INTER ALIA
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Northern District of Ohio Chapter of the Federal Bar Association
Spring 2006

A call for Motion Day

by Anthony J. LaCerva

I bet most of you are unfamiliar with Rule 78 of the Federal Rules of Civil Procedure. That rule is styled "Motion Day," and provides that "each district court shall establish regular times and places . . . at which motions requiring notice and hearing may be heard and disposed of . . . ." Based on my experience as a civil litigator in this judicial district, "motion day" does not appear to be the normal practice.

This is not to say that hearings are mandated on every motion filed. Indeed, the second paragraph of Rule 78 provides that, as an exception, and to expedite its business, the district court may make provision for the submission and determination of motions without oral hearing. This is the course our district has opted to take, as reflected by Local Rule 7.1. Interestingly, some litigants have challenged local rules of this type and others that deny oral argument on the ground that such rules abridge a litigant's due process rights, but the courts have uniformly rejected these challenges.[1]

While "motion day" is not a constitutional prerequisite, I write to make the case that our district court should consider holding hearings on select motions, and to set forth some of the reasons why I believe the practice of scheduling important motions for oral argument would be beneficial to the bench and the bar. Just my opinions, to be sure, but some may ring true.

Hearings on important motions would result in more expeditious rulings and help move cases forward. Some district courts, on receipt of a motion deemed worthy of oral argument, will send out a notice scheduling the motion for oral argument, and requiring that a response brief be submitted by a certain date. It is not unheard of, nor in my view inappropriate, for the court to rule from the bench following oral argument, or to take the matter under advisement and then issue an opinion based on the bench memorandum prepared for the oral argument.

Anothony LaCerva *is a shareholder in the litigation department of McDonald Hopkins Co., LPA. He began his career as a law clerk for the Hon. Robert E. DeMascio of the U.S. District Court for the Eastern District of Michigan. Judge DeMascio held motion day every Friday afternoon. This was the unrivaled highlight of the work week for both Judge DeMascio and his staff.*

If this practice were followed, many motions that otherwise might linger would be heard and decided in a relatively defined period of time.

The practice of holding oral argument on select motions would lead to an increased likelihood of correct and just results. Some attorneys make their point best in written submissions to the court. Some do not. Oral argument would give attorneys who best present their case from the standing position a chance to level the playing field and to make subtle points that might be lost in the papers. It would also cause counsel and the court to focus on the motion and to prepare for the hearings. Only good things can come from focus and preparation.

Holding hearings on important motions would improve the relationship between the bench and the bar, and make it more enjoyable to practice law in the Northern District of Ohio. I know very few civil litigators in Cleveland who do not desire to spend more time before the courts. Recently published statistics reveal that only 43 civil trials were held in the U.S. District Court for the Northern District of Ohio in 2005. That equates to about two civil trials per judicial officer. Given that so few civil cases are actually tried, motion hearings can be the primary way for civil litigators (and their clients) to interact with the judicial branch. We would hone our skills as advocates, and utilize the beautiful and spacious new courtrooms.

Oral argument would give attorneys who best present their case from the standing position a chance to level the playing field and to make subtle points that might be lost in the papers.

Not every motion calls for oral argument. But there are good reasons why the court should schedule hearings on dispositive and other important motions. Just as intended by Rule 78, "Motion Day" should be the norm, not the exception.

[1] *See Wilkins v. Rogers*; 581 F.2d 399, 405 (4th Cir. 1978); *Skolnick v. Martin*, 317 F.2d 855, 857 (7th Cir. 1963). Compare *Dredge Corp., v. Penny*, 338 F.2d 456, 461–62 (9th Cir. 1964) (district court may not preclude a party from requesting oral argument on a motion for summary judgment nor deny request by a party opposing the motion).

The President's Corner

by Lori White Laisure

My mother, Lillian White, passed away two months ago. The *Plain Dealer* highlighted some of her achievements (Section B 5, Dec. 24, 2005). She was a teacher for Shaker Heights School System and when she retired in 1989, she started a second career and became a real estate agent. She worked full time and raised three children (with the help of my father). She volunteered for various organizations like Meals on Wheels delivering meals to those who were sick or shut in; Shaker Heights Interest Group (a women's community service group) and United Black Fund just to name a few. She participated in all of these worthy projects and still found time to be there for her children and make homemade pies and cakes. Her cakes were so good, when my birthday arrived, I opted for a homemade cake instead of a Hough Bakery cake. There is not a day that goes by that I do not think about her and miss her. I have such fond memories that keep me going. This column is dedicated to her. She would have been happy at the progress the Northern District of Ohio (NDOH) chapter is making. The board has been working hard at accomplishing the three goals we have set for this year: to offer quality continuing legal education; to increase the public awareness of our chapter's community service projects; and to strengthen our relationship with the federal judiciary. The NDOH chapter is off and running.

