

# The Public Lawyer



STATE BAR OF NEVADA

## Nevada Supreme Court Cases

***Clean Water Coalition v. The M Resort, LLC.*** 127 Nev. Adv. Op. No. 24 (May 26, 2011) Confronting a statewide budget crisis, the Nevada Legislature, during the 2010 special session, undertook several revenue-adjustment and cost-cutting measures in an effort to balance the State's budget, which resulted in the enactment of Assembly Bill 6 (A.B. 6), 26th Special Session (Nev. 2010). Section 18 of A.B. 6 mandates the transfer of \$62 million in securities and cash from a political subdivision of the State created by inter-local agreement into the State's general fund for the State's unrestricted, general use.

In this appeal, we are asked to consider whether A.B. 6, section 18 violates the fundamental law of the state—the Nevada Constitution. We recognize that the Legislature is endowed with considerable lawmaking authority under Article 4, Section 1 of the Nevada Constitution. But that authority is not without some restraints. Two such restrictions are contained in Article 4, Sec-

tion 20, which prohibits, among other things, local and special laws for the "assessment and collection of taxes for state . . . purposes," and Article 4, Section 21, which requires laws to be "general and of uniform operation throughout the State" in all cases "where a general law can be made applicable."

We conclude that A.B. 6, section 18 violates both. A.B. 6, section 18 converts \$62 million collected by the Clean Water Coalition (CWC) as user fees into a tax that is contrary to Article 4, Section 20's prohibition against local or special taxes. Because A.B. 6, section 18 applies only to the CWC, and a general law could have applied, it also violates Article 4, Section 21's mandate that all laws shall be general and operate uniformly throughout the state in all cases where a general law can be made applicable. For those reasons, we reverse the district court's judgment declaring A.B. 6, section 18 constitutional.

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***Sparks v. The Alpha Tau Omega Fraternity, Inc.***, 127 Nev. Adv. Op. No. 23 (May 26, 2011) Appellant Roy Sparks and Jeffrey Clack engaged in a fight during a college football tailgate event that resulted in an injury to Roy. Roy and his wife, appellant Andrea Sparks, filed suit against Clack and a number of other entities allegedly involved with the tailgate event, asserting several causes of action, including negligence and intentional torts. The Sparkses also named fictitious Doe and Roe defendants because they did not know the true identity of all of the potentially liable parties. Eventually, the Sparkses attempted to substitute the UNR Alumni Association, Inc., Julie Ardito, and the Southern Nevada Young Alumni Chapter (collectively, the Alumni respondents) in place of the fictitious Doe and Roe defendants. The district court dismissed claims against the Alumni respondents based on the statute of limitations and granted summary judgment in favor of the other entities. The Sparkses appealed.

In this appeal, we address three main issues: (1) whether the Sparkses exercised reasonable diligence under Nurenberger Hercules-Werke v. Virostek, 107 Nev. 873, 822 P.2d 1100 (1991), in ascertaining the identities of the Doe and Roe defendants, such that their amended complaint could relate back to the date that they filed the first complaint, pursuant to NRCP 10(a); (2) whether respondents Alpha Tau Omega Fraternity, Inc. (ATO National); Alpha Tau Omega Eta Epsilon Chapter (ATO-UNLV); Doug Foley, president of ATO-UNLV; Alpha Tau Omega Delta Iota Chapter, UNR (ATO-UNR); Robert Rojas, president of ATO-UNR; and Alpha Tau Omega Nevada Southern Alumni Association (ATO-NSAA) (collectively, the ATO respondents) owed a duty of care to the Sparkses, which is needed to proceed with their negligence claims; and (3) whether a factual dispute exists as to the ATO respondents' exercise of control over Clack or subsequent ratifi-

cation of his actions sufficient to hold them liable for his intentional torts, if any. After explaining what constitutes reasonable diligence under the third element of the Nurenberger test, we conclude that the Sparkses did not exercise reasonable diligence in ascertaining the identities of the Doe and Roe defendants and, thus, the statute of limitations ran on their causes of action against the Alumni respondents. We further conclude that the ATO respondents owed no duty of care to the Sparkses and did not possess the ability to control Clack or ratify his actions sufficient to be held liable for Clack's intentional torts. Therefore, we affirm.

***Southern California Edison v. First Judicial Dist. Court***, 127 Nev. Adv. Op. No. 22 (May 26, 2011) In this writ proceeding, we are asked to clarify the proper method of challenging the refund claim decisions of the Nevada Tax Commission. Specifically, the parties dispute whether such challenges should be through an independent civil action in which the district court's review is de novo, or through a petition for judicial review, which provides for a more deferential review of the Commission's decision. While we conclude that a petition for judicial review is the proper vehicle for challenging the Commission's decisions on claims for sales and use tax refunds, the Nevada Department of Taxation is judicially estopped from requesting that the claimant here proceed in such a manner, and thus, mandamus relief is appropriate.

***State ex rel. Bd. of Parole Comm'rs v. Morrow***, 127 Nev. Adv. Op. No. 21 (May 26, 2011) In the two cases below, the district courts reached different conclusions regarding whether inmates are entitled to due process protections related to their parole release hearings. In considering that issue on appeal, we recognize that no statutory due process protections applied in

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these particular cases, and we conclude that, because the possibility of release on parole is not a protectable liberty interest, inmates are not entitled to constitutional or inherent due process rights regarding discretionary parole release. We clarify that *Stockmeier v. State, Department of Corrections*, 122 Nev. 385, 135 P.3d 220 (2006), abrogated on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008), does not create due process rights related to parole release hearings, and as a result of the confusion stemming from that case, we explicitly adopt and further explain the judicial function test for determining whether a proceeding is quasi-judicial.

***In re AMERCO Derivative Litigation***, 127 Nev. Adv. Op. No. 17 (May 12, 2011)  
AMERCO is a Nevada corporation controlled by the feuding Shoen family. Its main operating subsidiary is U-Haul International, Inc. AMERCO has engaged in numerous business transactions with the SAC entities, which are real estate holding companies controlled by AMERCO shareholder and executive officer Mark Shoen. Based on several of those transactions, appellants filed the underlying shareholder derivative suit in 2002 against AMERCO's former and current directors, Mark, and the SAC entities, primarily for breach of fiduciary duty and aiding and abetting the breach of that fiduciary duty. However, appellants failed to make a demand for corrective action on the AMERCO board of directors, and subsequently, the district court granted respondents' motion to dismiss for failure to adequately allege demand futility. Appellants appealed that decision, and this court reversed and remanded for reconsideration, after clarifying the demand futility stan-

dards. See *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 626, 137 P.3d 1171, 1174-75 (2006). On remand, the district court once again granted respondents' motions to dismiss—this time on two grounds distinct from demand futility: (1) a settlement agreement entered into in 1995 by AMERCO and shareholders who are not involved in this case, referred to as the Goldwasser settlement,[1] barred appellants' derivative claims; and (2) appellants could not pursue derivative claims against the SAC entities on behalf of AMERCO based on transactions in which AMERCO itself participated.

In this appeal, we first address whether a claim-release clause contained in the Goldwasser settlement agreement reached by different shareholders several years earlier bars the derivative claims now asserted by appellant shareholders. We conclude that it does not. When a settlement agreement does not contain language exhibiting a clear intent to release future claims, the release clause is limited to the claims that existed at the time the settlement agreement was reached.

Second, we address whether appellant shareholders could bring their derivative claims against the corporation's alleged conspirators. In doing so, we examine, for the first time, the defense of *in pari delicto* in a corporate context, which first requires an analysis of whether an agent's acts are imputed to the corporation. We also clarify the adverse interest exception to imputation, which provides that when the officers have totally abandoned the corporation's interests, their actions are not imputed to the corporation. We further adopt the sole-actor rule, which operates as an exception to the adverse interest exception in limited circumstances. We conclude that the adverse interest exception and sole-actor rule do not apply in this case. Therefore, without more, the

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AMERCO officers' alleged actions are imputed to the corporation. We then address whether respondents can assert the *in pari delicto* defense, concluding that this is a question that must be remanded to the district court.

