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The Business Suit

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Committee Leadership

Chair
Michelle Thurber Czapski
Bodman PLC
Troy, MI

Vice Chair
Tracey L. Turnbull
Porter Wright Morris & Arthur LLP
Cleveland, OH

Editors

Luther M. (Rusty) Dorr, Jr.
Maynard Cooper & Gale
Birmingham, AL

James M. Weiss
Ellis & Winters LLP
Raleigh, NC

Sarah Thomas Pagels
Laffey, Leitner & Goode LLC
Milwaukee, WI

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In This Issue

Leadership Notes

From the Vice Chair

By Tracey Turnbull

One of the most common questions I receive from colleagues, friends and family is why do you spend so much time doing things with DRI? What do you get out of it? Implicit in this question is how much business have you gotten—is the investment of time worth it? The answer is yes. But it isn't all dollars and cents when I explain why?

I have been a DRI member for many years (although not long enough to say since before some of you were born. . . yet), and I have been fortunate to travel to many different cities, meet lawyers from all over the world, who work for all types of firms and companies, and have different practice areas. One of my first mentors at my firm encouraged me to join DRI and "stay at it." He told me that if I really wanted to benefit from the organization I had to get involved. He never said what to do, when to do it, but just keep doing it and you will see results. I did what I was told and got involved. Looking back today, I cannot thank him enough for the continuous encouragement and support.

My introduction to DRI began in Orlando, not at the most magical place on earth, but very close. My involvement and DRI activities have changed over the years. Initially, I was simply excited to attend conferences and travel to different cities. After I left Young Lawyers, it took me a few years to "find my place." There have been some periods of time where I limited my DRI activities because other events in my life took priority, but all in all, I am still here. So back to the question of why do you do it?

If you read the last issue of the *Business Suit* you heard several of our Committee leaders talk about the benefits of DRI. These benefits included business referrals and building an extensive network. I could tell of similar experiences. These benefits are real, and anyone truly involved in DRI will receive them.

But DRI provides so much more. DRI gives you numerous resources that help you help others. Almost every week I am asked for a recommendation for local counsel. These requests come from colleagues at my firm, friends and from clients. The recommendation requests are not simply limited to counsel, but also include expert witnesses and litigation support services. The ability to help connect my colleagues, friends and clients makes me feel good, and is almost never forgotten by the people you help connect.

One of the most overlooked DRI resources is DRI's publication library. When a new legal issue arises I frequently search for any articles on the topic. These articles may not provide me the final answer that I need, but they almost always get me started and headed in the right direction. Providing these resources to younger attorneys working with you will also help them complete research projects faster and more efficiently—which presumably will keep your clients happy. Again, everyone wins.

The online communities are also invaluable. As a result, I subscribe to at least six different boards. If you think checking Community posts is simply another way to waste time, wait until you post a legal question, and someone points you to a case directly on point or better yet email their winning brief. Or, wait until you have a deadline for a presentation looming and you post asking if someone has slides addressing your particular topic. You almost always will get something—either slides, a blog post or an article on the topic. Even if it only happens once a year, it is priceless. On the flip side, will I ever forget the sender of this helpful information? No. And now that sender has a guaranteed referral the next time a suitable opportunity comes their way. The Communities also keep me apprised on a variety of topics ranging from legal issues, information on experts, arbitrators and opposing counsel. The boards are also a giant place to find the most recent articles (and some commentary) on a variety of different topics in the legal arena.

DRI has also given me many different avenues to give back, and help others in the communities that we visit during conferences. Over the years, I have been introduced to numerous non-profit associations and joined volunteer projects including painting murals, serving meals, packing items food in a food bank, sorting children's books in a depository, sent hospitalized children cards with encouragement, wrote letters to our troops and most recently collected toiletry items for the homeless. In most instances, these experiences have taken me past the hotel and conference room and into the host community. These experiences always make you feel good about helping others!

So, what do I get out of DRI? A little bit of everything—business and referral sources for legal work across the country, tremendous legal research resources, a strong sounding board for anything I need in my practice and opportunities to help others. Of course, there are more reasons, but do you really need them? Next time someone asks you why . . . you know where to start.

