STATE COURT
DocketWatch®

SUMMER 2009

ABA-NCSC Summit Addresses Challenges to Fairness, Impartiality of State Courts

by Joshua D. Davey

In May, delegations from thirty-seven states and territories participated in a national summit held in Charlotte, North Carolina, entitled *Justice is the Business of Government: The Critical Role of Fair and Impartial State Courts*. The summit, sponsored by the ABA's Commission on Fair and Impartial State Courts in corporation with the National Center for State Courts (NCSC), focused on state court operations in the wake of the ongoing economic crisis, which has forced states to slash funding, cut back on operations, and raise filing fees in an effort to plug ever-widening holes in their budgets.

The goal of the summit was to leverage the expertise of the participants in order to foster discussion on how the three branches of government can work together to address these problems. Describing these goals, North Carolina Supreme Court Justice Mark Martin said that "[o]ur hope is that the summit will serve as a catalyst for stakeholders in the 37 participating jurisdictions to engage in a continuing dialogue about their respective justice systems…. The objective of this ongoing dialogue is to foster better collaboration and coordination among the three branches of government concerning the delivery of services within state justice systems."[1]

A number of prominent judges and subject matter experts participated, including retired U.S. Supreme Court Justice Sandra Day O'Connor, members of the highest courts of North Carolina, Massachusetts, Utah, Arizona, Ohio, and Indiana, as well as former Georgia Governor Roy E. Barnes, members of North Carolina's General Assembly, representatives of the ABA and NCSC, and many others.

Justice O'Connor delivered the keynote address, emphasizing the critical role state courts play in the nation's legal system (state courts handle 98 percent of the nation's caseload). O'Connor identified several problem areas: disagreement over procedures for selecting judges, overcrowded dockets, sentencing policies and practices driven by overcrowded prisons, and discovery that is overly burdensome and expensive.[2]

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Proposals for Changing Judicial Selection in Wisconsin

After three years in a row of vigorously contested state supreme court races, numerous proposals have emerged to reform judicial selection in Wisconsin. Members of the legal, legislative, and policy communities have weighed the various options to improve the system by which Wisconsin selects its trial and appellate judges.

Since the state's founding in 1848, the people of Wisconsin have elected their judges. Although judges were originally elected on a partisan basis, the state constitution was amended in 1878 to require that judicial elections be held separately

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FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents State Court Docket Watch. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Additionally, readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Sarah Field, at sarah.field@fed-soc.org.

CASE IN FOCUS

California: Unfair Competition Law

by Jeremy B. Rosen

The consumer protection statutory scheme known as the Unfair Competition Law (UCL) has been in effect in various forms in California since the 1930s.[1] By its terms, it affords consumers remedies against unfair competition, which is broadly defined in the statute as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."[2] Particularly in the last twenty to thirty years, courts have read this vague statutory language in ever broader terms, so that many business practices can be prosecuted in court as "unlawful, unfair or fraudulent" acts in violation of the UCL.[3] The court's broad reading of the UCL has been restricted by the fact that remedies are somewhat limited. A consumer can get injunctive relief or restitutionary disgorgement to restore money or property taken by means of a UCL violation, but he cannot get compensatory or punitive damages.[4]

Despite the limited remedies that the statute allows, prior to the enactment of Proposition 64, plaintiffs frequently brought UCL actions in part because recovery was enhanced by a standing provision that allowed "any person" to sue on behalf of the general public as a self-appointed attorney general.[5] This provision made it possible for attorneys to file UCL suits even if they did not represent specific consumers who had been subjected to a company's unfair business practices.

California voters restricted the scope of the UCL by passing Proposition 64 in 2004. The proposition limited the UCL by eliminating the "any person" standing rule.[6] Thus, Proposition 64 brought UCL cases more closely in line with generally applicable standing requirements by providing that only a person who has suffered an injury in fact, having lost money or property, as a result of an unfair business practice has standing to sue under the UCL.[7] It further limited the scope of the UCL by requiring plaintiffs wishing to sue as representatives of a class of consumers to bring a class action suit rather than allowing them to pursue the "non-class" collective action alternatives that had been previously allowed.[8]

In May, the California Supreme Court addressed the question of whether all the unnamed plaintiffs in a class action suit are required to have standing according to Proposition 64 in *In re Tobacco II Cases*.[9] The plaintiffs alleged that the defendants had violated the UCL "by conducting a decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease."[10] They sought certification of a class of "[a]ll people who at the time they were residents of California, smoked in California one or more cigarettes between June 10, 1993 to April 23, 2001, and who were exposed to Defendants' marketing and advertising activities in California."[11] The Superior Court of San Diego County held that this class should be decertified because the plaintiffs could not prove that all members of the class had standing pursuant to Proposition 64.[12] The court of appeal affirmed.[13] The California Supreme Court then granted review.

In an opinion issued on May 18, 2009, four members of the California Supreme Court construed Proposition 64 to mean that consumers who could not themselves establish standing to bring a UCL action in their own

name under the new rule could nonetheless be included in a class of plaintiffs represented by a single named individual who can establish standing. In holding that Proposition 64's "standing requirements are applicable only to the class representatives, and not all absent class members,"[14] the court effectively read into Proposition 64 an intent to carve out UCL claims from the rule that class actions are procedural devices for case management, and are not intended to alter the substantive rights that the parties would have if the same claims were pursued individually.[15] Further, because Proposition 64 left the remedies provision of the UCL unchanged, the court held that unnamed plaintiffs may obtain a monetary award "'to restore to any person in interest any money or property, real or personal, which *may have been acquired*' by means of the unfair practice"[16] even if there is no evidence that they suffered an actual injury caused by the claimed acts of unfair competition.[17]

Finally, the court held that, in an action based on allegedly deceptive business practices, the named plaintiff (either in an individual action or as the named representative in a class action) must nominally show actual reliance on the claimed deception, but such reliance by the individual may be inferred from evidence that the defendant's misrepresentation was "material."[18] The court did not explain how this approach can be squared with the court's earlier flat rejection of such a "fraud on the market" theory of liability.[19] It will be interesting to see how lower courts interpret this part of the court's opinion in future cases.

Three justices disagreed with the majority's approach. Justice Baxter, in a concurring and dissenting opinion, called the court's holding that unnamed plaintiffs need not satisfy the injury-in-fact and causation requirements of Proposition 64 "mistaken" and noted the potentially perverse effect that the court's reasoning could have on cigarette companies' liability in UCL suits:

> [S]o long as the named plaintiffs actually relied on the allegedly deceptive advertising claims when buying and smoking cigarettes, they may seek injunctive and restitutionary relief on behalf of all California smokers who simply saw or heard such ads during the period at issue, regardless of whether false claims contained in those ads had anything to do with any class member's decision to buy and smoke cigarettes.[20]

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"Now" Is the Time: U.S. Supreme Court Rules on Rhode Island Indian Land Case

by David Strachman

The U.S. Supreme Court recently ended a decade-old skirmish in the 100-year legal battle between the State of Rhode Island and the Narragansett Indians by interpreting a three letter word. This dispute involved the rights of the native tribe, the limits of its unique sovereignty, and the role of the Bureau of Indian Affairs. As in President Clinton's infamous litigation over the meaning of "is," the interpretation of a single word would determine the outcome of the case.[1]

Despite a lengthy history and numerous procedural twists and turns, the case turned on little more than the interpretation of the word "now" as contained in the phrase "shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction" of the Indian Reorganization Act (IRA), 25 U.S.C. § 479, enacted by Congress in 1934 to determine the relationship between the Secretary of the Interior and numerous American Indian tribes.

Background

The case involved the fascinating and tragic backdrop of the tension between the Narragansett Indian Tribe and the Colony (and subsequently State) of Rhode Island. Unfortunately, the relationship between the largest Indian tribe and the smallest state has been largely defined by years of litigation. The case was the outgrowth of a decades-long attempt to reclaim 31 acres of land from the Department of the Interior. It was set against the equally acrimonious history of the Narragansett Tribe's long held ambition to obtain a gambling casino on its tribal lands, the perpetual opposition it faced from Rhode Island politicians, and its clashes with state troopers over the sale of untaxed cigarettes.

Procedural History

Justice Thomas began the decision with a recitation of the history of the Narragansett Tribe, beginning in the 17th century. As of 1880, the tribe had relinquished

all but "two acres of its remaining reservation land for $5,000."[2] Quickly regretting its decision, the tribe commenced what would be a 130-year struggle in the federal courts to regain title to its former holdings.