Finally, we address various arguments set forth by respondents regarding alternative grounds for affirming the district court's order of dismissal, including whether the district court properly held that appellants adequately pleaded demand futility, whether appellants sufficiently pleaded their causes of action, and whether appellants' claims are barred by the statute of limitations. We conclude that appellants adequately pleaded demand futility, but the district court must now conduct a proper evidentiary hearing regarding whether the evidence supports appellants' allegations; appellants sufficiently pleaded some, but not all, of their claims; and whether the statute of limitations has run is a question of fact for the district court. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

***Landreth v. Malik***, 127 Nev. Adv. Op. No. 16 (May 12, 2011) This appeal involves an unmarried, childless couple, who previously lived together and now dispute the ownership of certain property. Although NRS 3.223 does not give the family court division jurisdiction over such matters, the Legislature does not have the constitutional authority to limit the constitutional powers of a district court judge in the family court division. Therefore, we hold that the district court judge sitting in family court did not lack the power and authority to dispose of this case merely because it involved a subject matter outside the scope of NRS 3.223.

Second, we must determine whether the district court abused its discretion when it denied appel-

lant Dlynn Landreth's motion to set aside the default without considering whether Malik gave a proper notice of intent to take a default. A party is required to inquire into the opposing party's intent to proceed before requesting a default under this court's holding in *Rowland v. Lepire*, 95 Nev. 639, 600 P.2d 237 (1979), and Rule of Professional Conduct (RPC) 3.5A. Generally, one notice of an intent to request a default is sufficient for purposes of *Rowland* and RPC 3.5A. If, however, the party applying for a default grants subsequent time extensions, that party must also provide a subsequent notice of his or her intent to seek a default. Thus, we conclude that the district court abused its discretion when it denied Landreth's motion to set aside the default when Malik admitted to granting further time extensions without subsequently serving Landreth with another notice of intent to request a default.

***Valley Health System v. Eighth Judicial Dist. Court***, 127 Nev. Adv. Op. No. 15 (May 6, 2011) In this opinion, we review our rule regarding the waiver of an issue on appeal that is not first raised in the district court. We expand that rule to include the situation where a party fails to raise an issue before the discovery commissioner and, instead, raises the issue for the first time before the district court. Further, we determine the scope of the privilege provided by NRS 439.875.

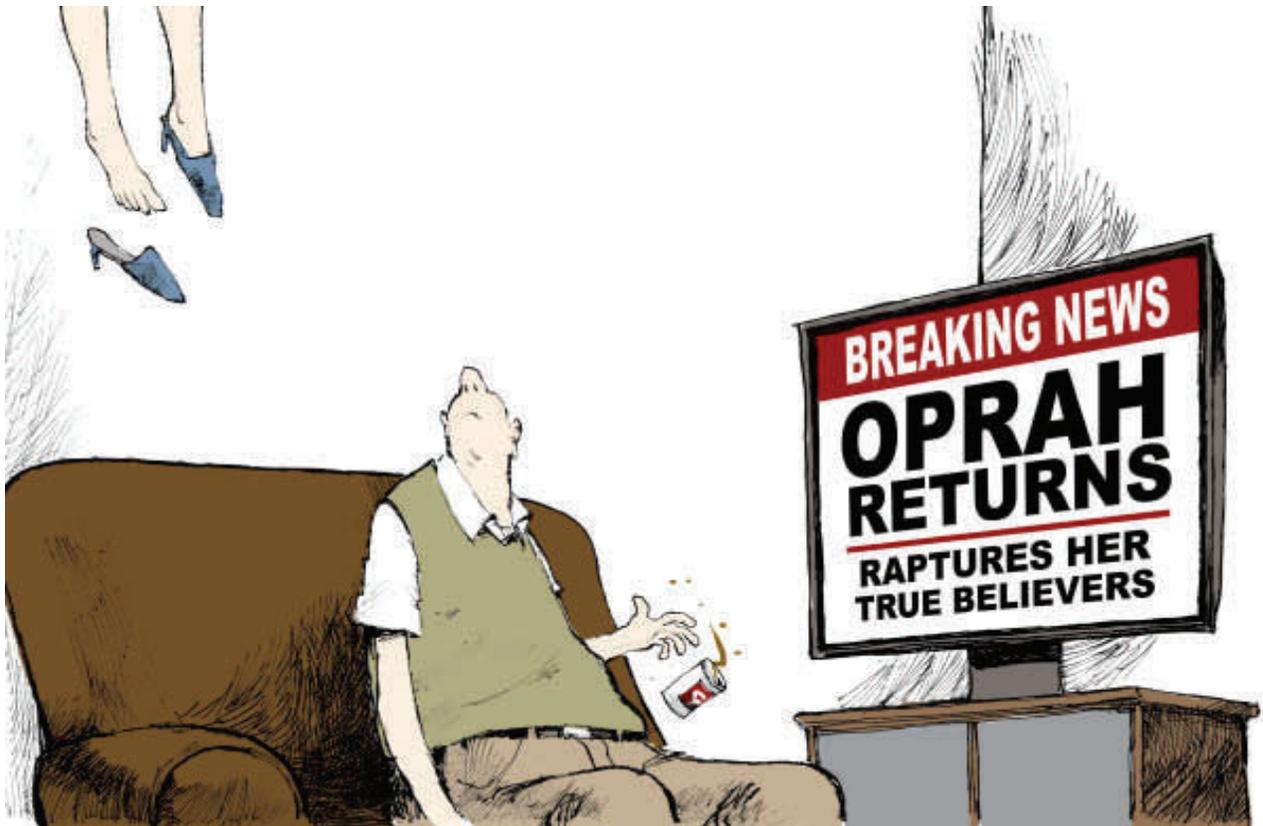
This is an original petition for a writ of mandamus challenging a district court's order adopting the report and recommendation of the discovery commissioner to grant a motion to compel production of documents. The district court, after a hearing, adopted the discovery commissioner's report and recommendation and ordered petitioner Valley Health System, LLC, d.b.a. Cen-

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ennial Hills Hospital Medical Center to produce the requested documents.

Valley Health argues that the district court erred in ordering the production of the requested documents. Valley Health contends that its petition for extraordinary relief should be granted because the district court's order allows for dis-

duced, any privilege applicable to that information cannot be restored. Thus, a writ petition is the proper mechanism to seek relief in this instance, and we will consider the petition. Based on the partial holding of this opinion, because Valley Health failed to raise its privilege argument before the discovery commissioner, that argument was waived. However, for the purpose of this



covery of material privileged under NRS 439.875, and Valley Health has no other adequate remedy at law. However, Valley Health failed to raise its privilege argument before the discovery commissioner; instead, Valley Health raised the issue for the first time during the district court hearing.

While writ relief is rarely available with respect to discovery orders, once information is pro-

duced, any privilege applicable to that information cannot be restored. Thus, a writ petition is the proper mechanism to seek relief in this instance, and we will consider the petition. Based on the partial holding of this opinion, because Valley Health failed to raise its privilege argument before the discovery commissioner, that argument was waived. However, for the purpose of this

*Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. Adv. Op. No. 14 (May 5, 2011) Appellant Milled Powell filed an insurance claim with respondent Liberty Mutual Fire Insurance Company to

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cover damage to her house. Liberty Mutual denied the claim, stating that the damage was excluded under the earth movement exclusion in Powell's insurance policy. Powell then filed a complaint against Liberty Mutual in the district court. The district court eventually granted Liberty Mutual's motion for partial summary judgment, concluding that the earth movement exclusion of the Liberty Mutual policy excluded coverage of the damage. We must determine whether the earth movement exclusion in Powell's insurance policy with Liberty Mutual is enforceable to exclude coverage of the damage to Powell's house and whether the district court erred in granting summary judgment in favor of Liberty Mutual. First, because the earth movement exclusion is ambiguous, we must construe it against Liberty Mutual. Second, we consider whether *Schroeder v. State Farm Fire and Casualty Co.*, 770 F. Supp. 558 (D. Nev. 1991), which held that an earth movement exclusion barred recovery for similar damages to those sustained here, was applicable to the present case. We conclude that because the policy in *Schroeder* is distinguishable from the policy here, *Schroeder's* holding is inapplicable. Thus, we hold that Liberty Mutual's earth movement exclusion is ambiguous and must be enforced against it, that the district court erred in granting summary judgment, and that *Schroeder's* holding is case specific. Accordingly, we reverse and remand.

