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Litigation Update:
Hot Topics Impacting Your Business

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ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

Presented by:

Moderator:

Mike Crehan
Associate General Counsel
Metropolitan Washington
Airports Authority - Tysons, VA
michael.crehan@MWAA.com

Panelists:

Todd Conley
Partner - Tysons, VA
todd.conley@wbd-us.com

Jeff Golimowski
Associate - Tysons, VA
Jeff.golimowski@wbd-us.com

Danielle Herritt
Partner - Boston, MA
danielle.herritt@wbd-us.com

Louis Rouleau
Partner - Washington, DC
louis.rouleau@wbd-us.com

Agenda

- Contract Formation and Enforcement
- Trade Secrets
- Public Appeals
- Vicarious Liability
- Intellectual Property-related Antitrust Issues
- Reverse Piercing of the Corporate Veil
- Dispute Resolution Consideration

Contract Formation and Enforcement

4

I Didn’t Mean to Sign That

- *Knox Energy, LLC et al v. Gasco Drilling, Inc.*, 738 Fed. Appx. 122 (4th Cir. 2018)
  - Party Disputing Existence of Enforceable Contract: Consol Energy, Inc. (Co-Plaintiff)
  - Party Contending Enforceable Contract Formed: Gasco
  - Procedural Setting: Gasco’s appeal of jury verdict that found no contract existed because there was no “meeting of the minds – mutual assent”
    - Gasco appealed Court’s jury instruction on mutual assent

I Didn’t Mean to Sign That (cont)

- Key Takeaways
  - Contracts department needs to be careful in sending out unexecuted contract forms, and even more careful, in executing forms
  - Under most circumstances, signing a contract is very strong (although not dispositive) objective evidence of intent to enter into binding agreement

Actions Speak Louder than Words

- *Precision Pipeline, LLC v. Dominion Transmission, Inc.*, 2018 WL 3744018 (E.D. VA. Aug. 7, 2018)
  - Contractor: Precision Pipeline
  - Owner: Dominion Transmission
  - Project: Construct a 55-mile natural gas pipeline through Pennsylvania and West Virginia
  - Dispute: Precision claims $8.2M in retainage; Dominion claims $8.5M in set-offs
  - Procedural Setting: Cross motions for Summary Judgment

Actions Speak Louder than Words (cont)

- Key Takeaways
  - Need to “paper the record” when withholding contract payments
  - During contract performance adhere as closely as possible to the contract terms and when there is any deviation from contract terms document it
  - Contract terms can always be waived by the parties’ actions

Trade Secrets

It's How You Said It

- *AirFacts, Inc. v. De Amezaga*, 909 F.3d 84 (4th Cir. 2018)
  - Underlying dispute: Employer seeking damages for trade secret theft under Maryland law
  - Issue before the Court: Was information properly considered trade secret
  - Procedural Setting: Appeal from decision in favor of employee after bench trial

It’s How You Said It (cont)

- Key Facts
  - Employee downloaded flow charts he had generated for employer to make employer’s business process more systematic and easier
  - District Court found for employee, stating flow charts were not trade secrets
  - Fourth Circuit reversed

It’s How You Said It (cont)

- Key Holdings
  - Compilation of public available information can give rise to protectable trade secret
  - Improvement of efficiency to company and competitors in similar industry sufficient to prove economic value of secret
  - Confidentiality agreements and restricting access to electronic documents sufficient protective measures

It’s How You Said It (cont)

- Key Takeaways
  - Value-add to information can be sufficient to show confidentiality of information
  - Trade Secret does not have to be a formula or operable document – courts will protect marginal increases in productivity
  - Confidentiality agreements and standard monitoring practices carry weight to prove protection of information

Public Appeals

14

Little Things Make a Big Difference

75-80 Properties, LLC, et al.,
Appellants
v.
RALE, INC., et al.,
Appellees

CSP-REG-1689-2017 (Md. Court of Spec. Appeals)

- A story of how years of effort and millions of dollars to obtain zoning and development rights can be undone by a legislator's failure to record his attendance at a quasi-public meeting.

Little Things Make a Big Difference (cont.)

- The Parties
  - Developers: 75-80 Properties, LLC & Payne Investments, LLC
  - Government: Frederick County, MD
  - Citizens' Group/Petitioners: RALE, INC. (Residents Against Landsdale Expansion)

Little Things Make a Big Difference (cont.)

- Factual Background
  - Developers seek to develop a Planned Unit Development (PUD) in the Monrovia section of Frederick County, MD (the Monrovia Town Center project ("MTC")).
  - Developers start process in 2006.
  - After 8 years, on May 24, 2014, the County Board of Commissioners (now County Council) approves the MTC Project.

Little Things Make a Big Difference (cont.)

- 3 Approvals Obtained:

  (1) The Zoning Ordinance;

  (2) Development Rights and Responsibilities Agreement (“DRRA”);

  and

  (3) Adequate Public Facilities Ordinance Letter of Understanding (“APFO LOU”).

