SEVENTH CIRCUIT: TITLE VII TRUMPS PATIENT AND CUSTOMER RACIAL PREFERENCES

A recent Seventh Circuit Court of Appeals ruling makes clear that an employer's obligation under Title VII of the Civil Rights Act of 1964 to provide employees with a discrimination-free workplace takes precedence over patient or customer preferences regarding the race of employees from whom they receive services. The court held, in Chaney v. Plainfield Health Center, that by accommodating a patient's demand for white-only health-care providers, a nursing home maintained a racially hostile work environment in violation of Title VII. (The court also determined that issues of fact existed as to whether the defendant nursing home's discharge of the plaintiff, a black nursing assistant, was motivated by race).

In Chaney, the defendant nursing home had a policy of honoring the racial preferences of its residents when assigning them health-care providers in order to avoid violating federal and state laws the nursing home viewed as requiring it to grant residents certain related rights to privacy, bodily autonomy and choice of providers. The court noted that, while allowing patients to choose the gender of their health care providers is permissible under Title VII, the patient-privacy grounds justifying employee assignment based on gender-based preferences are inapplicable to race-based preferences. The court further dismissed arguments that state or federal health laws otherwise permitted a policy of permitting patients to choose providers on racial bases, reasoning that laws requiring access to chosen providers did not necessitate race-based work practices and any state law otherwise conflicting with Title VII would be preempted.

The court also rejected the defendant's contention that, as a practical matter, its race-based policy protected black employees from racial harassment from the residents, referencing several alternative means to accomplish such objectives. Calling the defendant's willingness to accede to a patient's racial preferences "the principal source of the racial hostility in the workplace" where the plaintiff allegedly experienced three specific incidents of racial harassment from co-workers, the court reasoned that barring such a policy was consistent with judicial precedence, which "now widely accept[s] that a company's desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race." The court concluded that the defendant nursing home's status as a medical provider and permanent home to its residents did not exempt it from Title VII's prohibitions of such race-based employment policies.

A full copy of the decision can be found here.

TEXAS BILLIONAIRE'S DEATH TRIGGERS RENEWED ESTATE TAX DEBATE

For the first time in nearly 100 years, extremely wealthy individuals who pass away this year will leave enormous estates to friends and family tax-free. Since 1916, the estates of America's wealthiest individuals have been subject to a federal estate tax. Over the years the minimum value has fluctuated, but the tax has remained in effect. In 2009, for example, the tax applied to the portion of individual estates valued over $3.5 million, or the portion of a couple's estate valued over $7 million. However, because of a law passed by Congress in 2001, the estate tax has been entirely repealed for the year 2010.

In March of this year the first American since 1916 was able to pass a multi-billion dollar estate to his children and grandchildren without paying an estate tax. Dan L. Duncan, a Texas pipeline tycoon ranked 74th wealthiest individual in the world, passed away from a brain hemorrhage in late March, leaving billions of dollars in assets behind. Had Duncan passed away in 2009, his $9 billion estate would have been subject to at least a 45% federal estate tax.

Supporters of the estate tax argue that it is unconscionable to allow the wealthiest Americans a tax break at a time when income gaps between the wealthy and poor are so large and deficits so high. Opponents of the estate tax, however, argue that taxing an individual when income is earned and then again at death is unfair and it forces the liquidation of family owned businesses and farms. Read the full New York Times article for a more detailed look at the Duncan estate and the implications of the estate tax repeal.

This window of opportunity for tax savings may be short lived as the current law has the estate tax returning in 2011 with an exemption of only $1 million for individuals and a top marginal rate of 55%.

ATTORNEYS RANDY NASH AND JASON SCOBY PUBLISH ARTICLE IN ABA'S HEALTH LAW LITIGATION NEWSLETTER

Randy Nash and Jason Scoby recently published an article in the Spring/Summer 2010 edition of the American Bar Association's *Health Law Litigation newsletter* entitled "New Rules Dramatically Affect Health Care Expert Witness Disclosures."

The article discusses the existing Federal Rules of Civil Procedure and a proposed change to Rule 26 involving the disclosure of expert witness draft reports and communications between the attorney and an expert witness in a case. This proposed rule change has the potential to impact expert witness disclosures before the federal courts. It is expected to go into effect on December 1, 2010.

Under the current rule, an expert witness's entire file with regard to the matter in litigation, including any drafts of the expert's report and any communications with the attorney, is discoverable by the opponent in the lawsuit.