***American Ethanol, Inc. v. Cordillera Fund.*** 127 Nev. Adv. Op. No. 13 (May 5, 2011) In this appeal, we examine the definition of "fair value" as prescribed by the stockholder right-to-dissent statutes. We adopt a flexible approach in determining fair value, whereby the district court should evaluate a number of relevant factors in determining fair value.

Furthermore, we determine who bears the burden

of proving the fair value of a stockholder's corporate shares in a stockholder's right-to-dissent appraisal action. We conclude that in such an appraisal proceeding, both the dissenting stockholder and the corporation have the burden of proving their respective valuation conclusions by a preponderance of the evidence. In evaluating the fair value, even if neither party satisfies its burden, the district court ultimately must use its independent judgment to determine the fair value.

***Donlan v. State***, 127 Nev. Adv. Op. No. 12 (April 28, 2011) In this appeal, we consider whether someone convicted of a sex offense in another state who now resides in Nevada must continue to register as a sex offender in Nevada even though the requirement to register as a sex offender in the other state has since been terminated by an executive branch administrative action of that state. We conclude that the Full Faith and Credit Clause does not require Nevada to dispense with its preferred mechanism for protecting its citizenry by virtue of termination of the duty to register in another state. Accordingly, we affirm the district court's order denying appellant's petition to terminate his duty to register as a sex offender in Nevada.



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### ***McCollum v. California Dep't of Corrections and Rehabilitation***, No. 09-16404 (June 1, 2011)

In an effort to accommodate inmates' religious needs, the California Department of Corrections and Rehabilitation ("CDCR") has a paid chaplaincy program that employs Protestant, Catholic, Jewish, Muslim, and Native American clergy. Those chaplains serve all inmates, but other religions are also served by volunteer chaplains. The heart of this appeal is a challenge to the paid chaplaincy program by a Wiccan volunteer chaplain, Patrick McCollum, and a small group of inmates. The inmates failed to exhaust their claims or brought them in a untimely fashion. The added wrinkle in the suit is that the chaplain is pursuing constitutional claims that are derivative of the inmates' claims rather than his own. In short, McCollum claims that, as a Wiccan chaplain, he should be eligible for employment in the paid-chaplaincy program. McCollum attempts to transform his employment discrimination action into an effort to vindicate the inmates' First Amendment rights.

The district court properly dismissed and granted summary judgment in favor of the defendants on McCollum's claims because, for the most part, he lacked standing. As a prudential matter, we agree that the court need not exercise jurisdiction over these derivative claims. Although McCollum had standing to pursue his personal employment claims, and also constitutional claims for differential treatment as a volunteer chaplain and retaliation, ultimately he cannot prevail on those claims. We therefore affirm.

***Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control Dist.***, No. 09-16790 (May 27, 2011) In 2007, the Monterey Bay Unified Air Pollution Control District (District) adopted and began enforcing rules that regulate diesel-powered engines. In particular, the Dis-

trict's regulatory regime: (1) requires owners and operators to register and pay fees for certain diesel engines used in agricultural operations, and (2) sets emissions standards for stationary diesel engines within the District. The principal question in this case—among other questions—is whether the District's rules are preempted by the federal Clean Air Act (CAA), 42 U.S.C. §§ 7401 et seq. We hold that the District rules are not preempted, and affirm the district court's judgment on the pleadings in favor of the defendants.

***Lewis v. United States***, No. 10-356 (May 21, 2011) Under the FMLA, a federal employee is entitled to up to twelve weeks of unpaid leave within a twelve-month period if he or she has a "serious health condition that makes the employee unable to perform the functions of the employee's position." 5 U.S.C. § 6382(a)(1)(D). The employing agency may require that the employee provide a medical certification to support an FMLA request for leave. *Id.* § 6383(a). Relevant here, the Act provides that a medical certification "shall be sufficient if it states [among other things] the appropriate medical facts within the knowledge of the health care provider regarding the condition." *Id.* § 6383(b)(3); *see also* 5 C.F.R. § 630.1207(b)(3) (requiring that a medical certification state "[t]he appropriate medical facts within the knowledge of the health care provider regarding the serious health condition, including a general statement as to the incapacitation, examination, or treatment that may be required by a health care provider").

Lewis challenges the MSPB's finding that "none of the documents submitted by [Lewis] to the agency in support of her FMLA leave provide[s] sufficient medical facts to support the

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conclusion that appellant is suffering from a serious health condition.” We conclude that the MSPB’s finding is supported by substantial evidence. Lewis’s WH-380 form states only that she was diagnosed with Post-Traumatic Stress Disorder and needed therapy, medical treatment, bed rest, two prescription medications, and 120 days off work. The form, however, fails to provide a summary of the medical facts that support this diagnosis. *See* 5 U.S.C. § 6383(b)(3) (requiring the certification to state “the appropriate medical facts”). The form contains no explanation as to why Lewis was unable to perform her work duties and no discussion about whether additional treatments would be required for her condition. When Lewis refused to submit any further documentation, her medical certification remained deficient.

***Simonoff v. Expedia, Inc.***, No. 10-35595 (May 24, 2011) In 2003, Congress passed the Fair and Accurate Credit Transactions Act (“FACTA”), Pub. L. No. 108-159, 117 Stat. 1952, an amendment to the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, in part to combat identity theft. FACTA provides that no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction. 15 U.S.C. § 1681c(g)(1). This restriction covers only “receipts that are electronically printed, and [does] not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.” *Id.* § 1681c(g)(2). Expedia, Inc. runs a website that allows users to make travel arrangements online. Like other merchants “that accept[ ] credit cards or debit cards,” *see id.* § 1681c(g)(1), Expedia must comply with FACTA. Dimitriy Simonoff purchased travel arrangements through Expedia’s

website. Expedia then emailed him a receipt, which included the expiration date of Simonoff’s credit card. He claims that this email receipt violates FACTA.

The question we consider under FACTA is the meaning of the words “print” and “electronically printed” in connection with an emailed receipt. “Print” refers to many different technologies—from Mesopotamian cuneiform writing on clay cylinders to the Gutenberg press in the fifteenth century, Xerography in the early twentieth century, and modern digital printing—but all of those technologies involve the making of a tangible impression on paper or other tangible medium. *See generally* S.H. Steinberg, *Five Hundred Years of Printing* (new ed. 1996). Although computer technology has significantly advanced in recent years, we commonly still speak of printing to paper and not to, say, iPad screens. Nobody says, “Turn on your Droid (or iPhone or Pad or Blackberry) and print a map of downtown San Francisco on your screen.” We conclude that under FACTA, a receipt that is transmitted to the consumer via email and then digitally displayed on the consumer’s screen is not an “electronically printed” receipt. We affirm the district court’s dismissal of Simonoff’s claims under Rule 12(b)(6).

***Dudham v. Arnzt***, No. 10-17198 (May 20, 2011) In 1873, Charles Lutwidge Dodgson, better known by his pen name, Lewis Carroll, spotted what he took to be an “extraordinary injustice”: using simple plurality voting to determine the winners of elections. Dodgson, celebrated for his whimsical classics *Alice’s Adventures in Wonderland* and *Through the Looking Glass*, was also a mathematician who developed election systems—meaning, simply,

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methods for translating preferences, or votes, into winners of elections. Dodgson disliked simple plurality voting because, in fields With several candidates, it can elect a candidate who receives the most first-place votes but is strongly *disfavored* by a majority of the electorate. Dodgson's innovative election systems were designed to remedy that limitation, and are still praised today because they tend to elect candidates with widespread electoral support.

While Dodgson preferred his systems to simple plurality voting, he recognized that his innovations were themselves imperfect. In a letter accompanying one of his pamphlets, Dodgson lamented: "A really scientific method for arriving at the result which is, on the whole, most satisfactory to a body of electors, seems to be still a desideratum." Over a century later, Dodgson's wish remains unfulfilled. No perfect election system has been devised. Nonetheless, some governmental entities continue to experiment with innovative methods for electing candidates. At issue here is one such system, used by San Francisco for the election of certain city officials.

