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Class Arbitration: What Happens When the Parties’ Chosen Arbitral Forum is Unavailable?
By Steven M. Appelbaum

Existing case law has made it difficult to predict whether an agreement to arbitrate will be enforced where the arbitral forum identified in the agreement no longer exists or is otherwise unavailable at the time a dispute arises.

The Fate of the Implied Certification Theory of False Claims Act Liability
By Sean Hennessy

This term, the U.S. Supreme Court will decide whether the “implied certification” theory of liability is valid under the federal False Claims Act.

Keeping it “Real”: Toward a More Comprehensive “Economic Reality” Test for Joint Employers
By Miriam R. Nemeth

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The Legal Aftermath of a Mass Shooting: Dylann Roof and the “Emanuel Nine”
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Class Arbitration: What Happens When the Parties’ Chosen Arbitral Forum is Unavailable?

By Steven M. Appelbaum

The U.S. Supreme Court has developed and refined its class arbitration jurisprudence over the past few years through several cases. The Court’s decisions in this area are shaped by two guiding principles: (1) a “liberal policy favoring arbitration” under the Federal Arbitration Act (“FAA”), and (2) “the fundamental principle that arbitration is a matter of contract[.]” However, unresolved class arbitration issues remain. One such issue is whether a court should compel arbitration and appoint a substitute arbitrator where the parties’ chosen arbitral forum is not available. This article explores the conflicting case law interpreting this issue.

Where the chosen forum is unavailable, Section 5 of the FAA requires the appointment of a substitute arbitrator:

> If the agreement provision be made for a method of naming or appointing an arbitrator . . . such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator . . . or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator . . . who shall act under the said agreement with the same force and effect as if he . . . had been specifically named therein[.]

The mechanism adopted by Section 5 for the appointment of a substitute arbitrator further advances the guiding principle favoring arbitration.

However, some U.S. Circuit Courts have stated that Section 5 does not apply, and, thus, arbitration cannot be compelled, when “the choice of forum is an integral part of the agreement”

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3 Rent-A-Center, 561 U.S. at 67.
to arbitrate, rather than an ancillary logistical concern." Whether the choice of forum is “integral” is determined by the intent of the parties at the time they entered the arbitration agreement.

For example, in Brown v. ITT Consumer Financial Corp., the U.S. Eleventh Circuit Court of Appeals affirmed the district court’s decision to appoint a substitute arbitrator and compel arbitration under Section 5 where the forum specified in the arbitration clause had been dissolved. There, the arbitration clause stated:

[A]ny dispute...shall be resolved by binding arbitration under the Code of Procedure of the National Arbitration Forum....

The court concluded that Section 5 applied because the forum’s unavailability was inconsequential; there was “no evidence that the choice of the NAF as the arbitration forum was an integral part of the agreement to arbitrate.”

Unfortunately, Brown did not articulate the factors a court should consider to decide whether the chosen arbitral forum is “integral” to the agreement. The lack of a uniform test has led to disparate outcomes. The Eleventh Circuit’s subsequent decision in Inetianbor v. Cashcall, Inc., highlights how the nebulous “integral” standard has led to unpredictable results.

Unlike in Brown, in Inetianbor, the Eleventh Circuit refused to compel arbitration when the chosen arbitral forum was unavailable. The arbitration provision at issue in Inetianbor stated:

[A]ny Dispute...will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.

The court found that the parties “intended the forum selection clause to be a central part of the agreement to arbitrate” because their agreement (i) expressly required the dispute be resolved by the Tribe; and (ii) referenced the Tribe in five of its nine paragraphs regarding arbitration.

The Inetianbor court distinguished Brown based on the differences in the language of the arbitration clause at issue in each case. The court stated that the agreement in Brown “provided for the procedural rules only, stating that ‘[A]ny dispute ... shall be resolved by binding arbitration

6 Inetianbor, 768 F.3d at 1350.
7 Brown, 211 F.3d at 1222.
8 Id. at 1220.
9 Id. at 1222.
10 768 F.3d 1346 (11th Cir. 2014).
11 Id. at 1351.
12 Id. at 1350-51.
under the Code of Procedure of an unavailable arbitration forum." By contrast, the arbitration clause in Inetianbor "select[ed] not just the rules of procedure, but also the arbitral forum," by stating that arbitration "shall be conducted by the [Tribe]...in accordance with its...dispute rules." Additionally, in Brown, the arbitral forum was only referenced once; in Inetianbor, the chosen arbitral forum was referenced throughout the agreement.

