on race, see §2000e– 2(*l*), and the section that expressly protects bona fide promotional exams, see §2000e–2(h). Thus, the Court adopts the strong-basis-in evidence standard as a matter of statutory construction in order to resolve any conflict between Title VII's disparate-treatment and disparate-impact provisions.

Melendez-Diaz v. Massachusetts, No. 07–591 (June 25, 2009) At petitioner's state-court drug trial, the prosecution introduced certificates of state laboratory analysts stating that material seized by police and connected to petitioner was cocaine of a certain quantity. As required by Massachusetts law, the certificates were sworn to before a notary public and were submitted as prima facie evidence of what they asserted. Petitioner objected, asserting that *Crawford* v. *Washington*, 541 U. S. 36, required the analysts to testify in person. The trial court disagreed, the certificates were admitted, and petitioner was convicted. The Massachusetts Appeals Court affirmed, rejecting petitioner's claim that the certificates' admission violated the Sixth Amendment.

Held: The admission of the certificates violated petitioner's Sixth Amendment right to confront the witnesses against him.

District Attorney's Office for the Third Judicial District et al. v. Osborne , No. 08–6 (June 18, 2009) Respondent Osborne was convicted of sexual assault and other crimes in state court. Years later, he filed this suit under 42 U. S. C. §1983, claiming he had a due process right to access the evidence used against him in order to subject it to DNA testing at his own expense. The Federal District Court first dismissed his claim under *Heck* v. *Humphrey*, 512 U. S. 477, holding that Osborne must proceed in habeas because he sought to set the stage for an attack on his conviction. The Ninth Circuit reversed, concluding that §1983 was the proper vehicle for Osborne's claims. On remand, the District Court granted Osborne summary judgment, concluding that he had a limited constitutional right to the new testing under the unique and specific facts presented, *i.e.,* that such testing had been unavailable attrial, that it could be accomplished at almost no cost to the State, andthat the results were likely to be material. The Ninth Circuit affirmed, relying on the prosecutorial duty to disclose exculpatory evidence under, *e.g., Brady* v. *Maryland*, 373 U. S. 83.

Held: Assuming Osborne's claims can be pursued using §1983, he has no constitutional right to obtain post conviction access to the State's evidence for DNA testing.

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Mere Speculation of Destruction of Relevant E-Mails Insufficient to Justify Sanctions

Phillips v. Potter, 2009 WL 1362049 (W.D.Pa. May 14, 2009). In this sexual discrimination case, the plaintiff filed a motion for sanctions based on the defendant's failure to preserve electronically stored information; the defendant admitted that a litigation hold was not put into place after litigation became foreseeable and that e-mails were destroyed by an automatic deletion system as a result. The defendant argued that sanctions were nevertheless inappropriate because the e-mails destroyed were not relevant. The court agreed with the defendant that there was no evidence of destruction of relevant documents and refused to order sanctions arising out of "mere speculation" that relevant documents were destroyed, noting also that there was no indication of any bad intent on the part of the defendant.

Court Issues Evidence Preclusion Sanction for Preservation Failure

Innis Arden Golf Club v. Pitney Bowes, Inc., 2009 WL 1416169 (D.Conn. May 21, 2009). In this environmental law litigation, the defendant sought sanctions alleging the plaintiff failed to preserve electronic data packages associated with soil sample testing. Noting the data at issue was indisputably destroyed, the court analyzed whether a preservation obligation existed and whether sanctions were warranted. The court found a duty to preserve arose by mid-2005 at the latest, when the plaintiff's documents evinced an understanding that the evidence would be critical to the upcoming litigation. Citing the plaintiff's own recognition of the importance of the evidence, the court rejected the plaintiff's argument that destruction should be excused since the defendant did not demonstrate an intent to rely on the evidence during litigation. Noting an adverse inference would be an insufficient remedy, the court found the appropriate sanction to be preclusion of the evidence.