Little Things Make a Big Difference (cont.)

- RALE Challenges the Approvals (Petitions for Judicial Review)
- The Petitions Focused on Traffic until . . .

- The ETHICS LAW ISSUE

- RALE argued that former Commissioner Paul Smith failed to file an ex parte disclosure with the County Administrator re: his attendance at a April 14, 2014 Meeting of FACT.

The FACT Meeting

- FACT: Frederick Area Committee for Transportation.

- FACT:
  - is a quasi-public organization designed to address transportation issues in Frederick County.

  - Commissioner Smith was the Board-appointed liaison to FACT.

  - FACT meetings are published on County website, open to the public, and held in the County's Admin Building.

Ex Parte Communications
The Reporting Requirement

- Frederick County Ethics Law
  - Codified at §§ 15-857-862, Md. Code Ann., General Provisions.

  - It provides as follows:

    "A Board member who communicates ex parte with an individual concerning a pending application during the pendency of the application shall file with the County Manager a separate disclosure for each communication within the later of 7 days after the communication was made or received." (emphasis added).

Purposes of the Reporting Requirement

- The Statute:

- (1) Targets *quid pro quo* corruption between legislators and applicants …

And

(2) Shines light upon the political process – namely, ex parte communications between legislators and applicants with pending business before those legislators.

Trial Court

- Findings:
  - Commissioner Smith did not report his attendance at the FACT meeting in violation of § 5-859(b).
  - The timing of FACT letter submission “increases its propensity to influence a Commissioner’s vote.”
  - The lack of attribution of the FACT letter “was intended to deceive not only member of the Board but the public at large.”

Trial Court

- Vacates all three Approvals based on the violation of § 5-859(b) and the supplemental record collected by the County on remand.

- With respect to the DRRA, it was passed in violation of local law and therefore cannot be sustained.

Appeal Before Maryland Court of Special Appeals

- Case of first impression
  - No cases interpreting or applying the Reporting Requirement § 5-859(b).
  - Both Developers and former Commissioner Smith appealed trial court's decision.

Developers' Appellate Arguments

- Ex Parte Communication Statute Does **Not** Apply.
  - No ex parte communication.
  - FACT Meeting was a public meeting.
  - FACT letter was on FACT letter head and simply memorialized FACT's position (not ex parte).

Developers' Appellate Arguments (cont)

- § 5-859(B) – if applicable, as applied, violates the First Amendment.
  - Restricts legislative communications on matters of public concern without a substantial relationship to the Government's interest in eliminating corruption.
  - As applied, legislators must report all communications – regardless of how innocuous and even when making stump speeches.

Developers' Appellate Arguments (cont)

- **Substantial Evidence**
  - Numerous experts
- **Equities**
  - Developers had no involvement

Government's Appellate Arguments

- Statute is unambiguous. "Individual" is broader than applicant.
- The record supports the trial court's findings.
- Statute requires vacatur.

Takeaways

- YEARS OF EFFORT AND MILLIONS OF DOLLARS WIPED OUT THROUGH NO FAULT OF MTC DEVELOPERS.
- RALE FOUND 1 ALLEGED EX PARTE COMMUNICATION VIOLATION AND USED IT TO INVALIDATE AN ENTIRE DEVEVELOPMENT PROJECT.
- MISUSE OF REPORTING REQUIREMENT.
- **Case was argued before Maryland Court of Special Appeals on November 7, 2018 (decision pending).**

We Can't Hear You!

- *Pulte Home Corp., et al. v. Montgomery County, MD, et al.*, Case No. 17-2112 (4th Cir., November 29, 2018)
- A warning by the Fourth Circuit: Don't bring your land use/zoning cases to federal court any more. We don't want to hear them.

Pulte Home
Ten Mile Creek Project

- **THE PARTIES**

  - Developers: Pulte Home Corporation
    Shiloh Farm Investments LLC

  - Government: Montgomery County, MD
    Maryland-National Capital Park and Planning Commission

  - Various environmental groups

Ten Mile Creek Project

- In 2004, Pulte purchased 540 acres in Clarksburg Area of Montgomery County.
- Pursuant to 1994 Master Plan, land was zoned RE-1/TDR2.
- RE-1/TDR2 permits density at 1 residential unit per acre but allows for 2 units per acre with use of TDRs (transferrable development rights).

1994 Master Plan

- Provides:
  - "Master Plans . . . are intended to be updated and revised every 10 years."
  - Regarding water and sewer change applications, the County Council may "[d]efer action on a Water and Sewer Plan category change, pending further study or consideration as deemed necessary and appropriate by the County" or to "[c]onsider such other land use action as are deemed necessary."

2014 Amendment

- Reduced Pulte's ability to develop its own land (no more than 93 of its 540 acres).