If the aspects of the City's restricted IRV scheme Dudum challenges impose any burdens on voters' constitutional rights to vote, they are minimal at best. Moreover, the City has advanced valid, sufficiently-important interests to justify using its system. We, of course, express no views on the wisdom of using IRV, restricted IRV, or any other electoral method. There is no perfect election system, and our search for one would prove no more successful than a hunt for the mythical snark. appily, we are not required to engage in any such endeavor. We hold only that Dudum has not established that the City's chosen system is unconstitutional.

*Bauman v. DaimlerChrysler Corp.*, No. 07-15386 (May 18, 2011) Plaintiffs-Appellants (the "plaintiffs"), twenty-two Argentinian residents, bring suit against DaimlerChrysler Aktiengesellschaft (DCAG) alleging that one of DCAG's subsidiaries, Mercedes-Benz Argentina (MBA) collaborated with state security forces to kidnap, detain, torture, and kill the plaintiffs and/or their relatives during Argentina's "Dirty War." Some of the plaintiffs are themselves former employees of MBA and the victims of the kidnapping, detention, and torture, while others are close relatives of MBA workers who were "disappeared" and are presumed to have been murdered. The only question before us is whether the district court had personal jurisdiction over DCAG. The district court granted DCAG's motion to dismiss the case for lack of such jurisdiction. We conclude, however, that DCAG was subject to personal jurisdiction in California through the contacts of its subsidiary Mercedes-Benz USA (MBUSA). We hold that MBUSA was DCAG's agent, at least for personal jurisdictional purposes, and that exercise of personal jurisdiction was reasonable under the circumstances of this case.

*Veterans for Common Sense v. Shinseki*, No. 08-16728 (May 10, 2011) In this context, two non-profit organizations, Veterans for Common Sense and Veterans United for Truth (collectively "Veterans"), seek injunctive and declaratory relief to remedy the delays in (1) the provision of mental health care and (2) the adjudication of service-connected death and disability compensation claims by the VA. Among other issues, Veterans ask us to decide whether these delays violate veterans' due process rights to receive the care and benefits they are guaranteed by statute for harms and injuries sustained while serving our country. We conclude that

they do.

We do not reach this answer lightly. We would have preferred Congress or the President to have remedied the VA's egregious problems without our intervention when evidence of the Department's harmful shortcomings and its failure to properly address the needs of our veterans first came to light years ago. Had Congress taken the requisite action and rendered this case unnecessary even while it was pending before us, we would have been happy to terminate the proceedings and enter an order of dismissal. Alternatively, had the VA agreed with Veterans following oral argument to consider a practical resolution of the complex problems, the end result surely would have been more satisfactory for all involved. We joined in our dissenting colleague's suggestion that we defer submission of this case in order to permit the parties to explore mediation, and we regret that effort proved of no avail. We willingly acknowledge that, in theory, the political branches of our government are better positioned than are the courts to design the procedures necessary to save veterans' lives and to fulfill our country's obligation to care for those who have protected us. But that is only so if those governmental institutions are willing to do their job.

***Ursack, Inc. v. Sierra Interagency Black Bear Group***, No. 09-17152 (May 9, 2011) Plaintiff-appellant Ursack, Incorporated manufactures a bear-resistant container called the Ursack. Between 2001 and 2007, it urged SIBBG to recommend the Ursack for inclusion on the agencies' lists of approved containers. Mostly it was unsuccessful, but in 2007, SIBBG recommended that the agencies grant conditional approval to the Ursack for the 2007 summer season. SIBBG recommended that the agencies withdraw approval if they determined that the container failed three or

more times during the season. (We explain below what "failure" means in this context.) The agencies accepted this recommendation and granted conditional approval. At the end of the 2007 season, however, SIBBG determined that the Ursack had failed more than three times, and it recommended that the agencies withdraw conditional approval. The National Park Service accepted this recommendation and withdrew conditional approval, and to this day it refuses to permit backpackers to use the Ursack in the container-only areas of Yosemite and SEKI. The Forest Service, on the other hand, continues to allow backpackers to use the Ursack in Inyo National Forest.

Ursack and three individual users of the Ursack brought this action pursuant to the Administrative Procedure Act ("APA") against SIBBG, the Park Service, the Forest Service, and the superintendents of the relevant national parks and forests, alleging that the decision to withdraw conditional approval of the Ursack was arbitrary and capricious and otherwise not in accordance with law. After reviewing the administrative record, the district court granted summary judgment to the agencies. Ursack and the three individuals appeal. We affirm.

***Garcia v. County of Merced***, No. 09-17188 (May 5, 2011) Defendants Alfredo Cardwood and John Taylor (the "Officers") interlocutorily appeal the district court's denial of qualified immunity from John Garcia's 42 U.S.C. § 1983 Fourth Amendment claims against them. Garcia's Fourth Amendment claims and his state law false imprisonment claim arose out of his arrest on suspicion of smuggling methamphetamine into the Merced County Jail to one of his clients, Alfonso Robledo, and from a subsequent search, supported by a search warrant, of

his office. We reverse and remand for entry of judgment in favor of the Officers.

Facts require context. Garcia was neither a green attorney nor one familiar only with civil practice. As of his arrest, he had been practicing criminal law in Merced and Modesto for twenty years, a fact known to the Officers. Garcia does not dispute that he knew — as does anyone familiar with the system — that it was unlawful to deliver even tobacco to an inmate in the jail where Robledo and Plunkett were housed. Simply to accept jail contraband from one inmate who was out on a pass for delivery to another in custody raises unmistakable red flags. Thus, at the point of acceptance of the pouch, the Officers clearly had probable cause both to arrest Garcia and to support their application to Judge Dougherty for a search warrant for Garcia’s office. The probable cause we conclude was present was not just that Garcia knowingly possessed the methamphetamine in the prepared pouch, but that he was actively involved in smuggling a controlled substance and contraband into the jail.

***Montz v. Pilgrim Films & Television, Inc.***, No. 08-56954 (May 4, 2011) In 1981, Plaintiff Larry Montz, a parapsychologist, conceived of an idea for a television show that would follow a team of paranormal investigators conducting field investigations. As envisioned, each episode would follow the team to different real-world locations, where they would use magnetometers, infrared cameras, and other devices to investigate reports of paranormal activity. According to the complaint, from 1996 to 2003, Montz and Plaintiff Daena Smoller, a publicist and a producer, pitched Montz’s idea to television studios, producers, and their representatives, including representatives of NBC and the Sci-Fi channel. A number of meetings and discussions took place, and

Montz and Smoller presented screenplays, videos, and other materials relating to their proposed show. Ultimately, the studios indicated that they were not interested.

Three years later, in November 2006, Montz and Smoller filed a complaint against Pilgrim Films & Television, Inc., NBC Universal Inc., Craig Piligian, Jason Conrad Hawes, and ten unknown defendants in federal district court, alleging copyright infringement, breach of implied contract, breach of confidence, and several other causes of action. According to the complaint, after the meetings with Montz and Smoller, NBC partnered with Piligian and Pilgrim to produce a series on the Sci-Fi Channel based on the plaintiffs’ materials. The show, called *Ghost Hunters*, starred Hawes as the leader of a team of investigators who travel across the country to study paranormal activity. Plaintiffs’ complaint specifically alleged that defendants breached an implied-in-fact contract.

***Fayer v. Vaughn***, No. 10-15520 (May 4, 2011) We affirm the district court’s dismissal of Alex Fayer’s amended complaint under Federal Rule of Civil Procedure 12(b)(6). Nevada Revised Statutes (“NRS”) § 205.465 makes it “unlawful for a person to possess . . . any document or personal identifying information for the purpose of establishing a false status . . . or identity.” Fayer admitted to Agent Arthur Vaughn of the Nevada Gaming Control Board (“NGCB”) that he possessed and used an unofficial identification card and credit card in the name of “James McLynn” to gamble at several Las Vegas casinos. Fayer’s admissions provided Vaughn with probable cause to believe Fayer had committed a crime, therefore permitting Vaughn to arrest Fayer. As a result, Fayer’s amended complaint failed to state plausible claims for false arrest,

conspiracy to commit false arrest, false imprisonment, and premises liability under state and federal law.

cause the district court did not abuse its discretion when it determined T.A.'s parents enrolled him at Mount Bachelor for non-educational reasons, we affirm.



