

# Certworthy

Summer 2007

The newsletter of the DRI  
Appellate Advocacy Committee

  
The Voice of the Defense Bar

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### FROM THE CHAIR



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It is with mixed emotions that I write this column, my last as chair of the Appellate Advocacy Committee. Although I am saddened that my time as committee chair is ending, I am delighted with the committee's achievements during the past two years, and I am excited about its prospects going forward.

There have been many highlights during my term as chair. One was the seminar in Phoenix, which both set attendance records and received enthusiastically positive reviews. Program chairs Scott Burnett Smith and David Axelrad deserve special mention for organizing such an outstanding program. I am also delighted that our committee was selected to present CLE sessions at both the 2006 and 2007 DRI annual meetings. One of my goals as chair was to promote the importance and value of appellate practitioners by elevating the committee's visibility, and getting one

## Thanks, and so long.

of the coveted slots at the annual meeting is an effective way to do that. I am pleased that the committee continued its tradition of frequently appearing in the pages of For the Defense by contributing a fascinating collection of articles on logic and persuasion that appeared in the July 2007 issue. Publications chair Ray Ward deserves all the credit for both conceiving of that project and bringing it to fruition. Finally, I am glad that the committee's membership has continued growing as more DRI members discover the benefits of joining the Appellate Advocacy Committee.

The committee's next major event will be a seminar in Miami in February 2008. Program chair Diane Bratvold and program vice chair Mitch Brown have assembled a stellar faculty for a program that will include both traditional topics as well as some unconventional subjects that will prove thought provoking. And there is nothing wrong with spending some time in Miami in February!

Because this is my last column, I want to acknowledge some of the people who have been a great help to me both before and during my time as chair: Kelly Freeman, the

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*It is better to fail in originality than to succeed in imitation.*

Herman Melville (1819-1891)

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committee's first chair, who showed me how to be a committee chair; Mike Wallace, my predecessor as committee chair, who left the committee in such great shape, and who, despite having plenty of other things to deal with, was always ready to help with any

task, large or small; Ray Ward, whose devoted stewardship of publications made that an area I never needed to worry about; Scott Stolley, who as the committee vice chair provided wise counsel and readily took on whatever needed to be done; and Scott Smith,

my good friend and consigliere who, I am certain, will soon chair this committee. To all of you, thanks for making this job both easy and enjoyable.

And to everyone, see you down the road

*Abuse of words has been the great instrument of sophistry and chicanery, of party, faction, and division of society.*

John Quincy Adams (1767-1848)

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In *Young Frankenstein*, Igor remembered something that his old dad used to say to him at poignant moments: “What the hell are you doing in the bathroom day and night? Why don’t you get out of there and give someone else a chance?” Fortunately, no one is pounding on my literal or figurative bathroom door. But I think that after nearly four years as publications chair and editor of *Certworthy* (and a couple of years before that as vice-chair and assistant editor), it’s time for me to heed the advice of Igor’s father: get out of here and give someone else a chance at this job.

Looking back, I’m proud of what our committee has accomplished during my term. We completed *A Defense Lawyer’s Guide to Appellate Practice*, a nearly 400-page manual covering every step of an appeal. We produced a well-received collection of articles on appellate practice for the April 2004 issue of DRI’s flagship magazine, *For the Defense*. Besides reaching FTD’s usual 30,000 or so readers, this collection was uploaded to Howard Bashman’s popular blog, *How Appealing*, making it available to thousands more readers. In July of this year, FTD featured a collection of articles produced by our committee on the science and art of persuasion — a topic of interest to all DRI members, not just appellate lawyers. We contributed a stream of “Writer’s Corner” columns to FTD. And of

course, we produced eight issues of *Certworthy*.

I say “we,” because these accomplishments belong to the committee, not to me. The 400-page manual would never have gotten started without the vision and leadership of my predecessor, Scott P. Stolley, and never would have been finished without the efforts and patience of its four editors and 33 authors. Our April 2004 collection of FTD articles would not have happened without Scott B. Smith, who envisioned that project and recruited an all-star group of authors to pull it off. Our July 2007 collection of FTD articles would not have happened without the ideas and efforts of John J. Bursch, Matthew S. Lerner, Linda L. Morkan, and Mary Massaron Ross. And of course, *Certworthy* would be awfully thin without the contributions of dozens of people.

Although I’m grateful to everyone who has contributed to *Certworthy* over the years, I’d like to thank by name everyone who was a circuit editor from Summer 2001 through Summer 2007, for two reasons. First, their contributions form the backbone of this newsletter. Second, they don’t get enough credit for their fine work.

Let me start with everyone who was a circuit reporter from 2001 through 2003, when I edited the circuit reports for *Certworthy*. During that time, I committed two cardinal sins of an editor: heavy-handed editing (not respecting the writer’s own style), and failure to give ample warning of upcoming deadlines. Despite my shortcomings, they stuck with the

program. So to Amber L. Achilles, Karena Bierman, Charles W. Craven, Diane R. Crowley, Gina Fantasia, Donald W. Fowler, Robert L. Galloway, Geoffrey M. Johnson, Ralph W. Johnson, III, Eric J. Magnuson, Jody R. Nathan, Richard L. Neumeier, Frank E. Noyes II, Michael Scudder, Michael Anthony Shaw, William E. Shreve, Jr., Scott B. Smith, Michael S. Taylor, Rebecca A. Womeldorf: Thank you for your contributions and for putting up with me.

Since the Winter 2004 issue, the circuit reports have been edited by Diane R. Crowley. Having had her job before, I know how much work it is. Diane, thank you. And thanks to Diane and everyone else who has been a circuit reporter since Winter 2004: Diane B. Bratvold, Charles W. Craven, William S.D. Cravens, Katherine Taylor Eubank, Timothy Fitzgerald, Charles T. Frazier, Jr., Timothy Gallagher, Geoffrey M. Johnson, Ralph W. Johnson, III, Linda Marie Lee, Jeffrey K. McGinness, Steven R. Minor, Richard L. Neumeier, Sarah M. Riley, Michael Anthony Shaw, Scott B. Smith, Adam B. Wiens, and Rebecca A. Womeldorf.

I congratulate whoever succeeds me in this job. With the breadth and depth of writing talent on this committee, being chair of publications is like driving a Lamborghini: just point it in the right direction and go easy on the clutch.

### **Specificity in a Notice of Appeal** ***Brooks v. AIG SunAmerica Life*** ***Assurance Co.*, 480 F.3d 579 (1st** **Cir. 2007).**

Nancy Brooks and Joan Silverman brought a putative class civil action against SunAmerica, alleging breach of contract (Count 1), breach of the implied covenant of good faith and fair dealing (Count 2), and violations of the Massachusetts and California Unfair Business Practice Statutes (Counts 3 and 4). SunAmerica moved to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim. The court granted the motion with respect to Count 2, but deferred any ruling on the remaining counts. After complying with a court order to produce a pertinent document, SunAmerica brought a motion for summary judgment, seeking dismissal of the remaining three counts. The court granted summary judgment and dismissed the suit.

Brooks and Silverman filed a notice of appeal specifying that they were appealing from the “Order Granting Summary Judgment for Defendant *entered 3 March 2006 . . .*” *Id.* at 585; emphasis by the court. However, in their brief, they argued that the district court erred in dismissing Count 2 under Rule 12(b)(6), a ruling that had been entered on October 5, 2005.

The First Circuit held that it had no jurisdiction to review the district court’s earlier dismissal of Count 2

under Rule 12(b)(6). Although Fed.R.App.P. 3(c)(1)(B) requires that notices of appeal be liberally construed, “if the appellant ‘chooses to designate specific determinations in his notice of appeal — rather than simply appealing from the entire judgment — only the specified issues may be raised on appeal.’” *Id.* at 585.

### **Preservation of error** ***Federal Insurance Co. v. HPSC, Inc.*,** **480 F.3d 26 (1st Cir. 2007).**

This case involved a failed attempt by HPSC, Inc., to recover an embezzlement loss under an executive protection insurance policy issued by Federal Insurance Co. Federal brought a declaratory judgment action against HPSC seeking rescission of the policy based on the misrepresentation made by HPSC in its 2001 insurance renewal application, and HPSC counterclaimed, seeking recovery under the policy and damages for unfair and deceptive trade practices. The case went to a jury trial. At the conclusion of the evidence, Federal moved for judgment as a matter of law (“JMOL”) under Fed.R.Civ.P. 50(a). The district court denied the motion, and the jury returned a verdict in favor of HPSC.

On appeal, Federal attempted to argue that it was entitled to JMOL under Rule 50(a). HPSC argued that Federal failed to preserve this issue by failing to re-urge its motion for JMOL under Rule 50(b) after the verdict was rendered. The First Circuit agreed with HPSC. “[T]he Supreme Court made it abundantly clear in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*[, 546 U.S. 394 (2006),] that in the absence of a renewed motion for judgment as a matter of law pursuant to Rule 50(b), we are utterly ‘without

power to direct the District Court to enter judgment contrary to the one it had permitted to stand[.]” *Id.* at 32. Richard L. Neumeier  
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### **Treating the Appeal of an** **Ancillary Order as a Writ of** **Mandamus**

### ***Stein v. KPMG, LLP*, 486 F.3d 753** **(2d Cir. 2007)**

In the course of a criminal prosecution, the district court asserted ancillary jurisdiction over a state law contract claim brought against KPMG by sixteen of the defendants in the criminal case, former partners and employees, seeking to force KPMG to pay their legal expenses. KPMG appealed from the decision allowing the ancillary proceeding and from the denial of its motion to compel arbitration of the contract claim.

