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The Business Suit

The newsletter of the Commercial Litigation Committee

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Committee Leadership

In This Issue

Leadership Notes

From the Chair

By Tracey Turnbull

It is my privilege to serve as the chair of the Commercial Litigation Committee along with vice chair Dwight Stone. 2020 brings a new leadership team bursting with new ideas and big plans for moving the committee forward this year. These plans will build upon the solid foundation established by immediate past Chair Michelle Czapski who left some very big shoes for me to fill.

As you are likely aware, the DRI Executive Committee decided to postpone or cancel the 2020 Business Litigation Super Conference because of the health concerns presented by COVID-19. In a best case scenario, we will find a way to reschedule the seminar. However, thousands of organizations are attempting to take the same steps as DRI, so I encourage everyone to think creatively when looking at the time of year and days of the week when considering rescheduling options in 2020. We will also examine the feasibility of presenting the seminar via webcast or other alternative delivery method. DRI greatly appreciates your efforts and dedication. Gratitude in particular is extended to Program Chair Charlie Frazier along with Vice Chairs Liam Felson and Peter Lauricella and the full planning committee, who worked so hard to develop a program with tremendous speakers addressing hot topics in the areas of class actions, cyber security, business competition, and government enforcement.

As we look to the future, we will continue to build the CLC's membership and increase engagement and participation by our members. Our new Membership Chair, Matt Murphy, will lead our membership efforts this year. Take a moment and think about colleagues and friends who you can invite to join us. Once they take the first step by joining the CLC, Phil Korveisis, our membership integration Vice Chair will connect them with our committee leadership to get them involved and engaged. There is a place for everyone in the CLC. We understand that engagement means different things to different people and will find a role for everyone who wants to get involved. Emily Ruzic, our new Social Media Chair has introduced the CLC on Facebook and LinkedIn. These new outlets will help our members connect, spread the word of what we do and offer opportunities to get involved. We encourage everyone to accept the invitations to join these platforms and share your successes and insight as well as follow our activities.

Third, we will reinvigorate our Pretrial, Practice and Procedure SLG with a brand new leadership team led by Chair Stacy Moon and Vice Chair Josh Gayfield. While our members have diverse practices, this SLG focuses on issues which we all encounter or could encounter as we litigate commercial disputes as well as ongoing developments and changes in the rules of civil procedure and evidence rules. We hope this SLG will serve as a gateway for young lawyers looking to gain practical experience and more seasoned litigators to share their wisdom and experience. If you are not a member of this SLG, we encourage you to reach out and join this group.

Finally, we will continue to share our programming in different formats. Last year, we presented our first webinar addressing attorney-client privilege issues. Our Online Programming Chair, MaryAnn Alexander will be preparing more programs in the coming year. These hour long programs offer CLE and can be accessed anywhere with an internet connection. Please feel free to reach out with ideas for webinar content or to volunteer to present one in the future. In addition to online programming the Class Action SLG is hard at work completing the updated Class Action Compendium which reviews key class action issues and how they are handled across all jurisdictions. This tremendous effort is led by Natalie Kussart and Mike Pennington and will be an invaluable resource for any practitioner who focuses on class actions or has an issue involving a class action. We look forward to unveiling this publication later this year.

If you made it this far—you know the CLC will have a busy year ahead. Dwight and I look forward to working with our Steering Committee to make this a great year. We certainly cannot do it alone and appreciate all the efforts by the many people who contribute to our committee's activities. But we can always use more members—so reach out and join us!

Tracey L. Turnbull, a partner in the Cleveland, Ohio, office of Porter Wright Morris & Arthur LLP, focuses her practice on complex commercial and employment litigation matters.

She represents companies and individuals in cases involving contract disputes, covenants not to compete, trade secrets, intellectual property, and product liability claims. Ms. Turnbull is chair of the DRI Commercial Litigation Committee.

From the Editor

By Sarah Thomas Pagels

I don't know about you, but after another month of what felt like an endless winter, the constant noise about the death of civil discourse on the national news and in my social media feeds—not to mention the impact of a new global virus—I am ready for an escape, if only virtual for now.

Lucky for all of us, DRI's Commercial Litigation Committee and this issue of the *Business Suit* can provide us with just the escape we need. This issue of the *Business Suit* is full of articles and opportunities for you to escape and get over the winter blahs and perhaps learn something new as we all spend more time working remotely and less in our more traditional office spaces.