***Forest Grove School Dist. v. T.A.***, No. 10-35022 (April 27, 2011) T.A., a former student in the Forest Grove School District (“Forest Grove”), appeals the district court’s determination that he is not entitled to an award of reimbursement for his private school tuition under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1415(i)(2)(C). On remand from the Supreme Court’s opinion and our opinion, *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078 (9<sup>th</sup> Cir. 2008), *aff’d*, 129 S. Ct. 2484 (2009), the district court held that equitable considerations did not support any award of private-school tuition at Mount Bachelor Academy as a result of Forest Grove’s failure to provide T.A. with a Free Appropriate Public Education (“FAPE”) under the IDEA. Be-

***Balvage v. Ryderwood Improvement and Serv. Assoc., Inc.***, Nos. 10-35714 (April 27, 2011)

We hold that a residential community that has continuously operated as a retirement community for persons age 55 or older can qualify for the housing for older persons exemption from the Fair Housing Act’s prohibition on familial status discrimination by establishing that it *currently* satisfies the exemption’s three statutory and regulatory criteria at the time of the alleged violation, even if the community enforced age restrictions when it first achieved compliance with the exemption’s age verification requirement.

**Court Denies Protective Order for Request Seeking Retention Policies and Data Map**

*Nissan N. Am., Inc. v. Johnson Elec. N. Am., Inc.*, 2011 WL 1002835 (E.D. Mich. Feb. 17, 2011).

In this discovery dispute, the plaintiff moved for a protective order in response to the defendant's informal request for additional information. Having produced more than 1.79 million pages of documents during discovery, along with 84,000 pages of documents from its non-party Japanese parent company, the plaintiff argued the order was necessary to prevent producing its record retention policies and data map, and conducting broad system-wide searches along with searches of systems not readily accessible. Although the court agreed the backup systems were not readily accessible, it found that the defendant had not requested this information or the system-wide searches. Instead, the defendant requested the plaintiff's backup policies, tracking records, requests for restores and confirmation that relevant data sources of 41 employees had been searched. Regarding the data map, the court noted that counsel must be knowledgeable about their client's computer systems and ESI at the onset of litigation pursuant to Fed.R.Civ.P. 26(a)(1)(ii); thus, producing this information should not be an undue burden. Accordingly, the court denied the protective order.

**Department of Justice Investigation Does Not Trigger Duty to Preserve in Related Civil Litigation**

*In re Delta/AirTran Baggage Fee Antitrust Litig.*, 2011 WL 915322 (N.D. Ga. Feb. 22, 2011).

In this antitrust litigation, the plaintiffs sought spoliation sanctions alleging the defendant failed to suspend the automatic deletion procedures of its e-mail and backup tapes. Although the defendant issued a written litigation hold to 22 custodians after being served a Civil Investigative De-

mand (CID) from the Department of Justice (DOJ), the plaintiffs argued the defendant failed to apply this hold to its e-mail servers and backup tapes for three months. Reviewing the elements necessary to support a spoliation claim, the court found the defendant's preservation obligation upon receipt of the CID extended only to the DOJ and that it was not expected to anticipate the filing of a civil suit three months later. Refusing to substitute speculation for actual proof, the court determined that even if a duty to preserve had existed, the plaintiffs failed to demonstrate any evidence of prejudice. Finally, the court found the defendant's actions constituted at most negligence and not the bad faith conduct required to support spoliation sanctions in the Eleventh Circuit. Accordingly, the court denied the motion for sanctions.

**Court Imposes Default Judgment, \$1 Million Sanction and Attorney Fees for Egregious Discovery Misconduct**

*Rosenthal Collins Grp., LLC v. Trading Tech. Int'l Inc.*, 2011 WL 722467 (N.D. Ill. Feb. 23, 2011).

In this patent litigation, the defendant sought monetary sanctions and a default judgment claiming significant and sustained discovery misconduct. After an admission that the plaintiff's consultant and expert witness had fabricated critical evidence, the trial court granted the defendant's motion for attorney fees and additional discovery. However, the plaintiff did not comply with the discovery order for another year, until after two additional court orders by two separate judges. Although the plaintiff adamantly denied the allegations that virtually every piece of media ordered to be produced was wiped, altered or destroyed, the court determined the defendant's contentions were sup-

ported by forensic analysis. Finding that the last modified dates for critical evidence were backdated and otherwise modified, and that seven zip disks, three USB thumb drives and two computers had been wiped or reformatted in "bad faith and with willful disregard for the rules of discovery" and court orders, the court imposed a default judgment, dismissed the plaintiff's complaint with prejudice and ordered \$1,000,000 in sanctions for its egregious conduct. The court also ordered the plaintiff's counsel to pay all costs and attorney fees for their part in the misconduct.

#### **Citing "Explicit" Company Policy, Court Finds E-Mails Sent Over Company Systems Not Privileged**

*In re Royce Homes, LP*, 2011 WL 873428 (Bkrtcy. S.D. Tex. Mar. 11, 2011).

In this bankruptcy litigation, the trustee sought production of documents that a key employee of the debtor company claimed as privileged. Despite using his work computer and company e-mail account for personal matters, the employee argued that he did not waive attorney-client privilege and maintained that only necessary third parties were privy to his communications. Rejecting this argument, the court focused on the debtor company's Electronic Communications Policy. The policy stated that nothing contained on any company electronic system would be considered private and permitted limited personal communications "with the understanding that personal communications may be accessed, viewed, read or retrieved by a company manager or employee" but that "Employees are NOT to disseminate any confidential information over the company's system." Finding the policy explicitly and straightforwardly banned confidential communications, the court rendered evidence of actual enforcement irrelevant. Noting the policy was memorialized in the employee handbook, the court also determined that

actual or direct notification to employees was not required and that it was unreasonable for the employee to believe his e-mails would remain confidential. Finding insufficient evidence that privilege applied or was waived, the court ordered production of the communications listed in the employee's privilege log.

#### **Court Orders Meet and Confer to Resolve Failure to Fulfill Custodian Protocol Agreement**

*Monsanto Co. v. E.I. DuPont de Nemours & Co.*, 2011 WL 1004852 (E.D. Mo. Mar. 18, 2011).

In this intellectual property litigation, the defendants moved to compel production in response to the plaintiffs' alleged failure to meet the terms of a stipulated preservation and production agreement. Contending the defendants' interpretation of the agreement was overbroad, unrealistic and a moving target, the plaintiffs argued their obligations were satisfied by interviewing all stipulated custodians except former employees. Although the court agreed with the plaintiffs' narrower interpretation, it characterized the plaintiffs' decision not to interview former employees as "an inadequate and unsupported excuse" and concluded the plaintiffs failed to comply with the custodian protocol required by the agreement. However, finding an order to fully comply at this point in the litigation would likely do "violence," and that the parties might already have received the requested information in late productions, the court instead ordered the parties to meet and confer and report any agreement concerning how to proceed with non-expert discovery, after which time the court will rule on the 12 categories included in the defendants' motion to compel.

**Court Grants Motion to Compel Citing Failure to Identify Information Not Reasonably Accessible**

*Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc.*, 2011 WL 1125493 (W.D.N.Y. Mar. 21, 2011).

In this business litigation, the plaintiff sought disclosure of internal e-mails relating to its breach of contract claim. Opposing the motion, the defendant argued the request was untimely and the information sought was not relevant, responsive or readily accessible. Noting the duty to supplement production continues even after the discovery period closes, the court found the requested e-mails were relevant and responsive to the plaintiff's initial document request. Despite the defendant argument that producing the e-mails would require searching Exchange databases housed on an external 4 terabyte storage array at a cost of \$13,000, the court asserted that the defendant had a duty to identify sources of information that were not reasonably accessible in its discovery response and rejected its belated arguments regarding burden. Accordingly, the court determined the defendant's initial production was incomplete and granted the motion to compel.

**Court Finds Privilege Waiver and Orders Production of Unredacted Investigative Reports**

*Coleman v. Sterling*, 2011 WL 1099793 (S.D. Cal. Mar. 24, 2011).