In November we sponsored a unique CLE, "Handling the Media: Lawyers, the Press and the Courts." The guest speakers were Chief Judge James Carr, Judge Donald Nugent, Mag. Judge Nancy Vecciarelli and Bruce Hennes of Hennes Communications LLC. The chair of this CLE was Carter Strung of Tucker, Ellis & West. In December, we co-sponsored another unique CLE, "The U.S. Supreme Court Nomination of Judge Samuel Alito to the U.S. Supreme Court." The guest speaker was MSNBC Anchor Dan Abrams, moderator of the Abrams Report. We also offered our annual "Professionalism, Ethics & Substance Abuse" seminar where the guest speakers were W. Jack Rekstis III, Squires Sanders & Dempsey LLP; Micheal Drain, Drain & Assoc.; and Harry Cornett Jr., Tucker, Ellis & West LLP. The chair of this CLE was Jim Satola of Squires, Sanders & Dempsey. In March, we co-sponsored a luncheon in Toledo with Supreme Court Justice Ruth Bader Ginsburg. The chair of this event is Tony LaCerva of McDonald Hopkins and Ellen Toth of Roadway Express. In April, we offer our members an opportunity to be sworn in to the U.S. Supreme Court in Cleveland by clerk, William Suter. Please see www.fedbar.org for more information.

The NDOH chapter stepped up to help Cleveland Public Schools with our books for kids initiative. The NDOH chapter teamed with Mag. Judge Patricia Hemann and the Cleveland Bar Association, and will be delivering more than 5,000 new and gently used books to several schools in Cleveland. The chair of this program is Kip Bollin of Thompson & Hine.

Our chapter also partnered with North Central State College and the Bankruptcy Pro Bono Project and with a grant from the FBA Foundation, held a series of financial educations courses called Credit Abuse Resistance Program (C.A.R.E.) to help college students

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Lori White Laisure *is an assistant United States attorney for the Northern District of Ohio. She is responsible for litigating affirmative civil enforcement programs cases on behalf of the United States and its various agencies and against individuals and corporate entities against which the government asserts financial claims.*

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(The President's Corner, continued from page 2)

improve their money management skills . This was an excellent opportunity for community outreach because Ohio has recently seen a record number of bankruptcy filings. The guest speakers were Saul Eisen, U.S. Trustee-Region 9; Alan Hochheiser, Weltman Weinberg & Reis Co., L.P.A.; Dov Frankel, Buckley King; and Dean Gamin, Key Bank. We also received a request to give the C.A.R.E. presentation to the Richland County Young Leaders Institute. The guest speaker was Beth Ann Schenz, Roetzel & Andress.

As I mentioned in my last column, historically this chapter has served as a model nationwide. I believe this is in large part due to the quality of our board of directors. I want to publicly thank the board of directors and all of our volunteers for their hard work this year as we continue to offer quality CLEs, increase the public awareness of our community service projects and strengthen our relationship with the federal judiciary. My mother, Lillian, would be proud!

UT and the FBA team up to host Ruth Bader Ginsburg

On Monday, March 13 2006, The University of Toledo and the Federal Bar Association Northern District of Ohio Chapter co-sponsored a luncheon program at the university's College of Law for the Hon. Ruth Bader Ginsburg. Justice Ginsburg was at the university as part of College of Law's Distinguished Lecture Series. The Hon. James G. Carr, Chief Judge of the Northern District of Ohio, had the honor of introducing Justice Ginsburg at a luncheon gathering of lawyers, law students, and 26 federal and state judges. Judge Carr, the father of four adult daughters, praised and personally thanked Justice Ginsburg for her crucial role, as both a lawyer and judge, in broadening opportunities for all women. Justice Ginsburg humbly stated that she came along at the right time and that what separated her from being a bookkeeper in New York City's garment district like her mother was a single generation.

U.S. Supreme Court Justice Ruth Bader Ginsberg and Tony LaCerva, McDonald Hopkins.

Later, at a lecture that was attended by more than 750 students, faculty, lawyers, and judges, Justice Ginsburg spoke about her role as the ACLU's general counsel during the height of the 1970's feminist movement. Justice Ginsburg stated that she and her colleagues at the time viewed themselves as teachers whose job it was to instruct the judicial and legislative branches, both of whom were dominated by white males, that differential treatment on the basis of sex was inherently wrong and violated the Constitution's equal protection clause. Justice Ginsburg explained that the climate of the era, including the large increase of women in the work force and the changing patterns of marriage, contributed greatly to the advances in gender equality that came out of the 1970s. Justice Ginsburg noted that the culmination of the 1970s gender equality movement came in 1996 when the