Indeed, CLC Chair Tracey Turnbull shares that we are all in for an exciting year with many new opportunities for all of our members to get—and stay—involved. She shares many of these options: recruiting new members, attending our virtual programs, inviting a friend to join you for a virtual networking session, posting on social media, joining an SLG, or even submitting an article for publication. In short, if you have time and interest, the CLC has something for you.

In this issue, CLC Membership Chair Matt Murphy discusses the many resources that DRI can provide to assist us in our new "full remote" environment. The CLC Membership Committee also features one of our members, John Drake, in this issue's Membership Spotlight.

We would also be remiss if we did not take some time while we are social distancing to reflect on our personal health and those of our colleagues. Contributor Jennifer Kenyon shines some daylight on an overlooked issue—women's heart health.

And, while we hopefully wait for the return of our spring sports traditions like baseball, Greg Farkas shares his insight about the recent clash between on-field conduct and sports gambling. According to Farkas, a class action lawsuit against some Major League Baseball teams may transform "what happens in Vegas" from an easy strikeout into a line drive into court.

Walter Judge also shares a recent Vermont decision regarding "the special relationship" exception to the Economic Loss Doctrine that reflects a trend to thaw the doctrine's bar of tort claims in contractual disputes.

Even with a possible government relief package in the works, as we get closer to tax time and have tax issues on the brain, John Goodman highlights an issue of taxable costs that we should all consider—costs associated with collecting and processing electronically stored information, or ESI.

Finally, to be blunt about it, CLC member Pat Haggerty also shines a light on a growing area of practice—cannabis litigation.

No matter how you spend your time sheltering in place, I invite you to escape and enjoy this issue of the *Business Suit*.

Sarah E. Thomas Pagels is a partner at Laffey Leitner & Goode LLC. Sarah has experience defending clients in all types of litigation, but focuses her practice on defending companies in general commercial matters, product liability and toxic tort matters, and professional malpractice claims.

Membership Minute

Dispatches from the Home Office

By Matthew Murphy

Wow! So much has changed in the past month! As I write this column, I've not been to my office, or seen one of my colleagues or clients face-to-face, for two weeks. Instead, I am working from home, and all of my appointments and meetings take place telephonically. When I originally drafted this column, I wrote about the myriad benefits attending the Commercial Litigation Super Conference provides our members. Of course, that conference is now postponed. And because flexibility is the currency of the day, I decided to rewrite the column to focus on the many online benefits DRI members enjoy. If you already knew about these resources, it doesn't hurt to be reminded. And if you never knew they existed, I mention them now because I suspect they will prove helpful in the weeks ahead.

LegalPoint Service: A members-only resource, LegalPoint provides DRI members with exclusive access to a vast online library of DRI articles, books and materials. Members can search thousands of documents, including content from For the Defense, In-House Quarterly, Committee Newsletters, and Seminar Materials, and filter them by practice area and resource. Members can also access the Defense Library Series books and review their table of contents and individual chapters online. Whether you have a research project or just need to do some mental gymnastics to stave of cabin fever, DRI's LegalPoint Service may prove invaluable in the coming weeks!

Live and On-Demand Programing: Another benefit DRI members enjoy is access to live webinars and on-demand programing. Upcoming live events cover topics ranging from evidentiary issues in jury trials to insurance implications arising from this global pandemic. And DRI's on-demand CLE library contains hundreds of topics sortable by practice area. Even if we cannot now meet at traditional in-person CLEs and seminars, DRI members can easily stay on top of their licensure requirements through the wide array of online offerings available through the DRI website.

SLG Teleconferences: As always, the Commercial Litigation Committee's SLGs are hard at work planning substantive discussions led by experts in their fields. Take advantage of these regularly scheduled conference calls to connect with your colleagues and keep up with new developments in the law. It's also a good way to keep up on your social skills, at a safe distance!

Finally, if you are looking forward to some downtime to catch up on your individual marketing and networking plan, don't forget about DRI's member directory, which you can use to connect with friends and acquaintances all over the country. You might also consider touching base with new associates at your firm to see what they are doing to cultivate their professional network. If they are not already a member of DRI, tell them about DRI's great online resources and invite them to join DRI!

I look forward to the day we reschedule our conference and I see you all again! Until then, stay safe and have fun exploring DRI's online resources.

Matthew C. Murphy is an shareholder in Nilan Johnson Lewis PA's Minneapolis office, concentrating on product liability, commercial litigation, and white-collar criminal defense. He is admitted to practice law in Minnesota and New York.