In this employment litigation, the plaintiffs, former executives of the defendant company, sought unredacted copies of four investigative reports prepared by a private law firm concerning alleged misconduct. Arguing the law firm provided legal advice or analysis on certain legal issues, the defendant redacted nine pages citing attorney-client privilege and work product doctrine from the 364 pages of the reports produced. In finding that privilege and work product protection applied to

the documents, the court noted that each page of the reports was marked as confidential, was prefaced with a warning to that effect, contained legal advice and analysis, and was prepared under the prospect of litigation. However, the court determined the defendant disclosed substantially all of the communications and relied on counsel's advice to justify its termination of the plaintiffs. In reliance of those facts and Federal Rule of Evidence 502(a), the court found the defendant waived privilege and ordered it to produce unredacted copies of the reports.

**Finding Defendant Exhausted Reasonable Search Efforts, Court Denies Motion to Compel**

*Benson, M.D. v. Sanford Health*, 2011 WL 1135379 (D.S.D. Mar. 25, 2011).

In this discovery dispute, the plaintiff filed a fourth motion to compel seeking production of a single e-mail. Asserted that its e-mail retention policies and document destruction cycles would have destroyed any such e-mail – if it ever existed – years before the plaintiff's request, the defendant nevertheless attempted to locate and retrieve the e-mail. Discrediting the plaintiff's "counterproductive overstatement and half truth," the court determined the plaintiff's "picture of her own 'pure driven snow' innocence and [the defendant's] dastardly evasion" and description of the first three motions were inaccurate. Instead, the court acknowledged the defendant's efforts and characterized the fourth motion as duplicative to an order previously denied. Finding a strong probability that the e-mail no longer existed anywhere on the defendant's laptops, networks, backup tapes or in hard copy, and concluding there was nothing else the defendant could reasonably do, the court denied the motion and awarded attorney fees to the defendant.

## CLLOUD COMPUTING

A service that dramatically lowers costs while actually improving quality; these are the magic words for any company, and in a tough economy, a service that can deliver is an easy sell.

It is also exactly what cloud computing claims to provide. Cloud computing uses the speed and scope of the Internet's maturing global infrastructure to centralize core processing and computing functions into massive server systems that are remotely accessible via secure Internet connections. From an economic standpoint, the concept is revolutionary. But as we distance ourselves from our data, security and accountability concerns emerge. When litigation inevitably occurs, companies that spot these issues early and address them proactively will truly maximize the tremendous value offered by the cloud.

### What Is Cloud Computing?

Although difficult to define, generally speaking, cloud computing is an extension of the operations and functions of a traditional data center to resources accessible remotely via the Internet. The services outsourced to a cloud provider can include pure data storage, the provision of computer applications through Application Service Providers (ASPs), software, platform or infrastructure through Software-as-a-Service (SaaS), Platform-as-a-Service (PaaS) and Infrastructure-as-a-Service (IaaS), respectively, or some combination thereof.

Cloud computing services are often attractive because they can provide companies access to a wide range of high-quality IT services at lower costs than a company providing and maintaining these IT functions on its own. Furthermore, these variable operational costs require very little up-front investment or need for reinvestment later. Best of all, reducing IT spending allows companies to re-

direct more resources into core business practices.

### Challenges to Cloud Forensics

Despite the numerous benefits, cloud computing is not without its challenges. Electronically stored information (ESI) is easily manipulated, hence why courts and regulatory agencies require proof that the data produced is authentic as dictated through evidentiary rules. Computer forensics attempts to ensure the authenticity of data, but cloud computing environments pose significant obstacles to this process.

Proper forensic collection first requires knowledge of where the targeted data is stored, what form it is in, and on what device or devices it exists. Traditionally, companies own and house the machines containing the targeted data, so it is generally known where the information resides and physical access is relatively simple. In a cloud environment, however, information is often accessed in a virtualized environment and the data owner typically does not know its physical location. Cloud providers also may not be willing to provide this information – even to their customers.

Even if the location of the information is known, significant obstacles may make access impossible, or at least infeasible. First, cloud providers typically maintain servers in multiple locations. Network load balancing, local outages and other factors can lead to decisions – often made without any human intervention – to relocate data, programs and processing from one location to another. Making matters worse, the data may be dynamically fragmented for efficiency, meaning that various parts of your data may be stored in, and move among, multi-

ple venues at any point in time.

As if these challenges were not enough, the cloud can really start to rain on your parade when these multiple venues are located not only great distances apart, but also in completely different countries and subject to varying data protection laws. Data privacy protection laws are generally growing stricter and more complex as information is increasingly stored electronically. This is especially true in the European Union, where data privacy generally carries more weight vis-à-vis litigation than it does in the United States. Granting access to servers may even be illegal in some jurisdictions because of the multi-tenancy nature of cloud servers. Cloud providers are not data owners, and allowing forensic collection could result in the inadvertent seizure of an unrelated client's data, which could constitute a costly, even if unintended, data breach for both the client and cloud provider. Even the specter of this risk could be enough to make voluntary permission to access the data impossible and require litigation in a foreign court to gain access.

Assuming access is granted, forensic examination may require sending an investigator across the globe or, due to local licensing requirements, partnering with a local firm to conduct the work – both of which can be extremely expensive. Finally, even after access is granted and the information is obtained, foreign blocking statutes may prohibit exporting the data outside the country. Unfortunately, these statutes rarely satisfy the liberal discovery posture in U.S. courts of law, often leaving litigants in a precarious position.

The sum of all these obstacles equals a strong likelihood that – absent a thoughtful and proactive approach to retaining cloud services – forensic collection in the cloud environment could be

nearly impossible and will almost certainly be difficult and expensive.

### **The Silver Lining**

Unfortunately, because the cloud computing model is still evolving, there is no perfect solution that will cover all companies in all situations. However, several key advisory points can help companies protect their interests when retaining cloud computing services.

First, recognize that cloud computing involves more than just business strategy and information technology considerations. Significant legal issues can also come into play. Luckily, many of these challenges can be controlled or mitigated through well-constructed service contracts. For example, it may be possible to negotiate with a cloud provider to keep data within specific data centers or countries, and to provide for physical access to the data when required. Second, ensure that your own confidentiality interests are adequately protected in relation to other cloud tenants. The use of dedicated rather than shared hardware may be another aspect of cloud usage that can be successfully negotiated ahead of time. Perhaps most importantly, remember that contracting with cloud service providers requires hitting a moving target. The cloud computing market is continuously evolving, with vendors entering, leaving, merging and forming other relationships that can unexpectedly alter your relationship with your cloud provider. Thus it is critical to involve both IT and legal counsel when contracting for cloud computing services.

It is also important to remember that because the cloud computing landscape is relatively new and still developing, retaining a forensic pro-

vider that is equally dynamic is critical. Addressing the complexities of server virtualization and advanced data structures – such as properly collecting data from large RAID, SAN or other storage arrays – requires the right tools, the right techniques and the right people.

Finally, recognizing that some of these risks can only be mitigated rather than eliminated in their entirety, consider the sensitivity of the data that will be stored in the cloud. For highly sensitive data, it may be better to use private clouds where you own the infrastructure and provide your users with cloud services in an environment where the processing and storage are provided on your own equipment or on dedicated equipment oper-

ated in managed services environments.

### Conclusion

Ignorance and the need for efficiency are no excuse when it comes to the obligation to produce data stored as part of a cloud environment. Courts and regulators are growing increasingly intolerant of companies that have taken a haphazard approach to their information management obligations. While the challenges may seem numerous and daunting, the significant benefits of cloud computing can be realized if they are addressed proactively in a thoughtful and comprehensive way.



## **NLRB ALLEGES BUFFALO NONPROFIT UNLAWFULLY TERMINATED EMPLOYEES FOR FACEBOOK COMMENTS**

Putney, Twombly, Hall & Hirson LLP

On May 18, 2011, the National Labor Relations Board (the "Board" or "NLRB") announced that it had issued a complaint against Hispanics United of Buffalo for terminating the employment of five employees who posted comments on Facebook criticizing working conditions. The Board's news release is available online here. The NLRB claims that the nonprofit organization terminated employees who commented on Facebook about a co-worker's allegation that employees did not do enough to assist the organization's clients. In their Facebook posting, those five employees defended their job performance and criticized working conditions, including their work load and staffing issues. The organization purportedly claims that the Facebook postings constituted harassment of the co-worker originally mentioned.

