This May Be Us…But It Doesn’t Have to Be

The Emmy®-award winning and hit television show This Is Us pushes its audience to confront serious issues about life, love, family, and race. The protagonists, Jack and Rebecca Pearson, are a Caucasian middle-class couple who suffer tragedy when one of their triplets dies during childbirth. That same day, an abandoned baby left at a local fire station eventually makes his way to the same hospital nursery, only to lie beside the two surviving Pearson babies. He is African American; he was born to a junkie mother and father who abandoned him. The Pearsons take him into their arms and home with intentions of filling the hole left in their hearts by the baby they lost. Through This Is Us, the audience watches a blended family become one, break apart, learn, grow, love, hurt, and heal.

In the second season episode “The Most Disappointed Man,” the audience faces a twisted reality about adopting across racial barrier lines. When Jack and Rebecca initially go before the Family Court seeking to adopt the baby, the Hon. Judge Ernest Bradley continues the matter three weeks without explanation.

The following article also ran in a prior issue of the TIPS Employment and Labor Law Committee Newsletter.

Read more on page 12

In This Issue

• This May Be Us…But It Doesn’t Have to Be  1
• Injunction Bonds Are An Important Yet Overlooked Part of Non-Compete Litigation  7
• International Service of Process by Registered Mail  8
Chairs Message

Dear Members:

Welcome to this very special joint edition of the ABA TIPS Business Litigation Committee and International Law Committee Newsletters! This issue covers both new and timeless developments, ranging from the use of mail for service of process across borders, unconscious bias, and the importance of paying attention to injunction bonds in non-compete litigation. We hope our members will find these articles interesting and relevant, either to your practice, or simply as a way to keep abreast of key issues.

Both of our committees are on the lookout for submission for our upcoming newsletters. If you are interested in writing for either the Business Litigation Committee or the International Law Committee, please do get in touch. We have included our email addresses below.

Thank you to our contributors for keeping us all up-to-date on a variety of subjects and for participating in this cooperative effort between committees. Thank you also to all members who have connected us with authors and made it possible for us to share their work with our committees. And, as always, thank you to the ABA staff – their hard work makes these issues possible.

Thank you for your participation in the BLC, the ILC (or both!).

Andy Cao  
Chair, Business Litigation Committee  
acao@mcglinchey.com

Zascha Blanco Abbott  
Chair, International Law Committee  
zba@lgplaw.com

Connect with  
Business Litigation website

Connect with  
International Law website

Stay Connected  

We encourage you to stay up-to-date on important Section news, TIPS meetings and events and important topics in your area of practice by following TIPS on Twitter @ABATIPS, joining our groups on LinkedIn, following us on Instagram, and visiting our YouTube page! In addition, you can easily connect with TIPS substantive committees on these various social media outlets by clicking on any of the links.