Tracey Turnbull is a partner in the Cleveland office of Porter Wright Morris & Arthur LLP. She focuses her practice on commercial, product liability and employment litigation matters. In the commercial litigation arena, she represents corporations and individuals in disputes involving contracts, covenants not to compete, trade secret, intellectual property, and product liability claims. She is an active member of DRI, serving as the vice chair of the Commercial Litigation Committee and on the steering committee of the Women in Law Committee.

From the Editor

By Sarah Thomas Pagels

Fall is in the air, which means it's networking season! Whenever I am traveling for business or at an outside networking event and I am introduced to someone new, I often start the conversation by telling them I am from Wisconsin. Inevitably, three things come up: beer, cheese, and (Packers) football. While I do love and appreciate all of these things (cheese was my daughter's second word after all, and I lived in Green Bay for a semester in college), the real reason I love living in Wisconsin, and Milwaukee in particular, is because it is an undiscovered jewel of city in the Midwest. It has an incredible cultural scene (including music, art, and dance), is on the shores of Lake Michigan, and the people (including my fellow members of the Bar) are approachable and reasonable. I love that DRI gives me the opportunity to share with others what I love about Wisconsin—and why I have built my home and my career here.

My conversations about DRI with non-members reflect that they have similar stereotypes—why would you invest so much of your free time in just another Bar organization—isn't it better to invest your limited time in your community, billing more or networking elsewhere? I love getting the chance to debunk those stereotypes and tell them why DRI can also be an undiscovered jewel in your networking arsenal. This is true whether you are just starting your legal career, in a time of transition, or in the prime of your career.

There is no better time to take advantage of all DRI has to offer than at the biggest DRI event of the year, the DRI Annual Meeting in San Francisco, October 17–22. Just in case you need some pointers, this issue of the *Business Suit* provides you with many reasons to share with others about why DRI is a worthwhile investment in your career. First, our vice chair, Tracey Turnbull provides some great answers to the questions your colleagues ask—Why DRI? I can certainly second her comments.

This issue also features other pearls of wisdom for your practice and your career, including an article from our Financial Services SLG by Andrew Sayles and Omar Arnouk analyzing the Third Circuit's recent interpretation of Supreme Court precedent in *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718 (2017) and the Fair Debt Collection Practices Act, a case update from the Eighth Circuit, and a membership focus piece from Dwight Stone.

I for one intend to use many of these tips when I go to the Annual Meeting in October, and I look forward to seeing many of you in San Francisco!

Sarah Thomas Pagels is a partner at Laffey, Leitner & Goode, LLC in Milwaukee. Ms. Thomas Pagels advises her clients on personal injury, transportation, toxic tort, and commercial litigation matters. She also guides them on navigating the e-discovery process creatively and cost-effectively in preparation for trial or alternative resolution. She specializes in leading a team of attorneys and paralegals in high-volume, document-intensive cases, using technology to manage costs and locate key facts.

Financial Services SLG

Third Circuit Delves into FDPCA's Principal Purpose Test (and Popeye the Sailor)

By Andrew Sayles and Omar Arnouk


In May 2017, the Supreme Court, in *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017), found that companies that buy defaulted debts are not "debt collectors" under the Fair Debt Collection Practices Act (FDCPA) definition because they are not "collect[ing] or attempt[ing] to collect . . . debts owed or due . . . another," under 15 U.S.C. §1692a(6). While the decision was well-received by companies that buy debt, it notably deferred ruling on arguments concerning whether companies whose "principal purpose … is the collection of debts" are subject qualify as debt collectors under the Act. As expected, litigation regarding the FDCPA in the District Courts against debt buyers subsequent to *Henson* has focused on the "principal purpose" argument. On August 7, 2018, the United States Court of Appeals for the Third Circuit became the first Circuit Court to weigh in on the "principal purpose" standard involving debt buyers, in *Tepper v. Amos Fin., LLC*.

Under the FDCPA, a "debt collector" is: (1) one whose "principal purpose … is the collection of any debts;" or (2) one who "regularly collects or attempts to collect … debts owed or due … another." 15 U.S.C. §1692a(4). In the Third Circuit, as in some other jurisdictions, pre-Henson Courts often applied the "default" test in determining whether a creditor constitutes a debt collector under the "principal purpose" prong of the statutory definition. Under the "default" test, "an assignee of an obligation is not a 'debt collector' if the obligation is not in default at the time of the assignment; conversely, an assignee may be deemed a 'debt collector' if the obligation is *already in default when it is assigned*." *See Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 403 (3d Cir. 2013) (emphasis added). In apposite to the "default" test, the Supreme Court in *Henson* concluded "[a]ll that matters is whether the target of the lawsuit regularly seeks to collect debts for its own account or does so for 'another,'" focusing more squarely on the FDCPA statutory definition. *Henson*, 137 S. Ct. at 172. *Tepper* was the Third Circuit's first opportunity to address the applicability of the "default" test, post-*Henson*.