- Wiped away Pulte's ability to use TDRs in connection with developing the Clarksburg property.

Developer Files Suit

- In November 2014, Pulte files a complaint against Montgomery County and M-NCPPC in state court: Circuit Court for Montgomery County.

- The Complaint is 76 pages, has 126 paragraphs of allegations, and attaches a map showing Pulte's property within the Clarksburg area.
  - Count I: Violation of Substantive Due Process Rights Guaranteed by the Maryland and Unites States Constitutions and the Civil Rights Act of 1871 (42 U.S.C. 1983).
  - Count II: Violation of Equal Protection Rights Guaranteed by the Maryland and United States Constitutions and the Civil Rights Act of 1871 (42 U.S.C. 1983).
  - Count III: Taking for Public Use Without Just Compensation in Violation of the Maryland Constitution; and Alternatively, Under the United States Constitution and the Civil Rights Act of 1871 (42 U.S.C. 1983).
  - Count IV: Violation of Procedural Due Process Rights Guaranteed by the Maryland and United States Constitutions and the Civil Rights Act of 1871 (42 U.S.C. 1983).
  - Count V: Violation of Article 19 of the Maryland Constitution Guaranteeing a Right to a Remedy for Injury to One's Property.

Removal to Federal District Court

- The Government removes the case from state court to the U.S. District Court for Maryland (Greenbelt Division).

- Pulte moves to remand back to State Court (Circuit Court for Montgomery County)
  - Denied.

The Surprise Rule 12(C)

- After the Government's filed preliminary Rule 12(b) motions, and after the Defendants filed answers, the parties engage in discovery.

- Discovery ensues for nearly 2 years.

- On April 13, 2017, over 30 months into the case, the Government Defendants filed Rule 12(c) motions for judgment on the pleadings.

The Government Defendants' Rule 12(C) Motions

- Core Concept:
  - Rule 12(c) permits a party, after the pleadings are closed, to move for judgment (not dismissal) if no material facts remain at issue and the parties' dispute can be decided on the pleadings.

The Government Defendants' Rule 12(C) Motions (cont)

- The Government Defendants' attached 306 pages to their Rule 12(c) motions.
  - Mainly excerpts from the 2014 Amendment, setting forth the Council's stated rationale for what it did.
  - District Court grants the motions and enters judgment in favor of the Government Defendants and against Pulte on all counts.

The Fourth Circuit Appeal

- On Appeal, Pulte argued, among other things, that:
  - Maryland no longer adheres to a strict formulation of the vested rights doctrine;
  - The question of rationality under the Equal Protection clause is a question of fact that can be rebutted by allegations in a complaint; and
  - *Penn Central* takings claims are fact-intensive that do no turn on a vested, property right.

The Fourth Circuit Appeal
When a Federal Forum is No Forum At All

- Affirmed on all issues:

- Fourth Circuit emphasized, at the beginning and at the end of its decision, that local land use claims do not belong in federal court:

> "This Court has stated repeatedly in similar cases, and as recently as last year, that federal courts are not the appropriate forum to challenge local land use determinations."

The Fourth Circuit Appeal
When a Federal Forum is No Forum At All (cont)

- "Local zoning authorities must have the ability to respond to constantly changing environmental . . . conditions, and we are unwilling to tie their hands by . . . forcing them to pay compensation to every disappointed developer whose land has been downzoned."

- "We recognize that Pulte originally filed this case in state court, but by asserting federal constitutional claims, it practically assured that the case would be removed to federal court . . . Pulte, like many landowners and developers before it, is attempting to use a bevy of federal constitutional claims to displace state and local decision making."

Takeaways

- For landowners/developers in Maryland, Virginia, West Virginia, North Carolina, and South Carolina, the Fourth Circuit's decision in *Pulte Home* is the "nail in the coffin" for attempts to obtain relief from local land use decisions in the federal court comprising the Fourth Circuit.

- So long as the government's stated rationale is plausible and facially identifiable, courts will look no further in assessing equal protection claims.

Vicarious Liability

What Did You Just Say?

- *Garnett v. Remedi SeniorCare of Virginia, LLC*, 892 F.3d 140 (4th Cir. 2018)
  - Dispute: Employee sought to hold employer liable for employee's allegedly defamatory statement
  - Procedural Setting: Appeal from grant of employer's motion to dismiss
  - Holding: Remanded in part based on sufficient allegations in complaint

What Did You Just Say? (cont)

- Key Facts
  - Plaintiff's co-worker spread defamatory rumor about nature of undisclosed medical condition
  - District Court held statement to be clear opinion
  - Fourth Circuit affirmed on different ground

What Did You Just Say? (cont)

- Key Holding
  - “There is no reason to hold employers liable for an employee’s statements when those statements serve no plausible employer interest, the employee’s workplace responsibilities did not facilitate the tort, and only the most heavy-handed workplace policies would have stood a chance of preventing the offensive conduct.”