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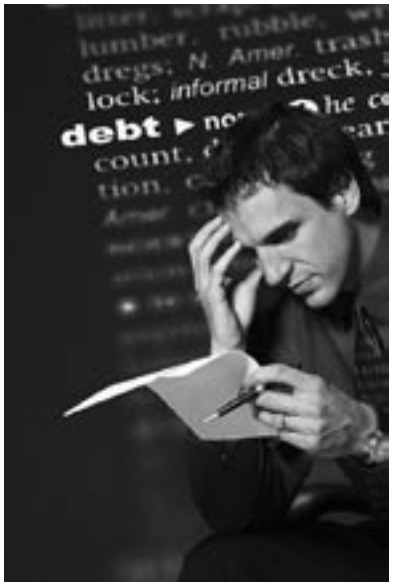
Bankruptcy attorneys are now "debt relief agencies"

By Robert J. Delchin

Next time you see the latest advertisements for bankruptcy attorney services on television or in print, pay attention to the not-so-little disclosure at the bottom. "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."



One of the most controversial provisions of the new Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) is the requirement that bankruptcy attorneys must now hold themselves out as a "debt relief agency," defined in 11 U.S.C. §101(12A) as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer." This controversy, however, stems not so much from the professional indignity associated with such a label, but because of the practical implications this has on all attorneys, not just bankruptcy.

If, for instance, a tax/divorce/estate planning attorney advises a client that bankruptcy is an option, he/she technically may fall under the definition of "debt relief agency." The requirement also would encompass attorneys who represent small business owners whose debts are primarily consumer. It may affect corporate bankruptcy attorneys as well, who may now be reluctant to take on traditional pro bono cases due to the civil and possible criminal penalties associated with violating the debt relief agency provisions. Some commentators have gone so far as to say that because BAPCPA defines "person" to include corporations or partnerships, an entire law firm is now a "debt relief agency" if just one of its attorneys provides bankruptcy assistance. The problem, of course, is more than just the label. It is that these attorneys are now subject to all the requirements that come with being a debt relief agency.

In addition to the advertising requirements described above, BAPCPA requires debt relief agencies to provide detailed written disclosures to clients, such as informing them that they have the right to hire an attorney. (Why would a debtor who sought out an attorney need to be informed by the attorney that he/she has the right to hire an attorney?) The law also restricts the type of advice that may be given to clients, such as prohibitions against advising clients to incur more debt in contemplation of bankruptcy. (What of the attorney who advises a client to take out a second mortgage to help avoid bankruptcy? Or the personal injury attorney who advises a client to seek medical care despite knowing that the client anticipates bankruptcy?)

Judges and attorneys have taken notice. The day BAPCPA took effect, Judge Lamar W. Davis, Chief Bankruptcy Judge of the Bankruptcy Court for the Southern District of Georgia, ruled sua sponte that attorneys are not "debt relief agencies" so long as their activities fall within the practice of law. He rejected the plain meaning of the statute, arguing that attorneys are already governed by the bar, and if Congress intended to include attorneys it would have used the term "attorney" instead of "debt relief agency."

Attorneys have also filed challenges in Pennsylvania, Kentucky, North Carolina and Minnesota, primarily on First Amendment grounds. They argue that the debt relief agency provisions unconstitutionally limit the advice that attorneys may give to their clients. In the meantime, though, attorneys have continued to conduct their practices on the assumption that the debt relief agency provisions do, in fact, apply to them. Whether other judges, including Ohio's Northern District judges, follow the lead of Judge Davis remains to be seen.

***Robert J. Delchin**, J.D., LL.M., is an attorney with R.C. Biales & Associates in Mentor. His primary focus is in consumer bankruptcy.*

5,000 books collected for kids

by Kip T. Bollin

As reported in the last newsletter, lawyers from the Federal Bar Association recently teamed up with federal Magistrate Judge Patricia Hemann and the Cleveland Bar Association for a project called "A Book of Your Own." Throughout the month of December, the lawyers collected more than 5,000 new and gently used books to be given to Cleveland school students. On March 10, the books were delivered to five different Cleveland public schools for distribution directly to the students to keep as "A Book of Your Own."

Judge Patricia Hemann and Kip Bollin sort through boxes of donated books.

The Federal Bar Association Northern District of Ohio Chapter, and the chapter's Younger Lawyer Division (YLD) members, adopted the program this year. We reached out to the Cleveland legal community, including the Cleveland Bar Association, to help collect the books. Then, on a Saturday in February, about a dozen volunteers including the judge, members of her staff, and lawyers from the FBA and CBA got together in the judge's chambers and spent a morning sorting and boxing the books.

On March 10, the books were distributed to media specialists at five Cleveland City Schools including: H. Barbara Booker Elementary; Charles A. Mooney Elementary; Dike Montessori Elementary; Harry L. Eastman; and Union Elementary.

The media specialists at these schools are in turn giving the books as awards to students.

