There'll Always Be Posner: Hemingway, Boxing, and Sanctions

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Those of us who graduated from the University of Chicago are just a wee bit tired of the "place where fun goes to die" epithet. It's true that U of C is an intensely intellectual place, and it's true that Hyde Park is a long way from Chicago's hot spots, and it's true that the Cubs will continue to disappoint, and it's true that when the Winter wind ("the Hawk") blows in off Lake Michigan one prays for death, but ... what was our point, anyway? Right - intellectual combat can be a fascinating spectator sport. It can be a moveable feast. It can even be, yes, fun.

In mid-February, the Law School put on a "Manhood in Law and Literature" conference. Here is part of what the conference announcement promised: "The conference will include two dramatic performances by members of the University of Chicago law School. The first scene, from the **Caine Mutiny Court Martial** by Herman Wouk, will feature Judge Richard Posner as Lt. Commander Queeg … and Judge Diane Wood as Captain Blakely. The second scene, from **The Little Foxes** by Lillian Hellman, will feature Professor Martha Nussbaum as Regina Hubbard Giddens and Professor Douglas Baird as her husband Horace. A musical interlude will be provided by Jajah Wu, Gary de Turck, and Martha Nussbaum."

Sounds like fun, right? It gets better. An article describing the conference reveals that Professor Nussbaum sang "Can't Help Lovin' Dat Man" from **Show Boat**. Mind you, this is the same Martha Nussbaum who is one of the country's most daring and creative philosophers, who is a hero to the Drug and Device Law Daughter because of her position on animal rights, and whose analysis of Plato's **Symposium** has been stuck to our brain for over 25 years. We are genuinely sorry we missed this performance. Author Joyce Carol Oates also spoke (but did not sing) at the conference. She talked about Hemingway and boxing. Oates's writings on boxing have given it an unexpected intellectual heft.

And then there was Judge Posner, whom the article calls "arguably America's most influential judge outside the Supreme Court." "Arguably"?! At the Manliness conference Judge Posner did

something he doesn't have to do too often on the Seventh Circuit: he dissented. According to the article, Judge Posner “finds Hemingway a sick and crazy wreck of a person, and disdains biographies of writers and artists since he sees them as unhelpful invasions of privacy.” And he thinks that boxing is boring. Oates had some withering responses to these opinions ("Muhammad Ali is boring?"), but it's not as if she was able to overrule Judge Posner.

What's strange about that disdain of Hemingway and boxing is that Judge Posner's prose is as muscular and direct as Hemingway's, and his opinions often pack a mean punch. A recent example of that is the case of *Feldman v. Olin Corp*., No. 11-2772 (7th Cir. February 23, 2012). *Feldman* is not a product liability case, but it caught our attention nonetheless. The plaintiff lawyers filed a case that seems meritless. We are not labor lawyers, but bringing an employment discrimination case against a party that never employed the plaintiff strikes us as problematic. Then the plaintiff lawyers were sanctioned. Then they appear to have filed a late appeal from that sanction. Now they are memorialized by a classic Posner opinion.

The issue is murky. We are not in a clean, well-lighted place. With a little help from Judge Posner, we'll tell you what happened. The district court ordered the plaintiff to pay attorney's fees and dismissed the entire case with prejudice. The plaintiff filed a timely appeal from both the judgment and the attorneys' fee order on December 23, 2010. The day before the plaintiff's notice of appeal was filed, the defendant informed the district court that its attorneys' fees had amounted to $1,475. Two months later, on February 22, 2011, the district court approved that amount and ordered that the plaintiff's lawyers must pay, "thus relieving the plaintiff of the obligation imposed by the previous order." Slip op. at 2. The approval of the fee amount and the order that the lawyers rather than the client pay were in the form of a memorandum and order. There was no separate judgment. The plaintiffs' lawyers filed an appeal from the fee order on August 3, 2011. That was long after the expiration of the 30 day appeal deadline (28 U.S.C. section 2107(a); Fed. R. App. P. 4(a)(1)(A)).

This sort of thing is what we expert civil litigation practitioners call A Problem.

But the plaintiffs' lawyers, like a Hemingway hero, displayed grace under pressure by offering a furious argument about why the 30 day deadline should not apply to them. They contended that a "separate document" was required for the fee order, and that lack of such "separate document" means that the order did not become final until 150 days passed. They filed their appeal within 30 days of the expiration of 150 days, so their appeal was timely. *See* Fed. R. Civ. P. 58(c)(2) on the separate order business. Nicely done, right? But there is a counterpunch. Since 2002, Rule 58(a)(3) has provided that no "separate document" is required for an order disposing of a motion for attorney's fees under Rule 54." Goodbye 150 day rule. Now the Hemingway hero plaintiff lawyers are back in trouble, true?

Not so fast. The plaintiff lawyers point out that Rule 54(d)(2)(E) lists "Exceptions" for "claims for fees and expenses as sanctions for violating these rules." Since the attorney fee award was under Rule 11, it was for violating "these rules," therefore a "separate document" was required, and because there was no "separate document" the 150 day provision applies. Dizzy yet?

Judge Posner acknowledges that "the rules could be better drafted." Slip op. at 3. We hope that we do not have to turn in our Defense Hack card if we admit to feeling a twinge of sympathy for the plaintiff lawyers. But just because it is hard to handle the angry bull that is the Federal Rules is no reason not to do one's best. And Judge Posner's best is, as Larry David would say, pretty, pretty good. Judge Posner reasons that the "Exceptions" in Rule 54 merely call off specific procedures for asking for attorneys' fees. They are inapplicable to fees under Rule 11. "Rule 58 should not be read to mean that some motions for awards of attorneys' fees are 'under' Rule 54 and others are 'under' something else and therefore require a separate judgment document to start the 30-day appeal time running. We can't think of any reason why appeals from awards of attorneys' fees, whether awards based on violations of the Federal Rules of Civil Procedure or awards based on the courts' inherent power to sanction litigant or lawyer misconduct (or both, in this case), should be subject to one deadline and appeals from other attorneys' fee awards subject to another." Slip op. at 4. Down goes Frazier! Or Feldman. Or, rather, Feldman's attorneys.

But they are still slugging! The plaintiff lawyers also argued that, because the fee order was directed against them rather than their client, it was a "substantive" order. Judge Posner does "not know what work that characterization is supposed to do," and anyway Rule 11 authorizes imposition of sanctions on lawyers, and such sanctions are therefore "under Rule 54." Slip op. at 5. Finally, Judge Posner points out that it "is far from certain" whether the sanctions order at issue was a "judgment" within the meaning of Rule 58. If it is not a "judgment," there can be no requirement of a separate judgment document. *Id.* We don't know if that's a TKO, a knockout, or a blow below the belt. But it's bad for the plaintiff lawyers.

Clearly, Judge Posner does not think this is a hard case. Just as clearly, there are many judges who would consider this a hard case, if only because of the confusing language in the rules. That requires a temporary departure from common sense, but do any of you doubt that happens? And just as clearly, there are many judges who would consider a hard case inappropriate for upholding sanctions. Not Judge Posner. Hard case? Hard cheese. He arrives at a conclusion and lets the chips fall where they may. It is a fun opinion to read.

Well, maybe not fun for everybody.