By way of factual background, James and Allison Tepper (collectively "Plaintiffs") alleged that they entered into a home equity line of credit with NOVA bank, secured by a mortgage on their property. While Plaintiffs were making periodic payments, they received a notification that NOVA had closed, and that the Federal Deposit Insurance Corporation ("FDIC") was appointed receiver. Plaintiffs alleged that they continued to remit payments, but discovered that the FDIC neither cashed nor returned their checks. Accordingly, Plaintiffs ceased making payments, choosing to wait until they received periodic statements, which they stopped receiving after NOVA's closure. The FDIC declared the loan to be in default, and sold it to Amos Financial, LLC ("Amos"). Admittedly, Amos was in the sole business of purchasing debts and attempting to collect them. After various collection efforts, Plaintiffs brought suit against Amos, alleging that Amos violated the FDCPA. The principal issue addressed by the Court was whether Amos constituted a "debt collector" under the FDCPA.

In arguing that it constituted a creditor under the FDCPA, rather than a debt collector, Amos contended that it met the statutory definition of a creditor, *i.e.*, the entity "to whom [the] debt is owed." 15 U.S.C. §1692a(4). As such, they argued that they could not constitute both a creditor *and* a debt collector under the FDCPA. However, Amos ignored binding Third Circuit precedent that an entity could both meet the statutory definition of a creditor, while still constituting a debt collector. Further, Amos' arguments mirroring the "default" test were found to lack support in the plain language of the FDCPA. Indeed, the Court concluded that Amos' self-admitted "principal purpose" was "the collection of debts," noting that such a question was "akin to asking if Popeye is a sailor." In doing so, the Court held that the Supreme Court repealed the "default test" in *Henson* and chose to follow the plain text of the statute. Most significantly, the Court opinion suggests that the fact that an entity may be also be a creditor at times does not disqualify it as a debt collector, noting that "following *Henson*, an entity that satisfies both [definitions] is within the Act's reach."

Since the promulgation of the FDCPA, the definition of a "debt collector" has been heavily litigated across the Country. The Supreme Court's holding in *Henson* provided further guidance by moving away from the "default" test

and applying a plain text reading of the FDCPA and the corresponding "principal" purpose test. Although the Third Circuit was the first higher Federal Court to weigh in on the treatment of debt buying entities under this plain text interpretation, this issue is percolating among courts in other circuits, including the Seventh and Ninth Circuits.

Andrew Sayles, asayles@connellfoley.com, is a partner with Connell Foley LLP in New Jersey and New York. His practices include consumer financial services, commercial litigation and professional liability. Mr. Sayles regularly counsels clients regarding consumer class actions and is an active member of DRI.

Omar Arnouk, oarnouk@connellfoley.com, is an associate with Connell Foley in its commercial litigation and professional liability practice groups.

Recent Cases of Interest

Eighth Circuit Case Update

By Paul Tschetter

***Kmak v. Am. Century Companies, Inc.*, 873 F.3d 1030 (8th Cir. 2017): Former employee's alleged violation of public policy against employer, by calling former employee's restricted shares of company stock for repurchase, did not constitute breach of implied covenant of good faith and fairing dealing in parties' stock restriction agreements.**

In 2003 and 2005, Plaintiff/employee exercised options to purchase restricted shares of Defendant's common stock. At the time of the purchase, Plaintiff signed an agreement that Defendant would have the right to call any of the shares for repurchase at any time following Plaintiff's disability, death, or termination of, or retirement from the Company's employment. Plaintiff thereafter terminated his employment in 2007, and Defendant called Plaintiff's shares for repurchase in 2011, timing that denied Plaintiff regular and special year-end dividends. Plaintiff thereby filed a complaint alleging that Defendant violated its implied covenant of good faith and fair dealing because (1) Plaintiff reasonably expected he would retain the stock as long as he did not work for a competitor, and (2) because Defendant arbitrarily and vindictively exercised its discretion for the purpose of retaliating for testimony that Plaintiff had given on behalf of JP Morgan in a separate arbitration proceeding between JP Morgan and Defendant.

