Extraordinary Writs

Volume I, Issue 1

JORDAN COYNE & SAVITS, L.L.P.

Jordan Coyne & Savits, L.L.P. is an AV-rated law firm with offices in the District of Columbia, Maryland, and Virginia; its attorneys also practice in West Virginia.

Virginia Supreme Court Finds Statute of Limitations Expired on Legal Malpractice Claim

In *Van Dam v. Gay*, 280 Va. 457, 699 S.E.2d 480, (Va. 2010), the Virginia Supreme Court affirmed the trial court's award of summary judgment to an attorney in a legal malpractice case based on the statute of limitations.

The alleged malpractice involved the representation of the former wife in a divorce case. As part of the divorce settlement, the wife's attorney drafted a property settlement agreement. During the marriage, the former husband participated in two federal retirement plans, military and civil service. The property settlement agreement made only the following reference to them: "The wife shall receive . . . survivor's benefits from the husband's retirement pay."

Twenty years later, the former husband died. The former wife then applied for survivor's benefits under her former husband's two retirement plans. Both claims were denied on the ground that the 1986 property settlement agreement was insufficient, as a matter of federal law, to entitle her to benefits under either plan.

The former wife then brought a legal malpractice suit against her attorney, who entered a plea in bar asserting the statute of limitations.

The Circuit Court sustained the plea in bar of the statute of limitations, and the wife was awarded an appeal.

On appeal, the former wife argued that her cause of action could not have accrued until her husband's death in 2006, because up to that point, her right to survivor's benefits would have been purely contingent upon the former husband predeceasing her.

The Court disagreed, reasoning that the legal injury suffered by the wife in 1986 was not vitiated by the fact that her right to pension benefits was contingent upon her surviving her former husband. Under the equitable distribution statute, Va. Code sec. 20-107.3(A)(2), all pensions in divorce proceedings are presumed to be marital property in the absence of satisfactory evidence that they are separate property and the court may direct payment of the marital share of such benefits whether they are "vested or nonvested" as they become payable.

Some injury or damage, however slight, is

(Con't on page 2)

Legal Malpractice Claim Barred By Collateral Estoppel

In *Johnson v. Sullivan*, CA No. 09-2056, the U.S. District Court for the District of Columbia dismissed a legal malpractice claim arising out of prior criminal representation, based in part on the doctrine of defensive collateral estoppel.

The plaintiff brought a legal malpractice action against his former criminal attorneys, who had represented him at trial and in post-trial proceedings. Among other things, the defendants moved to dismiss on the ground that the plaintiff could not demonstrate that, but for the alleged negligence, the outcome of the plaintiff's post-conviction application for relief would have concluded in his favor.

The district court agreed: 'Because the doctrine of collateral estoppel bars relitigation of the adequacy of [the attorney's] representation, the plaintiff cannot show that [the attorney] breached a duty owed to him or that the outcome of his post-conviction proceedings would have been favorable.

John Tremain May, of Jordan Coyne & Savits, LLP, represented one of the defendants in this matter. Mr. May is an Adjunct Professor of Legal Ethics at Washington College of Law American University, and has been representing attorneys in legal malpractice cases since 1982.

Inside this issue:

JOCS NEWS

Jordan Coyne & Savits is proud to announce that two of its partners were named to the 2010 Super Lawyers list. ***Dwight D. Murray*** *was named a 2010 Washington, D.C. Super Lawyer, and* ***Carol T. Stone*** *was named a 2010 Virginia Super Lawyer.*

Court Finds Statute of Limitations Expired On Legal Malpractice Claim

(Con't from page 1)

essential to a cause of action, but it is immaterial that all the damages resulting from the injury do not occur at the time of the injury.

Accordingly, the Court held that the Circuit Court correctly held that the wife's legal injury arising out of the defendant's alleged malpractice occurred on November 3, 1986, when the court entered a final decree of divorce, terminating the defendant's employment in the matter.