Court Imposes Adverse Inference Citing Party's Failure to Preserve Relevant ESI

Plunk v. Village of Elwood, IL, 2009 WL 1444436 (N.D.Ill. May 20, 2009). In this civil rights action, both parties filed a "slew of pretrial motions." The defendants argued the court should bar the plaintiffs' expert from testifying unless discovery was re-opened. The plaintiffs requested an examination of the defendants' computer system by their expert to determine if any deleted ESI was backed up. The plaintiffs also sought default judgment sanctions based on the defendants' destruction of an audio recording, failure to preserve data on computers and hard drives, and failure to back up relevant ESI. Addressing the defendants' motion, the court found the defendants' discovery failures and withdrawn expert statement that certain hard drives were not wiped clean necessitated testimony from the plaintiffs' expert, and thus allowed a short deposition from the plaintiffs' expert at cost to the defendants as a "fair discovery sanction for defendants' failure to follow the rules." Turning to the plaintiffs' motions, the court denied the examination request as expensive and futile. Regarding sanctions, the court rejected the defendants' arguments that evidence erasure was inadvertent and found the defendants breached their preservation obligations. The court determined an adverse inference sanction was appropriate, using the plaintiffs' expert's identification of e-mail chains suggesting relevant documents were destroyed accidentally or inten-

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tionally as partial justification.

LA Supreme Court Finds Court of Appeal Erred in Vacating Preliminary Injunction Regarding Dissemination of Privileged E-Mails

Council of the City of New Orleans v. Washington, 2009 WL 1492869 (La. May 29, 2009). In this litigation, the Supreme Court of Louisiana held that the Court of Appeal erred when it vacated the preliminary injunction issued by the District Court since it considered a constitutional issue that was not raised on appeal. Previously in Council of the City of New Orleans v. Washington, 2009 WL 1300747 (La. App.4 Cir. May 12, 2009), the Court of Appeal considered the defendant's appeal of the preliminary injunction preventing the defendant from disseminating e-mails. The plaintiff argued the e-mails were not sanitized for privilege, that ethical rules require return of the documents, and that the temporary nature of the injunction did not violate the defendant's First Amendment rights. Finding the injunction violated the defendant's constitutional rights since the records had already been released pursuant to a written public records request, the Court of Appeal vacated the injunction. The court recognized that ethical and procedural violations would likely be asserted against the defendant if the inadvertently privileged documents – by definition not public records – were disseminated but found the constitutional issues overrode any ethical concerns.

Court Grants Adverse Inference Sanction Finding Intentional or Reckless Destruction of Computers and Thumb Drive

Triton Constr. Co. v. Eastern Shore Elec. Servs., Inc., 2009 WL 1387115 (Del.Ch. May 18, 2009). In this breach of fiduciary duty litigation, the plaintiff sought an adverse inference instruction claiming the defendant intentionally destroyed ESI on his work computer and did not produce his personal laptop or thumb drive. The plaintiff retained a computer forensic expert who found a wiping program installed on the computer that made certain files and deleted e-mails irretrievable. The defendant argued he never used wiping software and no longer owned the home computer or thumb drive. Finding the defendant intentionally, or at least recklessly, destroyed relevant evidence on his work computer and intentionally failed to preserve evidence on the other media forms, the court imposed an adverse inference sanction.

Practice Points: Near De-Duplication & E-Mail Threading – Overcome Redundant Data Woes and Gain a Better Understanding of Your Case

Redundant data is everywhere and can be a major problem in electronic discovery, as reviewing substantially similar documents often requires extensive time and money. However, emerging technologies such as content-centric near de-duplication and e-mail threading are available to more efficiently organize, analyze and economize an otherwise unstructured redundant data set.

The Problem of Redundant Data

Redundant data is a natural by-product of creating documents and communicating electronically. Consider a business contract that is drafted and distributed to ten people for review via e-mail. There are now ten identical documents and ten duplicate e-mails on ten computer systems. Assuming the recipients amend the contract

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slightly and e-mail it back to the sender, the number of near-duplicate contracts and e-mails has grown dramatically. After several communications back and forth, the number of related e-mails and near duplicate documents (i.e., redundant data) has expanded exponentially.

The problem of redundant data painfully manifests itself in the context of e-discovery. Conceptualize a simple document review where five attorneys are each given an unstructured set of responsive documents containing a dozen versions of the contract and ten random e-mails pertaining to it. Not only will the unstructured review of this redundant data be exorbitantly expensive as each document will need to be reviewed, but the legal team will lack a comprehensive understanding of the data as none of the reviewers have seen every relevant e-mail or contract version necessary to gain a complete picture of the events surrounding the contract creation. Thankfully, cutting-edge near de-duplication and e-mail threading technologies have emerged that provide a powerful solution to the problem of redundant data.

Near De-Duplication Solution

Near de-duplication tools use conceptual search (a technology that retrieves documents conceptually related to the search term rather than only documents with exact keyword matches to the query) to intelligently identify near duplicates. Near duplicates are documents which differ only slightly from each other, such as the contract in the above scenario. Documents that differ by a few words or paragraphs, by formatting, or by document type can all be identified by near de-duplication tools; these documents would all fall outside the reach of standard de-duplication tool.