Into the 1970s, the tribe was still litigating its claim that Rhode Island had "misappropriated" the tribe's land in violation of the Indian Non-Intercourse Act, 25 U.S.C. § 177.[3] The litigation was finally resolved by the Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 *et seq.*, which codified an agreement between the state and the tribe whereby the tribe would receive an 1800-acre parcel in Charlestown, Rhode Island.[4]

Despite years of litigation, negotiations with the state, and the enactment of federal statutes to specifically address their claim, however, the Narragansetts had yet to be officially recognized as a tribe by the United States. In a move that would prove critical to the litigation, that recognition did not come until 1983, when the Bureau of Indian Affairs granted the tribe recognized status under federal law.[5]

In 1991, the Narragansett Tribal Housing Authority purchased 31 additional acres in Charlestown, Rhode Island, adjacent to its 1800-acre settlement parcel.[6] While the tribe skirmished with the State of Rhode Island over whether or not it was required to comply with local land use regulations, it attempted to "free itself from compliance with local regulations" by requesting that the Bureau of Indian Affairs hold its newly purchased 31 acres in trust pursuant to 25 U.S.C. § 465.[7]

The Bureau accepted the parcel into trust, and shortly thereafter, the State of Rhode Island and the Town of Charlestown sought administrative review, arguing that the plain language of § 479 prohibited

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Criminal Confessions and Police Tactics: TN Supreme Court Tosses Murder Conviction under *Miranda*

by Aaron Chastain

In a unanimous decision in January, the Tennessee Supreme Court suppressed two confessions made by a convicted murderer: a first, non-*Mirandized* confession given when the suspect was not yet formally under arrest, and a second, *Mirandized* confession obtained by police immediately upon his subsequent arrest. The case, *State v. Dailey*,[1] received significant public attention in Tennessee as it resulted in the release of a confessed killer.[2] Some argued that the court went too far by releasing Dailey on a legal technicality, while others defended the decision as necessary to protecting the constitutional rights of the citizenry at large. Regardless of one's view of the decision, *State v. Dailey* may have important ramifications in Tennessee, and perhaps beyond, for police interrogation tactics and the admissibility of confessions and other statements made to law enforcement.

I. Dailey's Non-Mirandized & Mirandized Confessions

In April of 2004, Metro Nashville Police discovered a woman's severely decomposed body with a piece of rope around her neck in an abandoned vehicle at Tommy's Wrecker Service in Davidson County in central Tennessee.[3] Detective Mike Roland conducted an investigation that led him to interview employees of the wrecking service. Although the search did not provide forensic evidence incriminating any of them, Detective Roland felt a "gut instinct" that one of the wrecker service's employees, Kenneth C. Dailey, III, was involved in the woman's death.

On this suspicion, Detective Roland arranged through Dailey's employer for Dailey to come into the police station on the pretense that the police "needed to retake his fingerprints."[4] Detective Roland later acknowledged that the fingerprinting was unnecessary and that the real reason for the request was to interview Dailey further. Dailey complied with the request and arrived voluntarily at the police station. Detective Roland later acknowledged that, at this point, the police department lacked probable cause for an arrest.[5]

When Dailey arrived, Detective Roland met him and invited him to talk some more about the investigation. When Dailey agreed, an officer escorted him back to an interview room in the interior part of the building. Detective Roland greeted him there, then left for a moment to gather his paperwork, leaving the door open behind him. When he returned, he brought another officer with him and shut the door.[6] The men began the interview, which was recorded on videotape.[7]

After a few minutes of casual conversation, the detective began to question Dailey more specifically. He first asked a few questions about Dailey's weekend work schedule and his actions on the weekend before

the victim's body was found.[8] He then moved on to a series of questions that indicated his suspicion of Dailey's involvement in the crime. Detective Roland began by indicating to Dailey that the police had evidence that he was guilty of the crime and that it would be better for Dailey to talk to them. After a few more exchanges, Dailey responded to the questions and admitted to picking up the victim as a prostitute and then killing her.[9]

After hearing a short explanation of how the victim died, Detective Roland told Dailey that he would be charged with the crime and that he "want[ed] to make this official" by reading him his rights.[10] The officers then read Dailey his *Miranda* rights. Twenty-one minutes had passed since the conversation began.[11] Neither Detective Roland nor the other officer in the room informed Dailey that the statement he had given might not be admissible as evidence against him.

After having his *Miranda* rights read to him, Dailey repeated the substance of his confession with a few additional details. At the end of the conversation, the officers informed him that he would be charged with "standard criminal homicide." The second confession only took eleven minutes.[12]

Dailey's attorneys moved to suppress the incriminating statements Dailey had made to the police officers both before and after being given his *Miranda* warnings. When the motion was denied, Dailey entered a guilty plea to second degree murder, but reserved for appeal the certified question of whether the statements were taken in violation of his rights under the Tennessee Constitution and the Due Process Clauses of the Fifth and Fourteenth Amendments of the Federal Constitution. Dailey contended that his first confession was invalid under *Miranda v. Arizona* because it was given while he was in custody without the benefit of knowing his rights, and the second statement was barred by *Missouri v. Seibert* because it was forced by a two-tiered coercive interrogation technique of extracting a confession and then sanitizing it by reading *Miranda* rights after the fact.[13] After going up to the Tennessee Supreme Court once on procedural grounds and being sent back down to the Court of Criminal Appeals for reconsideration, the issue returned to the supreme court on the merits in late 2008, with the court rendering its decision on January 2, 2009.

II. Court Suppresses Dailey's Confessions

In addressing Dailey's claim, the Tennessee Supreme Court analyzed the constitutional question first. The court began with a recitation of the background of the

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Delaware Chancery Court Addresses E-Discovery

by Shauna Peterson

The Delaware Court of Chancery issued four decisions in late May and early June clarifying the procedural rules in Delaware courts that govern the discovery of electronically stored information. The chancery court has no procedural rules that specifically govern electronic discovery (e-discovery). Instead, e-discovery is governed by the general rules of civil procedure for the Delaware Court of Chancery.[1] Kevin Brady, a member of the Court of Chancery Rules Committee, has noted that the lack of specific e-discovery rules allows judges flexibility to "adapt the rules when cases involving pending business deals need to move quickly through the docket."[2] However, it also creates a situation in which "the court's e-discovery case law has more impact on practice."[3] Accordingly, the court's recent decisions are likely to encourage companies that anticipate litigation involving e-discovery to alter their business practices in order to comply with the law. Further, because many corporations are chartered in Delaware and may be likely to face litigation there, these decisions will have an impact on companies whose principle place of business is located outside the state.

The Delaware chancery court's civil procedure rules establish a broad scope of discovery. According to the *Rules of the Court of Chancery of the State of Delaware*, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."[4] Also, the rules establish that "[i]t is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence."[5]

Two of the court's recent decisions discussed parties' motions to compel the production of discoverable material. The other two discussed litigants' duty to preserve discoverable material from spoliation and sanctions against spoliators.

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Missouri Supreme Court Upholds State's Worker's Compensation Scheme

by Jennifer Wolsing

In 1926, the Missouri legislature enacted the Workers' Compensation System, which entitled workers to compensation for accidental injuries that occurred on the job without requiring them to file a claim in civil court. Since then, the Missouri Supreme Court and the legislature have broadened the scope of this system several times. In 2005, the legislature amended thirty sections of the Workers' Compensation System through Senate Bills Nos. 1 and 130.[1] These amendments narrowed the scope of the type of "injury" that falls within the definition of an "accident," thereby narrowing the scope of the act.[2]

In response to the amendments to the Workers' Compensation System, sixty-six labor unions, four labor councils and one not-for-profit corporation filed a nine-count petition against the Workers' Compensation Division in the Cole County Circuit Court challenging the constitutionality of the amendments.[3] The circuit court granted judgment as a matter of law to the Workers' Compensation Division on two counts and summary judgment to the Workers' Compensation Division on the other seven counts. The plaintiffs appealed, arguing that the amended Workers' Compensation System was unconstitutional as a whole and that the other claims in their petition were justiciable. The Missouri Supreme Court heard oral arguments in 2007 and issued an opinion in February, 2009, affirming the circuit court's decision in part and reversing it in part.[4]

The supreme court held, in a plurality opinion with one justice dissenting, that the plaintiffs had presented no facts supporting their claim "that specific provisions of the act as amended are unconstitutional because they are so narrow and restrictive that they provide no adequate remedy for an injured worker."[5] Because no actual workers' compensation claims were at issue, the court held that plaintiffs' assertions were merely hypothetical and not justiciable.[6] The court also held that the issues raised by the plaintiffs' claim that certain provisions of the act render the act as a whole violative of the open courts or due process provisions of the Missouri constitution were not ripe for review, as there had been no judicial interpretations of the individual amended provisions.[7]

Further, the court held that the plaintiffs' request for declaratory judgment addressing whether the exclusivity provision in the act bars workers' ability to pursue negligence tort actions against their employers was ripe for review because no factual development was necessary to address this legal question.[8] Resolution of this question "require[d] only that the Court review the changes in the scope of the act's exclusivity provisions as applied to 'injuries' resulting from an 'accident.'"[9] The court held that workers who suffered an "injury" that did not fall within the scope of an "accident" under the amended Workers' Compensation System were no longer governed by the act.[10] The court noted, however, that workers excluded from the act by the narrowed definition of "accidental injury" could still seek relief under the common law, just as they could prior to the initial adoption of the act.[11] The court did not express an opinion as to which injuries fall within the definition of accident under either the workers' compensation laws or the common law, holding that whether or not workers have a remedy should be determined by the finders of fact on a case-by-case basis.[12]

** Jennifer Wolsing is a litigation associate in St. Louis, Missouri*

Endnotes

1 Mo. Alliance for Retired Ams. v. Dep't of Labor and Indus. Relations, 277 S.W.3d 670, 674 (Mo. 2009).

2 *Id.*

3 *Id.*

4 *Id.* at 680.