Earlier this year, the Eleventh Circuit again applied the “integral” standard in Flagg v. First Premier Bank to affirm the lower court’s denial of a motion to compel arbitration. There, the arbitration clause contained the following language, which is nearly identical to the arbitration clause in Brown:

[A]ll claims, disputes, or controversies...shall be resolved by...arbitration by and under the Code of Procedure of the National Arbitration Forum[.] But unlike Brown, the arbitration clause in Flagg went on to say that the “Rules and forms of the NAF may be obtained and all claims shall be filed at any NAF office.” The Flagg court, following the lead in Inetianbor, concluded that the chosen arbitral forum was integral to the agreement because “the arbitration agreement specifically designates the NAF as the arbitral forum and mentions the chosen forum throughout the agreement” and “[t]he provision directed consumers to file their claims with and obtain required forms from the NAF office.”

Other circuit courts have refused to invalidate arbitration agreements under the “integral” standard. For example, the U.S. Seventh Circuit Court of Appeals criticized and rejected the standard in Green v. U.S. Cash Advance Ill., LLC. Observing that “no court has ever explained what part of the text or background of [Section 5 of the FAA], or even authorizes” application of the “integral” standard, the court suggested a different approach:

Instead of asking whether one or another feature is “integral,” a court could approach this from a different direction and assume that a reference to an unavailable means of arbitration is equivalent to leaving the issue open.

Where there is a clause requiring arbitration, but lacking any other details (such as a clause simply stating “Any disputes arising out of this contract will be arbitrated”), a court could supply the particulars. In concluding that the parties in Green must be compelled to arbitration, the court explained that, where the contract makes it clear that the “parties selected private dispute

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13 Id. at 1351 (emphasis added).
14 Id. (emphasis added).
15 Id.
17 Id. at *2.
18 Id.
19 Id. at *3.
20 724 F.3d 787, 790-92 (7th Cir. 2013).
21 Id. at 792.
22 Id.
resolution[,][c]ourts should not use uncertainty in just how that would be accomplished to defeat the evident choice. Section 5 allows judges to supply details in order to make arbitration work.\footnote{Id. at 793.}

Similarly, the U.S. Third Circuit Court of Appeals, in a matter of first impression, upheld this liberal federal policy favoring arbitration by concluding that Section 5 of the FAA requires the appointment of a substitute arbitrator when the parties’ chosen arbitral forum is not available.\footnote{Khan v. Dell Inc., 669 F. 3d 350 (3rd Cir. 2012).}

Based on the current state of the case law, contract drafters should take special care to ensure that the intent of the parties is expressly and unambiguously set forth in arbitration clauses. To give effect to the parties’ clear intent to arbitrate and to prevent a court from invalidating an arbitration provision where the parties’ chosen arbitral forum is not available, drafters should consider expressly (1) stating that it is the parties’ intent to resolve any dispute by arbitration; and (2) providing a method for selecting a substitute arbitrator or forum should the chosen arbitral forum becomes unavailable or, alternatively, specifically deferring to Section 5 of the FAA.

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The Fate of the Implied Certification Theory of False Claims Act Liability

By Sean Hennessy

The federal False Claims Act (“FCA”) imposes liability on those who defraud the federal government by submitting a false claim to the government for reimbursement. False claims fall into two categories: factually false and legally false. A factually false claim is the submission of a bill for an improper amount or for services never rendered. A legally false claim is a false representation of compliance with a statutory, regulatory, or contractual condition of payment. The U.S. Supreme Court will decide whether the “implied certification” theory of liability under the FCA—a type of legally false claim which has been approved by nine, and rejected by two, of the U.S. Courts of Appeals—is valid in Universal Health Services, Inc. v. United States ex rel. Escobar. The Court’s resolution of this question is significant because implied certification is the basis for many FCA suits and has been used by the government and private qui tam relators to expand the FCA’s reach. The Court heard oral argument on April 19, 2016, and is expected to issue an opinion this term.