The district court had found that the government had used the threat of prosecution to pressure KPMG into cutting off payment of the appellees’ legal fees and thereby violated their Fifth and Sixth Amendment rights to a fair trial and to the effective assistance of counsel. It suggested that the constitutional violation could be rendered harmless if the appellees could successfully force KPMG to recommence or, for some of the appellees, commence paying their legal expenses. The district court *sua sponte* instructed the clerk of the district court to open a civil docket number for a contract claim by the appellees against KPMG for advancement of defense costs.

On appeal, KPMG argued that the district court lacked subject matter jurisdiction over the advancement claims and also that, if jurisdiction existed, the district court further erred by refusing to compel arbitration.

The appellees argued that the Second Circuit had no appellate jurisdiction to review the district court's assertion of ancillary jurisdiction because the denial of KPMG's motion to dismiss the advancement complaint was an unappealable interlocutory order. KPMG responded that the court had jurisdiction under the Federal Arbitration Act to review the district court's refusal to compel arbitration, and that the Second Circuit could then exercise pendant jurisdiction over the question of ancillary jurisdiction.

The Second Circuit declined to resolve the issue of appellate jurisdiction. It believed that it was more appropriate to exercise its mandamus power. Accordingly, the Second Circuit treated the appeal as a petition for a writ of mandamus. It granted the petition and vacated the district court's orders finding jurisdiction over the complaint against KPMG and dismissed that complaint.

At the outset of its analysis, the court recognized that three conditions had to be satisfied before a writ of mandamus may issue: (1) the petitioner must have no other adequate means to obtain the relief desired, (2) the petitioner must show that the right to the writ is clear and indisputable and (3) the court must be satisfied that the writ is appropriate under the circumstances. The Second Circuit concluded that all of the standard requirements for granting mandamus relief were met, while the reasons un-

derlying the traditional reluctance to resort to the writ were either not present or favored granting the writ.

First, the Second Circuit rejected the argument that KPMG's right to relief was not clear and indisputable because the proper scope of ancillary jurisdiction was not well-settled. It noted that, because ancillary jurisdiction cannot be limitless and still be ancillary, boundaries had to be recognized, and that in the instant case the exercise of ancillary jurisdiction was clearly outside those boundaries.

The court recognized that ancillary jurisdiction is intended to permit the disposition of claims that are, in varying respects and degrees, factually interdependent by a single court, and to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees. The most common exercise of ancillary jurisdiction is to resolve a fee dispute between a party and its attorney arising in litigation in which the attorney represented the party. Here, however, the Second Circuit concluded that that common scenario was a world away from the exercise of ancillary jurisdiction over a proceeding to adjudicate a contract dispute between the defendants and a non-party former employer.

Next, the Second Circuit concluded that the ancillary proceeding's contribution to the efficient conclusion of the criminal proceeding was entirely speculative. Even if the district court's holding that the government violated the Fifth and Sixth Amendments was correct, the ancillary proceeding would only provide a remedy if KPMG lost the proceeding. Moreover, it recognized that if there were constitutional violations and

even if KPMG was contractually obligated to pay appellees' expenses, the ancillary proceeding was not an indispensable remedy and might not even constitute a full remedy. Dismissal of the indictment for Fifth and Sixth Amendment violations was always an available remedy. Moreover, if the government violates the Fifth and Sixth Amendments by coercing an employer to decline to pay expenses on a voluntary basis, it might well be a similar violation for it to coerce the employer to breach a contract to pay such expenses, thereby compelling the employees to pay the substantial cost of enforcing the contract in a civil action. Either way, the government used coercion to raise the cost of the defendants to obtain counsel of their own choosing. Thus, the ancillary proceeding might not render any constitutional violation harmless.

Finally, the court found that, even if there were constitutional violations and even if KPMG were contractually obligated to advance appellees' attorneys' fees, creating an ancillary proceeding to enforce that obligation was not the proper remedy.

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### **Hiring Counsel to Represent an Insured Does Not Necessarily Bind Carrier on Corporate Successor Issue**

***Greenway Center, Inc. v. Essex Insurance Company*, 475 F.3d 139 (3rd Cir. 2007).**

An insurer hired counsel to represent its insured to contest the plaintiff's

attempt to rectify mistakes made in identifying and suing the correct defendant. Despite counsel's efforts, the trial judge decided that principles regarding the substitution of parties indicated that the contesting party could be viewed as the "predecessor" to the mistakenly named defendant. The trial judge did not consider or decide whether the principles applicable to corporate succession would lead to the same conclusion. Moreover, the hiring insurer, whose interests did not coincide with the insured on the succession issue, did not have the opportunity to present its own position that the party was not the corporate successor to the named defendant.

Nevertheless, in an ensuing federal declaratory judgment action, the district court held that the insurer was bound by the state court decision and had to provide coverage for the named defendant as the successor to the insured. The Third Circuit reversed that determination on the ground that the insurer did not have a full and fair opportunity to litigate the corporate succession issue. That the attorney hired by the carrier to represent the insured had the opportunity to participate in the hearing on plaintiff's motion to amend, object to exhibits and questions, and give testimony was "entirely beside the point," because the attorney was retained to represent the interests of the insured, which were different from those of the hiring insurer.

### **Limits on "Closely Regulated Industry" Exception to Need for Search Warrant**

***Watson v. Abington Township*, 478 F.3d 144 (3rd Cir. 2007).**

Under the Fourth Amendment, probable cause and a warrant are usually needed for a search or seizure to be considered reasonable. However, "[b]ecause the owner or operator of commercial premises in a 'closely regulated' industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search, have lessened application in this context." *New York v. Burger*, 482 U.S. 691, 702 (1987).

Of course, the "closely regulated industry" exception is a narrow one, and "requires more than a finding that the business being conducted on that property is closely regulated. It requires that the search or seizure actually be carried out in accordance with a regulatory scheme that provides a constitutionally adequate substitute for a warrant." *Watson, supra*, 478 F.3d at 152.

Furthermore, when the regulatory scheme permits warrantless inspection only by specified categories of individuals, such inspections conducted by officials who are not among or authorized by those individuals are not protected by the "closely regulated industry" exception.

### **Appealability of an Unquantified Award of Attorney's Fees**

***American Society for Testing & Materials v. Corpro Companies, Inc.*, 478 F.3d 557 (3rd Cir. 2007).**

This declaratory judgment action involved a claim by defendants for indemnification of the amounts which they spent to defend and to settle underlying claims, and a claim for reimbursement of the attorney's fees and costs incurred in connection with the

declaratory judgment action. The district court granted relief to defendants by ordering indemnity for specific sums paid in the underlying settlements and in the defense of the underlying litigation, and by granting their claim for attorney's fees and costs incurred in connection with the declaratory judgment action. The district court, however, did not quantify the amount of the latter award. The unquantified award generated two questions of appellate jurisdiction.

The first question, raised by the Third Circuit *sua sponte*, considered whether the court had jurisdiction and, if so, to what extent. The court concluded that, despite the unquantified award, it had "jurisdiction over the appeal insofar as it is from the order providing for defendants' indemnification for settlement costs and attorney's fees incurred in the [underlying] litigation, sums that the district court has quantified." *Id.* at 570.

The second question stemmed from plaintiff-appellant's assertion that the court could exercise pendant appellate jurisdiction to vacate the unquantified attorney's fees award. The court rejected that contention, holding that unquantified fee award was collateral to and not entwined with the appealable merits issues, and thus not reviewable in the current appeal. *Id.* at 580-581.

### **A Cautionary Tale of Offer, Acceptance, Commercial Practice and How To Amend a Complaint** ***Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247 (3rd Cir. 2007).**

As this case demonstrates, basic prin-

ciples should never be forgotten. One is that a court interprets documents in accord with their plain language, and when the text of a contractor's bid says that it is *not* a firm offer, that language trumps the more esoteric concept that offers made in the construction industry are frequently regarded as firm offers which become binding upon acceptance.

On the legal procedural level, the case reinforces the rule that the Third Circuit will not, except perhaps in a civil rights case, entertain a plaintiff-appellant's argument for the right to file an amended complaint, unless the plaintiff took advantage of an opportunity to file an amended complaint or made a timely request of the district court for leave to file an amended complaint, which was accompanied by a proposed amended complaint.

### Trigger for Underinsured Motorist Claim

#### ***State Farm Mutual Automobile Insurance Co. v. Rosenthal*, 484 F.3d 251 (3rd Cir. 2007)**

Answering a question of first impression, and perhaps raising additional related questions, the Third Circuit rejected the district court's prediction that the Pennsylvania Supreme Court would hold that the statute of limitations on underinsured motorist claims would begin to run when the insurer denies the insured's claim. Instead, the court predicted that the Pennsylvania Supreme Court would start running the statute of limitations on the date on which the insured settles with or obtains an award from the adverse driver for less than the value of his damages.