What Did You Just Say? (cont)

- Key Takeaways
  - Reiterates narrow nature of vicarious liability
  - Makes it much more difficult for plaintiff's to claim defamation is within scope of employment
  - Protects employers that have reasonable policies

What Am I Paying You For?

- *Parker v. Carilion Clinic*, 819 S.E.2d 809 (Va. 2018)
  - Dispute: Patient sought to hold employer health system vicariously and directly liable for actions of employees
  - Procedural Setting: Appeal from grant of employer's and employee's demurrers
  - Holding: Vicarious liability only available when "the service itself, in which the tortious act was done was within the ordinary course of [the employer's] business

What Am I Paying You For? (cont)

- Key Facts
  - Multiple employees at Carilion Clinic locations shared private medical information regarding Parker with no discernable medical rationale
  - Circuit Court dismissed all claims as outside scope of employment
  - Supreme Court of Virginia approved dismissal of direct liability and remanded on vicarious liability question

What Am I Paying You For? (cont)

- Key Holding
  - “It is not enough . . . That the employee’s claim ‘arose out of an activity which was within the employee’s scope of employment or within the ordinary course of business. Instead, the employee must have committed the tort while actively engaged in a job-related service. Respondeat superior liability cannot be established merely by showing that the employee was ‘on the clock,’ using the employer’s property, or on the employer’s premises at the time of the alleged tortious acts or omissions.”

What Am I Paying You For? (cont)

- Key Takeaways
  - Reiterates narrow nature of vicarious liability
  - Forces plaintiff to plead acts and relationship of acts to job duties with some specificity
  - Gives employer greater leeway in defense that employee was acting out of personal motive

Intellectual Property-related Antitrust Issues

55

The Case of the Embedded Tweet

Goldman v. Breitbart News Network, No. 17-CV-3144 (KBF) (SDNY Feb. 15, 2018)

or

The Case Of the Embedded Tweet

The Parties

- Justin ***Goldman***, a photographer
- ***Online Media*** e.g. Time, Yahoo, Boston Herald, Boston Globe….

- Third Parties: Twitter, Tweeters

Goldman v. Breitbart News Network, No. 17-CV-3144 (KBF) (S.D.N.Y. Feb. 15, 2018)

Key Facts

- ***Goldman*** photographed Tom Brady and uploaded it to his Snapchat Story
- Photo goes viral and ends up in several Tweets
- ***Online Media*** and blogs prominently featured the photo by embedding the Tweet in articles that automatically load the image
- Embedding is a code that directs a browser to retrieve e.g. an image from a third-party server which creates a hyperlink

Goldman v. Breitbart News Network, No. 17-CV-3144 (KBF) (S.D.N.Y. Feb. 15, 2018

Holding

- When ***Online Media*** caused the embedded tweets to appear on their websites, their actions violated plaintiff's exclusive display right; the fact that the image was hosted on a server owned and operated by an unrelated third party (Twitter) does not shield them from this result
- ***Online Media*** websites actively took steps to "display" the image.

Goldman v. Breitbart News Network, No. 17-CV-3144 (KBF) (S.D.N.Y. Feb. 15, 2018)

Takeaways

- At variance with the 9th circuit "Server Test" where a content provider infringes only if the copyrighted material resides on their servers.
- The Judge drew a distinction between providers who require users to click to access the material and those who do not—many believe this distinction is very unclear.
- Interlocutory appeal denied July 2018. Stay tuned.

Goldman v. Breitbart News Network, No. 17-CV-3144 (KBF) (S.D.N.Y. Feb. 15, 2018)

Tinder v. Bumble

Case to Watch

Match Group, LLC v. Bumble Trading Inc., No. 6:18-cv-00080 (W.D. Tex, Filed Mar. 16, 2018)

or

Tinder v. Bumble

The Parties

- Match Group (***Tinder***), an online dating app
- ***Bumble***, an online dating app founded by Tinder's co-founders.

Match Group, LLLC v. Bumble Trading Inc., No. 6:18-cv-00080 (W.D. Tex, Mar. 16, 2018)

Key Facts

- ***Tinder*** owns a patent relating its mutual opt-in premise and a registered trademark to its "swipe left" and "swipe right"
- ***Tinder*** alleges ***Bumble*** infringes its patent, its trademark, and also copied its user interface, chat screen and other features.
- It also alleges unfair competition alleging its ex-founder stole "confidential information related to proposed Tinder features."

Match Group, LLLC v. Bumble Trading Inc., No. 6:18-cv-00080 (W.D. Tex, Mar. 16, 2018)

Complaint

24. The English Oxford Dictionary also specifically defines the terms "swipe right" and "swipe left" in connection with the Tinder brand:

Phrases

swipe right (or left)

informal (on the online dating app Tinder) indicate that one finds someone attractive (or unattractive) by moving one's finger to the right (or left) across an image of them on a touchscreen.