The project turned out to be a great way for adults to revisit their favorite books and for parents and children to go through bookshelves together. On the receiving end, it is hoped that over time as the students' interest in reading grows, they will have the beginnings of a personal library to nurture that interest. Indeed, as Judge Hemann said, through the project, "We send two messages to the Cleveland school children. The first is that the community really cares about them, and the second is that a book is a special gift."

Without Judge Hemann's vision and the work of scores of volunteers, the project would not have succeeded. Dozens of law firms and individual lawyers worked together to collect, sort and box the books. Special thanks goes to all of these coordinators and firms (listed in the box below).

This year's effort was a great start, but Judge Hemann is not satisfied with 5,000 books. In the year to come, she and the YLD will try to take the legal community's initial contribution and expand it. "If we can just tap the interest of the greater Cleveland community, we will be able to put books in the hands of every single child," says Hemann. "That would send the powerful message needed at this time."

Kip T. Bollin *is an attorney with Thompson Hine in Cleveland.*

"A Book of Your Own" coordinators

Diane Chapman, Baker & Hostetler
Tamara Karel, Benesch Friedlander Coplan & Aronoff
Suzanne Saganich, Bricker & Eckler
Keven Eiber & Michael O'Donnell, Brouse McDowell
Robert E. Cahill, Brzytwa Quick McCrystal
Jeffrey W. Ruple, Buckley King
James F. Lang, Calfee Halter & Griswold
Natalie Peterson, City of Cleveland
Kathy M. Sasala, Cleveland Law Library
Carol Thonnings, Climaco Lefkowitz Peca Wilcox & Garofoli
Shawn A. Cormier, Davis & Young
Cathryn A. Sussman, Hahn Loeser & Parks
Kevin M. Butler, Joseph Jerome & Assocs.
Ann McGowan Porath & Julie DiBaggio, Legal Aid Society
Ian M. Redmond, McCarthy Lebit Crystal & Liffman
Jennifer Zador, McDonald Hopkins
Mark S. Bennett, Ohio Atty. Gen.'s Office
Nicole J. Quathamer, Tracey L. Turnbull & Scott B. Lepene, Porter Wright Morris & Arthur
E. Mark Young, Roetzel & Andress
H. Alan Rothenbuecher, Schottenstein Zox & Dunn
Donald W. Herbe, Squire Sanders & Dempsey
Hope E. Redmond, Thompson Hine
Steve J. Paffilas, U.S. Attorney's Office
Geri M. Smith, U.S. District Court
Jennifer Adams, Ulmer & Berne
John Gerak, Vorys Sater Seymour & Pease
Sarah L. Iddings, Walter & Haverfield
Antoinette F. Gideon, Wegman, Hessler & Venderburg
Kathy Hill, Margaret Wong & Associates

Clerk's Corner

by Geri M. Smith

U.S. Supreme Court swearing in ceremony to be held April 21, 2006

The Federal Bar Association Northern District of Ohio Chapter, along with the U.S. District Court for the Northern District of Ohio, is pleased to again sponsor the swearing ceremony to the U.S. Supreme Court by Clerk of Court William K. Suter at a luncheon on Friday, April 21, 2006, at the Cleveland Marriott Hotel—Key Center. Clerk Suter will join us and share his enlightening comments about the highest court of the land, as new and existing members of the FBA Northern District of Ohio Chapter are sworn in. Those interested in attending the luncheon only are also welcome. For more information please visit www.ohnd.uscourts.gov or contact your chapter office at (877) 322-6364 or admin@fba-ndohio.org.

Chief Justice's year-end report

Chief Justice John G. Roberts Jr., the nation's top-ranking federal judge, issued his first year-end report on the Federal Judiciary. In it he discusses the value of judicial independence, the importance of security for judges, the need for a solution to the judiciary's burdensome, escalating bill for courthouse rents and the importance of raising judges' pay. You may find Justice Roberts' report at www.uscourts.gov/news room/ChiefsYearEndStatement.pdf.

Judgeships

Judge Jack Zouhary of the Lucas County Court of Common Pleas and nominee for the vacancy created in Toledo, Ohio, on Judge David A. Katz taking senior status was introduced by Sen. Mike DeWine at his confirmation hearing conducted Feb. 15, 2006. We look forward to Judge Zouhary's confirmation and to formally welcoming him to the Northern District.