Membership Spotlight

John A. Drake

John A. Drake is Of Counsel in the Indianapolis office of Ogletree Deakins, where he focuses on litigating restrictive covenants, trade secrets, and unfair competition claims in Indiana and Illinois. Mr. Drake has obtained large damages awards and secured or defeated numerous restraining orders and injunctions in high-stakes cases. In addition, John practices extensively in employment law, including discrimination, retaliation, harassment, and wage and hour cases, and he also provides advice and counsel. In addition, John handles intellectual property matters, such as trademark infringement and cyber-squatting.

John has been a member of DRI for more than six years. He is currently online community vice chair of the Commercial Litigation Committee and is looking forward to more involvement. He is also a member of the Employment and Labor Law and Intellectual Property Litigation Committees. His article on drafting restrictive covenants was "This Week's Feature" in the February 12, 2020, edition of *The Voice*.

John graduated *summa cum laude* from Ave Maria School of Law in Ann Arbor in 2007. During law school, he was Editor-in-Chief of the law review and successful in moot court competitions. Before law school, he served as an investigator for Senator Charles E. Grassley on the U.S. Senate Finance Committee. He also worked as a newspaper reporter in several cities. John graduated from Marquette University with a journalism degree.

John and his wife have seven boisterous children. A native of South Bend, Indiana, John grew up in the shadow of the Golden Dome, left for college, moved around the country, and returned to South Bend to raise his growing family. John enjoys participating in his children's sports and other extracurricular activities, including high school mock trial and the Boy Scouts.

Time Out for Wellness

My Achy Breaky Heart

Gender Bias in Healthcare and the Misdiagnosis of Heart Attacks in Women

By Jennifer Blues Kenyon

The old misconception that heart disease is a man's disease has had a negative impact on women's cardiovascular health care for decades. This is particularly true as it applies to. Cardiovascular disease is the number one cause of death in women, causing *1 in 3* deaths each year. That is—*every single minute of every single day* a women dies from cardiovascular disease. And women are twice as likely to be sent home from the emergency room in the middle of a heart attack simply because they do not have the "usual" symptoms.

So why is half of America's population being misdiagnosed at such an alarming rate?

In medicine, the male biology has been the reference point for decades, specifically when making diagnosis and treatment decisions. This causes women to receive inaccurate diagnoses and treatment plans because medical schools and research studies still use the 154-pound white male as their archetypal patient. Despite efforts to include females in medical research and evaluate more sex-specific disease diagnostic and treatment approaches, decades of research on male subjects combined with systemic implicit gender bias continue to affect women's health experiences every day.

In fact, sex-dependent inequalities in cardiovascular care have contributed to higher rates of early mortality in women. The sad truth is that women under 55 are seven times more likely than men to be misdiagnosed and sent

home from the hospital in the *middle* of a heart attack. And one study estimated thousands of deaths among women could have been prevented had care been equal between the sexes.

Women are sent home from the emergency room mid-heart attack often due to: (1) the failure to recognize and diagnose women's unique heart attack symptoms; (2) mistaking symptoms of a woman's heart attack for other conditions, including acid reflux or a panic attack; or (3) the failure to order the proper diagnostic tests immediately upon admittance to the hospital, resulting in a delayed diagnosis.

It seems pretty obvious that symptoms of a heart attack differ by gender. Yet, many women, and their doctors, do not recognize their subtle heart attack symptoms. Symptoms like backaches, fatigue, and nausea can often be misdiagnosed as stress, overexertion, or the flu. Because women may not have the "usual" symptoms or may have symptoms that are mistaken for another condition, further tests—like an electrocardiogram (ECG) or blood tests—may not be ordered. Failure to order the proper diagnostic tests immediately upon admittance to the hospital may lead to a delayed diagnosis, or none at all. And only 22 percent of primary care physicians and 42 percent of cardiologists feel well prepared to assess a woman's risk of cardiovascular disease.

And the risk of mistaking symptoms for another condition is even higher in younger women and women of color. The American Heart Association acknowledges that, while heart disease in women remains under diagnosed and undertreated, this holds especially true for African American women. And even though African American women are more likely to have a heart attack and more likely to die from a heart attack as compared with Caucasian women, they are *less* likely to be referred for cardiac catheterizations or bypass surgery. This healthcare disparity arises because of the gaps in medical education on the treatment of racial minorities, unintentional bias, a lack of access to care as well as individual behaviors specific to the patient—like diet and exercise—and genetics. Therefore, it is absolutely critical that healthcare providers understand the different disease presentations, risk factors, and treatment options among different racial groups. And that the providers educate their patients to promote self-care and proper management of heart disease.