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### Exploring the "Complete Preemption Doctrine"

#### ***Discover Bank v. Vaden*, — F.3d —, 2007 WL 1695758 (3rd Cir. 2007)**

A federally-insured bank/credit card issuer sued in state court to collect a consumer's credit card debt, and the consumer counterclaimed with a class action claim based on the state law of usury. The bank filed a petition in federal court to compel arbitration of counterclaims. The district court concluded that it had subject-matter jurisdiction to address the petition, because a federal statute, the Federal Deposit Insurance Act ("FDIA"), completely preempted the subject matter of the counterclaim when brought against a state-chartered, federally-insured bank.

In an opinion by Judge Duncan, the Fourth Circuit affirmed the order compelling arbitration. The court noted that while the Federal Arbitration Act ("FAA") does not confer subject matter jurisdiction, petitioners with federal questions can file under the FAA in federal court. Under the "complete preemption doctrine," as an exception to the "well-pleaded complaint" rule, a federal question exists even as to claims based on state law, when the substantive area of law has been completely preempted by federal statute. The court agreed that the federally-insured bank was the real party in interest, and that the consumer's state law usury claims were completely preempted by the FDIA. The court also agreed that the dispute was within the arbitration clause of the parties' agreement.

In dissent, District Judge Goodwin complained that the complete pre-

emption doctrine, while applicable to the removal of claims from state court, provides no basis for the characterization of a counterclaim in state court as a federal question. Judge Goodwin relied on Supreme Court case law limiting the removability of cases based on counterclaims, and concluded the FAA should not be used as device for getting a case into federal court that could not otherwise be removed.

### DOL Wavers on Waivers of "Rights" and "Claims"

#### ***Taylor v. Progress Energy, Inc.*, — F.3d —, 2007 WL 1893362 (4th Cir. 2007)**

On rehearing, a panel of the Fourth Circuit refused to go along with the position of the Department of Labor {"DOL"} regarding the legality of a waiver of rights under the Family and Medical Leave Act ("FMLA"). In its original opinion, the court considered the meaning of "rights" under 29 C.F.R. § 825.220(d), which provides that "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." The court concluded that this regulation prohibits both prospective and retrospective waivers of FMLA rights, without approval from the DOL or a court.

The DOL filed an amicus brief in support of the petition for rehearing, which was granted. In the new opinion, the same panel reached the same decision, rejecting the DOL's position as inconsistent with the language of the regulation. The DOL argued in its amicus brief that "rights" did not include "claims." Judge Michael, in his opinion for the court, observed that this position was undercut by the DOL's position in another case in dis-

trict court in Pennsylvania, where the DOL had expressed the view that “the right to sue” is a “right under the FMLA.” Judge Michael rejected the DOL’s argument that public policy favors settlement of claims, noting that unsupervised settlement is against the policy of some federal statutes. Judge Michael also rejected the DOL’s “shifting” arguments as inconsistent with its original interpretation from when the regulation was promulgated.

In dissent, Judge Duncan shared the majority’s frustration with the DOL’s untimely participation, but concluded that the DOL’s position was entitled to judicial deference, notwithstanding the number of times the DOL’s position had changed over the years with regard to FMLA settlements.

### **Harassment of Athlete Raises Question of Liability of Coach and of University Lawyer**

***Jennings v. University of North Carolina*, 482 F.3d 686 (4th Cir. 2007)**

A former member of the women’s soccer team at the University of North Carolina (“UNC”) filed suit alleging sexual harassment by the coach and seeking relief including judgment against the school under Title IX and personal liability against the coach and a UNC official who served as assistant to the chancellor and legal counsel to UNC. The district court granted summary judgment for all the defendants. On rehearing en banc, the full court in a split decision reversed summary judgment on UNC’s liability under Title IX and the personal liability of the coach and the assistant to the chancellor.

In concluding that the harassment by the coach was actionable, Judge Michael in his opinion for the majority took into account that the coach had a lot of power by virtue of his success in winning national titles and also that the plaintiff and other players were much younger than the coach. Judge Michael concluded that there was at least a dispute of fact for purposes of Title IX as to whether the hostile environment concretely and negatively affected the plaintiff’s participation in the soccer program, from which she was cut during exams at the end of her sophomore year. Finally, the court held that the player’s meetings with the school’s lawyer beginning in the fall of plaintiff’s freshman year provided a sufficient basis for imputing knowledge of the harassment to UNC. Those same meetings also gave sufficient notice to the lawyer of the ongoing harassment to support a section 1983 claim against her as a supervisor of the coach.

Judge Niemeyer, joined by Judge Williams, concluded that the plaintiff did not act as though she thought her rights were being violated before she was cut from the team. Judge Niemeyer concluded that the plaintiff’s anger was understandable, but her circumstances did not satisfy the injury requirement for liability under Title IX. Judge Niemeyer also expressed the view that the coach’s vulgar language and personal comments, while offensive, were not gender-based so as to be actionable.

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### **Interlocutory Appeals/Class Certification**

***Regents of the University of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007)**

Shareholders of Enron Corporation sued several banks in a class-action suit, alleging that the banks violated securities laws in a scheme with Enron to form partnerships and transactions that allowed Enron to inflate revenue while disguising the liabilities it was actually incurring. Plaintiffs did not allege that the banks owed them any fiduciary duties, improperly filed financial reports on Enron’s behalf, or engaged in wash sales or other manipulative practices. Instead, they alleged that the banks aided and abetted Enron in its deception of its investors. The district court determined that the banks’ alleged conduct met the definition of “deceptive act” under Securities Exchange Act § 10b-5(c), and certified the class.

On the banks’ interlocutory appeal, the Fifth Circuit initially had to determine how far appellate review could address the merits of the case. Under Fed.R.Civ.Proc. 23(f), interlocutory appeals are limited to orders granting or denying class certification. Part of plaintiffs’ claim and request for class certification, however, required them to show they relied on intentional misrepresentations by the banks. Since the banks owed plaintiffs no fiduciary duty, commonality required each plaintiff to demonstrate reliance individually. The district court tried to avoid this requirement by allowing a class-wide presumption of reliance based on the “fraud on the

market” theory. Since certification required the Fifth Circuit to determine if the “fraud on the market” theory was valid, the court, noting widespread acceptance among other circuits, held that interlocutory review can inquire into the merits when legal or factual theories of a case also concern issues relevant to class certification.

The Fifth Circuit then found that plaintiffs’ claim for “deception” required them to show that the banks failed to comply with their duty to disclose material information. Because defendants did not owe plaintiffs this duty, no “deception” could have occurred. Additionally, the “fraud on the market” theory required the banks to make a public and material misrepresentation. Because the banks did not make any such statements, the theory did not apply. The court therefore reversed the class certification.

## Removal/Federal Question Jurisdiction

### *In re Hot-Hed Inc.*, 477 F.3d 320 (5th Cir. 2007) (per curiam)

Plaintiff sued defendant in a Texas state court, seeking relief for trademark dilution under a Texas statute and for trademark infringement and unfair competition under Texas common law. Defendant removed the case to federal court, arguing that plaintiff’s request for attorney’s fees converted its trademark claims into a federal question because attorney’s fees were not available for such claims under Texas law. The district court denied plaintiff’s motion for remand, and plaintiff sought mandamus relief in the Fifth Circuit.

First, the Fifth Circuit held that removal of trademark cases based on the

Lanham Act is improper absent a plaintiff’s clear intention to seek such relief under the act in the complaint. Here, plaintiff sought attorney’s fees “as allowed by law.” Since plaintiff pleaded no statutory basis for attorneys’ fees, the district court presumed that plaintiff intended to invoke the Lanham Act, the federal statute that permits the recovery of attorneys’ fees in trademark cases. The court held that the Lanham Act was only applicable in “exceptional circumstances,” and such relief is available only when a complaint clearly seeks it under the act. Because plaintiff carefully pleaded only state-law claims and did not allege any exceptional conduct required under the act to recover attorney’s fees, the court held that removal was improper.

The Fifth Circuit held that a request for attorney’s fees is not a proper basis for federal jurisdiction if such fees are only incidental costs of litigation. Under the federal rules, removal based on a federal question requires the removing party to raise a substantial question about an essential element of a federal right. Since plaintiff’s request for attorney’s fees was not based on a particular federal statute, the Fifth Circuit held that the requested fees were incidental costs of litigation, and thus did not raise a substantial question about a federal right. Accordingly, the court remanded the matter to district court and ordered that court to address whether diversity jurisdiction exists.