Carol T. Stone of Jordan Coyne & Savits, LLP represented the defendant/appellee in this matter. Ms. Stone has been selected for Super Lawyers and Top Lawyers in Virginia and DC for Legal Malpractice Law and The Best lawyers in America for legal Malpractice and Personal Injury Litigation.

Countering Minimal Expert Witness Disclosures in Lead Paint Litigation

In *Jamal Logan v. LSP Marketing Corp., et al.*, the Maryland Court of Special Appeals upheld the trial court's granting of an order in a lead paint case precluding all but one of plaintiff's 12 experts as a sanction for failure to comply with Md. Rule 2-402(g) (i.e. failing "to state the subject matter, substance of the findings/opinions, and summary of grounds for each opinion; and produce any reports, to which the expert is expected to testify.")

Defendant's interrogatories requested information as to Plaintiff's experts. When Plaintiff did not respond to the interrogatories within the time prescribed, defense counsel made a good faith effort to resolve the dispute. Plaintiff's counsel eventually submitted its answers to interrogatories, but failed to provide any substantive information. Not having received sufficient or satisfactory information, Defendant moved to dismiss/compel. The Court compelled Plaintiffs to supplement their responses, but Plaintiff's counsel again responded vaguely and did not produce any reports.

Consequently, Defendant moved for sanctions to exclude the experts or dismiss. The Court precluded all but one expert. As a result, Plaintiff was unable to put on a prima facie case resulting in the Court granting Defendants motion for summary judgment.

The Plaintiff argued as a defense that Defendants could have taken the experts' depositions. However, since 10 experts were out of state the Court emphasized the importance of Plaintiff's compliance with Md. Rule 2-402(g) to provide a proper designation so that the Defendant did not have to unnecessarily incur the costs associated with depositions.

$1,750,000 Jury Verdict Reversed, Errors in Admitting Expert Testimony

In *CNH America, LLC v. Smith*, No. 091991 (Va. Jan. 13, 2011), the Virginia Supreme Court reversed a jury verdict of $1,750,000 in a product defect case arising out of a burst hydraulic line hose on a mower, on the grounds that the plaintiff's expert testimony was not based on an adequate foundation. The Court remanded the case for a full retrial on the merits.

On appeal, the Virginia Supreme Court found both of the plaintiff's liability experts had testified based on inadequate foundation.

One expert based his opinion that a hose had a manufacturing defect solely on the failure of the hose itself. The Court held that it was insufficient for this expert to base his opinion upon the premise that because the hose failed, it was the result of a manufacturing defect. Further, the expert admitted that he failed to perform tests that could have determined whether the hose had the defect.

The second expert admitted that he was not an expert in the hydraulic systems of mowers and had no experience in the design or manufacture of mowers or any other agricultural equipment.

Undocumented Workers Get D.C. Workers Compensation

In *Asylum co. v. D.C. Depart. of Employment Services*, No. 08-AA-1158 (D.C. Dec. 23, 2010), the District of Columbia Court of Appeals considered an issue of first impression in D.C.: whether a worker who is an undocumented alien is covered under the District of Columbia Workers' Compensation Act.

The Court affirmed the Compensation Review Board's judgment that based on the plain meaning of the language of the Act and the legislative intent, an undocumented or illegal alien is an "employee" as defined in the Act.

In reaching its decision, the Court in a footnote acknowledged a pragmatic reason for according undocumented workers rights under the Workers Compensation Act: if the undocumented workers cannot recover under the Act, then they would be able to file tort suits to recover damages.

The Court also considered and rejected the argument that IRCA preempted the D.C. Workers Compensation Act.

Innocent Victim of Horseplay Doctrine Affirmed in Virginia

In *Simms v. Ruby Tuesday, Inc.*, No. 091762 (Va. Jan. 13, 2011), the Virginia Supreme Court considered the issue whether the actual risk test analysis articulated in Hilton v. Martin materially changed the "innocent victim of horseplay" doctrine under Virginia's workers compensation law. After reviewing the history and policy of the horseplay doctrine, the Court held that the doctrine had not been changed by Hilton v. Martin.