americanbar.org/tips
null
<table>
<thead>
<tr>
<th>Name</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marcy Greer</td>
<td>Alexander Dubose et al 515 Congress Ave, Ste 2350 Austin, TX 78701 (512) 716-8310 Fax: (512) 482-9303 <a href="mailto:mgreer@adlitlaw.com">mgreer@adlitlaw.com</a></td>
</tr>
<tr>
<td>Corey Hinshaw</td>
<td>Watkins &amp; Eager PLLC 400 E Capitol St, Ste 300 Jackson, MS 39201-2610 (601) 965-1822 Fax: (601) 965-1901 <a href="mailto:chinhinshaw@watkineager.com">chinhinshaw@watkineager.com</a></td>
</tr>
<tr>
<td>Sara Hirshon</td>
<td>Verrill Dana LLP 1 Bost on Pi, Ste 2330 Boston, MA 02108-4473 (617) 309-2600 <a href="mailto:sarahhirshon@hotmail.com">sarahhirshon@hotmail.com</a></td>
</tr>
<tr>
<td>C Hoffman</td>
<td>Kitchens Kelley Gaynes PC 5555 Glen Rdg Conn NE, Ste 800 Atlanta, GA 30342-4728 (404) 237-4100 <a href="mailto:jhoffman11@gmail.com">jhoffman11@gmail.com</a></td>
</tr>
<tr>
<td>Kermit Kendrick</td>
<td>Burr &amp; Forman LLP 420 20th St N, Ste 340 Birmingham, AL 35203-3284 (205) 458-5393 Fax: (205) 244-5665 kkendr <a href="mailto:ic@burr.com">ic@burr.com</a></td>
</tr>
<tr>
<td>Anthony Kuchulis</td>
<td>Barran Liebman LLP 601 SW 2nd Ave, Ste 2300 Portland, OR 97204-3159 (503) 276-2199 <a href="mailto:akuchulis@barran.com">akuchulis@barran.com</a></td>
</tr>
<tr>
<td>Chantel Lafrades</td>
<td>1840 Trym St. Hayward, CA 94541-5430 (415) 510-4839 <a href="mailto:Chantel.Lafrades@gmail.com">Chantel.Lafrades@gmail.com</a></td>
</tr>
<tr>
<td>Troy Larkin</td>
<td>11366 N Silver Pheasant Loop, Loop Oro Valley, AZ 85737 (520) 909-1769 Fax: (949) 607-5850 <a href="mailto:troy.e.larkin@gmail.com">troy.e.larkin@gmail.com</a></td>
</tr>
<tr>
<td>David McNeal</td>
<td>McNeal Law Group PLLC 2950 North Loop W, Ste 500 Houston, TX 77092-8830 (832) 819-3281 dmcneal@mcm eallawgroup.com</td>
</tr>
<tr>
<td>James Myrick</td>
<td>Womble Bond Dickinson (US) LLP 5 Exchange St Charleston, SC 29401-2530 (843) 720-4643 Fax: (843) 723-7398 <a href="mailto:jim.myrick@wbd-us.com">jim.myrick@wbd-us.com</a></td>
</tr>
<tr>
<td>Michael Pan ter</td>
<td>2254 N Lakewood Ave Chicago, IL 60614-3163 (312) 375-5444 panterm@kitchenle gan.com</td>
</tr>
<tr>
<td>David Pardue</td>
<td>Owen Glaton Egan Jones &amp; Sweeney LLP 1580 Peachtree St NE, Ste 3000 Atlanta, GA 30309-3531 (404) 566-4110 dpardue@owen glaton.com</td>
</tr>
<tr>
<td>George Parker</td>
<td>Bradley Arant Boult Cummings LLP 445 Dexter Ave, Ste 9075 Montgomery, AL 36104-3866 (334) 956-7607 Fax: (334) 956-7701 gparker@brad ley.com</td>
</tr>
<tr>
<td>Randel Patty</td>
<td>McGlnchey Stafford PLLC 301 Main St, 14th Fl Baton Rouge, LA 70801 (225) 383-9000 Fax: (225) 343-3076 dpatty@mcglinch ey.com</td>
</tr>
<tr>
<td>Dainen Penta</td>
<td>433 Belmont Ave E, Apt 101 Seattle, WA 98102 (206) 298-6303 <a href="mailto:dnplaw@gmail.com">dnplaw@gmail.com</a></td>
</tr>
<tr>
<td>Lisa Pittman</td>
<td>Tannenbaum, Trost &amp; Burk, LLC 4155 E Jewell Ave, Ste 1018 Denver, CO 80222 (303) 872-8226 <a href="mailto:lisapittman@gmail.com">lisapittman@gmail.com</a></td>
</tr>
<tr>
<td>Peter Reyes</td>
<td>MN Court of Appeals 25 Rev Dr Martin Luther King Blvd, Ste 311 Saint Paul, MN 55155 (651) 297-1008 Fax: (612) 339-4181 <a href="mailto:peter.reyes@courts.state.mn.us">peter.reyes@courts.state.mn.us</a></td>