As announced last fall, Judge Lesley Wells took senior status on Feb. 14, 2006, and has relocated from the Carl B. Stokes U.S. Court House back to her former chambers and courtroom in the Howard M. Metzenbaum Court House. Judge Wells will continue to conduct all criminal proceedings, however, in the Carl B. Stokes U.S. Court House. Her new phone numbers may be found at the court's Web site, www.ohnd.uscourts.gov, but for your convenience are listed below:

Judge Lesley Wells
Howard M. Metzenbaum United States Court House
201 East Superior Avenue
Cleveland, Ohio 44114-1201
Phone: (216) 615-4480
Fax: (216) 615-4371
Judicial Assistant (216) 615-4482
Courtroom Deputy (216) 615-4479

Congressional outreach

On Friday, Feb. 3, 2006, the court had the privilege of hosting Sen. George V. Voinovich at the Carl B. Stokes Court House. Among the topics discussed were judiciary funding, security, GSA rental rates, funding for the new Toledo Court House and cameras in the courtroom. The court, under the leadership of Chief Judge James G. Carr, actively pursues opportunities to meet with our congressional representatives for the purpose of keeping both Congress and the judiciary better informed on the issues. Chief Judge Carr regularly visits with our congressional representatives while conducting judicial business in Washington, D.C.

Citing unpublished opinions in federal appeals

The Federal Judicial Center has announced the publication of *Citing Unpublished Opinions in Federal Appeals*. The center prepared this report at the request of the Appellate Rules Advisory Committee, to help the Standing Committee on Rules of Practice and Procedure in its consideration of the proposed new Federal Rule of Appellate Procedure 32.1, which would permit attorneys and courts in all circuits to cite the court's unpublished opinions.

The center's research effort consists of three components: a survey of judges, a survey of attorneys and a survey of case files. The proposed rule, as amended and approved by the Judicial Conference in September 2005, would apply only to opinions issued in 2007 or later. The next body to act on the proposal is the U.S. Supreme Court, which is expected to act by May 2006. If the Supreme Court approves the proposed rule and Congress fails to act, the rule will become effective Dec. 1, 2006.

The report is available on the center's public Web site at www.fjc.gov.

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66th Judicial Conference

The 66th 6th Circuit Judicial Conference will be held May 17-20, 2006, at the Marriott Detroit Renaissance Center. This is an open conference and all attorneys admitted to practice in the federal courts in the 6th Circuit are cordially invited to attend. All attorneys attending this conference will receive credit toward life membership in the 6th Circuit Judicial Conference.

The program on Thursday, May 18, will feature plenary sessions on "The Law, the Courts, and the Future of the American Automobile Industry," "Class Action and Related Jurisdictional Issues," and breakout sessions on sentencing, communication, appellate practice and bankruptcy. On Friday, May 19, the program will have three plenary sessions beginning with a Supreme Court update followed by an "Independent Judiciary: An Historical Overview" and an "Independent Judiciary: Present Status and Future Prospects." Program sessions on Thursday and Friday will begin at 8 a.m. and conclude at 1 p.m. Social and recreational activities are in the planning stages. The conference banquet will be held Friday evening, May 19, and will feature remarks by 6th Circuit Justice John Paul Stevens, and speaker, Michael Barone, senior staff writer for *U.S. News & World Report*. On Saturday morning, May 20, the program will conclude with circuit and district meetings commencing at 8:15 a.m. and adjourning at 11 a.m. The circuit and district meeting format will encourage the active participation by all lawyers and judges in the discussion of issues and problems in each court as well as other issues that may be identified throughout the conference.

For those attorneys attending from Kentucky, Ohio and Tennessee, the conference will seek approved CLE credit for attendance at this program.

Phone: (513) 564-7200

E-mail: ca06-conf@ca6.uscourts.gov

Case Management / Electronic Case Files (CM/ECF)

In a year-end update, Administrative Office (AO) Director Ralph Mecham said, "CM/ECF has been a glowing success for the federal Judiciary. And that success is the direct result of the close cooperation and work among the many active players in the Judiciary family—the Conference committees, the various AO offices, the individual courts, and the court advisory and working groups."

As 2006 begins, virtually all district and bankruptcy courts are live on CM/ECF, and the regional courts of appeals are expected to join them by year's end, completing an implementation process that began in 1995.

A small AO team working with the Northern District of Ohio delivered the judiciary's first Internet electronic filing system, a prototype that provided electronic access to the Ohio court for attorneys nationwide who were involved in maritime asbestos litigation.

The Northern District of Ohio was drowning in a sea of paper—the asbestos caseload presented 5,000 cases per year, with 100 different defendants per case, and 10,000 pleadings a week. An AO team led by Gary Bockweg, now the CM/ECF project director, went to

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New filing fee increases effective April 9, 2006

Pursuant to the Deficit Reduction Act of 2005, the following filing fee increases will take effect April 9, 2006:

Court of Appeals

Filing fee: increased from $250 to $450.

District Court

Civil action filing fee: increased from $250 to $350.