FCA Background and the Origin of the Implied Certification Theory

The FCA was originally enacted during the Civil War in response to fear that suppliers were defrauding the government by providing substandard goods—defective canons, rifles, and uniforms—to the Union Army. As currently formed, the FCA makes it illegal for persons and companies to “knowingly” present, or cause to be presented, a “false or fraudulent claim for payment or approval” to the government. The FCA imposes per-claim civil penalties of $5,500 to $11,000 and treble damages. To combat fraud through the FCA, in addition to authorizing government suits, Congress enlisted the support of private qui tam individuals by including a provision authorizing these private parties—known as relators—to bring civil actions in the name of the United States.

The quintessential false claim is “a false invoice or bill for goods or services never actually provided.” In other words, there is factually false information on the face of the invoice submitted to the government. Over time, courts have interpreted the FCA to impose liability for claims that

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3 The First, Second, Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits recognize the implied certification theory; the Fifth and Seventh Circuits have rejected it. Not all circuits that recognize implied certification agree on how broadly it should be applied. For example, the Second and Sixth Circuits have held that “implied false certification is appropriately applied only when the underlying statute or regulation...expressly states the provider must comply in order to be paid.” Mikes v. Strauss, 274 F. 3d 687, 700 (2d Cir. 2001). In contrast, the First, Fourth, and D.C. Circuits have held that an express condition of payment is not required. See U.S. v. Triple Canopy, Inc., 775 F.3d 628, 636 (4th Cir. 2015); U.S. ex rel. Hutcheson v. Blackstone, 647 F.3d 377, 386-88 (1st Cir. 2011); U.S. v. Sci. Applications Int’l Corp., 626 F.3d 1257, 1268 (D.C. Cir. 2010).
7 See id.
do not contain any factually false information, but instead are considered legally false. Legally false claims are based on a false representation of compliance with applicable statutory, regulatory, or contractual conditions to payment. One variety of a legally false claim is based on the implied certification theory. Under the implied certification theory, a defendant who requests payment is impliedly certifying that it is in compliance with all applicable statutory, regulatory, and contractual requirements. Therefore, failure to comply with those requirements renders the claim for payment false.

Escobar Case: Factual Background

In Escobar, the defendant, Universal Health Services, Inc., operated mental health clinics that received federal and state Medicaid payments. Universal provided mental health treatment to the relators’ teenage daughter, who suffered a fatal seizure. The relators filed a FCA lawsuit alleging that their daughter was treated by unlicensed and unsupervised staff at Universal’s clinics in violation of state regulations. The relators alleged that Universal’s claims for payment to Medicaid were false because each claim contained an implicit certification that it was in compliance with the state licensure and supervision regulations.

The district court dismissed the complaint, finding the state regulations at issue were not conditions of payment under Medicaid. The First Circuit reversed, holding that FCA liability can be established if “the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a material precondition of payment.” The First Circuit further held that preconditions of payment contained in statutes or regulations “need not be expressly designated.” In other words, the First Circuit accepted the relators’ position that “each time [Universal] submitted a claim, [it] implicitly communicated that it had conformed to the relevant” state regulations.

The First Circuit’s decision in Escobar diverged from another recent FCA decision in which the Seventh Circuit rejected implied certification. In United States v. Sanford-Brown, Ltd, the Seventh Circuit held that it would be “unreasonable” to “hold that an institution’s continued compliance with the thousands of pages of federal statute and regulations incorporated by reference into the [federal program] are conditions of payment for purposes of liability under the FCA.”

The Supreme Court Case

In Escobar, the Supreme Court is considering two legal questions: (1) whether the implied certification theory is viable; and (2) if implied certification is viable, whether a claim can only be legally false under that theory when a provider failed to comply with a statute, regulation, or contractual provision that expressly states that it is a condition of payment.

Universal’s position is that the implied certification theory is inconsistent with the text and legislative history of the FCA and that there are sound policy reasons to reject the expansive theory of fraud. If the theory is viable, Universal argues that it should be limited to statutes, regulations, and contracts.