5 *Id.* at 677.

6 *See id.* at 674.

7 *See id.* at 678.

8 *See id.* at 678-79.

9 *Id.* at 679.

10 *See id.*

11 *See id.* at 680.

12 *See id.*

Delaware Chancery Court Addresses E-Discovery

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I. Motions to Compel the Production of Discoverable Material

The chancery court's civil procedure rules allow litigants to motion for the court to compel the production of discoverable material.[6] *Omnicare, Inc. v. Mariner Health Care Mgmt. Co.*[7] involved a billing dispute between the plaintiff, Omnicare, Inc., a pharmaceutical supplier, and the defendant, Mariner Health Care Management, a nursing home operator. Both litigants moved to compel discovery of the vast amount of material relevant to the case. Omnicare's motion to compel involved two e-discovery issues: (1) whether the defendant was required to restore and produce, at its expense, "backup tapes" containing information relevant to the litigation which was no longer available in e-mail form due to the defendant's automatic deletion program, and (2) whether the parties were bound to comply with an agreement they had formed prior to filing their cross-motions to compel, the Stipulation Regarding Electronic Discovery and Document Production (or "E-Discovery Stipulation"), even though that agreement had not been fully negotiated.[8]

The court refused to shift the cost of restoring and producing the backup tapes to the plaintiff. It cited a U.S. Supreme Court case establishing that "[g]enerally, the responding party bears the expenses associated with complying with a discovery request,"[9] but noted that the chancery court reserved the power to alter this general rule when appropriate.[10] The court reasoned that, even though it would be burdensome on the defendant to restore the backup tapes, the defendant had failed to prove that deletion of data from "active stores" had rendered it "not reasonably accessible."[11] The court noted, however, that the defendant should first produce information from its "active stores," which would indicate whether or not restoring the backup tapes would yield material relevant to the dispute.[12]

The court also held that the parties should resolve issues relating to the production and discovery of electronically stored information according to the "E-Discovery Stipulation" to the extent that the parties had fully negotiated the agreement. Issues not fully negotiated in the agreement should be heard by a neutral third party skilled in deciding technical questions of this nature.[13]

In *Grace Bros., Ltd. v. Siena Holdings, Inc.*,[14] the court addressed the question of whether the plaintiff could compel discovery of e-mails exchanged between members of the defendant corporation's board of directors relating to a 2003 corporate restructuring plan that allegedly violated a Delaware statute. The plaintiff had filed its complaint in 2004, and its first request for the production of documents included a request for the production of the e-mails. The defendant, by questioning board members about their "document retention and email communication practices" and turning over "sender-side versions" of the relevant e-mails" determined that it was unnecessary for board members to search their electronic records to produce relevant material.[15] The plaintiff filed a motion to compel production of the e-mails in May 2009.

The court granted the plaintiff's motion, compelling defendants to produce e-mails that were "reasonably related to Grace's prior requests."[16] It cited one of its earlier decisions establishing that "[t]he burden is on the objecting party to show that the information sought is privileged or improperly requested."[17] According to its civil procedure rules, the court should limit discovery if "the discovery sought is unreasonably cumulative or duplicative," or if it can be obtained from a "source that is more convenient, less burdensome, or less expensive."[18] The court held that the defendant had not met this burden because it had failed to show that the request was "fully duplicative" or "intended to harass Siena."[19] Further, although complying with the discovery request would be somewhat burdensome on the defendant, the court held that producing the e-mails would not be "overly burdensome."[20]

II. Duty to Preserve Discoverable Material from Spoliation and Available Sanctions

Triton Constr. Co., Inc. v. E. Shore Elec. Servs., Inc.[21] addressed the issue of a defendant's duty to preserve electronically stored information in anticipation of litigation and sanctions for spoliation. The case involved a dispute between the plaintiff Triton Construction Co., an electrical contractor, and the defendants Tom Kirk, a former employee of Triton, and Eastern Shore Electrical Services, Inc., Kirk's new employer. While employed at Triton, Kirk had kept information relevant to this dispute on a desktop computer at work.[22] In July 2007, shortly before Kirk stopped working at Triton on August 31, 2007, Triton employees made a "ghost copy" of Kirk's hard drive, in part "because Kirk recently had been implicated in an incident where wire went missing from a job site."[23] Shortly after Kirk left Triton, it was discovered that Triton and Eastern had submitted identical bids for a project.[24]

When the "ghost copy" of Kirk's hard drive was restored to investigate this matter, however, an expert discovered that Kirk had installed a "wiping program on the computer that targeted specific files for overwriting, making the files irretrievable."[25] Triton filed a complaint in October 2007, alleging that Kirk had breached his fiduciary duties and that his new employers had aided and abetted Kirk's breach of duties and had misappropriated Triton's trade secrets.[26]

The court noted that "[a]n affirmative duty to preserve evidence attaches upon the discovery of facts and circumstances that would lead to a conclusion that litigation is imminent or should otherwise be expected."[27] Emphasizing that this duty can arise even before the commencement of the litigation, the court held that Kirk had violated his duty to preserve discoverable materials. He knew that "litigation was imminent or otherwise to be expected" probably after the incident with the missing wire, and certainly after he ceased working for Triton.[28] As to the remedy, the court noted that "Delaware courts may draw adverse inferences against a party or impose other sanctions for intentional or reckless destruction of evidence."[29] It held that Kirk had at least "recklessly," and probably "intentionally," "destroyed or failed to preserve evidence relating to this litigation," and that it would draw an adverse inference "that the missing information would have supported Triton's position on any issue to which that information was relevant."[30]

The court again addressed the duty to preserve discoverable material and sanctions for spoliation in *Beard Research, Inc. v. Kates*.[31] A dispute arose between the plaintiffs, Beard Research, Inc. (BR), and CB Research & Development, Inc. (CB), two providers of chemistry outsourcing services, and the defendants Michael Kates, a former BR and CB employee, and Kates's new employers.[32] While still employed at BR and CB, Kates purchased a laptop to be used for "for business purposes."[33] After Kates ceased working for BR and CB, he continued to use the laptop when working for his new employers. In May 2005, BR and CB filed a complaint against the defendants.[34] On several occasions following the filing of the complaint, information was deleted from Kates's computer, sometimes intentionally and sometimes due to computer crashes.[35] In October 2008, BR and CB filed a motion for sanctions for spoliation of evidence against the defendants, requesting default judgment in their favor or, alternatively, an adverse inference in their favor.[36]

Citing its decision earlier that month in *Triton Construction Co.*, the court asserted that "a party in litigation or who has reason to anticipate litigation has a duty to preserve evidence that might be relevant to the issues in the lawsuit."[37] The court held that the defendants had a duty to preserve the evidence because they had a reason to know as early as when Kates resigned from BR and CB in 2004 and 2003 respectively that Kates's work laptop might contain information relevant to future litigation.[38]

As for the remedy, the court asserted that "[a] court may sanction a party who breaches this duty by destroying relevant evidence or by failing to prevent the destruction of such evidence."[39] It held that the defendants had breached their duty to preserve evidence on three occasions and therefore sanctions were appropriate.[40] The court denied the plaintiffs' request to enter a default judgment against the defendants because such a remedy is appropriate "only if no other sanction would be more appropriate under the circumstances."[41] However, it granted the plaintiffs' motion for an adverse inference against the defendants because Kates's violation of his duty to preserve had been intentional.[42]

III. Potential Effects of These Decisions

Read in conjunction, these four decisions illustrate principles that are likely to be influential for Delaware courts, as well as parties who anticipate litigating in these forums. First, these decisions indicate that the chancery court is willing to compel discovery of electronically stored information even when it imposes a significant burden on the producing party. In *Omnicare, Inc.*, the court argued that "voluminous discovery may be necessary in order for the merits of a given controversy to be addressed fairly. Our rules of discovery are liberal, and are based on the notion that, in the end, fulsome discovery is more likely to result in accurate fact-finding."[43] Second, the court indicated its willingness, at least under some circumstances, to hold employers accountable for employees' spoliation even if the employers' behavior would not have been sufficiently culpable to hold them liable on their own.[44]