'I swiped right, but sadly for me, she swiped left'

Images from Design Patent No. D798314

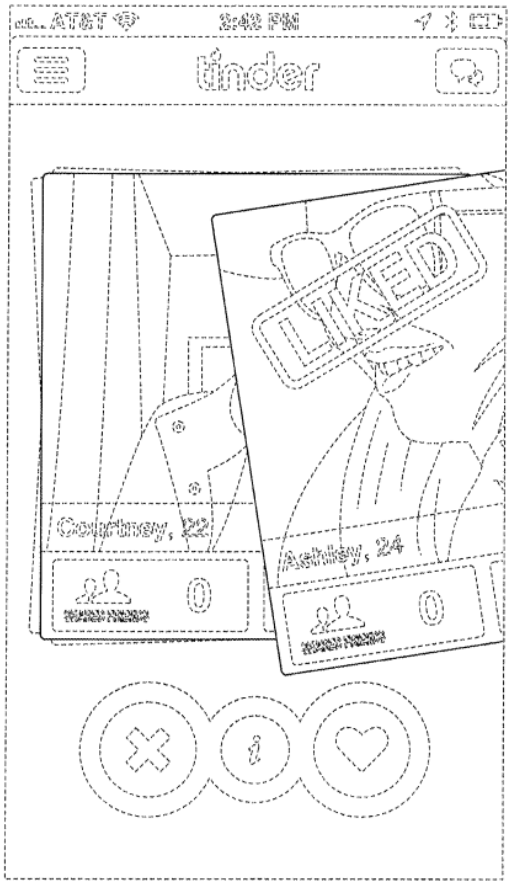


FIG. 1

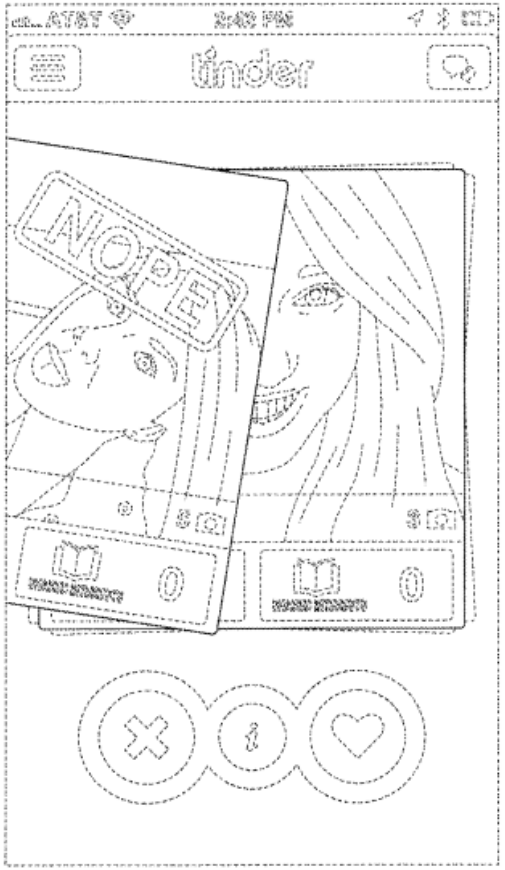


FIG. 2

US Patent No. 9959023 – Exemplary Claim

3. A system, comprising:

an interface operable to:

present a graphical representation of a first item … of information comprising a graphical representation of a first online dating profile … as a first card of a stack of cards;

a processor coupled to the interface and operable to:

detect a gesture … corresponding to a positive preference indication …, wherein the processor is further operable to detect a right swiping direction associated with the gesture; [and] store the positive preference indication …; and

the interface further operable to:

automatically present a graphical representation of a second item of information …comprising a graphical representation of a second online dating profile associated with a second user; and

automatically remove the graphical representation of the first item of information in response to detecting the gesture.

Complaint

35. Similarly, Match has protectable trade dress in its "It's a Match!" screen, shown below:

36. As with the swipeable card interface, this screen has distinctive trade dress source-identifying significance.

The Stakes

- It has been reported that Tinder offered to buy Bumble for $450m.
- And that later it offered over $1b.
- The definition of patentable subject matter as it applies to user interfaces.

Match Group, LLLC v. Bumble Trading Inc., No. 6:18-cv-00080 (W.D. Tex, Mar. 16, 2018)

Update

- December 2018: Case survived Motion to Dismiss based on §101 non-patentable subject matter: It was found that the patented invention improves existing interface technology, and is not an abstract idea.
- But… Judge Albright encouraged Bumble to raise the issue again as the record is developed further.
- Removed to Federal Court end of 2018.
- Stay Tuned – This is likely to be a pivotal case on patentable subject matter.