In Hilton v. Martin, the claimant was severely injured when a co-worker turned on the power to a manual cardiac defibrillator, adjusted its energy to 150 joules, and touched the defibrillator paddles to her left shoulder and left breast, while simultaneously activating them. The claimant died of electrocution and cardiac arrest. This was not horseplay in the Court's view. Rather, Hilton v. Martin was analyzed as a workplace assault.

In Simms, the claimant had been pelted with ice particles in a playful manner, and dislocated his shoulder when he raised his arm to block the ice. The Court distinguished horseplay encountered in the workplace from an assault:

"In deciding Hilton, it was not our intention to scuttle the horseplay doctrine, or to impose any additional burden of proof upon claimants found to be the innocent victims of workplace horseplay. The analysis stated in Hilton, regarding the actual risk test, is applicable in worker's compensation matters concerning an assault, not those involving an innocent victim of horseplay."

Surety Must Arbitrate Based on Contract Incorporated by Reference

In *Developers Surety and Indemnity Co. v. Resurrection Baptist Church,* Case No. RWT 10cv1224 (D. Md. Dec. 1, 2010), the Maryland District Court held that the surety must arbitrate disputes related to performance bonds where the performance bonds specifically incorporated by reference construction contracts containing an arbitration clause.

In so holding, the district court followed precedent in the First, Second, Fifth, Sixth and Eleventh Circuits.

In addition, the Court found that the surety is equitably estopped from refusing to arbitrate its disputes with the co-obligees under the performance bonds. The Fourth Circuit has held in a non-surety context that a nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause.

The Court also rejected the surety's argument that arbitration was waived because the opposing parties had engaged in some discovery.

JOCS NEWS

Jordan, Coyne & Savits proudly recognizes ***D. Stephenson Schwinn*** *for his position as the 2011 Co-Chair of the District of Columbia Chapter of the Council on Litigation Management. The Council is the largest fully inclusive defense organization, comprised of thousands of insurance companies, corporations, corporate counsel, risk managers, insurance professionals, claims adjusters and attorneys*

Grayson: Injury Required for Standing Under D.C. CPPA, Lax Pleading Standards Continue

The District of Columbia's Consumer Protection Procedures Act ("CPPA"), primarily codified at D.C. Code sec. 28-3904 and sec. 28-3905, provides for sweeping protection against any trade practice deemed "unlawful." Since the CPPA provides a wide variety of remedies, including injunctive relief, treble damages, and the ability to recover attorneys fees, it is frequently included in civil litigation claims.

Prior to the year 2000, the CPPA provided that "any consumer who suffers any damage as a result of the use or employment by any person of a trade practice in violation of a law of the District of Columbia" could bring an action in the Superior Court to enforce the CPPA. The District of Columbia Council amended the CPPA in 2000 to provide that "a person, whether acting for the interests of itself, its members, or the general public, may bring an action under this chapter. . . ."

The 2000 amendment, which substituted the phrase "a person" for the phrase "any consumer who suffers any damage" created substantial conflict as to whether the Council had waived the traditional standing requirement that a plaintiff must suffer an actual injury before pursuing an action for actions brought in Superior Court under the CPPA.

In *Grayson v. AT&T Corp*., 980 A.2d 1137 (D.C. 2009), a panel of the court considered the standing question and concluded that the 2000 amendments to the CPPA waived the standing requirement and permitted individuals to pursue CPPA claims on behalf of themselves and the general public regardless of whether they have experienced an injury in fact as a result of unlawful trade practices. In other words, the panel concluded that the Council had altered the traditional standing principles in the District for CPPA claims so that persons pursuing a CPPA claim would not have to show any injury in fact caused by the violation of the CPPA to bring an action in Superior Court.

Given the magnitude of this holding, the full court decided to hear Grayson, and a related case, en banc. *Grayson v. AT&T, Corp*, No. 07-CV-1264 (D.C. Jan. 20, 2011)(en banc). The en banc court reversed, concluding that the statutory amendments were not sufficiently clear to conclude that the Council intended to exempt CPPA suits from the District's usual standing principles. Instead, the court concluded that, in amending the statute, the Council had only intended to enlarge the remedies and enforcement procedures available to combat violations of the CPPA.