The Committee on Rules of Practice and Procedure has recommended that the current rule be amended, stating that the rule has caused "significant practical problems." The Committee described the problem as follows:

> Lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications. The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts—one for consultation, to do the work and develop the opinions, and one to provide the testimony—to avoid creating a discoverable record of the collaborative interaction with the experts. The practices also include tortuous steps to avoid having an expert take any notes, make any record of preliminary analyses or opinions, or produce any draft report. Instead, the only record is a single, final report.

Recognizing these issues, many have sought to change the discovery rules. The proposed amendment to Rule 26 attempts to avoid disclosure of experts' draft reports and attorney/expert communications. The goal is to permit the attorney to communicate freely with the expert about the attorney's thoughts and opinions relating to the case without fear of those communications being discovered by opposing counsel. The Rule also aims to avoid the unnecessary costs caused by hiring multiple experts and to prevent attorneys from taking other intricate maneuvers to evade the discovery of communications or drafts of expert opinions.

The Supreme Court recently approved these amendments to Rule 26 of the Federal Rules of Civil Procedure. It is expected that Congress will approve the amended Rule, and if it does, the amended Rule 26 will go into effect on December 1, 2010. A full copy of "New Rules Dramatically Affect Health Care Expert Witness Disclosures" can be found here.

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING ELECT JOSEPH GUMINA AS SHAREHOLDER

O'Neil Cannon is pleased to announce that Attorney Joseph E. Gumina has recently been elected as a shareholder of the firm. Joe will continue his labor and employment practice representing management in the states of Illinois and Wisconsin, and will represent clients in litigation matters in both state and federal courts, including the federal district courts in Illinois, Indiana, and Wisconsin.

O'Neil Cannon, founded in Milwaukee in 1973, is a full-service legal practice that primarily focuses on providing business law and civil litigation services to closely-held businesses and their owners. The firm represents corporations, institutions and partnerships at all stages of the business life cycle, helping them start, grow and transition from one generation to the next. We also assist business owners with their personal legal needs including tax and estate planning, family law and litigation – including personal injury litigation.

ATTORNEY MAGER ELECTED TO THE STATE BAR OF WISCONSIN FAMILY LAW SECTION'S BOARD OF DIRECTORS

Attorney Gregory S. Mager has been selected to serve on the State Bar of Wisconsin Family Law Section's Board of Directors from July 2010 to July 2013.

Attorney Mager is a shareholder with O'Neil Cannon, where he concentrates his practice on family law. He has served as Editor in Chief of the Wisconsin Journal of Family Law, and as chair and vice-chair of various committees of the American Bar Association's Family Law Section. He is a member of the Collaborative Family Law Council of Wisconsin, Inc. and the Divorce Cooperation Institute. Attorney Mager received his B.A., M.A., and J.D. from Marquette University.

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planning, family law and litigation – including personal injury litigation.

ATTORNEY LAING IN THE NEWS

The below article, discussing a decision of the Wisconsin Court of Appeals in a case being handled by Attorney Dean Laing of our firm, was published in the June 28, 2010 edition of the *Milwaukee Journal Sentinel*. Our client, Lake Beulah Management District, was successful in the appeal.

FIRM OBTAINS FAVORABLE DECISION FROM WISCONSIN COURT OF APPEALS

On June 16, 2010 the Wisconsin Court of Appeals issued a significant decision in a case of first impression being handled by our firm. The case has a long history. In 2005, the Wisconsin Department of Natural Resources (the "DNR") issued a permit to the Village of East Troy (the "Village") authorizing the Village to construct and operate a high capacity well approximately 1,400 feet from the shores of Lake Beulah, an 834-acre lake located in Walworth County, Wisconsin, with the capacity to withdraw 1,400,000 gallons of groundwater per day ("gpd"). The Village requested approval to construct and operate the well purportedly to eliminate current deficiencies and supplement for future growth.

The Lake Beulah Management District (the "District"), which consists mostly of residents owning frontage on the lake, objected to the issuance of the permit, contending that the proposed well would negatively impact the waters of the lake. The District contended that the DNR has a duty under the Public Trust Doctrine to determine whether a high capacity well, regardless of capacity, will negatively impact the waters of the State before issuing a permit to construct and operate such a well, and the DNR made no such determination in connection with the Village's permit application. The Public Trust Doctrine is a long-standing legal doctrine which requires the State to steadfastly preserve the State's waters for fishing, hunting, recreation and scenic beauty.