This will hopefully serve as a reminder to all women to trust your gut; it's almost always right. And only you know your body. If you experience uncomfortable pressure, chest pain, pain or discomfort in your arms or back, shortness of breath, or nausea, talk to a healthcare provider immediately to avoid becoming a statistic.

Jennifer Blues Kenyon, is a partner of Shook, Hardy & Bacon LLP in Kansas City, Missouri, where her practice focuses on the defense of corporations in individual and complex tort, product liability and consumer protection matters. She has experience in all stages of litigation, including fact investigation, depositions, expert and fact witness preparation, motion practice and trial. Jen has served on numerous case teams and trial teams in the defense of personal injury and wrongful death smoking-and-health cases.

Feature Articles

Vermont Supreme Court Recognizes Exception to the Economic Loss Rule Joining Other States

By Walter Judge

Despite its longstanding reputation as liberal and sympathetic to plaintiffs, the Vermont Supreme Court has for a very long time strictly enforced the Economic Loss Rule (prohibiting tort claims to recover for purely economic harms). *See, e.g., Breslauer v. Fayston School District*, 163 Vt. 416, 659 A.2d 1129 (1995) (dismissing tort claim against former employer by disappointed applicant seeking teaching job in new school district, and discussing need to "maintain a dividing line between contract and tort theories of recovery"); *Paquette v. Deere & Co.,* 168 Vt. 258, 719 A.2d 410 (1998) (denying tort claims of purchasers of allegedly defective motor home); *Gus' Catering, Inc. v. Menusoft Sys.,* 171 Vt. 556, 762 A.2d 804 (2000) ("Negligence law does not generally recognize a duty to exercise reasonable care to avoid intangible economic loss to

another unless one's conduct has inflicted some accompanying physical harm"). As recently as 2015 the court reaffirmed its longstanding policy of strong adherence to the rule, as demonstrated by *Walsh v. Cluba*, 2015 VT 2, 117 A.3d 798 (2015), where the court dismissed a landlord's tort claims against a tenant even where the claim involved physical damage to the leased property.

In a few cases the court has suggested that there could be an exception to the rule for "professional services" involving a "special relationship" between the parties, *Springfield Hydroelectric Co. v. Copp*, 172 Vt. 311, 779 A.2d 67 (2001) (recognizing possibility of an exception, but holding that it would not apply where defendants did not hold themselves out as providers of any licensed professional service, and affirming dismissal of tort claims), but to date it has never found such an exception. Now, in *Sutton v. Vermont Reginal Center*, 2019 VT 71 (Oct. 14, 2019), it has done so.

Reversing a dismissal of the plaintiffs' Complaint, the court in *Sutton* found, among other things, that the plaintiffs' negligence claims against the Vermont Agency of Commerce and Community Development (ACCD) were not barred by the rule.

The plaintiffs in this case were investors in Vermont's EB-5 visa program. They lost their investments due to the now-infamous EB-5 scandal, in which Ariel Quiros, a real estate developer, allegedly used the investors' money for purposes other than the stated real estate developments. https://www.burlingtonfreepress.com/story/news/2018/02/02/quiros-reaches-82-million-settlement-jay-peak-fraud-case/301137002/ The EB-5 program is a federal immigration program wherein foreigners can obtain "green card" visas by investing in certain development projects in the United States that create employment for U.S. workers. In this case, the ACCD, an agency of the State of Vermont, was licensed by the federal government to operate the program in Vermont. It emerged that representatives of the ACCD partnered with Quiros and shared a table with his representatives at development tradeshows, where they would jointly solicit foreign investors for Quiros' development projects in Vermont (the "Jay Peak Projects"). The ACCD employees would represent to potential investors that, unlike EB-5 programs in other states, the development projects in Vermont benefitted from state, *i.e.*, ACCD, approval and oversight, and therefore were sound investments. In fact, however, the State never oversaw, examined, inspected, or audited the projects, and plaintiffs' financial investments were lost. Plaintiffs sued the ACCD and its employees for negligence, negligent misrepresentation, gross negligence, breach of contract, breach of warranty, etc., for soliciting their investments and failing to safeguard them.