Bankruptcy Court

Filing fees:

- Chapter 7: increased from $220 to $245, total fees due at filing $299.*
- Chapter 13: increased from $150 to $235, total fees due at filing $274.*
- Chapter 11: It appears that Congress intended to increase chapter 11 filing fees as well, from $1,000 to $2,750, which would raise the total fees due at filing to $2,789*. However, there is a drafting error in the bill, which incorrectly references the statutory subsection prescribing the chapter 9 fee, rather than the chapter 11 fee. Thus, the chapter 11 fee, at this time, is unaltered. We will keep you apprised of Congress's actions to address this drafting error.

*The bankruptcy fee increases affect only the statutory chapter filing fees; all other fees collected at filing, such as the $39 miscellaneous fee in all chapters and the $15 case trustee fee in chapter 7 cases, remain unchanged.

When is an Ohio company not an Ohio company?

By Keven Eiber

28 U.S.C.A. Section 1332 provides that the "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between – (1) citizens of different States; . . ." In the case of a corporation, the diversity statute provides that a corporation "shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

Limited liability companies are fairly recent creatures of state statute. Ohio enacted its Limited Liability Company Act in 1994.[1] In Ohio, a limited liability company functions much like a closely held corporation in most respects. It is formed when its articles of organization are filed with the Secretary of State.[2] It may sue and be sued.[3] It may own property, make contracts, be a shareholder, partner or member of another company and issue bonds.[4] Individual members may bring a derivative suit against a limited liability company to protect minority interests.[5] Provision is made in the statute for mergers, consolidations and the winding up of limited liability companies.[6]

Despite these characteristics of limited liability companies, the 6th Circuit and most federal courts have held that, like other unincorporated business entities, the citizenship of a limited liability company is the citizenship of all of its members.[7] For the most part, the decisions not only disregard the location in which the limited liability company is formally organized, but also ignore the location in which the limited liability company has its principal place of business.

Two unreported Ohio district court decisions, however, have treated limited liability companies more like corporations for purposes of determining their citizenship. First, in *Morelli v. Morelli*, Judge Sargus considered first, whether an Ohio limited liability company must be joined as a necessary party, and second, whether doing so would defeat the court's diversity jurisdiction.[8] The court considered that the LLC was formed under Ohio law, had its principal place of business in Ohio, had an existence separate from its members and was clearly "domiciled" in Ohio for purposes of determining the court's diversity jurisdiction. The decision does not reflect that the court gave any consideration to the citizenship of the members of the LLC. *Morelli*, an unpublished decision, was decided before *Homfeld II, L.L.C. v. Comair Holdings, Inc.*, however, and has only limited precedential value.

Campbell v. Air Transport Intern'l Limited Liability Co., decided more recently, takes a different approach.[9] While acknowledging *Homfeld II, L.L.C. v. Comair Holdings, Inc.* and other authority for the rule that a limited liability company has the citizenship of its members, the court determined in this case that Air Transport was not a citizen of Ohio because its principal place of business was in Arkansas:

> Because the court finds that the overwhelming number of employees and the nerve center operations and corporate control of ATI are established in Little Rock, Ark., and that the Ohio operations, while significant, do not create Ohio as the principal business of ATI, diversity of citizenship is appropriate and the plaintiff's motion is denied.

Campbell can be read for the proposition that a limited liability company will have the citizenship of all of its members and the citizenship of the state where its principal place of business is established.

These cases provide litigants who wish to establish the citizenship of limited liability companies, whether to establish or to defeat diversity jurisdiction, with alternative arguments to do so. We can all stay tuned for the further developments.

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[1] O.R.C. § 1705.01 et seq.
[2] O.R.C. § 1705.04(A).
[3] O.R.C. § 1705.03(A).
[4] O.R.C. § 1705.03.
[5] O.R.C. § 1705.49.
[6] O.R.C. § 1705.36-48.
[7] *Homfeld II, L.L.C. v. Comair Holdings*, Inc. 53 Fed. Appx. 731 (6th Cir. 2002) ("[A] limited liability company is not treated as a corporation and has the citizenship of its members . . ." See also, *Mackason v. Diamond Financial LLC*, 347 F. Supp. 2d 53 (S.D.N.Y. 2004); *Saxon Fibers, LLC v. Wood*, 118 Fed. Appx. 750 (4th Cir. 2005); *General Technology Applications, Inc. v. Exro Ltda*, 388 F.3d 114 (4th Cir. 2004); *Contreras v. Thor Norfolk Hotel, L.L.C.*, 292 F. Supp. 2d 794 (E.D. Va. 2003); *Trident-Allied Associates, LLC v. Cypress Creek Associates, LLC*, 317 F. Supp. 2d 752 (E.D. Mich.

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Employee Requirement in Title VII does not confer Federal Court Subject Matter Jurisdiction

By Christopher J. Carney

Recently, I filed, pursuant to Fed. Civ. R. 12(b)(1), a motion to dismiss for lack of subject matter jurisdiction on behalf of a client where the plaintiff alleged violations of Title VII, the ADA, and the ADEA. The motion is premised, in part, on 6th Circuit case law holding that the district court did not have subject matter jurisdiction to hear the claims because the defendant did not have the requisite number of employees to be considered an "employer" for purposes of any of these federal laws. Coincidentally, on Feb. 22, 2006, the Supreme Court issued a decision that changes how the courts should look at this issue.