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10 United States v. Universal Health Servs., Inc., 780 F.3d 504, 512 (1st Cir. 2015).
11 Id. (internal quotations omitted).
12 Id. at 514 n.14.
13 788 F.3d 696, 711 (7th Cir. 2015).
regulations, and contracts that expressly condition payment on compliance.”¹⁴ Universal argues that, otherwise, there would be “boundless liability” under the FCA.¹⁵

The relators, on the other hand, argue that implied certification is consistent with both the text and purpose of the FCA. They claim the FCA was enacted to broadly combat all fraud on the public, and that Congress has continually reaffirmed this purpose, as shown by the legislative history associated with the FCA’s modern amendments.¹⁶ The relators further argue that implied certification should not be limited to those statutes, regulations, or contracts containing an express condition of payment because this “would create a gaping loophole in FCA enforcement.”¹⁷ For example, many government requirements which are material conditions to payment because they affect the nature or qualify of goods and services delivered are not expressly labeled as conditions of payment.

Conclusion

The Supreme Court’s forthcoming decision in Escobar will likely be one of the more important FCA developments in years. It could significantly impact the breadth of the FCA as an instrument to combat purported fraud. For this reason, the case is being watched closely by the government, qui tam relators, companies that transact business with the government, trade groups, and academics.

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¹⁴ Petitioner Br. at 25 (“[W]ithout a direct link between compliance and payment, there is no logical basis to treat the submission of a claim as certification of compliance.”), available at http://www.scotusblog.com/case-files/cases/universal-health-services-v-united-states-ex-rel-escobar/.
¹⁵ Id. at 26.
Keeping it “Real”: Toward a More Comprehensive “Economic Reality” Test for Joint Employers

By Miriam R. Nemeth

Whether two or more entities constitute joint employers—and thus are jointly liable for illegal working conditions—has been the subject of much recent litigation, as has the appropriate test to apply to this analysis. This litigation focus is the result of the evolving nature of modern work relationships and corresponding economic and business pressures. Additionally, the workforce itself is changing as members of the “Uber Generation” increasingly bear employment responsibilities to more than one entity. These developments make the determination of joint-employer status even more critical to employment litigation.

As the workplace evolves, so must the “economic reality” test for determining joint employer status. To respond to these changes, this article suggests that the economic reality test must take into account the financial dependence of the intermediate employer (i.e., the direct employer) on the potential joint employer (“PJE”), in addition to the financial dependence of the employee on the PJE. The approach advocated by the Department of Labor (“DOL”) in Administrator’s Interpretation 2016-1 (“AI 2016-1”), discussed below, is a step in the right direction; however, additional factors must be incorporated that examine the ways in which PJEs are able to influence workplace conditions and thereby increase the risk of labor law violations.

Jurisprudential Approaches to the Joint Employer Analysis

Joint employment under the Fair Labor Standards Act (“FLSA”)1 exists when an individual is employed by two or more entities that are jointly responsible for the individual’s overtime, rest and meal breaks, and other labor law rights.2 The earliest joint employment analysis examined only the PJE’s “actual control” over the intermediate employer and its implementation of the labor laws. This “actual control” test was quickly rejected and replaced with an “economic reality” test,3 which evaluates whether, as a matter of economic reality, the PJE operates as a joint employer under a varying series of factors.4

Despite this doctrinal change, the “actual control” test continues to play an influential—and often dominant—role in contemporary applications of the “economic reality” test.5 In many cases,
courts purport to apply the “economic reality” test, but ultimately reduce that analysis to the PJE’s actual control over the employee’s tenure and wages.

The DOL’s Administrative Interpretation

To correct this narrow focus and better respond to evolving modern workplaces, the DOL issued AI 2016-1 on January 20, 2016.6 This interpretation provides guidelines for applying the joint-employer analysis to a range of industries through the application of either (or both) a “horizontal” or “vertical” approach to joint employment.

The horizontal approach applies where an individual works for two different entities who are themselves sufficiently related to support joint liability.7 This relationship may exist where, for example, a waitress works for two different restaurants owned by the same company.8 To determine whether two entities are horizontally related, AI 2016-1 advances a control test that focuses on the relationship between the two employers.9

Under the vertical analysis, courts examine whether the employee is sufficiently economically dependent on the PJE—despite being directly employed by an intermediate entity—to justify imposing liability on the PJE as well as the intermediate employer.10 This situation often arises in subcontracting and staffing agency situations.11

Further Inquiries for Joint Employment in Our Modern Economy

AI 2016-1 is a solid step toward a joint employer analysis that takes into account the role of the entity with “a greater ability to implement policy or systemic changes to ensure compliance” with legal obligations.12 This statement, however, continues to beg the question of whether joint employer liability can be found where one employer influences—by setting and enforcing (directly or indirectly)—the standards for another employer’s workplace.