The trial court dismissed the plaintiffs' Complaint on grounds, inter alia, of the economic loss rule. Plaintiffs appealed. The Vermont Supreme Court reversed the dismissal. Concluding that the economic loss rule did not bar plaintiffs' claims, the court stated:

> Here, plaintiffs have alleged sufficient facts to make out a special relationship between defendants and plaintiffs such that they may recover for their purely economic losses. ACCD initiated a close relationship with the plaintiffs by recruiting them to invest their life savings in the Jay Peak Projects by promising exceptional oversight and management of the investment. As discussed above, ACCD demonstrated awareness of the risk that it was inducing plaintiffs to undertake – a risk it represented it would minimize – when it told plaintiffs it would provide a safeguard for their investments. ACCD did not simply endorse the Jay Peak projects to members of the public generally; it personally solicited investors, and entered into individualized relationships with each of the plaintiffs, who paid substantial fees directly to [ACCD] in connection with that relationship. It intended to influence a narrow class of identified people –prospective investors in the Jay Peak Projects – and those who actually invested relied on their representations and promised oversight. This is the kind of relationship that can give rise to liability for purely economic harms.

2019 VT 71 at 12, ¶ 33.

The court went on to hold that the plaintiffs' negligent misrepresentation claims also were not barred by the economic loss rule because the tort of negligent misrepresentation specifically applies to "pecuniary loss." (For reasons I will not go into here, the court also found that the ACCD and its employees were not protected from suit by sovereign immunity.)

Thus, the court reversed the dismissal of the plaintiffs' complaint.

This decision represents a significant departure from more than two decades of Vermont Supreme Court jurisprudence affirming a strict adherence to the economic loss rule. It may make it much more difficult, if not impossible, to get a complaint dismissed at the Rule 12(b) stage where the economic loss rule should apply to bar the plaintiff's claims. Superior courts may be more likely to say that the claims should survive a dismissal attempt and that the existence of, and extent of, a "special relationship," as alleged by the plaintiff, should await summary judgment or be decided by a jury.

Sutton also signals that the Vermont Supreme Court may join the courts in a substantial number of states over the past several decades that have, in some circumstances, declined to apply the economic loss rule when where a "special relationship" purportedly justifies an exception to the rule. *See, e.g., J'Aire Corp. v. Gregory,* 24 Cal.3d 799, 157 Cal.Rptr. 407, 598 P.2d 60 (1979); *Mattingly v. Sheldon Jackson College*, 743 P.2d 356 (Alaska 1987); *Aikens v. Debow,* 208 W.Va. 486, 541 S.E.2d 576 (2000); *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 750 N.E.2d 1097, 727 N.Y.S.2d 49 (2001); *Blahd v. Richard B. Smith,* 141 Idaho 296, 108 P.3d 996 (2005); *Wyle v. Lees*, 162 N.H. 406, 33 A.3d 11387 (2011). But whether this exception actually circumscribes liability for defendants based on the theory that "the special relationship defines the class of potential plaintiffs to whom the duty is owed," *532 Madison Ave.,* 750 N.E.2d at 1101, or instead, significantly erodes the continued vitality of the economic loss rule, remains to be determined by further development in the case law.

Walter Judge represents businesses in the state and federal courts of Vermont, Massachusetts, and Maine in commercial matters (contract disputes, unfair competition, etc.), intellectual property litigation (enforcement of copyright, trademark, and trade secret rights) and in products liability and personal injury defense. He defends retail establishments, premises owners, trucking companies, institutions, and individuals against negligence and personal injury claims. In 2019 Walter obtained a $3.6 million jury verdict in federal court on behalf of an aviation company against a competitor. He has been a DRI member for about 30 years.

Who's Gonna Pay for All This?

Can Prevailing Litigants Have Their E-Discovery Charges Taxed as Costs Against Their Losing Opponents?

By John E. Goodman

Parties in today's complex litigation world, and their counsel, need no reminder of the ubiquity of electronic discovery and the tremendous expense it occasions. Even before 2006, when "electronically stored information" (ESI) was expressly added to the federal rules, parties have had discovery obligations regarding electronic documents and data. E-discovery, and the costs associated with it, are not going away. (By some estimates, the volume of data existing in the world doubles every two years.) It is also increasingly common for case management orders to require production ESI in particular formats, with particular metadata fields and the capability of being searched electronically—all of which entail increased expense, frequently from e-discovery vendors.

So, the question presents itself: To what extent can winning litigants have their e-discovery expenditures taxed as costs to their opponents? The short answer is, a lot less than a winning litigant would want, but perhaps more than a winning litigant might think.