Critics might contend that the court's broad interpretation of litigants' duty to preserve potentially relevant data creates an incentive structure that encourages parties to over-preserve data which might be relevant to some litigation, whether it is pending or far in the future. However, the *Omnicare, Inc.* decision suggests that parties may be able to minimize this potential inefficiency by forming agreements in the early stages of litigation which define their responsibilities to preserve electronically stored information.[45] The court's decision in *Beard Research, Inc.* expressed a similar sentiment: "To the extent counsel reach agreements recognizing and permitting routine

destruction of certain types of files to continue during litigation, the Court has no reason to object."[46]

Some practitioners have said that the court's recent e-discovery decisions should encourage potential litigants to diligently preserve electronically stored information in anticipation of litigation. Jim S. Green Sr., a lawyer who represented defendant Eastern Shore Electrical Services, Inc., in *Triton Construction Co.*, advised "[i]f you're counsel for any party, you have to get right on the horn when litigation starts or litigation is contemplated and instruct your client in no uncertain terms that everything needs to be preserved." He asserted "I would go so far as if to say, if you have a document retention policy that involves deleting e-mails, prudence would dictate that litigation override that policy."[47]

** Shauna Peterson is a student at the University of Chicago Law School (J.D., anticipated 2011).*

Endnotes

1 *Rules of the Court of Chancery of the State of Delaware*, *available at* http://courts.delaware.gov/Rules/?chanceryrules.pdf (last visited July 9, 2009).

2 Sheri Qualters, Law.com, *Delaware Chancery Homes in on EDD*, June 16, 2009, *available at* http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202431475006 (last visited July 9, 2009).

3 *Id.*

4 Del. Ch. Ct. R. 26(b)(1).

5 *Id.*

6 Del. Ch. Ct. R. 37(a) ("A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery.").

7 No. 3087-VCN, 2009 WL 1515609 (Del. Ch. May 29, 2009).

8 *Id.* at *3.

9 *Id.* at *7 (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978)).

10 *Omnicare, Inc.*, 2009 WL 1515609, at*7.

11 *Id.* at*7.

12 *Id.* at*7.

13 *Id.* at *8.

14 No. 184-CC, 2009 WL 1547821 (Del. Ch. June 2, 2009).

15 *Id.* at *1.

16 *Id.* at *2.

17 *Id.* at *1 (citing Van de Walle v. Unimation, Inc., No. 7046, 1984 WL 8270, at *2 (Del. Ch. October 15, 1984)).

18 Del. Ch. Ct. R. 26(b)(1).

19 *Grace Bros., Ltd.*, 2009 WL 1547821, at *1.

20 *Id.* at *1.

21 No. 3290-VCP, 2009 WL 1387115 (Del. Ch. May 18, 2009).

22 *Id.* at *7.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.* at *1.

27 *Id*. at *7 (citing Sears, Roebuck & Co. v. Midcap, 893 A.2d 542, 550 (Del. 2006)).

28 *Triton Constr. Co.*, 2009 WL 1387115, at *7.

29 *Id.* at *7.

30 *Id.* at *8.

31 No. 1316-VCP, 2009 WL 1515625 (Del. Ch. May 29, 2009).

32 *Id.* at *1.

33 *Id.* at *1.

34 Id. at *2.

35 *Id.* at *2-3.

36 *Id.* at *4.

37 *Id.* at *5 (citing *Triton Constr. Co.*, 2009 WL 1387115).

38 *Beard Research, Inc.*, 2009 WL 1515625, at *5.

39 *Id.* at *5 (citing *Triton Constr. Co.*, 2009 WL 1387115, at *8).

40 *Beard Research, Inc.*, 2009 WL 1515625, at *6-9.

41 *Id.* at *10 (quoting Sundar Elec., Inc. v. E.J.T. Constr., 337 A.2d 651, 652 (Del. 1975)).

42 *Beard Research, Inc.*, 2009 WL 1515625at *11-12 & n.93.

43 *Id.* at *1.

44 *Id.* at *12 & n.93 ("Whether or not the action or inaction of ASDI and ASG are considered reckless... , I see no inequity in having this adverse inference affect ASDI and ASG, as well as Kates.").

45 *Omnicare, Inc.*, 2009 WL 1515609, at *8.

46 *Beard Research, Inc.*, 2009 WL 1515625, at *7.

47 Sheri Qualters, Law.com, *Delaware Chancery Homes in on EDD*, June 16, 2009, *available at* http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202431475006 (last visited July 9, 2009).

California: Unfair Competition Law

Continued from page 3...

According to critics, the California Supreme Court's decision in *In re Tobacco II*, nullified the effect of Proposition 64 on class actions.[21] With California and the nation's economy struggling, businesses should perhaps be concerned that the court's recent holding will increase consumers' ability to bring class action suits under the UCL without meeting traditional standing requirements despite California voters' endorsement of Proposition 64, resulting in expensive litigation.

** Jeremy B. Rosen is a Partner with Horvitz & Levy LLP in Los Angeles.*

Endnotes

1 Cal. Bus. & Prof. Code § 17200 *et seq.* (West 2004).

2 *Id.*

3 *See, e.g.,* Californians For Disability Rights v. Mervyn's, LLC, 138 P.3d 207 (Cal. 2006) (Californians for Disability Rights sought an injunction barring practices that allegedly violated the UCL, including "that pathways between fixtures and shelves in Mervyn's stores were too close to permit access by persons who use mobility aids such as wheelchairs, scooters, crutches and walkers.").

4 *See, e.g.,* Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1143-1152 (Cal. 2003); Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal.4th 116, 126-137 (Cal. 2000).

5 *Cf.* Cal. Bus. & Prof. Code § 17203 (West 2004) (The court may make orders and judgments "to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."), *with* Cal. Civ. Proc. Code § 367 (West 1992) ("Every action must be prosecuted in the name of a real party in interest, except as otherwise provided by statute.").

6 *See, e.g.*, *Californians for Disability Rights*, 138 P.3d at 228 (holding that Proposition 64 applied to pending actions).

7 *See In re Tobacco II Cases*, 207 P.3d 20, 41-42 (Cal. 2009) (Baxter, J., concurring and dissenting).

8 *See id.*at 42.

9 207 P.3d 20 (Cal. 2009).

10 *Id.* at 25.

11 *Id.*

12 *In re* Tobacco II Cases v. Philip Morris, Inc., No. JCCP 4042, 2005 WL 579720, at *1 (Cal. Super. Ct. March 7, 2005).

13 *In re Tobacco II Cases*, 47 Cal.Rptr.3d 917, 926,(Cal. Ct. App. 4th Dist. 2006).

14 *In re Tobacco II Cases*, 207 P.3d at 25.

15 *See, e.g.*, City of San Jose v. Super. Ct. of Santa Clara County, 12 Cal.3d 447, 462 & n.9 (Cal. 1974) (stating the principle that "[c]lass actions are provided only as a means to enforce substantive law"); Feitelberg v. Credit Suisse First Boston, LLC, 36 Cal. Rptr.3d 592, 603-04 & 606 (Cal. Ct. App. 6th Dist. 2005) (holding that "[c]lass certification does not serve to enlarge substantive rights or remedies" and that "[i]f a specific form of relief is foreclosed to claimants as individuals, it remains unavailable to them even if they congregate into a class").

16 *In re Tobacco II Cases*, 207 P.3d at 35 (quoting Cal. Bus. & Prof. Code § 17203 (West 2004)) (emphasis in the opinion).

17 *See id.* at 34-36 (arguing that "to hold that the absent class members on whose behalf a private UCL action is prosecuted must show on an individualized basis that they have 'lost money or property as a result of the unfair competition' (§ 17204) would conflict with the language in section 17203 authorizing broader relief").

18 *See id.* at 39-40 (explaining that "[a] misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question'" (quoting Engalla v. Permanente Med. Group, Inc., 938 P.2d 903, 919 (Cal. 1997)).

19 *See* Mirkin v. Wasserman, 5 Cal.4th 1082, 1090-1098 (Cal. 1993).

20 *In re Tobacco II Cases*, 207 P.3d at 42 (Baxter, J., concurring and dissenting).

21 *Id.* at 44-45 ("[T]he majority's holding encourages the very sort of abusive shakedown that Proposition 64 was designed to curb.").

TN Supreme Court Tosses Murder Conviction under *Miranda*

Continued from page 5...