</tr>
<tr>
<td>Lesley Reynolds</td>
<td>2548 N Wakefield St Arlington, VA 22207-4127 (202) 414-9282 <a href="mailto:leylreynolds@creedemith.com">leylreynolds@creedemith.com</a></td>
</tr>
<tr>
<td>Rachel Reynolds</td>
<td>Lewis Brisbois Bisgaard &amp; Smith LLP 111 Third Ave, Ste 2700 Seattle, WA 98101 (206) 436-2020 Fax: (206) 386-5130 rach el.reynolds@lewisbrisboi s.com</td>
</tr>
<tr>
<td>Ronald Rich man</td>
<td>Bu llivant House r Bailey PC 101 Montgomery St, Ste 2600 San Francisco, CA 94104 (415) 352-2722 Fax: (415) 352-2701 <a href="mailto:ron.richman@bullivant.com">ron.richman@bullivant.com</a></td>
</tr>
<tr>
<td>Anthony Severino</td>
<td>Bajo Cuva Cohen &amp; Turkel PA 100 N Tam pa St, Ste 1900 Tampa, FL 33602-5853 (813) 443-2199 anthony.severino@baj oucova.com</td>
</tr>
<tr>
<td>Sierra Spitz er</td>
<td>Schwartz Se merdjian Caul ey &amp; Moot LLP 101 W Broadway, Ste 810 San Diego, CA 92101-8229 (619) 236-8821 Fax: (619) 236-8827 <a href="mailto:sierra@escmeigal.com">sierra@escmeigal.com</a></td>
</tr>
<tr>
<td>Katriel Statman</td>
<td>1301 McKinney St, Ste 3700 Houston, TX 77010 (713) 210-7443 kstatman@bak erdondelson.com</td>
</tr>
<tr>
<td>Patrick Sweeney</td>
<td>55 Campau Ave NW, Ste 300 Grand Rapids, MI 49503 (616) 854-2444 pe wweeney@ho adesmckee.com</td>
</tr>
<tr>
<td>Anna Tejada</td>
<td>Kaufman Dolovich &amp; Voluck LLP 21 Main St, Ste 251 Hackensack, NJ 07601 (201) 708-8209 <a href="mailto:atejada@kdvlaw.com">atejada@kdvlaw.com</a></td>
</tr>
<tr>
<td>Frank Tiscione</td>
<td>Rivkin Radler LLP 926 Rvr Plz Uniondale, NY 11556-3823 (516) 357-3000 EXT 3315 <a href="mailto:frank.tiscione@rivkin.com">frank.tiscione@rivkin.com</a></td>
</tr>
<tr>
<td>Alexander Valdes</td>
<td>Winstead PC 401 Congress Ave, Ste 2100 Austin, TX 78701 (512) 370-2842 <a href="mailto:avaldes@winstead.com">avaldes@winstead.com</a></td>
</tr>
<tr>
<td>Richard Vanderslice</td>
<td>Richard L Vanderslice PC 1445 Snyder Ave Philadelphia, PA 19145-2317 (215) 667-8070 Fax: (215) 279-9229 <a href="mailto:rlv@vanderslicelaw.com">rlv@vanderslicelaw.com</a></td>
</tr>
<tr>
<td>Michael Vercher</td>
<td>Christian &amp; Small LLP 505 20th St N, Ste 1800 Birmingham, AL 35203-4633 (205) 250-6621 Fax: (205) 328-7234 <a href="mailto:mavercher@csattorneys.com">mavercher@csattorneys.com</a></td>
</tr>
<tr>
<td>Stacey Wang</td>
<td>Holland &amp; Knight LLP 400 S Hope St, 8th Fl Los Angeles, CA 90071-2809 (213) 896-2480 Fax: (213) 896-2450 <a href="mailto:stacey.wang@hklaw.com">stacey.wang@hklaw.com</a></td>
</tr>
<tr>
<td>James Weiss</td>
<td>Ellis &amp; Winters 4131 Parklake Ave, #400 Raleigh, NC 27612-2309 (919) 865-7000 Fax: (919) 865-7010 jamie.weiss@ellis winters.com</td>
</tr>
<tr>
<td>Gabriel White</td>
<td>The Utah Trial Lawyers, LLC 10 W 100 S, Ste 450 Salt Lake City, UT 84101-1556 (801) 915-6152 <a href="mailto:gabriel.white@utahtriallawyers.com">gabriel.white@utahtriallawyers.com</a></td>
</tr>
<tr>
<td>Janika White</td>
<td>The Walter Bailey Law Firm 22 N Front St, Ste 1060 Memphis, TN 38103-2162 (901) 576-8702 Fax: (901) 575-8705 <a href="mailto:attywhite@gmail.com">attywhite@gmail.com</a></td>
</tr>
</tbody>
</table>
## International Law | Member Roster