Initially, the District Court for the Western District of Missouri dismissed Plaintiff's complaint for failure to state a claim; however, on appeal, the Eighth Circuit reversed in part, finding that Plaintiff sufficiently alleged a breach of the implied covenant of good faith and fair dealing. After extensive discovery, Plaintiff's sole claim—that Defendant breached the implied covenant of good faith and fair dealing by taking discretionary action to retaliate in violation of public policy—was dismissed on summary judgment. Plaintiff, thereafter, appealed.

The Eighth Circuit primarily focused on Plaintiff's duty to establish a prima facie case of public policy retaliation based on temporal proximity between the call of his stock and the arbitration testimony. The Court found that Defendant had established non-retaliatory reasons for delaying its call to repurchase—specifically, the unusual economic conditions at the time and because Defendant did not want calling Plaintiff's stock to become an issue in the dispute with JP Morgan. Furthermore, Plaintiff failed to present evidence suggesting that Defendant's explanation was a pretext for public policy retaliation.

Aside from these findings, the Eighth Circuit specifically found that the case law provides that there can be no breach of the implied covenant where the contract expressly permits the actions being challenged. Plaintiff must establish that Defendant exercised a judgment conferred by the express terms of the agreement in such a manner as to evade the spirit of the transaction or to deny Plaintiff the expected benefit of the contract. The Eighth Circuit held that Plaintiff failed to meet the "reasonable expectation" standard and, therefore, the District Court's dismissal was affirmed.

***Decker Plastics Corp. v. W. Bend Mut. Ins. Co.*, 880 F.3d 1017 (8th Cir. 2018): Contamination of landscaping materials as a result of deterioration of plastic bags**

in which they were placed did not constitute covered "property damage."

Insured plastic bags manufacturer ("Plaintiff") brought this action in state Court against insurer ("Defendant") seeking indemnity and defense costs under a commercial general liability and umbrella/excess liability insurance policies incurred in an underlying lawsuit that Plaintiff's customer ("Customer") brought regarding bags that deteriorated in sunlight due to lack of an ultraviolet inhibitor. Plaintiff paid $125,000.00 to settle the action brought by Customer—those damages representing the diminution in value of Customer's landscaping materials that were contaminated with deteriorated shreds of plastic.

The District Court for the Southern District of Iowa entered summary judgment in favor of Defendant. Plaintiff appealed. In support of its basis for summary judgment, the District Court found there was no covered property damage and three policy exclusions applied.

The insurance agreement provided Defendant would only pay those sums that its insured became obligated to pay as damages because of "property damage." Property damage was defined as "physical injury to tangible property, including all resulting loss of use of that property" or "loss of use of tangible property that is not physically injured." Thus, the critical question was whether there was "physical injury" to Customer's "tangible property."

The Eighth Circuit agreed with the District Court, finding that Customer's tangible property, its landscaping materials, did not suffer physical injury. The Eighth Circuit reiterated that the "mere incorporation of a defective component into a customer's product is not property damage because it does not result in physical injury." Here, Customer's landscaping materials which were placed in Plaintiff's deteriorated bags became contaminated with small shreds of plastic. The rock and sand were not physically altered or destroyed, but contamination made the landscaping product unsaleable, and the contaminating plastic could not be economically removed. However, absent physical alteration, Customer's property suffered only diminution in value and, accordingly, Plaintiff's claims were properly dismissed because there was no property damage to trigger coverage.

***Seldin v. Seldin*, 879 F.3d 269 (8th Cir. 2018): Motion to dismiss for lack of subject matter jurisdiction was not an appropriate mechanism for trustees to use to attempt to compel beneficiary to submit his action to arbitration.**

Feuding members of the Seldin family entered into an agreement to divide jointly owned assets. This agreement contained an arbitration clause, requiring the parties to arbitrate any claims involving their jointly owned property. Instead of initiating an arbitration proceeding, Appellant (a family member) filed a lawsuit for an accounting of a trust that he claimed was not included in the agreement. The Appellee trustees ("Appellees") filed a motion to dismiss for lack of subject matter jurisdiction, which was granted on the basis that the District Court for the District of Nebraska did not have jurisdiction due to the binding arbitration agreement, which gave an arbitrator the authority to first decide the extent of the arbitrator's jurisdiction. The District Court also stated that it did not have jurisdiction, because of *res judicata* and *issue preclusion* (given that the claims, at this point, had already gone through arbitration). Lastly, the District Court found that the *Rooker-Feldman* doctrine barred it from hearing Appellant's claim. An appeal was thereby had.