The franchising context is a helpful illustration of this complex issue: the franchisor establishes service and labor standards13 for a range of production activities performed by a franchisee and its employees. The franchisor also imposes consequences that are related to those standards and that ultimately impact a franchisee’s business viability. This series of economic and business pressures—in practice, if not on paper—heightens the risk that intermediate employers will fail to comply with labor laws, such as the FLSA, by de-incentivizing compliance. For example, many

7 Id. at 2-3, 7-9.
8 Id. at 7-9.
9 Id. at 4-5, 7-9.
10 Id. at 3, 5, 9-15.
11 Id. at 9-10, 14-15.
12 Id. at 1-2.
13 Although these standards may not be phrased as requirements, they function in much the same way as a mother telling her child that he cannot see friends until his room is clean. Although the child does not have to clean his room as a general matter, he does if he wants to reach his ultimate goal. Similarly, franchisees need to meet these standards if they want to remain in business with the franchisor, on whom they are generally economically dependent.

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franchisors instruct franchisees to limit the individuals staffed on each shift in order to reduce labor costs and increase profits. This pressure to understaff creates a situation where there are not enough employees on a given shift to ensure timely meal and rest breaks. The PJE sets standards that encourages the potential for labor violations, yet bears no risk or liability for these violations under federal labor laws unless it is properly classified as a joint employer. Accordingly, such pressures from PJE's are tantamount to the type of conduct that should engender joint employer liability.  

To ensure broader compliance and worker protections, it makes sense that the entity that created these workplace standards should bear some of the risk of labor law violations. This analysis falls well-within the bounds of the traditional economic reality test as an evaluation of the financial dependence that both the intermediate employer and the employee have on the PJE. Some factors relevant to this evaluation vis-à-vis the intermediate employer should include:

- Whether the PJE owns or is the primary leaseholder of the facilities in which the intermediate employer and employee work;  
- Whether and in what way the intermediate employer benefits the PJE; and  
- Whether “the service rendered is an integral part of the alleged [PJE’s] business.”

**Conclusion**

Accommodating our ever-changing contemporary business relationships requires that courts and policy-makers inquire into the financial dependence on the PJE of both the intermediate employer and the employee. In doing so, courts must look beyond the bare contractual language to examine the incentives and influences that actually drive workplace conditions.

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14 See AI 2016-1 at 2, 4, 11-13; see also Antenor v. D & S Farms, 88 F.3d 925, 933 n.10 (11th Cir. 1996) (“courts have found economic dependence under a multitude of circumstances where the alleged employer exercised little or no control or supervision over the putative employee”).  
16 See Antenor, 88 F.3d at 936-37 (“a business that owns or controls the worksite will likely be able to prevent labor law violations, even if it delegates hiring and supervisory responsibilities to labor contractors”).  
17 See AI 2016-1 at 3, 7, 9, 11, 15 (discussing the concept of “benefit”); 29 C.F.R. 791.2(b).  
The Legal Aftermath of a Mass Shooting: Dylann Roof and the “Emanuel Nine”

By Stinson Woodward

One summer day in 2015, 21-year-old white male Dylann Roof walked into the “Mother Emanuel” AME Church in the center of Charleston, South Carolina, where he was welcomed by an African-American Bible study group. He sat with the group for an hour before opening fire and killing nine churchgoers—including senior pastor and State Senator, Reverend Clementa Pinckney. Roof, a self-identified white Supremacist, admitted to the murders of those now known as the “Emanuel Nine.”

Although Roof’s killing spree was contained to Mother Emanuel, the effects of his decisions that day are playing out in the legal system and continue to be felt by friends, families, courtrooms, clergy, and even the federal government. Several of those haunting effects are discussed here.