The Case of the Two Sided Market

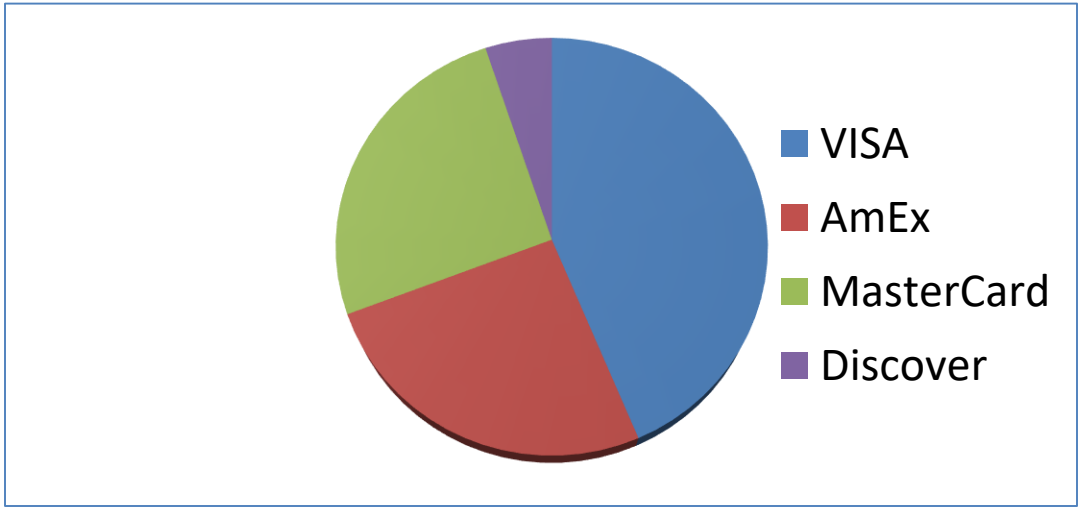
Ohio et al. v. American Express Co. et al., case number 16-1454, in the Supreme Court of the United States

or

The Case Of the Two Sided Market

The Parties

- ***American Express (AmEx)***
- ***United States***, claiming AmEx violated §1 of the Sherman Act



Ohio et al. v. American Express Co. et al., case number 16-1454, in the Supreme Court of the United States

Key Facts

- ***AmEx*** makes money by charging merchants
- Visa/MasterCard model makes most of its money by charging consumers interest
- ***AmEx*** charges merchants a higher rate (5% v. 3%)
- Merchants steer customers away from ***AmEx*** to avoid the larger ***AmEx*** fees
- ***AmEx*** places anti-steering provisions in its merchant agreements

Ohio et al. v. American Express Co. et al., case number 16-1454, in the Supreme Court of the United States

Holdings

- ***AmEx*** provides services to two groups: cardholders and merchants. And because the interaction between cardholders and merchants is a transaction, a credit-card network is a special type of a two sided platform.
- Competition cannot be assessed by looking at only one side of the platform in isolation.

Ohio et al. v. American Express Co. et al., case number 16-1454, in the Supreme Court of the United States

Holdings

- ***AmEx*** provides better rewards to consumers, and in able to do so, it must charge merchants higher fees. ***AmEx***'s model has spurred Visa/MC to offer new services and higher rewards. And fierce competition has constrained ***AmEx***'s fees.
- ***AmEx***'s anti-steering provisions in its merchant contracts—which prohibit merchants from avoiding fees by discouraging ***AmEx*** card use at the point of sale—do not violate federal antitrust law. There is no proof of anticompetitive effects that have harmed consumers.

Ohio et al. v. American Express Co. et al., case number 16-1454, in the Supreme Court of the United States

Dissent

Breyer with Ginsburg, Sotomayor and Kagan

As the District Court held (and we agree):

- Anti-steering provisions "disrupt the normal price setting mechanism" in the market. As a result, AmEx is able to raise merchant prices repeatedly without any significant loss of business, because merchants are unable to respond by encouraging shoppers to pay with other cards. Consumers throughout the economy paid higher retail prices as a result.

Takeaways

- This sharply divided opinion was the Supreme Court's first recognition of a two sided market – That is, every transaction between a credit card and a cardholder is also a transaction with the merchant.
- We will be fighting for years about what is a two sided market across many industries.

Ohio et al. v. American Express Co. et al., case number 16-1454, in the Supreme Court of the United States

The Case of the Foreign Profits

WesternGeco LLC v. Ion Geophysical Corp. *case number 16-1454, in the Supreme Court of the United States (June 22, 2018)*

or

The Case of the Foreign Profits

The Parties

- ***WesternGeco***, an ocean floor surveying technology company.

- ***ION Geophysical***, WesternGeco's competitor

WesternGeco LLC v. Ion Geophysical Corp. *138 S.Ct. 2129 (2018)*

Key Facts

- ***WesternGeo*** patented an ocean floor surveying system. Its system creates higher-quality data than previously available to perform surveys for oil and gas companies. For years it was the only company that used this technology.
- Starting in 2007, ***ION*** manufactured components for an indistinguishable system, and shipped them to companies abroad to be combined. And used this system to compete with ***WesternGeo***.
- Royalties were awarded, which was not controversial under the settled law.
- But ***ION*** disputed the $93.4 m in lost foreign profits because federal statutes apply only within the United States in order to not clash with foreign laws.