The National Labor Relations Act makes it an unfair labor practice to take an adverse employment action against employees for engaging in protected concerted activity. Employees engage in protected concerted activity when two or more employees communicate with each other about wages, hours, and other terms and conditions of employment. The Board considers the Facebook comments to have been a conversation among co-workers about their terms and conditions of employment, and thus protected concerted activity.

This new complaint is the latest sign that the Board intends to vigorously protect the social media activities of all workers, regardless of union status. We recommend that all employers review their social networking policies to ensure that the policy does not prohibit lawful activity.

## **PROCEDURE RULES: ACTIONS ARISING DURING COURSE OF LITIGATION REQUIRE EEOC CHARGE**

Hunton & Williams LLP

A recent Tenth Circuit decision sends a strong message that the court takes seriously the jurisdictional prerequisite that plaintiffs exhaust their administrative remedies in a Title VII claim prior to taking a claim to court. The process to do so is well-known -- before an employee can file a lawsuit alleging discrimination against his or her employer, he or she must file a charge with the U.S. Equal Employment Opportunity Commission ("EEOC"). Requiring individuals to exhaust their administrative remedies prior to filing a lawsuit serves, hopefully, to eliminate facially meritless charges, facilitate internal resolution, and help avoid litigation. This is often the case, as many charges filed with the EEOC never end up on a court's docket. But what happens if the parties are already enmeshed in litigation and the plaintiff claims that the defendant's conduct during the course of that litigation is retaliatory? Can the plaintiff amend his or her complaint to include that allegation? Or must he or she go back to the EEOC and file a charge for that claim?

In *McDonald-Cuba v. Santa Fe Protective Services, Inc.*, the Tenth Circuit held that the latter is true. No. 10-2151 (10th Cir. May 9, 2011). The Fourth came down the other way in a similar case.

In *McDonald-Cuba*, the Tenth Circuit continued down the road paved by the court in its prior decision in *Martinez v. Potter*, 347 F.3d 1208 (10th Cir. 2003). In *Martinez*, the court held that conduct occurring after the filing of an employee's Title VII complaint in federal court

involving “discrete and independent actions” requires the filing of a new EEOC charge. 347 F.3d at 1210-1211. Martinez had been fired after he filed his Title VII lawsuit. Subsequently, without filing a new EEOC claim, Martinez attempted to add the claim in his summary judgment brief. The court found that Martinez’s discharge was a “discrete and independent action” that should have been exhausted, even though it “occurred after the filing of the judicial complaint.” *Id.* at 1211. The difference in *McDonald-Cuba* was that the alleged retaliatory act involved the federal proceeding itself.

The plaintiff in *McDonald-Cuba* filed post-termination discrimination and retaliation charges with the EEOC against her employer. After receiving a right-to-sue letter, she filed suit. The defendant’s answer included three counterclaims: (i) breach of contract, (ii) intentional interference with prospective economic advantage, and (iii) breach of the duty of loyalty. The plaintiff then filed an amended and supplemental complaint alleging that the defendant’s counterclaims constituted a bad faith effort to retaliate against her for engaging in protected activity. The defendant later voluntarily dismissed the counterclaims. The district court granted summary judgment for the defendant. Upon review, the court, relying on Martinez, held that plaintiffs “must exhaust administrative remedies as to discrete acts of alleged retaliation that involve the filing of a counterclaim in federal court.” Accordingly, the court vacated the district court’s entry of judgment on the added retaliation claim and ordered the district court to dismiss the claim without prejudice.

The Tenth Circuit’s decision is potentially at odds with a decision from the Fourth Circuit. The Fourth Circuit found the exhaustion requirement satisfied where the EEOC charge alleged a

“pattern of [retaliatory] conduct.” *Jones v. Calvert Group, Ltd.*, 551 F.3d 297, 304 (4th Cir. 2009) (finding that court could hear retaliatory discharge claim where plaintiff alleged retaliatory discharge in lawsuit but had alleged only retaliatory actions during her employment in EEOC charge). As discussed above, the Tenth Circuit considered the defendant’s filing of counterclaims a “discrete act,” rather than an act that was part of a pattern of retaliation. The court did not mention whether the plaintiff had alleged that the retaliation was continuing in nature in her EEOC charge.

The decision serves as a good reminder that employers cannot be “surprised” in litigation by allegations that a particular act was discriminatory, harassing, or retaliatory. Employers should carefully review each of the plaintiff’s claims and ensure that every discrete act alleged to be discriminatory, harassing, or retaliatory has been included in a charge before the EEOC. Where situations like that in *Martinez* and *McDonald-Cuba* arise in other jurisdictions, employers have an opportunity to argue for a similar hard-and-fast adherence to the exhaustion requirement.

**NEW NINTH CIRCUIT CASE EMPOWERS EMPLOYERS SUING EMPLOYEES FOR COMPUTER FRAUD AND ABUSE**  
Miller Nash LLP

More and more employers are suing employees who abscond with sensitive company information to either start their own business or work for a competitor. As we near that time when 100 percent of business information is electronic, those renegade employees find it easier to take that information with a few clicks and key-strokes. They also know how to hit the delete

button to seemingly erase the trail of misconduct.

These employees are not deterred by company policies or employment-related agreements that prohibit the misappropriation of company information or contain covenants against competition. Those documents are typically signed and forgotten long before the misdeeds occur. Employees view them as written for lawyers to use in court, not for reminding them of their duty of loyalty. And case law and legislation has developed restrictions on enforcement. Now, however, help is on the way, thanks to an opinion issued on April 28, 2011, in *United States v. Nosal* by the Ninth Circuit Court of Appeals (which has jurisdiction over Washington and Oregon).

*Nosal* contains a helpful interpretation of the federal Computer Fraud and Abuse Act that breathes new life into employer policies and employment agreements. The Act prohibits persons from improperly accessing and using computerized information. The Act allows criminal enforcement and permits employers to sue employees who violate it. Before *Nosal*, some court opinions, including in the Ninth Circuit, held that an employee does not exceed "authorized access" to a computer by accessing information unless the employee had no authority under any circumstances to take the information. This meant that employees who took information that they were entitled to use properly (for example, a customer list or other proprietary information) but then misused it (perhaps to start another company or go to work for a competitor) could not be liable under the Act. Now, thanks to *Nosal*, as long as an employer has a clear policy on access to its computerized information that it communicates to the workforce, the employer can go after an employee who violates the policy for the unauthorized access of electronic records under the Act. So can the prosecutor.

Therefore, the wise employer should revisit its policy on the use of its computers. Does the policy limit what can be forwarded to an employee's home computer and personal e mail address? Does it explain restrictions on the use of information? Are restrictions customized for specific employees or levels of authority? Does the company warn that violations of the limits on access and use may be violations of the civil and criminal provisions of the Act?

In *Nosal*, employees accessed the company computer system to transfer a database of source lists, names, and contact information to their home e mail accounts, so that they could then start a competing executive-search firm. The trial court—relying on previous cases—determined that there had been no violation of the Act and dismissed the case. Now that the Ninth Circuit has reversed that decision, these former employees face potential jail time and fines.

Stay tuned to see how this decision will be applied in the civil context. We predict that it will strengthen employers' abilities to obtain remedies against disloyal employees.



### **Urine Sample Collector Will Be 'Directly Observing the Urine Coming Straight Out of Your Body,' Thank You Very Much**

There are some times that a man simply does not want to have a stranger “directly observe the urine coming straight out of his body.” Am I right, men? Is it really necessary to require a guy to provide a urine sample in a fashion that allows the "collector" of this test to have constant "visibility of the participant's genitalia?"

