ABA RECENT DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION: ANNUAL REVIEW PANEL

Thursday, March 28, 2019, 3:00pm–5:00pm
YOU CAN’T PICK UP YOUR TOYS AND LEAVE


• Some, but not all, of the members opened new business with a third party doing the same thing at the same location, with no binding obligation to pay original business for use of assets

• DISSOLVED
NO GOOD DEED GOES UNPUNISHED


• Calculation of “net worth” does not include goodwill or other intangible assets
#MeToo and Business Divorce


- “any shareholder of any corporation[] should know that a female shareholder reasonably expects to be treated with equal dignity and respect as male shareholders forming the majority”

- OPPRESSION FOUND; BUYOUT ORDERED
SELF HELP IS HARD TO DO

- Defendants amend LLC agreements to remove plaintiff as managing member and permit capital calls; make capital call and impose note on plaintiff for capital call
- MOTION TO DISMISS – DENIED
HOBGOBLINS OF LITTLE MINDS CAN BE GOOD FOR YOU


- Corporation’s lack of formality in decision-making and record-keeping made directors emails fair game in books and records action by stockholder.
WHAT’S FAIR IS FAIR?


• Expelled member entitled to fair value of interest in LLC per default rule in Act instead of capital account
Recent Updates in Trial Practice

Chelsea Mikula, Tucker Ellis LLP
Gina Ferrari, Seyfarth Shaw LLP
Honorable Elihu M. Berle
Informal Court Conferences

- Pleadings
  - Demurrers
  - Motions to dismiss
  - Judgment on the pleadings
- Discovery
  - Informal discovery Conferences
- Benefits
  - Cost
  - Early resolution
- Downside?
Innovations in the Courtroom

• Jurors taking notes
• Jury questionnaires
• Jurors taking notes (on IPad)
• Preliminary jury instructions before opening statements
• Interim attorney statements by counsel at junctures during trial
• Interim jury discussions during trial
• Copies of instructions for all jurors
• Trial time limits
Jury Selection

• “Almost every case has been won or lost when the jury is sworn” – Clarence Darrow

• Social media
  • Free information on prospective jurors like relationship status, political affiliation, educational background, employment likes and interests
  • Zealous advocacy, duty to investigate, privacy, impartial jury and other ethical considerations

• Millennials are now the largest generation
  • Many jury pools are 50% millennials
  • Only 19% of millennials believe people can be trusted
Jury Selection

- Size of Verdicts
  - $35 million to a quadriplegic man battling his insurance company after being hit by a drunk driver
  - $1 billion in a record verdict by a 12-person Georgia jury to a young rape victim
  - $150 billion to the family of a child who was horrifically burned
ABA Recent Developments in Business and Corporate Litigation: Annual Review Panel

Thursday, March 28, 2019, 3:00pm-5:00pm

TRIAL PRACTICE

Traditional approaches to case management and trials are changing as our society and technology evolve. New technology does not always result in efficiencies, and generational differences affect how litigation is managed and cases are presented at trial. This Panel of practitioners and a jurist will address these issues in roundtable format. The Panel will focus on multiple phases of litigation, including early case resolution, motion practice, jury selection, trial procedures, and verdict trends. What worked for docket management in the recent past is proving to be inefficient. Some courts are attempting to address judicial economy woes with more electronic filing options and less interpersonal interaction. Others are considering informal conferences early in the case to reduce motion practice and discovery disputes. The Panel will discuss how a return to in-person and/or informal conferences with the trier of fact may be the solution to promote judicial economy in a world where electronic communications and filings overwhelm practitioners and the court. Technology and generational preferences also influence how attorneys prepare for jury selection and trial. The use of technology in presenting evidence and ideas, and in gathering and culling information during trial, is not uniform. The Panel will discuss ethical duties related to accessing juror social media accounts during voir dire, how to capture the attention of younger jurors (and whether and when traditional demonstrative methods are still effective), and how younger generations and frequent public dissemination of legal issues via electronic media drives higher verdicts. Finally, the Panel will discuss the pros of requesting alternative procedures during trial related to, among other practices, the use of questionnaires, iPads for juror notes, mini-openings and statements of counsel at various times in the proceedings, and the distribution of jury instructions at various times in the proceedings.
INTERNATIONAL LITIGATION