WesternGeco LLC v. Ion Geophysical Corp. *138 S.Ct. 2129 (2018)*

Holdings

- The question in this case is whether these statutes allow the patent owner to recover ***lost foreign profits***. We hold they do.
- The court focused on the conduct relevant to infringement: the acts of making the components in order to export them abroad to be assembled into an infringing system.
- And deemed the infringement occurred in the US. It viewed foreign lost profits as merely a "remedial damages provision."
- The dissent (Gorsuch, Breyer) "wrongly conflates legal injury with the damages arising from that injury."

WesternGeco LLC v. Ion Geophysical Corp. *138 S.Ct. 2129 (2018)*

Takeaways

- This decision implicates any federal statute where there a foreign consequences to violation of a statute in the US.
- This may provide additional motivation to companies who do a significant amount of its business overseas to move a subsidiary overseas entirely to shield against application of this statute.

WesternGeco LLC v. Ion Geophysical Corp. *138 S.Ct. 2129 (2018)*

Takeaways

JUSTICE GORSUCH: Mr. Clement, though, the difference I wonder -- and I don't know, but I wonder -- might be this: That, as Justice Ginsburg indicated under 271(f), fine, you get royalties because it's as if the -- the bits were manufactured here. But you don't have a -- a monopoly, a lawful monopoly, to use this technology abroad. That doesn't belong to you. That's outside the patent laws.

Transcript from Oral argument in WesternGeco LLC v. Ion Geophysical Corp., 6:25-7:8.

Reverse Piercing of the Corporate Veil

83

What does Too Clever by Half Get You?

Randy Coley, Appellant v. DirecTV, Inc., Appellee

Sky Cable, LLC v. DIRECTV, Inc., 886 F.3d 375 (4th Cir. 2018)

Background

- DIRECTV sues Mr. Coley for fraudulently providing DIRECTV services to 2,500 units in his resort. [The services contract was for only 168 units.]
- DIRECTV obtains $2.3MM+ judgment against Mr. Coley.
- Mr. Coley is quasi judgment proof notwithstanding that he has membership interests in three other entities (LLCs).
- Post judgment, DIRECTV files a motion to reverse pierce the corporate veil, arguing that the thee entities were “alter egos” of Mr. Coley.

Issue: Does Delaware Law Permit Reverse Piercing of the Corporate Veil? Yes

- Generally, LLCs have a distinct legal identity from its members and members are not personally liable for the LLC's debts.

- Courts will disregard the distinction between a business entity and the individuals having ownership interests in that entity, "if maintaining the distinction would 'produce injustices or inequitable consequences.'" – an Equitable Remedy.

Traditional Veil Piercing

- An individual may be liable for entity's debt when the entity is in fact a mere instrumentality or alter ego of individual.

Reverse Veil Piercing

2 TYPES:

(1) Insider Reverse Piercing

Applies when “the controlling [member or shareholder] urges the court to disregard the corporate entity that otherwise separates the [member or shareholder] from the corporation.”

(2) Outsider Reverse Piercing

Applies when an outside third party (e.g., a creditor) argues that a company is liable for a judgment against one of its members.

Many courts allow outsider reverse piercing in actions by creditors because it follows traditional veil piercing principles.

Key Facts in Cole v. DirectTV

- District Court (trial court) found as follows:
  - 3 LLCs were Mr. Coley's alter ego because they operated as a single economic entity in which money flows freely between them at Mr. Coley's whim.
  - Mr. Coley failed to observe corporate formalities (no accounting records and commingling of assets) between and among LLCs.

Personal Jurisdiction

- Fourth Circuit rejected argument by one of Mr. Coley's LLCs that the trial court lacked personal jurisdiction over it as it did not participate in the trial proceedings.
  - "When reverse veil piercing of a single-member LLC is involved, the individual already is properly before the court. Thus, there is no concerns that the alter ego LLC controlled by that individual must somehow receive independent legal notice of a legal action."

Maryland

- Maryland state courts have not addressed the viability of reverse veil-piercing under Maryland law; however, the Court of Special Appeals has remarked, albeit in dicta and in an unpublished case, that the facts of a particular case were better suited to a “reverse veil piercing” theory than a traditional veil piercing theory, citing the Supreme Court of Virginia’s opinion in C.F. Trust. See Greystone Operations, LLC v. Steinberg, No, 454, Sept. Term, 2016, 2017 WL 1365365, at *4 n.4 (Md. Ct. Spec. App. Apr. 12, 2017). This suggests, albeit in the most marginal of fashions, that there may at least be some receptivity to the doctrine in Maryland.
- Consistent with that, the U.S. Bankruptcy Court for the District of Maryland applied the doctrine in a case where Maryland law applied, despite recognizing that the Chapter 7 trustee failed to cite any case in Maryland recognizing the doctrine. See In re Levitsky, 401 B.R. 695, 712-13 (Bankr. D. Md. 2008).