## Timeliness of Supplemental Notice of Removal

### *Board of Regents of the University of Texas System v. Nippon Tel. & Tel. Corp.*, 478 F.3d 274 (5th Cir. 2007)

Plaintiffs sued defendant in a Texas state court for allegedly stealing confidential

information related to certain lithium rechargeable-battery technology developed by plaintiffs. Defendant, a Japanese company, removed the case to federal court and later supplemented its notice of removal by alleging subject-matter jurisdiction based on its status as a foreign sovereign under 28 U.S.C. §§ 1330 and 1441(d). Ultimately, the case came before the Fifth Circuit to determine if defendant’s supplemental notice of removal was timely and if defendant properly raised foreign sovereignty as a basis for subject-matter jurisdiction.

The Fifth Circuit first determined that defendant timely filed its supplemental notice of removal. A notice of removal must be filed within 30 days after a defendant receives the complaint and the formal service of process. Here, defendant filed its supplemental notice more than 30 days after it was originally served, but the Fifth Circuit held that the supplemental notice was nevertheless timely because plaintiff did not properly serve defendant. When plaintiffs originally served defendant, they did not comply with Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. By the time plaintiffs complied with the Hague Convention rules, defendant had filed its supplemental notice of removal. Charles T. Frazier, Jr.  
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Sixth Circuit

**Removal Issues on Appeal**  
*Curry v. U.S. Bulk Transport, Inc.*,  
462 F.3d 536 (6th Cir. 2006)  
Plaintiff filed suit in state court to re-

cover damages resulting from injuries he sustained in an accident when a truck carrying potassium sulfate overturned in the warehouse in which he worked. After the case was removed to federal court based upon diversity of citizenship, the complaint was amended to substitute two individual defendants, both citizens of Ohio, in place of the “John Doe” defendants whose citizenship had been unknown when the complaint was filed. Although the addition of the two defendants destroyed complete diversity (plaintiff was also a citizen of Ohio), no party filed a motion to remand the case back to state court or took any other steps to notify the district court of the potential problem with its subject-matter jurisdiction.

Upon review of the jurisdictional basis for plaintiff’s appeal from the district court’s summary judgment, it became apparent that complete diversity had been destroyed when the two nondiverse defendants were substituted as parties in the case. The case was not a proper instance where a court of appeals might exercise limited authority to dismiss nondiverse defendants under *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). Because the district court lacked subject-matter jurisdiction to enter any judgment in the lawsuit, and after expressing some dissatisfaction and chastising the parties for their lack of diligence for not calling the jurisdictional defect to the attention of the district court, the Sixth Circuit remanded the case to the district court with instructions to remand the matter to the state court from which removal was granted.

### **Failure to Preserve Sufficiency-of-the-Evidence Challenge**

***Allison v. City of East Lansing* 484 F.3d 874 (6th Cir. 2007)**

Seven Michigan State University employees sued the City of East Lansing under 42 U.S.C. §1983 for Fourth Amendment violations that occurred during the East Lansing Fire Department’s response to a possible anthrax contamination at MSU. The plaintiffs (all women) were disrobed, scrubbed, and rinsed at different stations by men in HAZMAT suits. While some steps were taken to ensure their “modesty,” the plaintiffs’ privacy concerns went largely ignored. After about one hour, the plaintiffs were transported to a nearby hospital where it was determined that they had not been exposed to anthrax or any other chemical or bacteria.

Following the plaintiff’s case-in-chief during the jury trial, the city’s motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a) was denied by the district court. At the conclusion of the trial, the jury returned a verdict in favor of the plaintiffs. The city failed to renew its motion for judgment as a matter of law either at the conclusion of all the evidence or following the verdict pursuant to Fed.R.Civ.P. 50(b). Relying upon *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), the Sixth Circuit reconsidered prior precedent in the circuit which had held that an appellant’s failure to renew its motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b) could be deemed waived on appeal by the appellee if not raised in the appellee’s merit brief. The Sixth Circuit held that “it is now clear that

renewing the motion post-verdict is jurisdictional and cannot be waived.”

### **Law of the Case**

***Poundstone v. Patriot Coal Co., Ltd.*, 485 F.3d 891 (6th Cir. 2007)**

In this appeal involving an action for breach of contract, the defendant appealed from the district court’s calculation of plaintiff’s damages based upon the law of the case established in a prior decision from a different panel of the Sixth Circuit. The Sixth Circuit held that it was precluded from reaching a different conclusion from that of the prior panel unless one of three “exceptional circumstances” was found to exist: [1] the evidence in a subsequent trial was substantially different; [2] controlling authority has since made a contrary decision of law applicable to such issues; or [3] the decision was clearly erroneous and would work a substantial injustice. *Coal Resources, Inc. v. Gulf & Western Industries, Inc.*, 865 F.2d 761, 767 (6<sup>th</sup> Cir. 1989). The first two circumstances were not applicable here. Thus, to warrant relief from the prior panel’s decision and the district court’s order on remand, the defendant had to show that the prior panel’s decision was clearly erroneous and would work a substantial injustice. Declining the invitation to modify the law of the case, the Sixth Circuit affirmed and found that the prior panel’s decision was supported by the relevant agreements entered into by the parties and thus was not clearly erroneous.

### **Remand for Remittitur of Punitive Damages Award**

***Bach v. First Union National Bank*, 486 F.3d 150 (6th Cir. 2007)**

After determining that the defendant had breached certain provisions of the Fair Credit Reporting Act, the jury awarded plaintiff \$400,000 in compensatory damages and \$2,628,600 in punitive damages. The defendant appealed, claiming that the punitive damages award was unconstitutionally excessive. The Sixth Circuit agreed and remanded the case to the district court for either remittitur or a new trial on punitive damages. The district court then offered plaintiff the choice between a \$400,000 reduction in the punitive damages award or a new trial, and plaintiff chose the former (i.e., a punitive damages award in the amount of \$2,228,600). In the defendant's second appeal, the Sixth Circuit declared its previous decision to be the law of the case and found that the district court failed to fully appreciate the prior panel's observations that the defendant's conduct was not particularly outrageous as judged by the reprehensibility factors set forth in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). The Sixth Circuit reversed and, on remand, directed the district court to order a remittitur of the punitive damages award to an amount not to exceed \$400,000.

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Eighth Circuit

**Rooker-Feldman Doctrine Applies to State Court's Denial of Appeal**  
***Skit International, Ltd. v. DAC Technologies of Ark., Inc.*** — **F.3d** —, **2007 WL 1468819 (8th Cir.)**

Despite several attempts by a foreign

defendant to obtain appellate review, the Eighth Circuit affirmed a district court's decision that the defendant was correctly denied federal review of a state court judgment under the Rooker-Feldman doctrine.

In 2003, a judgment against Hong Kong corporation Skit International was entered in an Arkansas state court for breach of contract. Skit filed a notice of appeal, but then moved to dismiss in 2004. The Arkansas Court of Appeals dismissed the appeal the following day. In 2005, Skit filed a motion in state court to set aside the judgment as void for lack of service and jurisdiction, *inter alia*. The motion was denied. Skit filed another notice of appeal and tendered the record to the clerk of the Arkansas Supreme Court. The clerk, however, refused to file the record because the underlying motion to set aside the judgment appeared to be untimely. Skit filed a motion asking the Arkansas Supreme Court to order the clerk to accept the record; the court denied the motion. *Id.* at \*1.

Skit then filed an action in federal court seeking to nullify the state judgment for lack of jurisdiction and improper service of process. Summary judgment was entered for DAC. When Skit moved for reconsideration, the district court dismissed the claim for lack of subject matter jurisdiction under the Rooker-Feldman doctrine, finding Skit was "improperly seeking federal appellate review of a state court judgment." *Id.*, citing *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 416 (1923). Skit appealed to the Eighth Circuit, arguing that the Rooker-Feldman doctrine does not apply because it was unable

to obtain state appellate review. Skit contended that, because the state appeal was erroneously found untimely, it was not given the "reasonable opportunity to raise [its] federal claims in state court," as required to trigger Rooker-Feldman. *Id.* at \*3 (quoting *Simes v. Huckabee*, 354 F.3d 823, 829 (8th Cir. 2004)).

The Eighth Circuit held that "neither this court nor the district court has jurisdiction to review the Arkansas Supreme Court's decision to deny Skit's motion for a rule on the clerk." *Id.* The appellate court noted that because Skit had claimed no injury apart from an allegedly erroneous state judgment, it was necessarily seeking federal appellate review and rejection of a state decision. Such review is "precisely what the Rooker-Feldman doctrine was intended to prevent." *Id.*

Refusing to consider either the absence or denial of state appellate review due to untimeliness as grounds for an exemption from Rooker-Feldman, the Eighth Circuit explained that "nowhere in *Simes* did we suggest that a state system must provide an *appellate* court decision on plaintiff's claims, and we decline to exempt from Rooker-Feldman a party whose appeal was not heard because it was considered untimely." *Id.* (emphasis in original; citations omitted). The court affirmed the district court's judgment. *Id.* at \*4.

**Contingent Right Is Not a "Cognizable Interest" under Mandatory Intervention Rule**  
***Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC***, **485 F.3d 1006 (8th Cir. 2007)**

In an interlocutory appeal, the Eight

Circuit decided that a family member does not have a “cognizable interest” sufficient to support mandatory intervention in a declaratory judgment action that will determine insurance coverage for a family member’s wrongful death action.