Stephanie Lapierre and Steven Barber will guide a roundtable discussion on recent developments in international litigation. They will address recent case law pertaining to auditor liability and piercing of the corporate veil, with a special emphasis on a comparative analysis of Canadian and American law on these subjects. Ms. Lapierre, a leading Canadian attorney, will address *Deloitte & Touche v. Livent Inc. (Receiver Of)*, [2017] 2 SCR 855, 2017 SCC 63 (“Livent”) and subsequent case law and commentary pertaining to auditor liability. Mr. Barber, a leading U.S. litigator, will compare the liability framework in Livent to the various auditor liability regimes employed throughout the United States. Ms. Lapierre will also address *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472 (“Chevron”), a recent decision of the Court of Appeal for Ontario which addressed considerations surrounding the lifting of the corporate veil in the context of an attempted execution of a foreign judgment. Mr. Barber will compare the holding of *Yaiguaje* to recent jurisprudence in the United States pertaining to the doctrine of piercing the corporate veil.
BUSINESS DIVORCE

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CRIMINAL AND ENFORCEMENT LITIGATION

Fourth Amendment

- Cell-Site Records Are “Searches”/Carpenter v. United States, 138 S. Ct. 2206 (2018): The Supreme Court found that historical, time-stamped cell-site location information (“CLSI”) is so “detailed, encyclopedic, and effortlessly compiled” that it “provides an intimate window into a person’s life,” revealing not only particular movements, but intricate, private personal information derived therefrom. The Supreme Court found that, as a result of this “near-perfect surveillance,” when the government accessed Carpenter’s CLSI, it invaded his reasonable expectation of privacy in the “whole of his physical movements” and thus violated the Fourth Amendment’s protection against unreasonable searches and seizures. The Supreme Court also concluded that, in the absence of any applicable exceptions, the government must obtain a search warrant supported by probable cause before acquiring CLSI.

Fifth Amendment

- Double Jeopardy Clause/Currier v. Virginia, 138 S. Ct. 2144 (2018): The Supreme Court held that defendants’ consent to splitting the charges against him into two trials precluded his argument that his second trial violated the Fifth Amendment’s Double Jeopardy Clause. The Supreme Court relied on several prior cases, which “teach that consenting to two trials when one would have avoided a double jeopardy problem precludes any constitutional violation associated with holding a second trial.” The Supreme Court split, however, on a related question of whether the Fifth Amendment’s double jeopardy ban also incorporates the doctrine of issue preclusion, commonly deployed in civil cases. A four-Justice plurality (consisting of those in the majority minus Justice Kennedy) further stated that “issue preclusion principles should have only guarded application . . . in criminal cases.” Because the Double Jeopardy Clause “speaks not about prohibiting the relitigation of issues or evidence but offenses,” the plurality reasoned that the Supreme Court should not read issue preclusion into the Clause, except perhaps where the issues at two trials are so closely related to each other they would be “tantamount to the same offense.” A four-Justice dissent—comprising Justices Ginsburg, Breyer, Sotomayor, and Kagan—disagreed, reasoning that the Double Jeopardy Clause shields “the issue-preclusive effect of an acquittal.” According to the dissent, Currier’s consent to two trials did not prevent him from arguing that issue preclusion barred evidence at his second trial of the burglary of which he was acquitted in his first trial.

Sixth Amendment

- Defendant’s Right to Admit or Contest Guilt/McCoy v. Louisiana, 138 S. Ct. 1500 (2018)
- McCoy v. Louisiana, 138 S. Ct. 1500 (2018): The Supreme Court of the United States granted certiorari to decide the issue of “whether it is unconstitutional to allow defense counsel to concede guilt over the defendant’s intransient and unambiguous objection.”
In a 6—3 majority opinion authored by Justice Ginsburg, the Supreme Court reversed, reasoning that the Sixth Amendment guarantees a criminal defendant “the Assistance of Counsel for his defense.” Under the Sixth Amendment, a capital “defendant has the right to insist that counsel refrain from admitting guilt, even when counsel’s experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.” Because the defense itself belongs to the defendant, not his counsel, it is the defendant’s prerogative to decide the objective of his defense. This includes the autonomy to assert innocence when facing the death penalty, no matter how small the chance of exoneration. While counsel may make final trial-management decisions related to achieving the defendant’s objective, it is ultimately the capital defendant’s right to decide whether to concede guilt. The Supreme Court further determined that denying McCoy this right was a “structural” error, because it “affect[ed] the framework within which the trial proceeds” as opposed to “simply an error in the trial process itself.” Accordingly, a defendant like McCoy, whose right was denied, was entitled to a new trial without having to show prejudice.

Federal Sentencing Guidelines

- Federal Sentencing Guidelines

Mandatory Victims Restitution Act

- *Lagos v. United States*, 138 S. Ct. 1684 (2018). In a wire fraud case, the Supreme Court reversed the Fifth Circuit’s broad interpretation of the Mandatory Victims Restitution Act and held instead that recoverable expenses under the Act are limited to those expenses incurred in “government investigations and criminal proceedings” and do not include restitution of expenses related to private investigations or non-criminal proceedings.