Miranda decision, explaining the importance of the right against self-incrimination in its historic context.[14] In keeping with this backdrop, the *Miranda* Court held that, when a criminal suspect is "taken into custody or otherwise deprived of his freedom by the authorities in any significant way," the Constitution requires him to be afforded certain "procedural safeguards"—namely, the reading of the "Miranda Rights"—to protect his freedom against self-incrimination.[15] This led the Tennessee Supreme Court to conclude that, if Dailey was in custody at the time of his first confession, the confession was inadmissible under the federal and state constitutions.[16]

To determine whether Dailey was in custody at the time of the first confession, the court applied its precedent, *State v. Anderson*, where the court had stated that the test for whether a person is in custody for *Miranda* purposes "is whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest."[17] The *Dailey* court noted that the custodial inquiry was "fact specific" and involved the application of a list of factors that aided an "objective assessment."[18]

Applying the test and the factors, the court found that the preponderance of the evidence established that Dailey was, in fact, in custody at the time he made his first confession to the police.[19] Key to the court's decision were the fact that the tone of the questioning was "accusatory and demanding," the fact that Dailey's movements were constrained by his being in the back corner of a room with a single, closed door, and the fact that Dailey repeatedly denied the accusations and inferences made against him early in the questioning.[20]

Having determined that Dailey gave his first confession while in custody without the benefit of hearing his *Miranda* rights, the court turned to a more complicated issue: did the later *Miranda* warnings cure the first violation so that the second confession was admissible? For guidance, the court looked to *Missouri v. Seibert*, where the U.S. Supreme Court considered whether *Miranda* warnings could sanitize future confessions after a criminal defendant already confessed to the crime without being read his rights.[21] *Seibert* was a fractured opinion, written by four different justices with no single opinion commanding the majority of the Court. The four-justice plurality opinion stated that "question-first" confessions were of a dubious nature because they "render[ed] *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed."[22] Nonetheless, the plurality would hold that these confessions were made admissible under the Constitution if the late *Miranda* warning was effective, as determined by a five-factor test.[23]

Justice Kennedy concurred in the judgment, but did not join the plurality opinion. Finding that the plurality's test "envision[ed] an objective inquiry from the perspective of the suspect" and therefore "cut[] too broadly," he instead laid out a simpler inquiry: did the law enforcement officers actually coerce the suspect's confession or otherwise undermine his ability to exercise his free will?[24] Except for these instances of intentional manipulation, Kennedy's test would hold late *Miranda* confessions admissible.

The *Dailey* court then turned to when it first applied the *Seibert* test to a confession last term in *State v. Northern*.[25] In *Northern*, the court faced the difficult question of which *Seibert* test to apply to a two-step confession: the plurality's test or Justice Kennedy's narrower test? In the end, the *Northern* court found the distinction to be unnecessary, as the confession obtained in that case—one procured by sitting the defendant in an open area of the police station, surrounded by detectives discussing the crime— "was properly admitted under any of the competing tests."[26]

The *Dailey* court also held that the distinction was not important to Dailey's case, but for an entirely different reason: the second confession by Dailey was inadmissible under either *Seibert* test.[27] The court found that all five factors of the *Seibert* plurality test indicated that the *Miranda* warning was not effective enough to allow the admission of the second confession and that Detective Roland acted intentionally to coerce Dailey's second confession by using the two-step technique without there being any curative measures to make the *Miranda* warnings effective.[28] In light of these holdings, the court concluded that Dailey's "motion to suppress both of his statements should have been granted because his initial statement was taken in violation of his Fifth Amendment right against self-incrimination, and the tardy *Miranda* warnings did not function effectively so as to render his second statement admissible."[29]

After holding that the second confession was inadmissible under the federal Constitution, the court

offered an alternative holding—that Dailey's second confession was also barred by the Tennessee Constitution. The court noted that "the test of voluntariness for confessions under Article I, [section] 9 [of the Tennessee Constitution] is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment."[30] This broad test for confessions includes consideration of nine factors that determine whether the statement was "knowing and voluntary"[31] under "the totality of the circumstances."[32] The court quickly applied these nine factors and concluded that the confession was also inadmissible under Tennessee law.[33]

Notwithstanding the outcome in this case—the release of a confessed killer—the Tennessee Supreme Court ended its written opinion by emphasizing another concern: the importance of limiting the authority of law enforcement officers and "agents of our governments" when their actions intrude on the individual rights guaranteed by the federal and state constitutions.[34] The court effectively decided that it would err on the side of protecting personal liberties by barring enforcement officers from utilizing an effective way of persuading defendants to confess to their crimes.

**Aaron Chastain is a student at Vanderbilt University Law School (J.D., anticipated 2010), where he serves as the Senior Notes Editor of* Vanderbilt Law Review.

Endnotes

1 273 S.W.3d 94 (Tenn. 2009).

2 *See, e.g.,* NewsChannel5, *Police Video Helps Set A Convicted Killer Free*, January 5, 2009, *available at* http://www.newschannel5.com/global/story.asp?s=9621336&ClientType=Printable (last visited June 8, 2009).

3 The facts of this case come directly from the court's opinion. 273 S.W.3d at 97-100.

4 *Id.* at 97.

5 *Id.*

6 *Id.*

7 The Tennessee Supreme Court viewed the tape as part of its review of the case and based most of its interpretation of the facts on it.

8 *Id.* at 98.

9 *Id.* at 99.

10 *Id.* at 100.

11 *Id.*

12 *Id.*

13 *Miranda*, 384 U.S. 436 (1966); *Seibert*, 542 U.S. 600 (2004).

14 *Dailey*, 273 S.W.3d at 100-02.

15 *Miranda*, 384 U.S. at 478-79.

16 *Dailey*, 273 S.W.3d at 102.

17 937 S.W.2d 851, 852 (Tenn. 1996).

18 *Dailey*, 273 S.W.3d at 102.

19 *Id.* at 103.

20 *Id.*

21 542 U.S. 600 (2004).

22 *Id.* at 611.

23 *Id.* at 615.

24 *Id.* at 621-22 (Kennedy, J., concurring).

25 262 S.W.3d 741 (Tenn. 2008).

26 *Id.* at 760. The court further explained that "[i]n the absence of evidence that the interrogating officer deliberated [sic] employed such a strategy, a majority of the *Seibert* court-Justice Kennedy and the four dissenting justices-would apply *Elstad* to determine the admissibility of the defendant's postwarning statement." *Id. Oregon v. Elstad*, 470 U.S. 298, 314 (1985), had held that "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement."

27 *Dailey*, 273 S.W.3d at 107.

28 *Id.* at 108 & 109-10.

29 *Id.* at 110.

30 *Id.* (citing *State v. Crump*, 834 S.W.2d 265, 268 (Tenn. 1992)).

31 *Dailey*, 273 S.W.3d at 110 (citing *State v. Smith*, 834 S.W.2d 915, 920 (Tenn. 1992)).

32 273 S.W.3d at 110.

33 *Id.* at 112.

34 *Id.* at 113.

ABA-NCSC Summit Addresses Challenges to Fairness, Impartiality of State Courts

Continued from front cover...

Focusing on judicial independence, an issue she has addressed frequently since leaving the high court bench, O'Connor stated that "[t]he health of our entire legal system depends on our having a strong, appropriate state judicial system," and yet "we are confronting greater threats to judicial independence than in the past."[3] In particular, she said, a relatively new threat to judicial independence is the "flood of money coming into our courtrooms by way of increasingly expensive and volatile judicial elections."[4] She pointed to several guideposts illustrating this trend, from a $1 million judicial race in Texas in 1980 to more recent races in Illinois and Alabama costing $9 million and $5 million respectively.[5]

O'Connor also pointed to *Caperton v. A.T. Massey Coal Co., Inc.*[6] (later reversed by the U.S. Supreme Court in a case argued in March and decided in June[7]), as an example of harm to state court systems resulting from excessive spending on judicial elections. *Caperton* involved a business dispute between two West Virginia coal companies. After a $50 million verdict in the Circuit Court of Boone County, the CEO of the losing party personally spent $3 million on advertisements attacking incumbent state Supreme Court Justice Warren McGraw. McGraw was defeated by Brent Benjamin. Though the argument was made that Justice Benjamin should recuse himself from the case because the $3 million in expenditures helped him get elected, he declined to recuse himself and was part of the 3-2 majority of the court in *Caperton* that voted to overturn the jury's verdict.[8]

"It just doesn't look good," said O'Connor. "West Virginia cannot possibly benefit from having that much money injected into cases."[9] As a result of all this spending, O'Connor said, "[t]he public is growing increasingly skeptical of elected judges in particular," citing surveys showing declining public trust in judges.[10] Ultimately, she said, the risk is that the public will view judges as "just politicians in robes." After her speech, O'Connor was even more direct in her assessment of judicial elections, telling the *ABA Journal*: "They're awful. I hate them."[11]

Erwin Chemerinsky, dean of the law school at the University of California, Irvine, echoed O'Connor's sentiments in his closing remarks, stating that "[t]he very nature of judicial elections has changed in the last decade" and concluding that the change "has not been beneficial for judicial independence."[12] Still, Chemerinsky said that eliminating judicial elections altogether is likely unrealistic. Instead, he advocated other measures, such as campaign spending limits and taking recusal decisions out of the hands of sitting judges.[13]