Following her mother’s death, Mary Redden sued a nursing home and its operators, alleging a failure in diagnosis and treatment, resulting in death. *Id.* at 1007. After the nursing home’s operators demanded that its insurance company provide a defense in the action, the insurer sought a declaratory judgment that it had no obligation to defend or indemnify the nursing home or its operators against the daughter’s lawsuit. Redden moved for mandatory intervention under Fed.R.Civ.Proc. Rule 24(a)(2) and permissive intervention under Rule 24(b)(2). *Id.* at 1008. The district court denied both motions to intervene, and appealed. *Id.*

Rule 24(a)(2) provides that a party is entitled to intervention if the party, *inter alia*, has a cognizable interest in the action. *Id.* The appellate court noted that Redden was not a party to the insurance contract litigation or an intended beneficiary, and had not obtained a judgment against the nursing home or its operators. *Id.* at 1009. The court concluded that Redden did not have a cognizable interest because her interest in the insurer’s liability was contingent upon both a judgment and the defendant’s inability to satisfy that judgment, an interest “too remote and indirect” to satisfy the standards for Rule 24(a)(2). *Id.* at 1008-09.

Because Redden filed her motion more than a year after the commencement of the action and because the

discovery deadline was quickly approaching, the district court also held that the district court did not abuse its discretion in ruling against Redden’s motion for permissive intervention under Rule 24(b)(2). *Id.* at 1009. The court of appeals affirmed. Diane B. Bratvold  
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Ninth Circuit

### Limits on First Amendment Freedoms Explored in Three Cases

***Faith Center Evangelistic Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007); *Villegas v. Gilroy*, 484 F.3d 1136 (9th Cir. 2007); *Rosenbaum v. City and Co. of San Francisco*, 484 F.3d 1142 (9th Cir. 2007)**

Motorcycle club insignia, sound systems for an outdoor preacher and use of a meeting room in a public library were the centerpieces of three recent cases from the greater San Francisco Bay Area, all affecting First Amendment freedoms.

The *Faith Center* case arose when a public library in Antioch declined the request of a local church to use its public meeting room for a “praise and worship” service. The district court enjoined this policy, calling it “viewpoint discrimination,” but a divided panel of the Ninth Circuit disagreed, holding that excluding worship services was permissible to uphold the “limited public forum” purpose of the library facilities. A separate concurrence and a lengthy dissent accompanied the opinion, and when a petition for rehearing *en banc* was denied, seven justices penned yet another long, angry dissent, stating that one

may not exclude religious speech from a public forum simply because of its religious character, which the dissenters found to be squarely protected by the United States Supreme Court ruling in *Widman v. Vincent*, 454 U.S. 263, 275 (1981).

A few weeks later, the court issued two more First Amendment-related opinions on the same day. In *Villegas*, members of the Top Hatters Motorcycle Club were prevented from wearing vests bearing their club symbol (a skull with wings and a top hat) when they attended the annual Gilroy Garlic Festival, on the grounds that an unwritten dress code barred “demonstrative insignia.” *Id.* at 1138. After the district court granted the city’s motion for summary judgment, the motorcyclists appealed. The Ninth Circuit declared that the club’s insignia “did not rise to the level of protected speech for the purposes of the First Amendment,” and affirmed.

In *Rosenbaum*, outdoor evangelist preachers sued San Francisco for violations of constitutional rights after police officers ordered them to turn down the volume on their sound amplifiers. Having lost in district court, the preachers appealed, arguing that uneven enforcement of the city noise ordinance led to disparate treatment, especially in the form of a “heckler’s veto,” which occurs when a police officer silences a speaker in response to the complaint of someone who disagrees with the *content* of the speech. The Ninth Circuit disagreed and affirmed as to all claims, pointing out that what was prohibited was not the content of the speech but only its volume, and even that only at certain hours of the early morning or night,

and thus offended no constitutional rights.

### **When Does an Appeal Become Moot?**

#### ***Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157 (9th Cir. 2007)**

Intervening legislation rendered an appeal moot in a dispute arising over repairs and improvements to a canal on American soil which affects an aquifer in Mexico. Plaintiffs, Mexican and American non-profit organizations, filed suit against the Bureau of Reclamation, and the district court denied both injunctive and declaratory relief. Plaintiffs appealed; the motions panel of the Ninth Circuit issued a temporary injunction, halting the work pending appeal. After oral argument but before a decision, new legislation was passed which directly affected the canal project. As a result, the United States moved to vacate the injunction and remand to district court with instructions to dismiss several claims as moot. After a second oral argument and supplemental briefing, the Ninth Circuit agreed with the government, stating that “If legislation passing constitutional muster is enacted while a case is pending on appeal that makes it impossible for the court to grant any effective relief, the appeal must be dismissed at moot.” *Id.* at 1168, citing *Paulson v. City of San Diego*, 475 F.3d 1047, 1048 (9th Cir. 2006).

### **Case of First Impression Limits Absolute Immunity to Prosecutorial Conduct**

#### ***Goldstein v. City of Long Beach*, 481 F.3d 1170 (9th Cir. 2007)**

After 24 years in prison, Goldstein

was released on a petition for habeas relief and filed a civil action under 42 U.S.C. § 1983 based on his wrongful conviction for murder. He argued that the Los Angeles district attorney and his deputy failed to train and supervise their subordinates adequately, and that this failure led to his conviction based upon the false testimony of a long-time jailhouse informant with the appropriate name of Fink. Fink, who had received many reduced sentences in return for his informing, lied under oath at Goldstein’s trial and said he had never received such benefits. Although other attorneys in the D.A.’s Office knew of Fink’s history as a paid informant, this exculpatory information was never passed on to the prosecutors. Goldstein argued that this was a breach of the constitutional duties imposed on prosecutors to share relevant information on cases to every lawyer dealing with the case, pursuant to the United States Supreme Court ruling in *Giglio v. United States*, 405 U.S. 150, 154 (1972).

The two district attorneys pled absolute immunity, but the district court denied their motion to dismiss. Explaining that, while it did not ordinarily have jurisdiction over interlocutory appeals of denials of motions to dismiss, it does have jurisdiction to hear an immediate appeal from a denial of a claim of absolute immunity, the Ninth Circuit accepted the appeal and affirmed. Prosecutors are absolutely immune from suit for conduct that is “intimately associated with the judicial phase of the criminal process,” the court stated, but not for “performing investigatory or administrative functions” or for “conduct involving termination, demotion and treatment of employees.” 481 F.3d at 1173; ci-

tations omitted. As Goldstein’s charge was failure to develop a policy of sharing information about jailhouse informants and to provide training on this issue, his allegations were solely administrative, nor prosecutorial, the court found, and absolute immunity did not apply.

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Tenth Circuit

### **Appellate Jurisdiction over Interlocutory Appeals**

#### ***Pimentel & Sons Guitar Makers, Inc. v. Pimentel*, 477 F.3d 1151 (10th Cir. 2007)**

Pursuant to 28 U.S.C. § 1292(a), the Tenth Circuit joined several other circuits in holding that an appellate court does not have jurisdiction unless a district court order addressing an existing injunction “substantially and obviously alters the parties’ pre-existing legal relationship,” as set forth in the existing injunction. *Id.* at 1154. Additionally, whether a district court order interprets or actually modifies an injunction is determined by its actual, practical effect. Therefore, if the parties’ legal relationship is not modified, the order is not appealable.

The issue for the Tenth Circuit was whether the district court’s order actually modified the existing injunction or whether it merely clarified or interpreted the prior injunction.

In 1989, the parties settled the underlying case that resulted in the district court entering an injunctive order that required defendants to use a disclaimer whenever the word “Pimentel” was used in certain situa-

tions. In 2004, plaintiff filed a complaint in federal district court alleging violations of the 1989 injunction and moved for a preliminary injunction based solely on the 1989 injunction. The district court entered a preliminary injunction, finding that the 1989 injunction required defendants to use a disclaimer whenever he used the word “Pimentel” in a business name and that defendants had used the name several times without using a disclaimer. Defendants appealed.

The Tenth Circuit found that it did not have appellate jurisdiction, explaining that “[a]n interpretation or clarification does not alter the status of the parties, ‘but merely restates that relationship in new terms,’ . . . while a modification either ‘alters the legal relationship between the parties or substantially changes the terms and force of the injunction.’” *Id.*; internal citations omitted. Additionally, “[t]o change the legal relationship of the parties, the order must ‘change the command of the earlier injunction, relax its prohibitions, or release any respondent from its grip.’” *Id.*, internal citation omitted. As a result, the Tenth Circuit determined that the district court merely *interpreted* the existing injunction, and therefore the ruling was not appealable.

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**Standing Where Party Invoking Federal Jurisdiction Is Not the Object of Government Action**  
*Public Citizen, Inc. v. National Highway Traffic Safety Admin.*, — F.3d —, 2007 WL 1713334 (D.C. Cir. 2007)

In response to a series of accidents and deaths caused by tire blowouts in the late 1990s, Congress enacted the Transportation Recall Enhancement, Accountability, and Documentation Act (“TREAD Act”). As part of the TREAD Act, the secretary of transportation adopted a new standard requiring automakers to include an automatic tire pressure monitoring system that flashes a warning light when tire pressure falls below a certain level.