Taxable Costs: The Rules

Federal Rule 54(d)(1) provides that "[u]nless a federal statute, these rules, or court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party." The rule further provides that the clerk of court "may tax costs on 14 days' notice." 28 U.S.C. §1920 in turn defines "costs" for purposes of Rule 54 and sets forth the items that the clerk may properly tax. Relevant to e-discovery, the statute also allows taxation of "fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case" (§1920(4)). This subsection of the statute is the battlefield for e-discovery cost fights.

What the Courts Are Saying

Six of the federal courts of appeal have interpreted §1920(4) in the e-discovery context, with varying results. The Third Circuit's opinion in *Race Tires of America v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3rd Cir. 2012), was one of the earliest. There, the district court's taxation of more than $350,000 in e-discovery expenses was reversed by the

appeals court. The Third Circuit's central holding was that §1920(4) covers making copies only, so expenses related to tasks that aren't directed to copying or its "functional equivalent" cannot be taxed under the statute. This ruling invalidated charges for storage, searching, indexing, and deduplication of data – even for documents ultimately produced in the case. However, charges for converting data from native to TIFF format, scanning of documents to make digital duplicates, and reproduction of media from CDs to DVDs were found to be the functional equivalent of copying and therefore taxable. The court also held that "equitable considerations"—for example, that e-discovery vendors' services are "specialized" and indispensable to the production of ESI—are not relevant, being "untethered from the statutory mooring" of §1920. The Fourth and Ninth Circuits have taken similarly restrictive views. *See Country Vintner of N.C., LLC v. Gallo Winery,* 718 F.3d 249 (4th Cir. 2013); *In re Online DVD-Rental Antitrust Litig.,* 779 F.3d 914 (9th Cir. 2015).

The Federal Circuit adopted a slightly different analysis in *CBT Flint Partners, LLC v. Return Path, Inc.,* 737 F.3d 1320 (Fed. Cir. 2013). It distinguished between "preparatory or ancillary steps" in the ESI production (not taxable) and steps "associated with the creation of an image and preservation of metadata" (taxable). The tasks necessary to convert data to a uniform production format (such as TIFF), performing format conversions, and copying the converted files to production media would all, in the court's view, be a compensable part of "making copies." The same court several years later—albeit in a nonprecedential opinion—observed that if an agreement between the parties requires expenditures for particular tasks necessary to conform the production to the parties' agreement, such expenditures can fall within the ambit of §1920. *Deere & Co. v. Duroc, LLC*, 650 Fed. Appx. 779 (Fed. Cir. 2016).

Practice Pointers and Takeaways

- **The law is not settled yet.** While most courts tend to distinguish between tasks that are a part of "copying" (taxable) and mere "preliminary steps" to copying (not taxable), it's not yet clear what tasks fall into which bucket. Courts have disagreed, for example, on the compensability of expenses relating to optical character recognition, supplying confidentiality designations and bates numbering, and extraction and preservation of metadata. Consider the law in your circuit and district carefully when considering a cost request for e-discovery expenses.
- **That said, some costs are pretty clearly out.** No court to date has allowed expenses for data hosting or storage (at least in the absence of an agreement between the parties that such costs could be shifted), nor has any court allowed recovery of ESI costs that didn't relate to documents assembled and produced for one's litigation opponent (in other words, tasks undertaken for counsel's own convenience in litigating the case will not be recoverable under §1920). And the law is also clear thus far that attorneys' fees incurred in working with ESI are not taxable.
- **Vendor billing clarity is key.** A little bit of preparation on the front end can make a big difference on compensability down the road. Have a clear understanding with the e-discovery vendor at the outset as to how it will bill for its services. The vendor must provide time and cost entries that detail exactly the services being provided; both overgeneralization and multi-task entries (the equivalent in this context of "block billing") are likely to lead to invoices being non-taxable. Ensure that the vendor avoids technical jargon in its billing descriptions; multiple courts have rejected charges because the language used did not convey what work had been done in an understandable way. Keep in mind that the "audience" for these billing submissions is going to be court clerks, the district court, and its law clerks, none of whom are likely to have the same level of technical expertise on e-discovery processes that your e-discovery vendor does.
- **Case management orders and ESI protocols can impact taxability.** As noted above, one court of appeals has held that if an ESI protocol requires production in a certain way, the steps necessary to comply with the protocol can be taxed as costs in favor of the prevailing party. Some district courts have followed. On the other hand, it has been held that the parties can by agreement remove from the scope of §1920 expenses that which would have otherwise been taxable (for example, by agreeing that each side will bear all its own ESI costs). How the case management order or ESI agreement is worded can have a definitive impact in an ESI cost fight, so foresight and care in drafting are essential.
- **Keep local rules in mind.** Many districts have local rules that can impact ESI discovery in general, the

costs associated with it, and the timing for filing cost bills.