In *Arbaugh v. Y & H Corp., dba The Moonlight Cafe*, the Court, in an 8-0 ruling, held that the 15-employee minimum under Title VII is not jurisdictional.[1] Reversing a decision by the 5th Circuit Court of Appeals and resolving conflicting opinions in other Courts of Appeals, including the 6th Circuit decision in *Armbruster v. Quinn*, the Court adopted a bright-line rule that a threshold limitation on a statute's scope will only be treated as jurisdictional if Congress clearly labels it as such.[2] In so holding, the Court determined that the Title VII requirement that an employer must have 15 or more employees relates to the merits of the discrimination claim, rather than conferring the authority for a federal court to hear and decide the dispute. Thus, the 15-employee requirement now becomes one of the elements of the plaintiff's prima facie case.

The plaintiff in *Arbaugh*, a waitress and bartender at The Moonlight Café, sued the restaurant in federal district court for sexual harassment in violation of Title VII and various related claims under state law. In its answer, the restaurant admitted the plaintiff's jurisdictional allegations, but denied her substantive allegations. A jury returned a verdict in Arbaugh's favor and the court entered judgment based on that verdict. Two weeks later, the restaurant filed a Fed. Civ. R. 12(h)(3) motion in an effort to dismiss the case for lack of subject matter jurisdiction on the basis that the defendant had fewer than 15 employees at the time of the alleged misconduct and, therefore, the court had no jurisdiction under Title VII over the claim.

The trial court grudgingly granted the restaurant's motion to dismiss for lack of subject matter jurisdiction and vacated the judgment. In doing so, the district court noted that it was both "unfair and a waste of judicial resources" to allow defendant to raise the jurisdictional issue so late in the case, but ruled in the employer's favor anyway because the language of Fed. Civ. R. 12(h)(3)—whenever it appears that "the court lacks jurisdiction of the subject matter, the court shall dismiss the action"—mandated the result. The 5th Circuit affirmed the trial court ruling because it was bound by its own precedent holding that the failure to meet the 15-employee threshold deprived the trial court of subject matter jurisdiction.

Reversing the lower courts, the Supreme Court ruled that for a provision in a statute to be conferring subject matter jurisdiction it must be spelled out by Congress in the statute.

Reversing the lower courts, the Supreme Court ruled that for a provision in a statute to be conferring subject matter jurisdiction it must be spelled out by Congress in the statute. The Court noted that Title VII's numerosity requirement goes to the merits of the plaintiff's claim, rather than subject matter jurisdiction, since Congress did not designate it as such.

The practical effect of the Supreme Court's ruling is that an employer cannot seek to dismiss Title VII claims after trial, as was attempted by the Moonlight Café in *Arbaugh*. Presumably, the same result would apply with the ADEA's 20-employee and the FMLA's 50-employee minimum threshold requirements since Congress has not designated these provisions as conveying jurisdiction upon the federal courts.

The real question is will the *Arbaugh* decision adversely impact a Fed. Civ. R. 12(b)(1) motion filed early in the proceeding? The answer is probably not. The district court should treat it as a Fed. Civ. R. 12(b)(6) motion for failure to state a claim upon which relief can be granted or, in the alternative, a motion for summary judgment. Since the 15-employee requirement

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(Clerk's Corner, continued from page 7)

the Northern District of Ohio to assess the situation, and in less than three months came up with a workable electronic filing system. It enabled attorneys to electronically file and retrieve documents, and receive official notices via the Internet.

A year later, the Bankruptcy Court for the Southern District of New York began live operations with a similar system. By 2000, with primary oversight from the Judicial Conference's Committee on Information Technology, CM/ECF was operating in 14 pilot courts. The new system not only replaced the courts' aging electronic docketing and case management systems, but also provided courts the option to have case file documents in electronic format, and to accept filings over the Internet.

Success enjoyed in the pilot courts spurred the beginning of a national rollout in 2000 of CM/ECF to all bankruptcy and district courts.

"National implementation has been a major undertaking," Mecham said. "The AO has launched a concerted and disciplined effort to ensure further enhancements to the system and to assist courts as they work through a myriad of implementation issues and details."

Implementation also has been aided by mentor courts already experienced in using CM/ECF, and by working groups of court staff, all of whom helped identify desirable changes and enhancements.

By the end of 2005, more than 400,000 attorneys had registered and been trained to use CM/ECF, and 200,000 of those attorneys had made electronic filings. More than 24 million cases are on CM/ECF systems.