O'Connor's assessment of *Caperton* proved prescient. On June 8, the Supreme Court, in an opinion delivered by Justice Kennedy, held 5-4 that the Due Process Clause, on *Caperton*'s particular facts, required recusal.[14] According to Justice Kennedy, "there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable' …. Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average... judge to.... lead him not to hold the balance nice, clear and true.' ... we find that, in all the circumstances of this case, due process requires recusal."[15]

Justice Roberts dissented, arguing that the majority opinion had opened a Pandora's box that would ultimately undermine public confidence in the judiciary:

> Today... the Court enlists the Due Process Clause to overturn a judge's failure to recuse because of a "probability of bias." Unlike the established grounds for disqualification, a "probability of bias" cannot be defined in any limited way. The Court's new "rule" provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.[16]

Other aspects of the summit were also noteworthy. Stanford Law School professor Pamela S. Karlan presented the findings of a study commissioned by the NCSC regarding public attitudes toward the judicial system. According to the NCSC, the study is the "first ever survey to measure the public's perceptions of how the executive, legislative and judicial branches work together on public policy issues that affect the administration of justice."[17] Notable findings of the survey include:

- Nine in ten survey respondents think it is important for the heads of the three branches of government to meet regularly to discuss justice system issues, and 74 percent support mandating such meetings by law.[18]
- Most survey respondents oppose cutting court services or raising fees in response to budget problems, including 85 percent who oppose ending jury trials.[19]

• 74 percent of respondents expressed "some" or "a lot" of confidence in the courts, compared to 66 percent for the executive branch and 65 percent for the legislative branch.[20]

• 71 percent of respondents believe that their state supreme court should keep its ability to decide controversial issues, compared with 23 percent who believe its power should be restricted and it should decide fewer controversial issues.[21]

Justice Martin called the survey "very encouraging" because "it revealed strong public support for states to take all necessary steps to ensure that courts remain fair, impartial, and independent institutions."[22]

Other summit panels dealt with related topics, including identifying the challenges that the three branches of government face in promoting fair and impartial courts and presenting examples of how several states have approached issues affecting the courts.

In connection with the summit, the ABA has made available on its website briefing papers and action plans addressing four issues: (1) *Adequate Funding for the Courts*; (2) *Innovative Solutions to Challenges in State Court Systems*; (3) *Interbranch Communication and Cooperation*; and (4) *Maintaining and Increasing Public Respect for the Fairness and Impartiality of the Courts*.[23] These materials advance many specific policy proposals, including:

• predictable funding of state court systems not tied to fee generation.

• giving state court systems flexibility in managing their budgets, including allowing court systems to move funds between line items and across fiscal years.

• developing specialized courts in various areas, such as mental health courts, domestic violence courts, business courts, and medical malpractice courts.

• providing resources and support to *pro se* civil litigants.

• creating and supporting alternative dispute resolution programs.

• developing and providing information in languages most commonly spoken by court users.

• increasing the availability of interpreters.

• increasing diversity on the bench.

• developing performance measures for courts to provide accountability and clear standards.

• facilitating regular meetings between representatives of the three branches, both informally and through the creation of interbranch commissions.

• using outside groups such as bar associations to serve as intermediaries between the branches.

ABA president H. Thomas Wells, Jr., called the turnout at the summit "phenomenal" and said that "clearly where we go from here is back to the states."[24] He emphasized that each state's challenges are different, but that the summit "increased the energy level and the optimism" that the states have the ability to ensure that their courts remain just, fair, and impartial.[25]

More information on the summit can be found on the ABA's website, at http://www.abanet.org/op/nosearch/fisc/home.html.

** Joshua Davey is an attorney with McGuireWoods LLP in Charlotte, North Carolina, where he practices in the areas of financial services and commercial litigation.*

Endnotes

1 North Carolina Bar Association, *State Courts Summit Only the Beginning* (2009), *available at* http://www.ncbar.org/news/1/3808/index.aspx?print=tru (last visited June 29, 2009).

2 American Bar Association News Release, *Sandra Day O'Connor Cites State Budget Crises as Most Pressing Problem Confronting State Courts* (2009), *available at* http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=657 (last visited June 29, 2009).

3 *Id.*

4 *Id.*

5 *Id.*

6 No. 33350, 2008 WL 918444 (W. Va. April 3, 2008).

7 *Caperton v. A.T. Massey Coal Co., Inc.*, No. 08-22, 2009 WL 1576573 (U.S. June 8, 2009).

8 *Caperton*, 2008 WL 918444, at *38.

9 American Bar Association News Release, *Sandra Day O'Connor Cites State Budget Crises as Most Pressing Problem Confronting State Courts* (2009), *available at* http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=657 (last visited June 29, 2009).

10 James Podgers, American Bar Association News Release, *O'Connor on Judicial Elections: 'They're Awful. I Hate Them'* (2009), *available at* http://www.abajournal.com/news/oconnor_chemerinsky_sound_warnings_at_aba_conference_about_the_dangers_of_s/ (last visited June 29, 2009).

11 *Id.*

12 *Id.*

13 *Id.*

14 *See Caperton v. A.T. Massey Coal Co., Inc.*, No. 08-22, 2009 WL 1576573, at *2257 (U.S. June 8, 2009).

15 *Id.*

16 *Id.*

17 National Center for State Courts News Release, *Poll: On Justice Issues, Americans Want Three Branches of Government at Table Solving Problems Together* (2009), *available at* http://www.ncsconline.org/D_Comm/PressRelease/2009/separate_branches-release.html (last visited June 29, 2009).

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 North Carolina Bar Association, *State Courts Summit Only the Beginning* (2009), http://www.ncbar.org/news/1/3808/index.aspx?print=tru (last visited June 29, 2009).

23 ABAnet.org, Action Plans for May 2009 Summit, *available at* http://www.abanet.org/op/nosearch/fisc/actionnplan.html (last visited June 29, 2009).

24 ABAnet.org, ABA Online Media Kit, *available at* http://www.abavideonews.org/ABA2831/av.php?id=343&type=v (last visited June 29, 2009).

25 *Id.*

"Now" is the Time: U.S. Supreme Court Rules on Rhode Island Indian Land Case

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the Bureau of Indian Affairs from accepting land from the Narragansetts because the tribe did not come within the definition of "Indian" in 1934 when the law was enacted.

The District Court for Rhode Island rejected this claim, finding that "because it is currently 'federally-recognized' and 'existed at the time of the enactment of the IRA,' the Narragansett Tribe 'qualifies as an "Indian tribe" within the meaning of § 479' (citation omitted) As a result, 'the secretary possesses authority under § 465 to accept lands into trust for the benefit of the Naragansetts.'"[8]

The Court of Appeals for the First Circuit affirmed in both a panel decision[9] and a rehearing en banc.[10] The court found that there was "ambiguity as to whether to view the term [now] as operating at the moment Congress enacted it or at the moment the Secretary invokes it."[11] Finding the statute "ambiguous," the court deferred to the Secretary's interpretation of the construction of the word "now" pursuant to the Supreme Court's decision in *Chevron*.[12]

Supreme Court Review

Justice Thomas found no such ambiguity in the operative provision of 25 U.S.C. § 479: "The term 'Indian' as used in this Act shall include all persons of Indian descent who are *members of any recognized Indian tribe now under Federal jurisdiction*."[13] He found that the case "requires us to decide whether the word 'now under Federal jurisdiction' refers to 1998 when the Secretary accepted the 31-acre parcel into trust, or 1934, when Congress enacted the IRA."[14] As is now common practice in the Supreme Court's "back to basics" approach to statutory construction, Justice Thomas turned to a series of Supreme Court decisions, *Webster's New International Dictionary*,[15] and *Black's Law Dictionary*[16] when interpreting the meaning of the word "now." The Court found that the meaning contained in 170 years of Supreme Court jurisprudence, as well as lay and legal dictionaries, "aligns with the natural reading of the word within the context of the IRA."[17]

With perhaps unsurprising simplicity, the Court also drew on numerous grammatical usages of the word "now" from within related sections of the statute itself. Justice Thomas cited Congress's use of "now" in the phrase "measures *now* pending in Congress," contrasting it with the explicit wording of 25 U.S.C. §§ 468 and 472, which refer to geographic boundaries existing "now or hereafter."[18] He cited *Barnhart v. Sigmon Coal*,[19] pointing out that "Congress' use of the word 'now' in this provision, without the accompanying phrase 'or hereafter,' provides further textual support for the conclusion that the term refers solely to events contemporaneous with the Act's enactment."[20] Justice Thomas reasoned that "[h]ad Congress intended to legislate such a definition, it could have done so explicitly, as it did in §§ 468 and 472."[21]