Church Under Troubled Water: Mother Emanuel AME

At least $4.5 million in donations poured into Mother Emanuel AME during the weeks following the shootings.1 Reverend Norvel Goff, who became the Church’s pastor after Reverend Pinckney’s murder, claims that all donations designated for the victims’ families that the Church received were forwarded to the Charleston Mother Emanuel Hope Fund and that the Fund was used in part to cover the victims’ funeral costs.2

In the months following the shooting, a civil lawsuit sought to enjoin the Church from distributing any donations until a full accounting could be conducted. The plaintiff, Arthur Hurd, asserted claims individually and on behalf of the estate of his wife, Cynthia, one of the Emanuel Nine.3 The lawsuit alleged a lack of transparency and disclosure of information regarding the donations the Church received after the shootings.4

Goff insists that he values openness and transparency, stating that “[t]he public has a right to know about our movements.”5 Dale Simmons, Jr., a Virginian whose father was killed in the shootings, expressed “the utmost confidence that the city and the church are going to be transparent.”6

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2 Id.
3 Id.
4 Id.
6 Knapp, supra note 1.
However, several other survivors, relatives, and their attorneys claim that informal requests made to Goff went ignored.7 A parishioner and former secretary to the late Reverend Pinckney says she lost her job at the Church after expressing concerns about the handling of the donations.8

In response to Hurd’s suit, the Church provided the requested accounting. On March 26, 2016, the parties agreed to dismiss the lawsuit without prejudice. It is unclear whether the parties entered into a settlement or whether the dispute has truly ended.

The Defamed Pastor: Reverend Norvel Goff

Goff has instituted a lawsuit of his own—against his former parishioners. He claims members of his former churches along the east coast defamed him with allegations of “poor financial oversight” in the heat of the dispute over accountings at Mother Emanuel.9

Members of Goff’s most recent church in Columbia, South Carolina, “contend their former pastor took out large mortgages against the church without proper permission while amassing federal and state tax liens that reached $200,000.”10 At least one of these mortgages “was used to purchase a four-bedroom, 4,068-square-foot house for Goff to use as a parsonage about 10 miles away from the church,” according to church records.11

Goff insists that he followed protocol, “left [that church] in good shape,” and was “more than accountable” during his time there as pastor.12

Goff’s successor pastor at another previous church in New York described that church as debt-ridden and filled with disgruntled members upon Goff’s departure. Additionally, Goff was sued and has failed to fully repay the estate of a deceased parishioner “who said she loaned him large sums of money.”13

Goff claims the money was a gift.14 He is adamant that his parishioner-opponents are exploiting the Emanuel Nine for their own purposes. “They’re using the moment. They have other motives,” he said.15

The Friend Turned Fellow Defendant: Joey Meek

Prior to the shooting, Roof voiced his desire to kill to his friend and roommate, 21-year-old Joey Meek. Rather than reporting Roof to the police, Meek chose to keep quiet.

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7 Hawes, supra note 5.
9 Id.
10 Id.
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
Meek and his relatives admit that “Roof spoke of carrying out mass violence in Charleston and starting a race war.”\textsuperscript{16} According to the FBI, Meek knew more specifics about Roof’s plan and then lied to federal agents after the shootings.\textsuperscript{17} Meek now faces up to eight years in federal prison for his alleged acts and omissions.\textsuperscript{18}

Meek’s trial was scheduled for June 27, 2016, before U.S. District Judge Richard Gergel.\textsuperscript{19} On April 29, 2016, Meek pled guilty to the federal charges against him.\textsuperscript{20} As a result, the eight-year-sentence Meek faces could be greatly shortened if he cooperates with state and federal authorities in prosecuting Roof.\textsuperscript{21} Meek is currently free on bail.\textsuperscript{22} Judge Gergel will not likely sentence him until after Roof’s trial, where Meek could be a key witness.\textsuperscript{23}

\textbf{The Catalyst of the Chaos: Dylann Roof}

As for Roof, his state court trial for murder, attempted murder, and firearms charges is scheduled for July 11, 2016.\textsuperscript{24} State prosecutors intend to seek the death penalty.\textsuperscript{25}

Roof’s federal trial date has not yet been scheduled because the government has not determined whether it will pursue the death penalty.\textsuperscript{26} Meanwhile, Federal Judge Gergel’s patience is fading.\textsuperscript{27} “We are getting to a point where we need to make a decision…There are victims here. They have a right to put this behind them.”\textsuperscript{28} Roof’s attorneys have indicated that Roof will plead guilty if the death penalty is off the table.\textsuperscript{29}


\textsuperscript{17} \textit{Id}.