The court confirmed that any person wishing to bring a CPPA action, either on their own behalf or in a representative action, must show that they suffered actual injury as a result of the unlawful trade practice in question to have standing to maintain the suit.

Additionally, although unrelated to the questions presented under the CPPA, the court also had the opportunity to address the standard of review for motions to dismiss presented under Superior Court Rule of Civil Procedure 12(b)(6). While some of the court's recent panel decisions, including the panel decision in Grayson, cited with apparent approval the pleading standard set forth by the Supreme Court in *Bell Atlantic, Corp. v. Twombly*, 550 U.S. 544 (2007) and its progeny, the court confirmed that it had not yet decided whether to adopt the new federal pleading standard. See e.g. *Murray v. Motorola, Inc*., 982 A.2d 764, 783 fn 32 (D.C. 2009).

While acknowledging, in general, that the court usually follows the Supreme Court and other federal courts' interpretations of the federal rules in interpreting the District's own Rule 12, the court held that it had "not yet decided whether it will follow the facial plausibility standard enunciated in *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009)." Given the Court of Appeals preference for deciding cases on the merits, Grayson, without deciding the question, calls into serious doubt what persuasive effect the new federal pleading standard will have in cases brought in the Superior Court. For now, the Superior Court will continue to follow the older more permissive pleading standard pending further clarification from the Court of Appeals.

Removal to Federal Court; When Does the Clock Start Ticking?

The procedure for removal of a state law claim to federal court is usually simple. After the defendant is served with the complaint, she has 30 days to file a notice of removal, or the case remains in state court. 28 USC sec. 1446. But when there are multiple defendants served with the complaint on different days, when does the removal clock start ticking?

The Court of Appeals for the Fourth Circuit addressed this question in a recently issued opinion. *Barbour v. International* Union, Case No. 08-1740 (January 28, 2011). In Barbour, 23 retired autoworkers filed suit in Maryland Circuit Court, alleging that their unions had breached fiduciary duties. One defendant was served with the complaint on March 20, 2008; the other was served nine days later. Both defendants filed a notice of removal on April 28, 2008 -- more than 30 days after the first defendant was served, but less than 30 days after the second defendant was served.

The court held the notice of removal was not timely filed, and remanded the case to state court. Following the so-called "McKinney Intermediate Rule,"

The court explained the governing standard as follows: if the first defendant timely files a notice of removal, then subsequent defendants can join in the notice of removal within 30 days after they are served. However, if -- as was true in Barbour -- the first defendant does not timely file a notice of removal, all defendants are forever barred from seeking removal. The first defendant is barred because he missed the removal deadline. Later defendants are barred under the rule of unanimity, which requires all defendants to join in a notice of removal. Since the first defendant is precluded from joining in the notice of removal under the statutory deadline, the case cannot be removed by other defendants.

The takeaway from this ruling is that if the first defendant does not promptly file a notice of removal, later-served defendants may be foreclosed from removing to federal court. Defendants sued in state court should not assume that they have thirty days to make a decision regarding removal. If another defendant has already been served, later defendants will have to act quickly to preserve their rights, or may not be able to seek removal at all.