In a concurring opinion, Justice Breyer conceded that the statute was ambiguous and that the Department of the Interior's interpretive powers should usually be given wide latitude (although Breyer argued that the circumstances in this case "indicate that Congress did not intend to delegate interpretive authority to the Department").[22] He noted, however, "I am persuaded that 'now' means 'in 1934' not only for the reasons the Court gives but also because an examination of the provision's legislative history convinces me that Congress so intended."[23]

In a lengthy dissent, Justice Stevens rejected the majority's "cramped reading of a statute Congress intended to be 'sweeping' in scope."[24] He chastised the court for ignoring "the 'principle deeply rooted in [our] Indian jurisprudence' that '"statutes are to be construed liberally

in favor of the Indians.""[25] Justice Stevens pointed out that historically "[f]ederal recognition, regardless of when it is conferred, is the necessary condition that triggers a tribe's eligibility to receive trust land."[26] He hedged much of his dissent on an attempt to frame as moot the matter of the interpretation of "now" on which the majority relied, looking instead to the definition of "tribe" in § 479 and noting that "the plain text of the Act... places no temporal limitation on the definition of 'Indian tribe.'"[27] He argued, rather, that the temporal limitation "now" was designed only to affect "an *individual's* ability to qualify for benefits under the IRA."[28]

As recently as early April, the House Committee on Natural Resources has heard the testimony of witnesses arguing for both adherence to the Court's ruling and reversal by way of statutory revision.[29] Thus far, no official amendments to the statute have been introduced.

* *David Strachman, a partner at McIntyre Tate & Lynch LLP in Providence, RI, and an adjunct professor at Southern New England School of Law, is the author of Civil Terrorism Law (Lawyers and Judges Publishing 2008).*

Endnotes

1 Carcieri v. Salazar, 129 S.Ct. 1058 (2009).

2 *Id.* at 1061.

3 *Id.* at 1061-62.

4 *See id.* at 1062.

5 Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed.Reg. 6177 (Feb. 10, 1983).

6 *Carcieri*, 129 S.Ct. at 1062.

7 *Id.*

8 *Id.* at 1063 (quoting Carcieri v. Norton, 290 F.Supp.2d 167, 179-181 (D.R.I. 2003)).

9 Carcieri v. Norton, 423 F.3d 45 (1st Cir. 2005).

10 Carcieri v. Norton, 497 F.3d 15 (1st Cir. 2007).

11 *Id.* at 26.

12 467 U.S. 837, 843 (1984). *See Carcieri*, 497 F.3d at 30.

13 *See Carcieri*, 129 S.Ct. at 1064 (emphasis added by Thomas, J.).

14 *Id.*

15 Webster's New International Dictionary 1671 (2d ed.1934).

16 Black's Law Dictionary 1262 (3d ed.1933) ("noting that '"now" as used in a statute *ordinarily* refers to the date of its taking effect...'" (emphasis added in *Carcieri v. Salazar*, 129 S.Ct. 1059)).

17 *See Carcieri*, 129 S.Ct. at 1064.

18 *See id.* at 1065 (emphasis added by Thomas, J.).

19 534 U.S. 438, 452 (2002).

20 *Supra* note 18.

21 *Id.* at 1066.

22 *See id.* at 1068-69 (Breyer, J., concurring).

23 *Id.* at 1069.

24 *Id.* at 1078 (Stevens, J., dissenting) (quoting Morton v. Mancari, 417 U.S. 535, 542 (1974)).

25 *Carcieri*, 129 S.Ct. at 1078 (quoting County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 269 (1992) (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 767-768 (1985))).

26 *Carcieri*, 129 S. Ct. at 1075 (noting that when statutes are designed to limit or direct the Secretary's residuary power to take Indian land into trust, provisions do so very specifically).

27 *Id.* at 1072.

28 *Id.* at 1078 (emphasis added).

29 Andrew Martin, Carcieri v. Salazar *Will be Questioned*, Charino Times, May 1, 2009. *available at* http://www.ricentral.com/content/view/163050/239/ (last visited July 8, 2009).

Proposals for Changing Judicial Selection in Wisconsin

Continued from front cover...

from partisan general elections. In recent years, these non-partisan elections have increasingly assumed an ideological tone, pitting the "conservative" candidate against the "liberal" candidate, perhaps because of the perception that the court was engaging in an analysis better left to the legislature. In the spring 2007 race for an open seat on the court, the two candidates and outside groups spent approximately $6 million, four times as much as the previous record of $1.4 million, set in 1999. The following spring, a challenger upset an incumbent justice for the first time since 1967. The one television ad run by the challenger's campaign drew national media attention for its aggressive tone. The spring 2009 race, which pitted the thirty-four year incumbent chief justice against a trial court judge, was tamer than the two previous campaigns, but still received significant media attention across the state.

The heightened level of rhetoric and spending in these three races has prompted many progressives to consider modifying the state's current method of judicial selection. The three suggestions that are most widely discussed are the creation of a merit commission system, public financing of judicial elections, and the regulation of independent groups that run ads during judicial races.

A Commission Based System

The editorial board of the *Wisconsin State Journal*, the daily newspaper in the capital city of Madison, is the primary public proponent of enacting a commission based system in Wisconsin. During the past several elections, rather than endorsing a candidate for the supreme court, the paper has endorsed this system. The *Journal* believes that, under such a system, "merit trumps politics—so justices can be independent and impartial rather than soiled by the suspicion and partisanship that election campaigns create."[1]

Under this system, sometimes referred to as "the Missouri Plan," a commission of lawyers and non-lawyers would interview applicants for judicial vacancies and recommend a list to the governor, who would then pick one of the people on the list.[2] After a certain number of years on the bench, each judge would face a "retention election," an up-or-down vote by the citizens of the state or district, which would determine whether or not the judge would remain in office.

Critics charge that this system would take away the people's right to elect their judges, who in turn can exercise tremendous power in our society. Moreover, the selection commissions usually operate in great secrecy, hiding the judicial selection process from the press and public. Some argue that this allows bar association insiders and trial lawyers to dominate the process and push judicial appointments sympathetic to their agenda.

This is not the first time that such a constitutional amendment has been suggested in Wisconsin. As early as 1934, a panel of the State Bar of Wisconsin considered a commission based system, determined that it would require an amendment to the constitution, and recommended that the Bar urge such an amendment.[3] The Bar studied the matter for several years before concluding that "the Wisconsin judicial system is not in any dire need of change."[4]

In 1949, the state Senate considered Senate Joint Resolution 43, which would have amended the constitution to create a nine-member commission that would give the governor a list of two to three names to choose from. After a candidate was selected, he or she would be subject to a retention election. The system would have only applied to supreme court justices and Milwaukee judges, although voters in other circuits could have chosen to have the plan apply to them as well.[5] The Senate rejected the amendment.[6]

A similar bill was introduced in 1955 with the support of the State Bar. The bill passed the Assembly, but failed in the Senate.[7] The same bill was reintroduced in 1969 at the urging of a local bar association, but died in committee.[8] Two years later, a senator introduced an amendment to create two merit commissions, one for the supreme court and one for trial courts, but it died due to inaction.[9]

In 1971, Governor Pat Lucey established a blue ribbon commission to design a thorough constitutional reorganization of the judiciary. The Citizens Study Committee on Judicial Organization's original report recommended that the constitution be amended to provide for selection commission based system with retention elections.[10] However, due to pressure from organized labor's representatives on the committee, the recommendation was removed for fear that it would scuttle the entire package.[11]

The State Bar Board of Governors, after a contentious vote of 17 to 16, again endorsed such a constitutional amendment in 1981, following three years of study by a bar committee.[12] Legislation to this end was introduced

in the 1981 and 1983 legislative sessions, but failed to pass.[13]

In the past years, the *Wisconsin State Journal* has been a loud but lonely voice pushing for transformative change to the state's judicial selection system. The proposal lacks a champion in the legislature. Moreover, as this history demonstrates, a commission system would require amending Article VII, Section 4, of the state constitution, [14] a significant hurdle for any reform, particularly one that would require voters to choose to give up their right to elect their judges.[15]

Public Financing

Public financing of judicial elections came to the fore in December 2007 when the seven sitting justices of the Wisconsin Supreme Court signed a joint letter in support of public financing immediately before a special session of the legislature convened to discuss campaign finance reform.[16] Although the session did not pass a final bill, legislators and outside groups, like the State Bar of Wisconsin and the League of Women Voters, continue to clamor for public financing.[17]

Proponents of public financing stress that judges occupy a different kind of office than politicians. They decry the millions of dollars spent on judicial elections and the accompanying perception that justice can be "bought" by those with deep enough pockets. Many who donate to judicial candidates are lawyers who appear before the court. A recent federal court decision,[18] which allows Wisconsin judges to personally fundraise on behalf of their campaigns, will only expand opportunities for donors and judges to directly connect.