The sole question before the Eighth Circuit was whether the District Court erred in granting Appellees' motion to dismiss for lack of subject matter jurisdiction. The Eighth Circuit found an arbitration agreement alone, without other statutory or binding jurisdictional limitations, does not divest the federal courts of subject matter jurisdiction. Rather, Rule 12(b)(6) or Rule 56 motions are the appropriate means for parties seeking to compel arbitration. As the parties had entered into an arbitration agreement, the existence of said agreement did not deprive the District Court of jurisdiction.

Moreover, the Eighth Circuit held that the district court's dismissal based on its holding that it lacked jurisdiction, because of *res judicata* and *issue preclusion* was in error. Res judicata and *issue preclusion* are not jurisdictional matters. Instead, those issues are best argued as grounds for dismissal under Rule 12(b)(6) or Rule 56.

Lastly, the Eighth Circuit found that it was unnecessary to reach the question of whether the *Rooker-Feldman* doctrine applied because the arbitration had already been completed. Thus, the District Court could hear a challenge to the enforcement of the arbitration award, but could not consider whether the state Court's order to arbitrate accounting was appropriate.

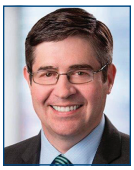
Paul Tschetter is an attorney with Boyce Law Firm LLP in Sioux Falls, South Dakota, where he focuses his practice on the areas of construction matters, creditor's rights and commercial litigation. Paul has brought and defended claims involving a list of issues including construction contracts, construction defects, mechanics' liens, public improvement

liens, payment disputes, and zoning and ordinance compliance disputes. He has a wide variety of commercial litigation experience including disputes between shareholders and members of closely-held entities. Paul has experience in arbitration and has tried both jury and court trials. He has also been involved in appeals to both the United States Court of Appeals for the Eighth Circuit and the South Dakota Supreme Court.

Membership Spotlight

For this Month, an Easy Question and a Hard One

By Dwight W. Stone II



This month's membership column starts with an easy question and ends with a hard one.

First, the easy one: Do you know someone who would benefit from DRI membership? We can be quite confident the answer is "Yes!" Do you mentor any young lawyers who could benefit from having resources like the online Communities where they can look to other attorneys from across the country to obtain immediate guidance on tough issues as they arise? Would these young lawyers be able to benefit from attending their first DRI seminar without paying the registration fee? Do you know a sole practitioner whose practice would benefit from the countless DRI online resources that are included with membership? Do you have a friend who is an outstanding lawyer but, like most of us, could use a boost in his or her professional networking? If so, tell these people about DRI and encourage them to join. You will help their careers substantially, and you will also help our Committee to reach its membership goal.

As a bonus, for every new member you recruit DRI will reward you with a $100 credit toward any seminar registration (except the Annual Meeting) and/or the purchase of various other DRI resources. Don't forget to ask your recruits to list the CLC as the referring committee and yourself as the referring member. (You can make it easy for them by filling out those fields in the membership application forms that you send them.)

Now the hard question: Was Julius Caesar morally justified when he crossed the Rubicon in 49 BC? (I promised the question would be difficult, not relevant, and your answer is as good as mine.)

If you have *any* questions on recruiting new members or on DRI's membership benefits and incentives, please call or email me (410.385.3649; dstone@milesstockbridge.com). If you have questions about morals and ethics in ancient Rome I probably won't to be nearly as helpful, but I'm still happy to chat.

Dwight W. Stone II is a partner in Miles & Stockbridge P.C.'s Baltimore office. Dwight's practice includes products liability and class action defense, toxic tort and environmental claims, insurance coverage disputes, and other complex business disputes. He regularly represents clients before the U.S. Consumer Product Safety Commission (CPSC). Dwight is the membership chair for the DRI Commercial Litigation Committee and president-elect of Maryland Defense Counsel, Inc.