Four major tiremakers and the Tire Industry Association (collectively, the “tire industry petitioners”), as well as the 130,000-member organization Public Citizen, petitioned for review of the new safety regulation on the grounds that the new standard will improve tire safety, but not as much as the TREAD Act requires. Relying heavily on *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (holding that standing is “substantially more difficult to establish” where the parties invoking federal jurisdiction are not “the object of the government action or inaction” they challenge), the D.C. Circuit found that the tire industry petitioners lacked standing and that supplemental submissions would be required to determine whether Public Citizen could challenge the new regulation.

The petitioners sought to establish standing under the theory that under-

regulation of the automakers would lead to more accidents than otherwise would occur, and that injured parties would bring suits not just against the automakers but also against the tire industry petitioners. This theory was backed by the assertion “that people involved in accidents attributable at least in part to tire under-inflation invariably file products liability suits against tire manufacturers, seek refunds under tire warranties, or do both.” *Id.* at \*8.

The D.C. Circuit rejected this standing argument for a combination of three related reasons: (1) the new standard “prescribes the conduct of *automakers*, not *tiremakers*,” and there is no precedent for recognizing standing where “the manufacturers of one product argue that manufacturers of another product should be more heavily regulated so as to prevent claims against manufacturers of the first product”; (2) the new standard “sets a *minimum* performance standard for tire pressure monitors” and in no way prevents the tire industry petitioners from more effectively solving the tire under-inflation problem; and (3) no evidence supports the theory that people injured in inflation-related accidents will bring successful warranty claims and products liability suits against the tire industry petitioners. The court also noted that no case “has found standing based on such an attenuated causation chain.” *Id.* at \*8-9.

With regard to Public Citizen’s submission, the court framed the issue as follows: “To reduce the risk of harm from using a product, when do consumers have standing to sue an executive agency to compel it to impose greater regulation on the product’s

manufacturers?” Under *Lujan*, “increased-risk-of-harm” claims generally fail to meet the constitutional requirement that a plaintiff demonstrate harm that is “actual or imminent, not conjectural or hypothetical.” *Ibid*. But the D.C. Circuit pointed out that it has allowed standing in increased-risk-of-harm cases when there was “at least *both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account.” *Id.* at \*13. The court determined that Public Citizen should be permitted to make further submissions to support its assertion of standing under the standards enunciated by the court.

### **Habeas Jurisdiction over American Citizen Convicted by Foreign Tribunal**

***Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. 2007)**

Defendant Mohammad Munaf, an American citizen who had traveled to Iraq in 2005, was convicted on kidnapping charges and sentenced to death by the Central Criminal Court of Iraq (“CCCI”). He sought a writ of habeas corpus in the district court, but the district court dismissed his petition. On appeal, the D.C. Circuit affirmed. Despite Munaf’s status as an American citizen under custody of U.S. military personnel in Iraq, the D.C. Circuit held that the district court lacked jurisdiction to consider Munaf’s habeas corpus petition because he was convicted by a foreign tribunal.

The D.C. Circuit explained that this result was required by the Supreme Court’s decision in *Hirota v. MacArthur*, 338 U.S. 197 (1948), and its own precedents interpreting

*Hirota*. In *Hirota*, Japanese citizens sought permission to file petitions for writs of habeas corpus directly in the U.S. Supreme Court. The petitioners were held in Japan, where they had been tried by a military tribunal authorized by General Douglas MacArthur, acting as the Supreme Commander for the occupying Allied Powers. Finding that the sentencing tribunal “[was] not a tribunal of the United States” the Supreme Court held that “the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners.”

The D.C. Circuit determined that “[t]he CCCI is an Iraqi criminal court of nationwide jurisdiction and is administered by the government of Iraq; it is not a tribunal of the United States.” Accordingly, under *Hirota*, “the district court has no power or authority to hear this case.” Rejecting the contention that this case should be distinguished from *Hirota* on the grounds that Munaf is an American citizen and that his detention is at the hands of U.S. military personnel, the court emphasized that “*Hirota* did not suggest any distinction between citizens and noncitizens who were held abroad pursuant to the judgment of a non-U.S. tribunal.... American citizenship cannot displace the fact of a criminal conviction in a non-United States Court and permit the district court to exercise jurisdiction over Munaf’s habeas petition.”

The panel noted that, as applied to American citizens, the logic of *Hirota* is neither “clear” nor “compelling.” Specifically, *Hirota* fails to “explain why, in cases such as this, the fact of a criminal conviction in a non-U.S.

court is a fact of jurisdictional significance under the habeas statute.” However, while acknowledging that the Supreme Court’s recent decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), “are grounds for questioning *Hirota*’s continued vitality,” the court refused “to disregard *Hirota* simply because we may find its logic less than compelling.”

### **Suit for Injunctive Relief against the Government**

***We the People Foundation, Inc. v. United States*, 485 F.3d 140 (D.C. Cir. 2007)**

Plaintiffs in this case are a group of individuals who have engaged since 1999 in “a nationwide effort to get the government to answer specific questions” regarding what plaintiffs view as the government’s “violation of the taxing clauses of the Constitution” and “violation of the war powers, money and ‘privacy’ clauses of the Constitution.” Specifically, plaintiffs have submitted petitions with extensive lists of inquiries to various government agencies. Plaintiffs contend that the legislative and executive branches have responded to the petitions with “total silence and a lack of acknowledgement.” In response, some plaintiffs stopped paying federal income taxes in protest.

The D.C. Circuit affirmed the district court’s dismissal of plaintiffs’ action, in which plaintiffs asserted (1) that the government violated their First Amendment right to petition for a redress of grievances by failing to adequately respond to plaintiff’s petitions, and (2) that by seeking to collect plaintiffs’ unpaid taxes, government officials have retaliated against

plaintiffs' exercise of their First Amendment rights. The D.C. Circuit agreed with the district court that the First Amendment does not provide plaintiffs with the right to receive a government response to their petitions and that the Anti-Injunction Act (26 U.S.C. § 7421) bars plaintiffs' claims for injunctive relief with respect to unpaid tax collection.

Plaintiffs argued on appeal that Section 702 of the Administrative Procedure Act waives the government's sovereign immunity, providing: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof...The United States may be named as defendant in any such action." 5 U.S.C. § 702. The government responded that the Anti-Injunction Act bars judicial relief in this case based on the act's provision that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). The court agreed that the Anti-Injunction Act precludes plaintiffs' second claim regarding the collection of unpaid taxes.

With respect to plaintiffs' straight First Amendment Petition Clause claim, the D.C. Circuit found that the Anti-Injunction Act does not bar that claim, and further, that section 702 waives the government's sovereign immunity from this claim for injunctive relief. The panel, however, ultimately rejected this claim, finding that the petition clause does not refer to a right to official consideration of a petition for redress of grievances.

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#### Federal Circuit

### **Jurisdiction under the Declaratory Judgment Act**

***Teva Pharmaceuticals USA, Inc. v. Novartis Pharmaceuticals Corp.*, 482 F.3d 1330 (Fed. Cir. 2007)**

In response to a patent infringement suit brought by a pharmaceutical company against a generic drug manufacturer, competitor Teva filed a declaratory judgment action against patent holder to establish "patent certainty." The United States District Court for the District of New Jersey relied on the Federal Circuit's two-part declaratory judgment test for patent non-infringement, set forth in *Teva Pharmaceuticals USA, Inc. v. Pfizer, Inc.*, 395 F.3d 1324 (Fed. Cir. 2005), and found that competitor failed to establish a reasonable apprehension of imminent suit by patent holder. Consequently, the district court determined that it lacked jurisdiction over the declaratory judgment action.

On appeal, the Federal Circuit recognized that the United States Supreme Court had expressly disagreed with the Federal Circuit's *Pfizer* test and, accordingly, reversed the district court's decision to dismiss competitor's declaratory judgment action.

The Supreme Court, in a detailed footnote in the recent decision of *MedImmune, Inc. v. Genentech, Inc.*, — U.S. —, 127 S. Ct. 764 (2007), stated that the Federal Circuit's "reasonable apprehension of imminent

suit" test "conflicts" and would "contradict" several cases in which the Supreme Court found that a declaratory judgment plaintiff had a justiciable controversy. Acknowledging that *Pfizer* had been overruled by this intervening decision, the Federal Circuit followed the Supreme Court's analysis in *MedImmune* to determine whether competitor had a justiciable controversy within the meaning of Article III, which is the only limitation on jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). *MedImmune* reaffirmed that the correct standard for determining a justiciable declaratory judgment action is whether, under all the circumstances, there is an actual and substantial controversy between adverse parties of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Finding under the broader analysis of *MedImmune* that competitor had an injury-in-fact and a justiciable controversy that could be fully resolved by a declaratory judgment, the Federal Circuit reversed the district court judgment and held that competitor had established standing and an actual controversy sufficient to confer jurisdiction under the Declaratory Judgment Act.