\textsuperscript{19} Knapp, supra note 16.


\textsuperscript{21} \textit{Id}.

\textsuperscript{22} \textit{Id}.

\textsuperscript{23} \textit{Id}.

\textsuperscript{24} \textit{Id}.

\textsuperscript{25} \textit{Id}.

\textsuperscript{26} \textit{Id}.


\textsuperscript{28} \textit{Id}.


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Roof faces “33 federal counts, including hate crimes and the religious violations that qualify him for the ultimate punishment.” Attorney General Loretta Lynch explained that the federal charges cover aspects of the crimes that the separate, state court charges do not.

The Legal Loophole: Impunity and Immunity

In addition to Meek, other parties that potentially stood between Roof and his plans also failed to act. The FBI has openly admitted “to federal and state agencies’ errors that led to the purchase of a firearm” used in the shootings.

Pursuant to the 1993 Brady Act, the FBI conducts background checks for firearm sellers through the National Instant Criminal Background Check System (“NICS”). Often, individuals neither fail nor pass the NICS check—more research is needed. This triggers a three-day period after which the firearm can be sold to the customer if the FBI does not first issue a denial. This is how Roof successfully purchased the firearm. Roof neither failed nor passed the initial NICS check.

Roof had been arrested the previous month on a felony drug charge but had not been convicted. A felony conviction or proof of unlawful drug use or addiction are two potential reasons to deny sale of a firearm. Although Roof had not been convicted of the felony, he had admitted to drug possession in the arrest report.

Most unfortunately, “the examiner never saw this information because of a series of miscommunications with—and misidentifications of—the local law enforcement agencies.” Because of this, the three-day period passed without incident and the purchase was allowed.

It is unlikely, however, that any lawsuit will emerge from these missteps. Civil immunity shields the FBI and law enforcement officers from lawsuits based on discretionary actions absent plain incompetence or a knowing violation.

Conclusion

30 Knapp, supra note 27.
31 Id.
34 Cevallos, supra note 32.
35 Id.
36 Id.
37 Id.
38 Id.
39 Id.
40 Id.
41 Id.
42 Id.
43 Id.
It is doubtful that Roof considered any one of these varied consequences when he acted on his plan to kill. Regardless, his actions that day will continue to strain families, friends, communities and congregations, and will continue to play out in state and federal courtrooms. Only time will tell how far Roof’s crimes will reach.

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NEWS AND ANNOUNCEMENTS

Call for Article Submissions—We Need Authors!

The Litigation Committee’s quarterly newsletter provides young lawyers a unique opportunity to have articles published and distributed to thousands of other young lawyers across the country. If you are interested in submitting an article for publication in the Litigation Committee’s Summer 2016 newsletter, please submit a brief description of your proposed article topic by Friday, June 3, 2016, to Content Editor Ellie Neiberger (eneiberger@bmolaw.com) and Co-Chairs Andrew Atkins (aatkins@mcguirewoods.com) and Morgan Swing (mswing@cfblaw.com).

For article topics that are approved, authors must submit draft articles and author agreements by Friday, June 24, 2016. Articles should be on recent legal developments and 600 to 1,200 words in length. The form of author agreement is available here.

ABA YLD Awards of Achievement

The ABA YLD Awards of Achievement program is up and running! Applications are available now and information can be found here. This program is an opportunity for young lawyer organizations to submit their best projects for evaluation and recognition by a jury of their peers. Categories for awards include (1) Public Service Projects; (2) Bar Service Projects; (3) Diversity Projects; (4) Comprehensive Programming; and (5) Outstanding Newsletter.

Information about the winners will be disseminated widely and the winners will be recognized during the YLD Assembly at the ABA Annual Meeting in San Francisco. The deadline to submit applications is Wednesday, June 15, 2016. Please send any questions to Logan Murphy (logan.murphy@hwhlaw.com) and Tara Blasingame (tara.blasingame@hwhlaw.com).

2016 ABA Annual Meeting

The 2016 ABA Annual Meeting will be held August 4-9 in San Francisco. Section of Litigation events will be held from August 3-5. Information about the annual meeting and registration is available here. Click here to register for Section of Litigation events.