### Chair
Zascha Abbott  
Liebler, Gonzalez, & Portuondo  
Miami, FL 33234  
(305) 610-2843  
zba@lgplaw.com

### Chair-Elect
Katziel Statman  
1301 McKinney St, Ste 3700  
Houston, TX 77010  
kstatmani@bakerdonelson.com

### Immediate Past Chair
Robert Caldwell  
Kolesar & Leatham  
400 S Rampart Blvd, Ste 400  
Las Vegas, NV 89145  
(702) 362-7800  
Fax: (702) 362-9472  
rcaldwell@klnevada.com

### Diversity Vice-Chair
Vartan Saravia  
260 Cousteau Pl, Ste 210  
Davis, CA 95618-7786  
vartan.saravia@hmclause.com

### Membership Vice-Chair
Stacey Wang  
Holland & Knight LLP  
400 S Hope St, 8th Fl  
Los Angeles, CA 90071-2809  
(213) 896-2480  
Fax: (213) 896-2450  
stacey.wang@hklaw.com

### Technology Vice-Chairs
Timothy Briggs  
27 Julian Ln, Apt 101  
Stuarts Draft, VA 24477-3076  
briggs.t@law.wlu.edu

Gary Zhao  
SmithAmundsen LLC  
150 N Michigan Ave, Ste 3300  
Chicago, IL 60601-6004  
(312) 894-3377  
Fax: (312) 894-3210  
ghao@salawus.com

### Council Representative
John McMeekin  
Rawle & Henderson LLP  
1339 Chestnut St, Fl 16  
Philadelphia, PA 19107-3597  
(215) 370-9626  
Fax: (215) 563-2583  
jmcmmeekin@rawle.com

### Scope Liaison
Denise Di Mascio  
Farmers Insurance Exchange  
3111 Camino Del Rio N, Ste 700  
San Diego, CA 92108-5727  
(619) 584-3366  
Fax: (619) 280-4588  
denise.dimascio@farmers.com

### Law Student Vice-Chair
Annette Dohanics  
790 Pattison St Ext, Box 161  
Evans City, PA 16033-3320  
adohanics@gmail.com

### Vice-Chairs
Randy Aliment  
Lewis Brisbois Bisgaard & Smith LLP  
1111 3rd Ave, Ste 2700  
Seattle, WA 98101  
(206) 876-2950  
Fax: (206) 436-2030  
randy.aliment@lewisbrisbois.com

Cynthia Antonucci  
Harris Beach PLLC  
100 Wall St, Fl 23  
New York, NY 10005-3704  
(212) 313-5410  
Fax: (212) 687-0659  
cantonucci@harrisbeach.com

Kyle Black  
Lewis Brisbois Bisgaard & Smith LLP  
429 Fourth Ave, Ste 805  
Pittsburgh, PA 15219  
(412) 250-7304  
kyle.black@lewisbrisbois.com

Daina Bray  
7935 Buffalo Rd  
Nashville, TN 37221  
(713) 492-6219  
Fax: (508) 744-2009  
dainah@mercyforanimals.org

Christopher DePhillips  
Porzio Bromberg & Newman PC  
100 Southgate Pkwy  
Morristown, NJ 07962  
(973) 889-4110  
dephillips@porziols.com

Paul Dominick  
Nexsen Pruet LLC  
205 King St, Ste 400  
Charleston, SC 29401-3159  
(843) 577-9440  
Fax: (843) 414-8203  
pdominick@nexsenpruet.com

Barbara Gislason  
Law Office of Barbara J Gislason  
7362 University Ave NE, Ste 120  
Fridley, MN 55432-3152  
(763) 572-9297  
Fax: (763) 571-1576  
barbara@gislasonlaw.com

Perry Granof  
1147 Longmeadow Ln  
Glencoe, IL 60022-1022  
(847) 242-9932  
pganof@granofinternational.com

Katherine Hessler  
Lewis & Clark Law School  
10015 SW Terwilliger Blvd  
Portland, OR 97219-7788  
(503) 766-9655  
Fax: (503) 768-6671  
khessler@lclark.edu

William Kelly  
18 Irvine Rd  
Old Greenwich, CT 06870-1808  
(914) 798-5475  
Fax: (914) 798-5401  
wkelly@gerberciano.com

Linda Murnane  
1801 McClellan Rd  
Xenia, OH 45385  
(401) 464-1876  
kumurnane98@aol.com

Christopher Nolan  
Holland & Knight LLP  
31 W 52nd St, Fl 11  
New York, NY 10019-6111  
(212) 513-3307  
Fax: (212) 341-7277  
chris.nolan@hklaw.com

Shannon O’Malley  
Zelle LLP  
901 Main St, Suite 4000  
Dallas, TX 75202  
(214) 742-3000  
Fax: (214) 760-8994  
somalley@zelle.com

Giuseppe Rosa  
Giuseppe L Rosa Esq & Associated Counsels  
19 B Via Carrozza  
Colognola Al Colli, VR 37030  
39(0)35234529  
Fax: (39)(0)58031040  
girosa@girosalaw.com

Grace Steinhurst  
1114 Camino La Costa, Apt 2045  
Austin, TX 78752-3945  
gracesteinhurst@utexas.edu

Susan Vargas  
King & Spalding LLP  
633 W 5th St, Ste 1700  
Los Angeles, CA 90071  
(213) 443-4346  
Fax: (310) 460-5601  
vargasas@kslaw.com

Mark Wojcik  
The John Marshall Law School  
315 S Plymouth Ct  
Chicago, IL 60604-3968  
(312) 9872931  
Fax: (312) 427-9974  
mwojcik@jmls.edu
Join us for the premier CLE conference for insurance, defense, corporate, and plaintiffs attorneys.