### **Timeliness of Veterans Claims Notice of Appeal**

***Rios v. Nicholson*, — F.3d —, 2007 WL 1662319 (Fed. Cir. 2007)**

The Federal Circuit reversed the decision of the U.S. Court of Appeals for Veterans Claims ("Veterans Court") to dismiss petitioner's appeal on the ground that his notice of appeal was not timely filed under 38 U.S.C. § 7266 (requiring notice of appeal to be

filed with the court within 120 days after the date on which notice of the decision was mailed). The Federal Circuit, addressing the application of the common law mailbox rule to section 7266 for the first time, found that the Veterans Court erred by precluding petitioner from relying upon the common law mailbox rule to show timely filing.

Under the mailbox rule, if it is demonstrated that a letter properly directed has been either put into the post office or delivered to the postman, it is then presumed that it reached its destination at the regular time, and was received by the person to whom it was addressed. Petitioner asserted that section 7266 can co-exist

with the mailbox rule, and accordingly, that Congress did not intend to abrogate the common law rule when enacting section 7266. The Government contended that section 7266 conflicts with the common law mailbox rule, and thus, that any presumption of intent to retain the mailbox rule is overcome.

The Federal Circuit determined that the application of the mailbox rule was not inconsistent with the intent of section 7266. Acknowledging that the presumption of receipt under the mailbox rule is a rebuttable presumption of fact, the court remanded the case to the Veterans Court for further proceedings consistent with its opinion. The panel emphasized that,

in order for the presumption to attach, petitioner would have to provide evidence demonstrating that the notice of appeal “was properly addressed, stamped, and mailed in adequate time to reach the Veterans Court in the normal course of post office business before the elapse of the 120-day deadline.” *Id.* at \*5.

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*I suggest that the only books that influence us are those for which we are ready, and which have gone a little further down our particular path than we have gone ourselves.*

E. M. Forster (1879-1970)

*If I had six hours to chop down a tree, I'd spend the first four sharpening the axe.*

Abraham Lincoln (1809-1865)

## Kudos

**John J. Bursch** has been doing an outstanding job as Publications Chair for the ABA's Council of Appellate Lawyers, and has been ably assisted by **Harold R. Rauzi**, editor of the CAL's on-line newsletter, Appellate Issues. To read the current issue and back issues of Appellate Issues, visit <http://www.abanet.org/jd/ajc/cal/publications.html>. John is a partner of Warner, Norcross & Judd in Grand Rapids, Michigan; Harold practices in Cleveland, Ohio.

**Mary Massaron Ross** recently had an article published in the Fall 2006 issue of *The Journal of Appellate Practice and Process*, a faculty-edited publication of the William H. Bowen School of Law in Little Rock, Arkansas. Mary's article, titled "Reflections on Appellate Courts: An Appellate Advocate's Thoughts for Judges," is based on a presentation given at the CAL Appellate Judges Summit in October 2005. Another article by Mary, originally published in the April 2004 issue of *For the Defense*, was selected for republication in the Fall 2006 issue of the *Journal of the Association of Legal Writing Directors*. The article, "A Basis for Legal Reasoning: Logic on Appeal," fit nicely with the theme of the Fall 2006 JALWD, *Rhetoric & Argumentation*, and was aptly categorized by JALWD as a "Best Practices Classic."

**Chuck Craven** has been unanimously elected as a Fellow of the American Academy of Appellate Lawyers. The Academy is a prestigious national organization of lawyers whose practices have a substantial emphasis

on appellate advocacy. It was founded in 1990 to promote the highest standards and practices in state and federal courts, to advance the quality of appellate justice, and to recognize outstanding appellate lawyers. Selection for membership in the Academy is by invitation only. To be considered for membership, a prospective candidate's law practice must have focused substantially on appellate matters for at least 15 years, and only those persons with a recognized reputation for the highest integrity and excellence in appellate work are invited to become Fellows of the Academy. Chuck is a shareholder of Marshall, Dennehey, Warner, Coleman & Goggin in Philadelphia, Pennsylvania.

Speaking of **Chuck Craven**, he and **Andrew C. Simpson** have been appointed to the Board of Governors of the newly formed Bar Association of the Third Federal Circuit. They were chosen for their positions in view of their status as highly regarded appellate practitioners in the Third Circuit. Andrew practices in St. Croix, U.S. Virgin Islands.

**Nancy C. Ciampa**, chair of our Amicus Subcommittee, passed this year's appellate-certification exam, becoming a Board Certified in Appellate Practice by the Florida Bar. This places Nancy in a select group of 157 board-certified appellate lawyers in Florida. Nancy practices with Carlton Fields P.A. in Miami, Florida.

## Members on the Move

**Diane B. Bratvold** and **Eric J. Magnuson** have joined Briggs and

Morgan, P.A. as shareholders in the firm's Minneapolis office. Diane is chair of our programs subcommittee. As if that weren't enough, she is also chair of the Minnesota State Bar Association's Appellate Section and the Minnesota director of the Eighth Circuit Bar Association. She is also an adjunct professor at the University of St. Thomas Law School. Despite all those endeavors, she somehow finds time to write the Eighth Circuit report for *Certworthy*. Eric is the founding president of the Eighth Circuit Bar Association and a co-reporter to the Minnesota State Supreme Court Appellate Rules Committee. Both Diane and Eric are fellows of the American Academy of Appellate Lawyers.

Former committee chair **Michael B. Wallace** has joined Wise, Carter, Child & Caraway, P.A. in Jackson, Mississippi. Mike served as a law clerk for Justice Harry G. Walker, Supreme Court of Mississippi, from 1976-1977, and to Associate Justice William H. Rehnquist, Supreme Court of the United States, from 1977-1978. From 1980-1983, he served as counsel to Trent Lott, who was then the Republican Whip of the United States House of Representatives. In 1984, he was appointed by President Reagan as director of the Legal Services Corporation in 1984, and served as chairman from 1989-1990. He is general counsel of the Mississippi Republican Party. Besides being a member of the steering committee of the DRI Appellate Advocacy Committee, he is also a member of the American Academy of Appellate Lawyers, the Charles Clark

American Inn of Court, and the National Practitioners Advisory Council of the Federalist Society.

#### Announcements

**Third Circuit Bar Association.** Some lawyers in the Third Circuit, with the endorsement of the court, have formed the Bar Association of the Third Federal Circuit. The Association's purpose is to improve the quality of appellate practice in the Third Circuit and strengthen the relationships among the courts, its staff,

and practitioners. Its goals include developing rules of practice, promoting events and educational programs to aid the court in the administration of justice, and facilitating bench-bar relations. One particular goal is to assist the court in planning and stating its biennial Judicial Conference, bringing judges and practitioners together from all parts of the Third Circuit in educational programming. The Association's dues are a modest \$35 / year. For more information about the Association, contact Nancy Winkelman, (215) 751-2342,

[nwinkelman@schnader.com](mailto:nwinkelman@schnader.com); or Jim Martin, (412) 288-3546, [jcmartin@reedsmith.com](mailto:jcmartin@reedsmith.com).

**The nation's second-best appellate CLE.** The Council of Appellate Lawyers is holding its annual program in conjunction with the Appellate Judges Educational Institute in Washington, D.C. on September 27-30, 2007. This program will bring together federal and state appellate judges, appellate staff attorneys, and appellate lawyers for CLE and socializing. For details and registration information, visit <http://www.law.smu.edu/AJEI/>.

*"Begin at the beginning," the King said gravely, "and go on till you come to the end: then stop."*  
Lewis Carroll (1832-1898)

# Counting Each Shot

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“The difference between direct and indirect writing is the difference between witnessing the murder and finding the body.” Patricia T. O’Conner, *Words Fail Me* 150 (1999). As writers, we sometimes want to write indirectly, to soften or deflect the harsh facts. Other times, we want to write directly, to confront readers with those harsh facts. For lessons in doing both, let’s compare two passages from *Atkins v. Virginia*, 536 U.S. 304 (2002), describing the same crime. One is from Justice John Paul Stevens’s majority opinion; the other is from Justice Antonin Scalia’s dissenting opinion in the same case.

In *Atkins*, a majority of the Court reversed a death sentence, holding that the Eighth Amendment no longer permits execution of a mentally retarded offender. Writing for the majority, Justice Stevens wanted to downplay the crime the defendant was convicted of, to justify the Court’s reversal of the death sentence. This is how he described the crime:

At approximately midnight on August 16, 1996, Atkins and William Jones, armed with a semiautomatic handgun, abducted Eric Nesbitt, robbed him of the money on his person, drove him to an automated teller machine in his pickup truck where cameras recorded their withdrawal of additional cash, then took him to an isolated location where he was shot eight times and killed.

Id. at 307.

Writing in dissent, Justice Scalia had a different goal: he wanted to emphasize the defendant’s culpability, to demonstrate why the death sentence should stand. This is how he described the same crime:

After spending the day drinking alcohol and smoking marijuana, petitioner Daryl Renard Atkins and a partner in crime drove to a convenience store, intending to rob a customer. Their victim was Eric Nesbitt, an airman from Langley Air Force Base, whom they abducted, drove to a nearby automated teller machine, and forced to withdraw \$200. They then drove him to a deserted area, ignoring his pleas to leave him unharmed. According to the co-conspirator, whose testimony the jury evidently credited, Atkins ordered Nesbitt out of the vehicle and, after he had taken only a few steps, shot him one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs.