The timeliness and efficiency of attorney docket entries and the availability of electronic documents can lead to significant savings and improvements, not only for a court but also the bar and the public. "CM/ECF already has saved the Judiciary many millions of dollars each year," Mecham said. "These major savings will be multiplied many times over in future years."

He added: "CM/ECF has forever changed the way federal courts conduct business and the way the public accesses public records. It will go down in history as one of the most significant milestones in federal court operations."

International Outreach

The court is proud to continue its ongoing efforts in hosting visiting members of the international judiciary. On Feb. 6, 2006, the court participated in the International Visitor Leadership Program's "Administration of Justice and Rule of Law: A Regional Project for the Western Hemisphere," hosting judges, attorneys and administrators from Columbia, Honduras, Nicaragua, Paraguay, Peru and Venezuela. In addition, last October, Judges Adams and Dowd, along with Clerk's Office representatives, hosted Russian attorneys visiting from the Russian Legal Services Program.

Geri M. Smith *was appointed the Clerk of Court for the U.S. District Court Northern District of Ohio on July 1, 1991, having joined the Court in 1982. She serves as the chief administrative officer of the court as well as the administrative assistant to the Chief Judge.*

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2004); *Commonwealth Ins. Co. v. Titan Tire Corp.*, 398 F.3d 879 (7th Cir. 2004); *GMAC Commercial Credit LLC v. Dillard Dept. Stores*, Inc., 357 F.3d 827 (8th Cir. 2004); *Nowick v. Gammell*, 351 F. Supp. 2d 1025 (D. Haw. 2004); *Birdsong v. Westglen Endoscopy Center, L.L.C.*, 176 F. Supp. 2d 1245 (D. Kan. 2001); *Shuylman v. Voyou, LLC*, 305 F. Supp. 2d (D.D.C. 2004); *Cosgrove v. Bartolotta*, 150 F.3d 729 (7th Cir. 1998).

[8]No. C2-00-988, 2001 WL 1681119 (S.D. Ohio Sept. 27, 2001).

[9]No. 3:05 CV 7055, 2005 WL 3484048 (N.D. Ohio Dec. 16, 2005).

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(Employee Requirement, continued from page 9)

is now an element of the plaintiff's case, the court should grant the motion if there is no dispute that the defendants had less than 15 employees.

The lesson from *Arbaugh* is that it is crucial to raise these defenses such as the numerosity requirement under Title VII at the beginning of the litigation. In doing so, you may be able to get your client's case dismissed and save them a lot of money in the process.

[1]No. 04-944 (U.S. Sup. Ct., Feb. 22, 2006).

[2]711 F. 2d 1332 (6th Cir. 1983).

Christopher J. Carney *is a partner with Brouse McDowell, LPA in Cleveland, where he is a member of the firm's litigation and labor and employment practice groups.*

(Ruth Bader Ginsburg continued from page 3)

Supreme Court prohibited the state of Virginia from continuing to maintain a military college exclusively for males in violation of the equal protection clause in *U.S. v. Virginia* 515 U.S. 518 (1996)—a case where Justice Ginsburg wrote the majority opinion.

Justice Ginsburg took her seat as an Associate Justice on the U.S. Supreme Court on Aug. 10, 1993. She was nominated by President Clinton. Prior to being nominated to the Supreme Court, Justice Ginsburg was, since 1980, a judge of the U.S. Court of Appeals for the District of Columbia Circuit. Before being appointed to the federal judiciary, Justice Ginsburg served as the ACLU general counsel from 1973 to 1980. She was also a professor of law at Columbia Law School from 1972 to 1980 and Rutgers University Law School from 1963 to 1972. Justice Ginsburg received her B.A. from Cornell University, attended Harvard Law School and received her L.L.B. from Columbia Law School.

U. S. Supreme Court swearing-in ceremony

On Friday, April 21, 2006, the Federal Bar Association and the U.S. District Court for the Northern District of Ohio will have a special swearing-in ceremony for admission to the bar of the U.S. Supreme Court. The ceremony will be conducted by William K. Suter, clerk of court, Supreme Court of the United States.

The luncheon and swearing-in ceremony will be held at the Cleveland Marriott Downtown at Key Center, 127 Public Square, Cleveland, Ohio from noon to 1:30 p.m., with registration and cash bar beginning at 11:30 a.m. The registration fee for the luncheon is $35.

For further information on this event, contact Chris Carney at ccarney@brouse.com.

Upcoming events

Supreme Court Swearing-In Ceremony
April 21, 2006

Chapter Leadership Training Program
April 29-29, 2006

Chapter Retreat
May 9, 2006, at the Union Club

6th Circuit Judicial Conference
May 17-20, 2006, in Detroit, Mich.

FBA Annual Meeting & Convention
August 24-26, 2006, in Las Vegas, N.V.

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