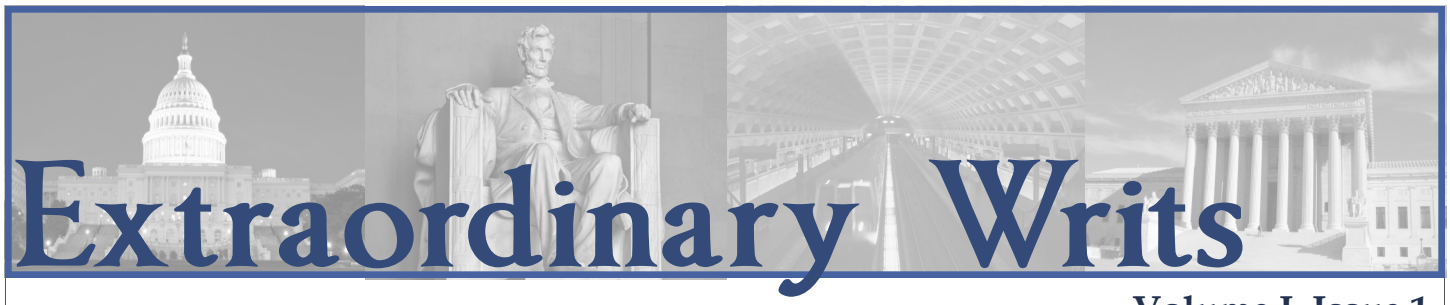
The Barbour decision is controlling only in the 4th Circuit. Other federal Courts of Appeals have adopted different interpretations of the removal statute. While the Court of Appeals for the D.C. Circuit has not yet addressed this question, two District Court decisions have followed the approach taken by the 4th Circuit in *Barbour. Princeton Running Co. v. Williams*, 2006 U.S. Dist. LEXIS 62622 (D.D.C. 2006); *Phillips v. Corr. Corp. of Am.,* 407 F. Supp. 2d 18 (D.D.C. 2005).

Foreign Subpoenas a Foreign Concept?

The Uniform Interstate Depositions and Discovery Act (UIDDA) was created to simplify the process for obtaining out-of-state discovery by subpoena. To request the issuance of a subpoena in a UIDDA discovery state, simply submit a subpoena from the litigation state to the clerk of the court for the jurisdiction where you seek to take the discovery (the discovery state). The clerk in the discovery state will then use the information on the litigation state's subpoena to issue a subpoena from the discovery state.

UIDDA eliminates the need to obtain local counsel in the discovery state because requesting a foreign subpoena will no longer constitute an appearance in court. However, be mindful that the discovery state subpoena must be served as directed by the rules of civil procedure in the discovery state.

UIDDA has now been adopted by Maryland, Virginia, Delaware, and the District of Columbia, but it is not as uniform as its name might suggest. For details on the UIDDA statutes in Maryland, Virginia, and the District of Columbia, read the full-length article available at www.jordancoyne.com. Contact any Jordan Coyne office for local counsel assistance.



Extraordinary Writs

Volume I, Issue 1

JORDAN COYNE & SAVITS, L.L.P.

1100 Connecticut Ave., N.W.
Suite 600
Washington, DC 20036
Phone: 202-296-4747
Fax: 202-496-2800

10509 Judicial Drive
Suite 200
Fairfax, VA 22030
Phone: 703-246-0900
Fax: 703-591-3673

161 Fort Evans Road, N.E.
Suite 345
Leesburg, VA 20176
Phone: 703-443-2550

111 S. Calvert Street
Suite 2700
Baltimore, MD 21202
Phone: 410-625-5080

33 Wood Lane
Rockville, MD 20850
Phone: 301-424-4161

8387 Appalachian Hwy
Davis, WV 26260
Phone: 304-636-9037

www.jordancoyne.com

Jordan Coyne & Savits, L.L.P., is an AV-rated law firm with offices in the District of Columbia, Maryland, and Virginia; its attorneys also practice in West Virginia. The Firm's practice concentrates on civil defense litigation, including professional liability, premises liability, employment law, fire loss litigation, construction torts, workers' compensation, asbestos and mass tort litigation, insurance coverage, and police and governmental liability.

JOCS NEWS: Jordan Coyne & Savits, L.L.P. is proud to announce that **Dwight D. Murray** was named a 2010 Washington, D.C. Super Lawyer; **Carol T. Stone**, was named a 2010 Virginia Super Lawyer; and **D. Stephenson Schwinn** was selected as the 2011 Co-Chair of the District of Columbia Chapter of the Council on Litigation Management.

JORDAN COYNE & SAVITS, L.L.P.

1100 Connecticut Ave., N.W. Suite 600
Washington, DC 20036

10509 Judicial Drive, Suite 200
Fairfax, Virginia 22030