Id. at 338 (Scalia, J., dissenting).

By comparing these two passages, we see many techniques for emphasizing or de-emphasizing facts.

Let’s start with the number of sentences in each passage. That’s important because the end of each sentence is a stress position, the moment of syntactic closure, where

the reader mentally exhales before taking on the next sentence. See George D. Gopen, *The Sense of Structure* 35–37 (2004). Thus, the more sentences, the more stress positions.

Justice Stevens describes a day’s worth of crime in one 61-word sentence. By limiting his description to just one sentence with one independent clause, Justice Stevens creates but one stress position. (Although he puts the murder in the stress position, he does other things to de-emphasize that information. More on that below.) In contrast, Justice Scalia breaks up his description into four sentences. By doing this, he creates four stress positions. And observe what he puts in those stress positions:

- “intending to rob a customer.”
- “forced to withdraw \$200.”
- “ignoring his pleas to leave him unharmed.”
- “shot him one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs.”

Justice Stevens makes the robbery at the ATM sound like an ordinary banking transaction: “where cameras recorded their withdrawal of additional cash ....” And notice the subject and verb in that clause: “cameras recorded.” In contrast, Justice Scalia makes sure we know who did what, telling us that the defendant and his accomplice “forced [Nesbitt] to withdraw \$200.”

Although Justice Stevens’s description of the murder is in a stress posi-

tion, this particular stress position comes at the end of a long sentence, 61 words; by the time readers reach it, they are mentally weary. But Justice Stevens does three more things to de-emphasize the murder:

First, he puts the murder in a dependent clause, “where he was shot eight times and killed.” Readers subconsciously assign less importance to a dependent clause than to an independent clause. Gopen at 49.

Second, he gets things over with quickly by describing the action in just seven words — the last seven words in a 61-word sentence. The fewer words there are to read, the less mental energy expended on them by the reader.

Third, he puts the murder in passive voice (“he was shot eight times and killed”), without identifying the shooter. One good reason to use the passive voice is to avoid saying who did what, thus weakening the focus on the actor. Gopen at 153. This is precisely what Justice Stevens is trying to accomplish. This is a good use of the passive voice.

In contrast, Justice Scalia’s account contains not a single passive-voice verb. Thus, when he comes to the actual murder, he tells us plainly who did what: “Atkins ordered Nesbitt out of the vehicle and ... shot him ....” While Justice Stevens makes us speed past the murder by describing it in just seven words, Justice Scalia depicts it in slow motion, counting each shot. Each comma in the series of shots (“one, two, three, ...”) is a speed bump, forcing the reader to slow down. And for added measure, he tells us where the shots landed.

Notice too that Justice Stevens and Justice Scalia select different details to mention:

- Justice Stevens tells us the name of Atkins’s accomplice, William Jones, thus transferring some of the focus from Atkins to Jones. Justice Scalia, meanwhile, never mentions Jones’s name. He wants to keep the focus squarely on Atkins.
- Justice Stevens tells us what kind of weapon was used to kill Nesbitt: “a semiautomatic handgun.” Interestingly, though Justice Scalia’s account is generally more concrete than Justice Stevens’s, he omits this detail. Perhaps he wants to make us wonder whether, in shooting Nesbitt eight times, Atkins had to reload.
- Justice Scalia personalizes the victim, Eric Nesbitt, telling us that he was “an airman from Langley Air Force Base,” that he pleaded for his life, and that he walked a few steps before being murdered, and that he suffered gunshot wounds to his thorax, chest, abdomen, arms, and legs. Justice Stevens tells us nothing about Nesbitt except his name.
- Justice Scalia tells us that Atkins and his partner “spen[t] the day drinking alcohol and smoking marijuana,” thus suggesting that Atkins himself is to blame for any mental impairment he had that day. Justice Scalia also tells us that they abducted Nesbitt from a convenience store — a kind of place familiar to Americans. Justice Stevens omits these details.

Finally, notice what Justice Scalia does not do. He uses no adjectives to describe Atkins (such as “cold-blooded”) and no adverbs to describe his actions (such as “cruelly,” “mercilessly,” or “heinously”). Instead, he relies on nouns, verbs, and selective detail to paint a vivid picture. For emphasis, he

does not need underlining, **bold print**, or ALL CAPITAL LETTERS. Instead, he uses nouns and verbs to focus attention on Atkins; he structures his sentences and his paragraph to create natural stress positions; and he uses those natural stress positions to emphasize what he wants to impress on the reader. To emphasize the deliberateness of the murder, he counts each shot.

This is not to say that Justice Scalia’s description is better than Justice Stevens’s. Remember that the two justices had different goals: while Justice Stevens merely wanted readers to find the body, Justice Scalia wanted them to witness the murder. Each does a good job of describing the crime in a way that accomplishes his goal.

## Amicus

Since its inception three years ago, the Amicus Subcommittee continues to grow; it now has more than 40 members with a vast array of appellate experience. Our members' court admissions cover most state courts, the District of Columbia, the United States Supreme Court and all Circuit Courts of Appeal. In the past four months alone, DRI's amicus committee authorized three amicus briefs, including two in the United States Supreme Court for which DRI selected authors from our committee to prepare the briefs.

Of our numerous highly qualified volunteers, DRI selected John Bursch to draft an amicus brief in *Morgan v. Gay*, Supreme Court Docket No. 06-1471, addressing the removal of class actions from state to federal court under the Class Action Fairness Act of 2005. Ruth Malinas accepted the assignment in *Tokai Corp. v. Saia*, Supreme Court Docket No. 06-1112, a product-liability case involving the "stream of commerce" theory of minimum contacts. Congratulations to both John and Ruth; we thank them for their efforts. We look forward to continue working closely with DRI to ensure that its voice is heard throughout the country on important matters.

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## Programs

The Supreme Court of the United States will be the subject of the Appellate Advocacy Committee's CLE presentation at DRI's Annual Meeting, to be held in Washington, D.C. on October 10-14, 2007. The program, entitled *The Roberts Court: Evaluating the 2006 Term and Previewing the 2007 Term*, is scheduled for Friday, October 12, at 1:15 p.m., and will feature ABC News legal correspondent Jan Crawford Greenburg, University of Texas Law School Professor Lucas A. Powe, Jr., and Supreme Court advocates Miguel Estrada and Maureen Mahoney. R. Dan Lindahl (Bullivan House Bailey, Portland, Oregon) and Scott B. Smith (Bradley Arant, Huntsville, Alabama) will moderate the program. The panelists will debate the 2006 term's important decisions, such as *Phillip Morris USA v. Williams*, *Gonzales v. Carhart*, and *Scott v. Harris*; they will also preview the cases that will make news during the 2007 term.

The U.S. Supreme Court will also be on the agenda at our next appellate seminar, scheduled for February 28-29, 2008 at the Eden Roc Resort, Miami Beach, Florida. We are busy assembling a distinguished and eclectic faculty of lawyers, judges, and professors. Our past seminars have become known for three things: the best appellate CLE available, the opportunity to meet and socialize with other appellate lawyers, and the opportunity to make a name for yourself by getting involved in our committee's activities. So please join us, soak up some sun along with some excellent CLE, and meet some new friends.

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## Publications

In addition to *Certworthy*, our committee has two recent publications to be proud of. The first is the July 2007 issue of DRI's flagship magazine, *For the Defense*, which features a collection of articles submitted by our committee on the science and art of persuasion. Congratulations to the authors: John J. Bursch, Matthew S. Lerner (joined by James J. Delaney, Ph.D.), Linda L. Morkan, and Mary Massaron Ross. (The July 2007 issue of *FTD* also featured Mary's "Writer's Corner" column on word selection — so double congratulations to Mary.)

The second publication that does us proud is Bryan Garner's latest book, *The Winning Oral Argument*. Why should we be proud of this non-DRI publication? Because it cites and quotes several articles on oral argument previously published in *Certworthy*. "Oral Argument—California Style?" by Douglas J. Collodel (p. 59); "David C. Frederick, Supreme Court and Oral Argument," book review by Roger D. Townsend (p. 46); "The Dynamics of Appellate Oral Argument," by Margaret M. Grignon (pp. 109 and 138-39); and "The Importance of Ernest Oral Argument,"

by Raymond P. Ward (p. 4). Bryan's book also cites Chuck Craven's chapter on oral argument in our appellate manual, *A Defense Lawyer's Guide to Appellate Practice* (p. 72) and his classic, "Chili Palmer and the Art of Appellate Oral Argument," published in the ABA TTIPS Appellate Advocacy Committee newsletter (p. 76).

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*Truth, like gold, is to be obtained not by its growth, but by washing away from it all that is not gold.*  
Leo Tolstoy (1828-1910)

*To see victory only when it is within the ken of the common herd is not the acme of excellence.*  
Sun Tzu (544 BC-496 BC)