Virginia

- Answering a certified question from the Fourth Circuit, the Supreme Court of Virginia held that Virginia recognizes "the concept of outsider reverse piercing and that this concept can be applied to a Virginia limited partnership." C.F. Trust, Inc. v. First Flight, L.P., 266 Va. 3, 11, 580 S.E.2d 806, 810 (2003). While the Court only explicitly recognized the concept in the context of a limited partnership, the Court noted that "there is no logical basis upon which to distinguish between a traditional veil piercing action and an outsider veil piercing action," suggesting that the latter would apply in any context in which the former would apply. Id. In fact, the Supreme Court of Virginia, albeit in an unpublished case, recently reversed a circuit court decision granting a demurrer dismissing a reverse piercing claim. See A.G. Dillard, Inc. v. Stonehaus Constr., LLC, Record No. 151182, 2016 WL 3213630, at *3-4 (Va. June 2, 2016).

District of Columbia

- D.C. has never authorized wholesale reverse-piercing; however, the D.C. Court of Appeals has stated that D.C. Code § 16-579, which pertains to garnishments, permits reverse veil-piercing to aid efforts at collection. See IBF Corp. v. Alpern, 487 A.2d 593, 596 n.8 (D.C. 1985). In addition, the U.S. District Court for the District of Columbia used reverse veil-piercing in a case involving D.C. law. See United States v. TDC Mgmt. Corp., 263 F. Supp. 3d 257, 266-72 (D.D.C. 2017), appeal dismissed, No. 17-5209, 2018 WL 2341804 (D.C. Cir. Apr. 26, 2018).

Dispute Resolution Consideration

94

Set in Stone

- *Uretek, ICR Midatlantic, Inc. v. Adams Robinson Enters., Inc. et al.*, 2017 WL 6391489 (W.D. Va. Dec. 14, 2017)
  - Subcontractor: Uretek
  - Contractor: Adams Robinson
  - Underlying dispute: Payment due following default termination of Uretek
  - Issue before the Court: Whether to vacate arbitration award in favor of Uretek
  - Procedural Setting: Uretek's motion to confirm arbitration award

Set in Stone (cont)

- Exceeded authority (FAA Ground)
  - Arbitrators do not exceed authority by failing to base award on express contract terms because that is simply an error of law and not a ground for vacatur
- Award fails to draw its essence from contract
  - Simply because decision is not based on express terms does not mean it is not derived from the contract; key is whether arbitrators acted “irrationally”

    Not irrational to have duty of good faith and fair dealing trump express contract terms
- Manifest disregard of law
  - Arbitrators must correctly state the law but then proceed to disregard that correct statement of law

Set in Stone (cont)

- Key Takeaways
  - It is next to impossible, if not impossible, to have an arbitration award overturned by a Court

    > "As long as the arbitrator is even arguably construing or applying the contract a court may not vacate the arbitrator's judgment." (Emphasis in original)
  - Using non-lawyer arbitrators makes prevailing on manifest disregard of law argument essentially impossible

Don’t Sit On It

- *Fluor Fed. Solutions, LLC v. PAE Applied Techs., LLC*, 728 Fed. Appx. 200 (4th Cir. 2018)
  - Prime Contractor: PAE
  - Subcontractor: Fluor
  - Project: Logistics and transportation services at the United States Air Force Nevada Test and Training Range
  - Dispute: Whether Fluor’s General and Administrative (“G&A”) rate was capped at 2.3% of direct costs for the life of the contract or was to be based on Fluor’s actual G&A rate during the years of performance (i.e., one-year base contract plus 14 one-year option periods)
  - Procedural Setting: Fluor’s appeal from the District Court’s decision following bench trial in favor of PAE
  - District Court determined Subcontract was ambiguous as to G&A and, based on parol evidence, found that the 2.3% cap for G&A was incorporated into the Subcontract from Fluor’s proposal

Don’t Sit On It (cont)

- Key Takeaways
  - Court’s ruling that installment payments result in a “non-indivisible” contract essentially destroys the exception and ignores the way long-term service contracts work in the real world
  - In a multi-year contract with periodic installment payments a non-breaching party is placed in a very difficult position

    Sue their customer prior to the end of the contract term

    Attempt to negotiate a tolling agreement that tolls the statute of limitations until the end of the performance

8065 Leesburg Pike
4th Floor
Tysons, VA, US 22182
t: 703.790.3310

1200 Nineteenth Street NW
Suite 500
Washington D.C., US 20036
t: 202.467.6900

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