Upcoming Events

There is still time to register for this year's Annual Meeting which will be held in Munich Germany. The Program Chairs, Mills and Carol Anne Gallivan, have gone the extra mile to ensure this will be a memorable event for all. The Program Chair, Deb Kuchler, has put together Educational Seminars which will not only be informative, but entertaining as well. Hotel reservations, flight reservations and signing up for the conference can all be accomplished by logging into the Federation Website at www.thefederation.org.

Mills Gallivan

Deb Kuchler

The Commercial Litigation Section and Financial Institutions Subsection are joining the Corporate Counsel, Extra-Contractual Liability and Construction Sections to host a blockbuster section meeting on Wednesday, July 28, titled **We Really Don't Like Surprises' - Anatomy of Case Assessment: Early, Ongoing and Post-Mortem**. A panel of senior in-house counsel and defense counsel will discuss the importance of accurate, complete, and ongoing case assessment in litigation. Hope you can join us for this very informative session.

Other upcoming events include the Corporate Counsel Symposium which is set for September 21-23, 2010, at the Hyatt at the Bellevue Hotel in Philadelphia, Pennsylvania. The Corporate Counsel Symposium is an intense two-day cutting edge program dealing with the hottest issues facing today's corporate in-house litigation managers. This is truly a great program and one that you will not want to miss.

Hotel reservations can now be made for the **2011 Winter Meeting in Indian Wells, CA**, February 26 to March 5, 2011. The meeting will be held at the Hyatt Grand Champions Resort, Villas & Spa. General Chairs Mike & Linda Nelson along with Program Chair Bruce Celebrezze promise an event you will not want to miss. Visit the FDCC web site today for more information regarding programming and registration information.

Member News - Victories

George E. Lieberman

George E. Lieberman, Partner, Vetter & White, Providence, Rhode Island, defended the Narragansett Bay Commission ("NBC"), a Rhode Island entity, in an eminent domain case. NBC acquired temporary and permanent easements in private property in order to construct a facility to control the flow of material into the Narragansett Bay. The private property owner demanded compensation in the amount of $2,393,000 for the takings of its property, including pre-taking lost rental income. The owner claimed that the highest and best use of its property was for development of a fourteen (14) story luxurious condominium. Before litigation commenced, NBC valued the taken property at $264,690 and paid that sum to the owner.

At trial George presented evidence that the owner would not have obtained the necessary zoning approval (variance) and the needed regulatory approvals (historic and marine) to construct such a condominium, that the highest and best use of the property was not for a condominium but, rather, for its existing use (mixed commercial and retail) and that the owner's appraiser (expert witness) had not properly valued the property. George also submitted that as a matter of law the owner was not entitled to compensation for the claimed lost rental income.

The trial court granted NBC judgments as a matter of law and ruled that the taken property had a value of $360,040, requiring NBC to pay the owner only $95,350, a savings of $2,032,960.

Thomas J. Welk

Thomas J. Welk and Jason R. Sutton, of Boyce, Greenfield, Pashby, & Welk LLP, were recently successful in sustaining an injunction prohibiting a competing manufacturer from using a manufacturing line for a period of two years in Raven Industries, Inc. v. Clark Lee and Integra Plastics, Inc., 2010 SD 49 (S.D. June 16, 2010). In this case, Raven brought suit against a former engineer for Raven named Lee, and a competitor named Integra, who hired Lee. While at Raven, Lee signed two non-disclosure agreements. After going to work at Integra, Lee replicated Raven's unique manufacturing line.

Raven sued Lee for breach of the non-disclosure agreements. Raven sued Integra for tortiously inducing breach of the non-disclosure agreements and for engaging in unfair competition. Raven only sought injunctive relief.

There were a couple of noteworthy procedural issues in this case. At the summary judgment stage, Lee and Integra argued that Raven's claims were preempted the Uniform Trade Secrets Act. Although the trial court denied summary judgment, it did not directly address this argument. Lee and Integra never again raised the issue even though there was elaborate briefing and proposed findings of fact and conclusions of law for this nine-day court trial. On a matter of first impression, the South Dakota Supreme Court held that the denial of summary judgment without any further argument on the issue was sufficient to preserve the issue for appeal.

The other interesting procedural aspect of the case related to Supreme Court's jurisdiction. Lee and Integra filed a timely notice of appeal of the original permanent injunction but failed to file a notice of appeal for a later, modified permanent injunction. Raven argued that the modified permanent injunction became final, which mooted the appeal of the original permanent injunction. The Supreme Court construed the original notice of appeal to include the modified notice of appeal so that it continued to have jurisdiction over the appeal.

From a substantive stand point, the noteworthy portion of the case relates to the enforceability of employer-employee non-disclosure agreements. Under South Dakota law, non-disclosure agreements are enforceable even if the information does not rise to the level of a trade secret. On a matter of first impression, the Court concluded that the employer must only engage in reasonable efforts to maintain the secrecy of its information at issue rather than have absolutely secrecy as argued by Lee and Integra. Raven's manufacturing line had been viewed by third parties but the trial court found that Raven's polices as to confidentiality to be reasonable.