- **Proportionality and other Rule 26 issues are not likely to matter much when it comes to taxation of costs.** While the federal rules allow for cost shifting in various contexts—notably through the burden and proportionality concepts under Rule 26—such concepts are not in play under Rule 54(d). An attempt to shift discovery costs as disproportionate or burdensome should be made by objection at the discovery stage, rather than in connection with a motion to tax costs.

John E. Goodman is a partner in the Birmingham, Alabama office of Bradley Arant Boult Cummings LLP. He has represented clients in complex litigation for more than 30 years in state and federal courts in Alabama, throughout the region and beyond. His practice is principally in class action and mass action defense, having served as lead counsel in more than 100 putative class actions. John also regularly litigates competition law issues, representing businesses in more than 50 antitrust, intellectual property and noncompetition covenant cases.

If You Ain't Cheating, You Ain't Trying

The Intersection of Fantasy Sports and Pitch Sign Stealing

By Gregory Farkas

Daily fantasy sports generated over $355 million in revenue in 2019. Given the size of the industry, it is not surprising that it has generated litigation. Recently, such litigation has spilled over to professional sports franchises and leagues, as DraftKings fantasy baseball participants sued the Houston Astros, Boston Red Sox, and Major League Baseball over baseball's sign-stealing scandal.

In January, Major League Baseball fined the Astros $5 million, took away its first-round draft picks through 2021, and suspended the team's general manager and field manager for using cameras to steal their opponents' pitch signs during the 2017 season. Infamously, the stolen pitch signs were then sent to batters by banging on a trash can. The Red Sox were also caught using smart watches to send signals to their dugout in 2017 and are awaiting discipline from Major League Baseball.

In *Olson v, Major League Baseball*, No. 1:20-cv-00632 (S.D.N.Y.) the plaintiffs, a group of DraftKings daily fantasy baseball participants, are pursuing a putative class action against the Astros, Red Sox, and Major League Baseball alleging claims for unfair and deceptive practices under state consumer protection statutes, unjust enrichment, and negligence. The suit contends that the pitch sign stealing undermined the plaintiffs' daily fantasy wagers. It stresses the close relationship between Major League Baseball and DraftKings. Major League Baseball was the first professional sports league to partner with DraftKings in 2013, including ballpark and online promotions. Major League Baseball also acquired an equity interest in DraftKings that it later sold. The plaintiffs claim that the financial relationship between Major League Baseball and DraftKings created a duty to DraftKings participants to ensure that all games were played fairly.

Major League Baseball, the Astros, and the Red Sox have predictably challenged both the existence of such a duty and the plaintiffs' ability to prove that the cheating caused them financial damages. But the defendants also are relying on another argument that might seem to be foul to sports fans. The defendants contend that everyone is aware that professional athletes cheat, and therefore the plaintiffs could not have been deceived into participating in DraftKings. In making this argument, the defendants noted that clubs were publicly disciplined for electronic sign-stealing violations during the 2017 regular season. The defendants also rely on precedent from another infamous cheating incident, the New England Patriots Spygate scandal, where a disgruntled New York Jets season ticket holder (and one can question whether there is any other kind) sued the Patriots, their coach, and the NFL. The Third Circuit affirmed dismissal of the claims, finding that sports fans understand that "players often commit intentional rule infractions in order to obtain an advantage over the course

of the game." *Mayer v. Belichick*, 605 F.3d 223, 236 (3d Cir. 2010).

The plaintiffs in *Olson* face an uphill climb to prove that they were directly damaged by the sign-stealing scandal and that Major League Baseball and the teams involved owed them any legal duty. However, with the popularity of daily fantasy sports and a 2018 United States Supreme Court decision paving the way for states to legalize sports gambling, the likelihood of on the field cheating leading to off the field litigation is likely to increase.

Gregory Farkas is a partner with the law firm of Frantz Ward LLP. Greg's practice encompasses a variety of litigation matters, including commercial disputes, consumer fraud claims, and defense of bad faith and insurance coverage litigation. Greg has represented defendants in numerous class actions in state and federal courts and has authored several articles concerning class action practice. Greg is a member of the steering committee for the DRI Commercial Litigation Committee.