In 2006 the District filed a lawsuit in the circuit court challenging the issuance of the permit. In the lawsuit, the Village argued that the DNR has no authority to consider whether a high

capacity well, with withdrawal capacity of less than 2 million gpd, will negatively impact the waters of the State in considering an application for such a well, because sections 281.34 and 281.35, Wis. Stats., only grant the DNR that authority for wells with withdrawal capacities of more than 2 million gpd. The DNR took a contrary position, arguing that while it has the authority to consider that issue for wells with withdrawal capacities of less than 2 million gpd, it had no duty to do so with respect to the Village's permit application because no scientific evidence was presented to it indicating that the proposed well would negatively impact the waters of Lake Beulah. The District countered by arguing that not only did the DNR have the authority to consider whether the proposed well will negatively impact the waters of Lake Beulah, it had the duty to do so because the DNR had an affidavit of a licensed geologist, prior to issuing the permit, indicating that the well "would cause adverse environmental impacts to the wetland and navigable surface waters of Lake Beulah."

The Wisconsin Court of Appeals agreed with the District. Initially, the court rejected the Village's argument that the DNR has no authority to consider whether high capacity wells with withdrawal capacities of less than 2 million gpd will negatively impact the waters of the State before issuing a permit for construction and operation of such a well, holding that "[t]he permit process has to be, as a matter of common sense, more than a mechanical, rubber-stamp transaction," and "[t]he DNR's mission must be to protect waters of the state from potential threats caused by unsustainable levels of groundwater being withdrawn by a well, ***whatever type of well that may be."*** (emphasis added)

The Court of Appeals further held that the geologist's affidavit was "certainly" sufficient to warrant "further, independent investigation," and remanded the case to the DNR to reconsider the Village's permit application in light of that affidavit.

The Court of Appeals' 25-page decision, issued by a unanimous 3-judge panel, will have far reaching impact on municipalities requesting high capacity well permits from the DNR, as the DNR must now consider the Public Trust Doctrine in connection with every application for such a permit, regardless of the well's capacity, whenever there is information suggesting that the proposed well may negatively impact the waters of the State.

The District was represented by Dean P. Laing of our firm in this case. A copy of the Court of Appeals' decision can be found here.

FIRM SUCCESSFULLY DEFENDS CLASS ACTION

LAWSUIT

Effective July 1, 2005, the Wisconsin law requires all mortgage brokers to use mortgage broker agreements and consumer disclosure statements in a form prescribed by the Wisconsin Department of Financial Institutions ("WDFI") with their consumer clients. See Wis. Stat. § 224.79. The WDFI has stated that "no change to the wording of either form is acceptable or approved." McGlone Mortgage Company, Inc. ("McGlone"), a Wisconsin licensed mortgage broker, did not begin using the WDFI prescribed forms until July 2008.

On February 20, 2009 John J. Avudria filed a class action lawsuit against McGlone on behalf of all persons who retained McGlone from July 2005 to July 2008, alleging that McGlone's failure to use the WDFI prescribed forms during that period of time entitled them to damages of twice the amount of the loan origination fees charged by McGlone or their actual damages, whichever is greater, pursuant to section 224.80(2), Wis. Stats. John J. Avudria v. McGlone Mortgage Company, Inc., Milwaukee County (WI) Case No. 09-CV-2782.

Dean P. Laing of our firm represented McGlone in its defense of this class action lawsuit. On February 3, 2010 Mr. Laing filed a motion for summary judgment on behalf of McGlone, seeking dismissal of the lawsuit on various legal grounds.

On June 17, 2010 the trial court, the Honorable William W. Brash III, presiding, granted McGlone's motion for summary judgment and dismissed the class action lawsuit, in its entirety, on the following legal grounds: (1) the statutes require a person to be "aggrieved" by a mortgage broker's failure to use the State prescribed forms in order to state a claim upon which relief can be granted, meaning that the person must have suffered actual damages as a result thereof, which the plaintiff admitted in his deposition he did not, and (2) the statutes were not designed to allow claims against mortgage brokers which "inadvertently" fail to use the State prescribed forms, as the statutory scheme is aimed at egregious, not innocent, conduct.

SEVENTH CIRCUIT CONFIRMS APPROPRIATENESS OF CLASS ACTION TREATMENT OF CONSUMER FRAUD CASES

In *Pella Corporation v. Saltzman,* No. 09-8025, 2010 WL 1994653 (7th Cir. May 20, 2010), plaintiffs alleged that the Pella aluminum-clad wood "ProLine" casement window contained a design defect that permitted the entry of water which accelerated the rotting of the wood.