*[Sidenote: It now occurs to me that the following conversation has probably taken place at some point in history:*

*Q: What do you do for a living?*

*A: I'm a collector.*

*Q: What do you collect?*

*A: Urine samples.]*

Moving on. Via **How Appealing** I see that on Wednesday, a three-judge panel of the 6th U.S. Circuit Court of Appeals **held** that if a urine sample collection company wants to have a rule that its collectors shall directly observe the urine coming straight out of a man's body, with visibility of that man's genitalia, well, that is just fine with the 6th Circuit.

Was this "direct observation" an overly intrusive, unreasonable search under the Fourth Amendment? No sir, the 6th Circuit held, because the appellant had agreed to undergo drug testing and [t]he government had a strong-indeed, a compelling-interest in insuring the accuracy of the drug testing by preventing Norris from giving a false

specimen.... The record shows that it is easy and widespread for people providing urine for drug testing to substitute false or inaccurate specimens and that only the direct observation method of obtaining such samples is fully effective “to prevent cheating on drug tests,” in the language of the district court. Neither the Kentucky authorities nor Premier acted improperly in requiring that method.

### **With Patriot Act About to Expire, Traveling Obama Uses 'Autopen' to Beat the Clock**

Late Thursday night, the Patriot Act was minutes away from expiring. Although disagreements in Congress led to some members attempting to hold up legislative efforts to prepare a bill extending the Act, a bill was finally ready for President Barack Obama's signature in the waning hours Thursday night. However, there was a logistical issue: Obama was attending an international summit in France and was not in a position to physically sign the bill presented by Congress.

The *Los Angeles Times* **reports** that with minutes to spare, however, Obama found a way around this problem by directing that the bill be signed in Washington via an "autopen," thus beating the midnight Thursday deadline. The autopen is a "little-known and infrequently used device" that can hold a pen and sign a person's actual signature, the Associated Press **notes**. It may only be used with proper authorization of the president.

Does the use of an autopen satisfy the "Presentment Clause" of Article I, Section 7 of

the U.S. Constitution, which requires that before a bill becomes law it must be "presented to the President of the United States?" Yes, according to the Office of Legal Counsel. Odd Clauses Watch **wrote last month** that in 2005, the Office of Legal Counsel issued an opinion confirming the President's authority to sign a bill in this fashion. The **opinion** (pdf) states that

Reading the constitutional text in light of this established legal understanding, we conclude that the President need not personally perform the physical act of affixing his signature to a bill to sign it within the meaning of Article I, Section 7.

### ['Loser Pays' Bill in Texas Just 3 Signatures Away from Becoming Law](#)

The introduction of a "loser pays" system in any U.S. jurisdiction sounds like the type of pie-in-the-sky proposal that creates lots of headlines but never ends up happening. But *Texas Lawyer's* Tex Parte Blog [reports](#) that a "loser pays" bill in Texas was passed by the Texas House Wednesday night in a 130-13 vote and will become law if it receives three more signatures: those of Texas House Speaker Joe Straus, Lt. Gov. David Dewhurst and Gov. Rick Perry.

Groups that had taken opposing sides on the issue of "loser pays," such as Texans for Lawsuit Reform and the Texas Trial Lawyers Association, have reportedly "lined up in support of Committee Substitute House Bill 274." If the bill becomes law, it is set to become effective on Sept. 1, 2011.

According to *Texas Lawyer*, some of the key provisions of House Bill 274 [include](#):

early dismissal of meritless suits, i.e., suits deemed to have "no basis in law or fact." In some cases, courts will decide motions to dismiss before hearing evidence on the claims;

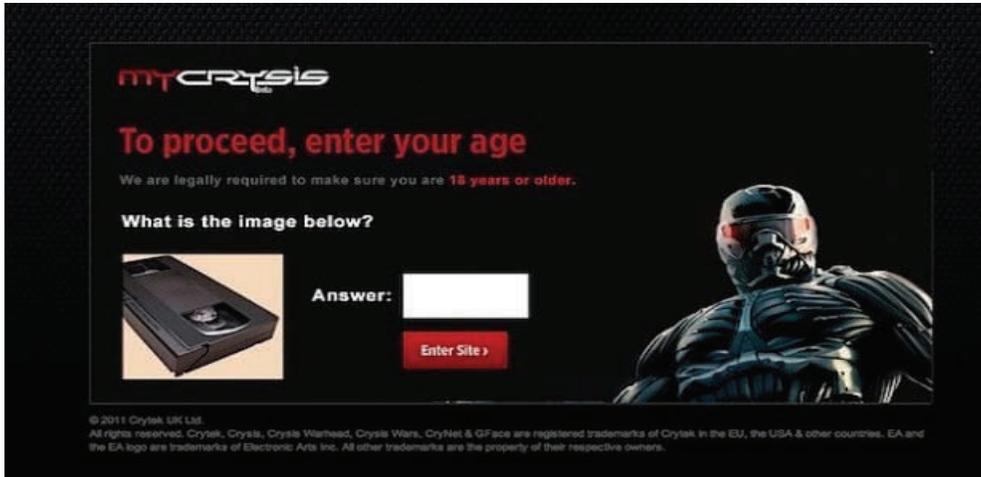
a 45-day deadline for courts to rule on motions to dismiss;  
an award of costs and attorney fees to prevailing parties if a meritless suit is dismissed (with an exception for the government); and  
the Texas Supreme Court shall make rules to limit discovery costs and expedite suits through the justice system for all claims less than \$100,000.

For more on Texas H.B. 274, visit [this link](#).

### **Website Unveils Foolproof Age Verification Test**

Many websites require users to verify their age before they can use the site or to register. In order to have a Facebook account, for example, users must be thirteen years of age or older. However, as the parents of many Facebook-using children can attest, it is no real challenge for underage people to sign up for Facebook or other websites. Just change the year you were born by a few years and you're in!

How, then, can websites verify the age of their users? Via [Futurelawyer](#) I see that one website has found a creative way to do so -- by forcing users to identify now-obsolete items that only people of a certain age are likely to recognize. Here's one such example:



## Winkelvi?

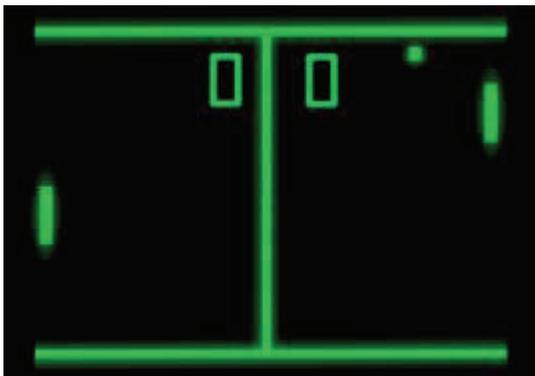
nt of certiorari by the  
r perhaps a sequel to  
we may have finally  
on and Tyler Winklevoss.  
S. Circuit Court of Ap-  
the Winklevoss twins a  
Esq. [reports](#). Last month,  
e 9th Circuit held that the  
with the cash and stock  
ver \$65 million) they had  
\$8 to resolve their now-

Let's see you identify that, 11-year-olds!!  
Here are a few other challenges I'd pose to test  
age:

1. To make sure a person is over 18 years old:



2. To make sure a person is over 30 years old:



(Answers: A roll of film; the video game "Pong")

amous lawsuit against Facebook founder Mark  
Zuckerberg. The Winkelvi claimed that Zucker-  
berg stole their idea while they were classmates  
at Harvard.

Immediately following the 9th Circuit's order  
Tuesday, the Winkelvi announced, predictably,  
that they would now appeal to the Supreme  
Court. The lawyers representing the twins  
[stated that](#):

Settlements should be based on honest dealing,  
and courts have wisely refused to enforce a set-  
tlement obtained by fraudulent means. The  
Court's decision shut the courthouse door to a  
solid claim that Facebook obtained this settle-  
ment by committing securities fraud. Our Peti-  
tion to the Supreme Court will ask the high  
court to decide whether that door should be re-  
opened.

Appellate experts such as [SCOTUSBlog's](#) Tom  
Goldstein pegged the odds of the Supreme  
Court hearing the appeal at "zero" because the  
dispute is primarily about facts rather than  
broad legal issues. Stanford Law school profes-  
sor Joe Grundfest agreed, joking that in his  
view the Winklevoss twins' certiorari petition  
"will not get many 'like' buttons" from the  
Court.