Delving into the Weeds

The New Normal of Commercial Cannabis Litigation

By Patrick Haggerty

On February 17, 2020, the American Bar Association's House of Delegates adopted ABA Resolution 103B requesting Congress to "clarify and explicitly ensure that it does not constitute a violation of federal law for lawyers, acting in accord with state, territorial and tribal ethical rules on lawyers' professional conduct, to provide legal advice and services to clients regarding matters involving marijuana related activities that are in compliance with state, territorial and tribal law" Why would this be necessary? The answer lies in the growing number of lawyers representing cannabis companies in transactions and litigation.

$23.4 billion in annual sales by 2022 is one current estimate of the size of the cannabis industry. Another measurement of this booming industry is the amount of legal work being generated. Even a cursory review of recent filings produces the conclusion that cannabis fever is spreading among the legal community faster than COVID 19.

Recently, DLA Piper announced it was forming a Global Cannabis Practice Group. Although this group will not work with US companies, the firm's 70 lawyers and staff will continue to perform the type of services which has already involved $8 billion of deal making. While DLA Piper is the largest firm with such a practice, other firms such as Cozen O'Connor, Dentons, and Fox Rothschild also have Cannabis Practice Groups. It is safe to say that the stigma of working with "pot companies" is fading. Rapidly.

While there is significant activity in financing, mergers and acquisitions, real estate and related transactional work, cannabis litigation is also growing. Just a few examples illustrate the breadth of commercial cannabis claims pending in federal courts around the country.

In Re Hexo Corp. Securities Litigation, 19-CV-10965 (S.D.N.Y.), is a securities class action with allegations that defendants misstated and withheld information which resulted in the loss of millions of dollars to investors. This case is one of many class actions alleging that cannabis companies misled investors eager to get into the gold rush of the cannabis marketplace.

Komassa v. Gallagher et al, 20-CV-103060 (D. Mass.) is a dispute among the partners in a cannabis venture management company involving claims of breach of contract, breach of fiduciary duty unjust enrichment, fraud and conversion.

In *Tapatio Foods LLC v. Alfarh*, 19-CV-00335, (E.D. Cal.), the court granted Tapatio's request for permanent injunction prohibiting the defendants from using the marks containing Tapatio's signature font and Charro (a traditional Mexican horseman).

Several lawsuits have been filed against credit card processor Linx Card claiming it improperly withheld money relating to cannabis transactions. In one such suit, *Tryke Management Services LLC v. Linx Card Inc. et al*, 19-CV-05324 (D. Ariz.) the Court considered but ultimately rejected a request to appoint a Receiver to oversee creditors' claims.

A major patent case, *United Cannabis Corp. v. Pure Hemp Collective Inc.*, 18-CV-011922 (D. Col.) has proceeded without either party raising the unenforceability of a patent on an illegal product. Instead, the case is proceeding with both sides presenting traditional patent claims and defenses.

Cannabis-related litigation has even been filed in a federal court in Texas. In *North Avenue Capital LLC v. Appogee Kazmira LLC*, 20-CV-00354 (N.D. Tex.), the parties dispute involves claims of a breach of a $10-million loan contract.

These suits follow on the heels of a flurry of predictable consumer class action lawsuits in the latter half of 2019 involving claims of misrepresentation and improper labeling against manufacturers and sellers of CBD and other cannabis products. In one such case, *Snyder v. Green Roads of Florida*, 19-CV-62342, the court recently stayed the claims under the primary jurisdiction doctrine pending FDA rulemaking regarding the marketing and labelling of hemp-derived ingestible products. Many defendants have sought similar stays, and forthcoming regulatory guidance will be critical to the industry in the coming months. Cannabis companies have also been the target of class actions allegations that have nothing to do with cannabis, such as ADA website violation claims, another sign the industry is no longer viewed differently from other defendants.

In sum, we have come along way, in a short period of time, from parties avoiding federal courts or invoking the illegality defense in claims involving cannabis, to the more traditional spectrum of commercial claims. It appears that the second decade of the 21st-century may very well be known as the time when commercial cannabis litigation entered the mainstream. And given the amounts of money at issue, it is safe to say it will be here for a long time.

Patrick Haggerty represents clients in a wide range of litigation related issues and serves as national coordinating and national trial counsel for companies facing significant exposures.

Pat created the Frantz Ward LLP's Cannabis Law and Policy Group in response to the increasingly complex issues surrounding the legalization of medical marijuana and hemp. This work has extended to providing representation to clients involving the vast array of issues created by the national movement to legalize hemp and recreational cannabis.