Opponents of public financing stress three major points. First, they argue that public financing will force state taxpayers to subsidize political campaigns at a time when the state budget is already under tremendous strain. Second, they argue that public financing will be ineffective at achieving its goal because most of the money spent on negative advertising comes from outside groups not affiliated with the campaigns. Third, they suggest that recent U.S. Supreme Court decisions may make public financing laws unconstitutional.[19] Overall, the opponents fear that the government's role in financing will lead to improper government entanglement in the campaign process.

Compelled Disclosure

Legislation is also pending to create significant new regulations of independent organizations that engage in "issue advertising." According to the Legislative Reference Bureau's analysis, "[Senate Bill 43] imposes registration and reporting requirement… upon any individual and organization that, within 60 days of an election and by means of communications media, makes any communication that includes a reference to a candidate at that election, an office to be filled at that election, or a political party."[20] The legislation would require disclosure of donors to organizations that run such advertisements. Separately, the Government Accountability Board, the agency charged with enforcing Wisconsin's campaign laws, is seeking to implement a similar rule if the legislature approves.[21] Legislative leaders and Governor Doyle have expressed support for the proposal.[22]

Those who favor the rule argue that significant amounts of money are channeled through these outside groups. They argue that this money, the sources and destinations of which are hidden from public view, is used to purchase advertising that affects elections without using the "magic words" that would make them campaign ads rather than "issue ads." Proponents of disclosure are concerned that the current system allows special interests to impact elections without playing by the same rules as everyone else.

A coalition of organizations from both the right and the left oppose compelled disclosure on free speech grounds.[23] These groups believe that citizens have a constitutional right to band together and draw voters' attention to important public policy issues. They have specific concerns that this legislation runs afoul of the U.S. Supreme Court's ruling in *Fed. Election Comm'n v. Wis. Right to Life, Inc.*,[24] which said that citizen groups had a right to buy advertisements regarding pending legislation outside the strictures of the McCain-Feingold campaign finance reform.

Other Proposals & Conclusion

A few other proposals are also in the mix, but they are currently receiving less public attention than the three discussed above. State Representative Frederick Kessler (D-Milwaukee) has authored a bill to amend the state constitution regarding judicial selection.[25] The bill proposes that the governor nominate, and a majority of the state senators confirm, a justice to a ten year term. At the expiration of the term, the justice would be automatically reappointed unless thirteen state senators voted against reconfirmation. The bill has only one co-sponsor and it does not seem likely that the bill will reach floor consideration.

Another constitutional amendment that some have suggested, most prominently current Wisconsin Supreme Court Justice N. Patrick Crooks, would remove the

constitutional requirement that judicial elections happen on a different day than the fall general election for partisan offices.[26] Such a change, proponents contend, would increase the number of citizens voting in judicial elections. However, it would result in supreme court elections being placed lower on the ballot and potentially getting lost among higher-profile races such as those for president, senator, or governor.

The people of Wisconsin have elected their judges for over one hundred and fifty years. Paging through old law reviews, one finds a cry for reform raised every decade or two after a particularly contentious election for the Wisconsin Supreme Court. Yet the system has endured, basically unchanged, and is likely to remain so. Current members of the court and the people of Wisconsin support judicial elections.[27] Although the legislature may tinker at the margins, Wisconsin's system of non-partisan elections seems likely to endure long into the future.

Endnotes

1 *Merit Should Nix Nasty Campaigns*, Wisconsin State Journal, Nov. 18, 2008, *available at* http://www.madison.com/wsj/home/opinion/314873 (last visited Apr. 23, 2009).

2 Tim Kiefer, *Debunking Myths on Judicial Merit Selection*, The Capital Times, Oct. 15, 2008, *available at* http://www.madison.com/tct/opinion/column/309476 (last visited Apr. 23, 2009).

3 William R. Moser, *Populism, A Wisconsin Heritage: Its Effect on Judicial Accountability in the State*, 66 Marq. L. Rev. 1, 58 (1982); and Joseph Ranney, Trusting Nothing to Providence: A History of Wisconsin's Legal System 598 (1998).

4 *Id.* (quoting *Report of the Committee on Judicial Selection,* 28 Wis. B. Rep. 56-63 (1938)).

5 Thomas E. Fairchild & Charles P. Seybold, *Constitutional Revision in Wisconsin,* 1950 Wis. L. Rev. 201, 213 (1950).

6 *Id.* at 234.

7 Moser, *supra* note 3, at 59.

8 *Id.*

9 *Id.* at 59-60.

10 *Id.* at 60.

11 *See, e.g.*, Nathan S. Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges,* 80 Marq. L. Rev. 1031, 1041-42 (1997); Moser, *supra* note 3 at 60.

12 Moser, *supra* note 3, at 61.

13 State Bar of Wisconsin, *A History of the Organized Bar in Wisconsin* (undated), *available at* https://www.wisbar.org/AM/Template.cfm?Section=BarHistory&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=48674 (last visited Apr. 23, 2009).

14 Thomas J. Basting, Sr., *Gutter Politics and the Wisconsin Supreme Court*, 81 Wisconsin Lawyer 5 (2008), *available at* https://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&contentid=72127 (last visited June 30, 2009) (The State Bar president called for a "very serious debate about amending the Wisconsin Constitution to create a merit selection process.").

15 The Wisconsin Constitution requires that amendments pass two successive sessions of the legislature and that they receive majority support in a statewide referendum.

16 The letter is posted online at http://www.lwvwi.org/cms/images/stories/PDFs/Legislative/Campaign%20finance%20letter.pdf (last visited Apr. 23, 2009) (Since the letter was published, Justice Gableman has replaced Justice Butler on the court).

17 This session, they are backing 2009 Senate Bill 40, introduced by Sen. Pat Kreitlow and Rep. Gordon Hintz.

18 *Siefert v. Alexander*, 597 F.Supp.2d 860 (W.D. Wis. 2009).

19 *See* Richard Esenberg, *The Lonely Death of Public Campaign Financing*, 32 Harv. J.L. & Pub. Pol'y (forthcoming, 2009).

20 Legisative Reference Bureau analysis of 2009 Senate Bill 43, *available at* http://www.legis.state.wi.us/2009/data/SB-43.pdf (last visited Apr. 23, 2009).

21 Tony Walter, *Disclosure Sought in State Supreme Court Elections*, Green Bay Press-Gazette, Mar. 17, 2009, *available at* http://www.greenbaypressgazette.com/article/20090317/GPG0101/903170514/1207/GPG01 (last visited Apr. 23, 2009).

22 *"Phony Issue Ad" Reform Measure Clears Government*, Common Cause in Wisconsin, March 31, 2009, *available at* http://www.wispolitics.com/index.Iml?Article=153968 (last visited Apr. 23, 2009).

23 *See* Letter to the Government Accountability Board, Aug. 21, 2008, *available at* http://elections.state.wi.us/docview.asp?docid=14615&locid=47 (last visited Apr. 23, 2009) (on behalf of twelve industry associations and citizen groups).

24 551 U.S. 449 (2007).

25 2009 Assembly Joint Resolution 6. A similar bill was introduced one decade ago, 1999 Assembly Joint Resolution 63. *See* Mary Hubler, *Governor Should Appoint Supreme Court Justices*, 72 Wisconsin Lawyer 10 (Oct. 1999), *available at* http://www.wisbar.org/am/template.cfm?section=wisconsin_lawyer&template=/cm/contentdisplay.cfm&contentid=49082 (The bill died in Committee. *See* Legislative Reference Bureau, *History of Assembly Joint Resolution 63*, *available at* http://www.legis.state.wi.us/1999/data/AJR63hst.html (last visited Apr. 23, 2009)).

26 Kevin Murphy, *Recent state Supreme Court races have turned 'elections into auctions,' panel says*, The Capital Times, November 19, 2008, *available at* http://www.madison.com/tct/news/stories/315051 (last visited Apr. 23, 2009).

27 *See, e.g.*, Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. Rev. 973 (2001); *Make impartial justice an election issue*, The Capital Times, Oct. 6, 2008, *available at* http://www.madison.com/tct/opinion/editorial/308063 (last visited April 23, 2009) (stating that Justices Bradley, Crooks, and Roggensack oppose moving from elections to a commission based system); *Re: Key Findings from a Survey of 500 Likely Voters in Wisconsin*, The Polling Company, Mar. 2008, *available at* http://www.pollingcompany.com/cms/files/Fed%20Soc%20Wisconsin%20Key%20Findings%20for%20Release.pdf (last visited June 30, 2009) (reporting that 66 percent of Wisconsinites approve of the state's current method of judicial selection).

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The Federalist Society
For Law and Public Policy Studies
1015 18th Street, N.W., Suite 425
Washington, D.C. 20036