Pella has sold over six million of the windows over the last 18 years. Plaintiff's further alleged that Pella attempted to modify its warranty through a service program designed to compensate customers and committed consumer fraud by concealing the inherent product defect. *Id.* at *1. The district court certified two classes of consumers: (1) a nationwide class under FRCP 23(b)(2) consisting of those class members whose ProLine windows manufactured from 1991 to the present have not yet manifested the alleged defect or whose windows have some wood rot but have not yet been replaced; and (2) a six statewide liability class under FRCP 23(b)(3) consisting of class members whose windows have had a manifest defect and have already been replaced, on the theory that Pella violated state consumer fraud laws in these states by failing to disclose the defect. *Id.* at *1-2.

Pella sought interlocutory review of the class certifications under FRCP 23(f), contending that consumer fraud cases are not amenable to class treatment as a general matter, due to various problems associated with causation, reliance, and the calculation of damages. *Id.* The Court of Appeals granted the petition and affirmed the district court's certification of the two consumer classes. The appellate court specifically addressed Pella's contention that prior decisions in the circuit supported the argument that consumer fraud cases are not appropriate for class treatment as a general matter and rejected the application of such a hard and fast rule. Instead, the court reasserted the proposition that class certification is "a sensible and legally permissible alternative to remitting all the buyers to individual suits each of which would cost orders of magnitude more to litigate than the claims would be worth to the plaintiffs." *Id.* at *2 (citing *Thorogood v. Sears, Roebuck and* Co., 547 F.3d 742, 748 (7th Cir. 2008) (reversing grant of certification where no common issues of law existed). The Seventh Circuit found that the district court in Pella had properly determined that "the common predominant issue of whether the windows suffer from a single, inherent design defect leading to wood rot is the essence of the dispute and is better resolved by class treatment." *Id.*

The court further noted that although class treatment of consumer fraud cases can present difficulties that must be addressed by the district court before deciding to grant class certification, that fact alone does not preclude the certification of a class or prevent class treatment of a group of consumers that are able to satisfy the procedural requirements of FRCP 23. *Id.* at *3. In rejecting the argument advanced by Pella, the Seventh Circuit confirmed that prior decisions of the court in *Thorogood, Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (class certification inappropriate where class representative's claims not typical of putative class) and *In re Bridgestone/Firestone, Inc.,* 288 F.3d 1012, 1018-19 (7th Cir. 2002) (class action unmanageable in tire-defect case given numerous different designs of allegedly defective tires) do not establish the proposition that class treatment of consumer fraud cases is inappropriate as a matter of general law in the circuit. *Id.* at *2. The fact that these actions may involve a more challenging review by the district court at the certification stage does not prevent the prosecution of these claims under the framework of FRCP 23. Rather, the appellate court made clear that in each particular action in which class

certification is sought, the district court will be required to undertake a thorough review of the procedural requirements of FRCP 23 and determine whether issues of commonality and predominance, among others, are satisfied and there is a sufficient economy to class treatment. Under the right circumstances, certification of a consumer fraud class will be appropriate. *Id.* at *5. A full copy of the Seventh Circuit opinion can be viewed here.

Attorney McBride is a shareholder in the Litigation Practice of the Firm and provides counsel to clients in matters related to the prosecution and defense of class actions in state and federal court.

ATTORNEY CAPREZ APPOINTED TO THIRD CONSECUTIVE TERM AS CO-CHAIR OF MBA'S HEALTH LAW SECTION

O'Neil Cannon Attorney Timothy Caprez has recently been re-appointed to serve as Co-Chair of the Health Law Section of the Milwaukee Bar Association ("MBA") for the upcoming 2010-2011 term. The upcoming term will be Attorney Caprez's third at the helm of the MBA's Health Law Section, which is focused on providing legal education resources and networking opportunities for health law attorneys and health care industry professionals.

During the course of Attorney Caprez's service as its Co-Chair, the Health Law Section has presented seminars regarding a wide range of issues, including:

- complex issues facing hospital in-house counsel;
- physician and facility lease arrangements;
- Stark and state law and regulations prohibiting self-referrals;
- medical staff credentialing and privileging;
- management of disruptive physicians;
- medical staff document analyses;
- Recovery Audit Contractors ("RACs");
- HIPAA and HITECH Act obligations on physician and facilities;
- impacts of the Patient Safety and Quality Improvement Act of 2005 and the related 2009 regulations;
- conflict and coordination of cultural and medicinal practices; and,
- reporting requirements and impact of physician apology related to medical errors.

Such issues are among the many types of matters in which the O'Neil Cannon health law practice provide counsel and representation to entities and individuals in nearly every sector of the health care industry, including provider health systems and networks, hospitals, clinics,

long-term care and skilled nursing facilities, physician practice groups, medical suppliers, third-party insurers and individual health care professionals.