The two year period of time for the injunction was selected because the CEO for Integra testified that was the period of time required to replicate the manufacturing line without Lee.

Case Law Updates

REMOVAL RESTRICTIONS IN *LOWERY* LESSENED BY 11TH CIRCUIT IN *PRETKA*[1]

On June 8, 2010, the U.S. Court of Appeals for the Eleventh Circuit issued a significant opinion in *Pretka v. Kolter City Plaza II, Inc.*, No. 10-11471, 2010 WL 2278358 (11th Cir. June 8, 2010), which clarified and, in some important respects, retreated from requirements imposed on a removing defendant by its prior decision in *Lowery v. Alabama Power Co.*, 483 F.3d 118 (11th Cir. 2007). This opinion should assist defendants seeking to sustain a removal based on evidence of the amount in controversy.

[1] Authored by: John P. Scott, Jr. and Bryan G. Hale; Starnes Davis Florie LLP; Birmingham, Ala.

1. Case Background

Pretka filed a class action in Florida state court seeking the rescission of purchase and sale contracts for units in a condominium development. The defendant developer removed the case to federal court, maintaining the facts satisfied the requirements of the Class Action Fairness Act.[2] In its motion to remand, Pretka argued that *Lowery* required evidence of the amount in controversy to come only from the plaintiff—the "receipt from plaintiff rule"—and based on its reading of *Lowery*, the district court granted plaintiff's motion to remand.

2. *Pretka's* Analysis

Questioning *Lowery's* broad sweep and potential inconsistencies with prior precedent, the Eleventh Circuit Court revisited *Lowery* and its application to removals brought under 28 U.S.C. § 1446(b). The Court distinguished the types of removal at issue in *Lowery* and in *Pretka* in that the defendant in *Pretka* removed the action under the first paragraph of § 1446(b), whereas the *Lowery* defendants removed that case well after the 30 day time limit and, thus, under the second paragraph of that statutory provision. This distinction proved critical to the *Pretka* court's analysis. The *Pretka* court also specifically acknowledged, in a departure from *Lowery*, that the substantive jurisdictional requirements of removal do not limit the types of evidence that may be used to satisfy the preponderance of the evidence standard. In other words, *Pretka* held that *Lowery's* "receipt from the plaintiff rule" had no application to cases removed under the first paragraph of § 1446(b). Finally, the *Pretka* court revisited *Lowery's* language concerning application of the "receipt from the plaintiff rule" in removals where the complaint seeks unliquidated damages.

The *Lowery* court had concluded that, "[w]hen a plaintiff seeks unliquidated damages and does not make a specific demand, … the factual information establishing the jurisdictional amount must come from the plaintiff." The *Pretka* court, however, limited *Lowery's* application to removals based on the second paragraph of § 1446(b). In applying this analysis, *Pretka* considered the language of the plaintiffs' complaint, the defendant's evidence in support of removal, and the defendant's evidence in opposition to remand. Specifically, in support of removal, the defendant submitted the declaration of its CFO stating that it collected more than $5,000,000.00 in condominium deposits. Though not stated, the *Pretka* court implied that this evidence alone carried the defendant's burden, even though the defendant provided more, which included post-removal evidence consisting of the individual purchase contracts and a second declaration in response to the Motion to Remand. The *Pretka* court rejected the argument that Lowery required that such evidence be ignored and expressly allowed this evidence in reply.

In summary, the *Pretka* court, in reversing the remand order, appears to have provided a clearer roadway for defendants seeking to have a removal stick under the first paragraph of § 1446(b) in the 11th Circuit.

[2] The Class Action Fairness Act, Pub. L. 109-2, codified in scattered sections of 28 U.S.C. (CAFA).

UPDATE ON HALL STREET DECISION

At the Orlando Meeting, Reid Manley presented on the *Hall Street* decision and whether the judicially created grounds for *vacatu*r or modification of arbitration awards were still valid after the United States Supreme Court's decision in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). As noted in Reid's presentation, the federal circuit courts that have addressed the issue since the Hall Street decision are split as to whether judicially created grounds for *vacatur* or modification are still valid. In the presentation, Reid mentioned that his case, *Frazier v. CitiFinancial Corporation, LLC*, was pending before the Eleventh Circuit and that this issue was presented to the Eleventh Circuit for decision.

On April 30, 2010, the Eleventh Circuit, in clear terms, held that the judicially created grounds for *vacatu*r or modification of arbitration awards are no longer valid after the *Hall Street* decision. The cite for the decision is *Frazier v. CitiFinancial Corporation, LLC*, 604 F.3d 1313 (11th Cir. 2010).

Volunteer Opportunities

There are so many ways to get involved with the work of the Commercial Litigation Section and the Financial Institutions Subsection. First, the Section always needs help with its Hot Cases duty. If you are available to help with Hot Cases, please contact Thomas K. Hanekamp at thanekamp@tsmp.com. We also need help with the Section Newsletters, publications in the FDCC Quarterly, our Section's website, and welcoming new members to our Section. Finally, this Section is always in need of topics to present at our Section Meetings. If you would like to be involved in any of these areas, please contact Reid Manley *rmanley@burr.com*.

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