Advanced near de-duplication software will identify a core document that is most representative of the near-duplicate document set, allowing one reviewer to quickly determine whether review of the entire set is necessary. If review of the entire set is necessary, one reviewer can efficiently review the entire set by focusing solely on the differences that are highlighted in the document without needing to read through the entire document. Importantly, these differences might have been missed due to the "glazed eye" syndrome if attorneys had to review each document in its entirety.

E-Mail Threading Solution

E-mail threading allows document review teams to view all related e-mail, sent and received, in a single conversation thread. Advanced e-mail threading tools identify e-mail threads based on the documents' content, again utilizing conceptual search rather than relying on the e-mail subject line. The tools determine the end-point e-mail for each thread, allowing users to review a single e-mail conversation inclusively contained in the end point e-mails and reducing the volume of e-mail that need be reviewed. These tools are invaluable in understanding complex conversations with multiple branches and end points. In the contract creation scenario discussed above, a single attorney could review all related e-mail chains and gain a better understanding of the case as it pertains to the contract and surrounding communication.

Conclusion

Near de-duplication and e-mail threading capabilities empower legal teams to overcome the problem of redundant data. These smart technologies enhance the accuracy and consistency of re-

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view decisions by facilitating the consistent treatment of similar documents that are logically and comprehensively organized into near duplicate document sets and e-mail threads. Moreover, the structured review of similar documents and e-mail threads enable legal teams to gain a greater understanding of the data – and thus the facts and legal arguments involved in a case. These tools also dramatically increase efficiency by decreasing the total number of documents that must be reviewed, resulting in significant cost savings. In the final analysis, a legal team facing redundant data can overcome the associated woes by turning to the aid of these powerful new technologies.

Does lawyer who bares sole have an ace in the hole?

By Frank Cerabino
Saturday, June 27, 2009

The holes in the soles of a lawyer's shoes have become a legal issue during a civil trial in the Palm Beach County Courthouse.

Defense lawyer Michael Robb has been showing up in Circuit Judge Donald Hafele's courtroom with a pair of black tasseled Cole Haan loafers that have visible holes in both soles.

"I've had pretty good luck with these shoes," Robb said. "They're comfortable and I wear them."

But they bothered the opposing lawyer, Bill Bone, who characterized the shoes in a court motion as part of Robb's trial strategy.

"Part of this strategy is to present Mr. Robb and his client as modest individuals who are so frugal that Mr. Robb has to wear shoes with holes in the soles," Bone wrote. "Mr. Robb is known to stand at sidebar with one foot crossed casually beside the other so that the holes in his shoes are readily apparent to the jury who are intently watching all counsel and the Court at that moment."

Rejoinder: Claim has no traction

Robb scoffed at the claim over his 12-year-old loafers.

"I don't walk around displaying the soles of my feet," he said. "I've been practicing law for 21 years, and Mr. Bone thinks he's finally cracked the key to my success? Gotta be the shoes. Like Michael Jordan."

Robb said the holes in his shoes aren't for display, and they don't bother him.
"They're just nicely proportioned holes in the middle of each shoe," he said. "They're my trial shoes."

It's not the first time an opposing lawyer has gone after the Coral Springs lawyer's footwear during trial.

In a case this year, his courtroom opponent offered to buy him a new custom-made pair if he stopped wearing his worn-out loafers.

Robb declined.

Objection, and gift offer, overruled

Bone, though, is the first opponent who asked for judicial intervention.

In his motion, he calls Robb's shoes "a ruse to impress the jury and make them believe that Mr. Robb is humble and simple without sophistication."

Bone filed the motion this month to keep Robb from showing up in court with the shoes during the ongoing personal injury trial.

Bone, the lawyer for the plaintiff, wrote that Robb's shoe tactics are "well known" among other lawyers.

"Then, during argument and throughout the case, Mr. Robb throws out statements like 'I'm just a simple lawyer' with the obvious suggestion that Plaintiff's counsel and the Plaintiff are not as sincere and down to earth as Mr. Robb," Bone wrote.

"Mr. Robb should be required to wear shoes with-

Does lawyer who bares sole have an ace in the hole?

out holes in the soles at trial to avoid the unfair prejudice suggested by this conduct."

Hafele didn't agree.

The judge denied Bone's motion, and Robb declined Bone's offer to supply him with a free new pair of shoes.

"They were close to being retired," Robb said of his old shoes, "but they're back in play. You ride that horse until it completely collapses."

Michael Jackson, 1958-2009