TIPS SECTION CONFERENCE
May 1-4, 2019 | The Westin New York at Times Square | New York, NY

LEARN:
CLE programs from distinguished panelists including prominent judges and leading in-house and corporate counsel.

NETWORK:
Expand your circle at our complimentary nightly networking receptions.

CELEBRATE:
Entertaining social events in the Big Apple.

JOIN:
Become involved with our over 30 practice-specific committees for professional development and leadership opportunities.

ENJOY:
Explore New York City with colleagues, new and old.
Injunction Bonds Are An Important Yet Overlooked Part of Non-Compete Litigation

Introduction

Your favorite client calls you in a panic. He just received legal documents, including one signed by a judge, forbidding him from continuing his work. You quickly learn that your client’s former employer obtained a temporary restraining order against him to enforce a non-compete agreement.

At the preliminary injunction hearing, the judge sides with the employer and sets an injunction bond based on a number plucked seemingly out of thin air. You give little thought to the bond amount because you are preoccupied with the injunction and because—in your estimation—the bond is the plaintiff’s problem.

Injunctive relief is an integral part of non-compete and trade secret litigation. Injunction bonds are a requisite for injunctive relief. Unfortunately, many lawyers get caught up in the substantive part of the injunction and give only passing consideration to the amount of the injunction bond. This is a mistake because injunction bonds can set the damages limit for any later wrongful injunction claim. Failing to persuade the court to set an adequate bond may deprive your client of the ability to recover for the damages sustained from a wrongful injunction.

Non-compete agreements and injunctions

Injunction practice is particularly relevant to non-compete litigation. A typical non-compete agreement bars a former employee from working in competition with the former employer, in a specific geographic area for a predetermined period of time. Injunctions enforcing non-compete agreements often severely curtail or even eliminate the enjoined party’s ability to earn a living or conduct business. If the injunction cuts off the client’s income and hampers his ability to finance the litigation, the injunction phase of the case may be the only phase.

Additionally, because many non-compete agreements have durations of one to two years, the length of pretrial litigation often means that the preliminary injunction is nearly as effective as ultimate relief. Because of this, defeating a non-competition agreement after two years of litigation can be a pyrrhic victory.

Wrongful injunctions

Federal courts recognize a cause of action for wrongful injunction. A claim for wrongful injunction requires (1) wrongful issuance; (2) a bond; and (3) damages.

Read more on page 15
International Service of Process by Registered Mail

The international service of process by registered or certified mail, return receipt requested, is a viable option for serving defendants in many countries around the world. Rule 4(f)(2)(C) of the Federal Rules of Civil Procedure allows service by mail, unless the law of the foreign country prohibits such service.

The United States is party to two treaties that deal with international service of process: the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the “Hague Service Convention”) and the Inter-American Service Convention with its Additional Protocol (the “Inter-American Service Convention”). The Hague Service Convention was opened for signature on November 15, 1965 in The Hague, Netherlands. It now has 73 state parties. The Inter-American Service Convention was opened on January 30, 1975 in Panama. It has 13 state parties.

The U.S. Supreme Court recently reviewed the question of whether the Hague Service Convention allows service of process by registered mail in the case of Water Splash, Inc. v. Menon, 137 S. Ct. 504 (2017).

The Supreme Court, in a unanimous decision (with the exception of Justice Gorsuch, who did not participate in the case), ruled that the Hague Service Convention does not prohibit service of process by registered mail. Resolving a split among the federal circuit courts, the Court held that Article 10(a) of the Hague Service Convention allows service of process by mail so long as (1) the state where process was to be served did not formally object to the service by mail when it ratified the Hague Service Convention, and (2) service by mail is authorized under otherwise-applicable law.

Water Splash, Inc., a company producing aquatic playground systems, sued its former employee, Tara Menon, in Texas state court, alleging that she had started working for a competitor while she was still employed by Water Splash. Because the former employee lived in Canada, Water Splash got permission from the trial court to serve her in Canada by registered mail. After a default judgment was entered in favor of Water Splash, the former employee moved to vacate the judgment on the ground that she had not been properly served. The trial court refused to vacate the default judgment but the Texas Court of Appeals reversed, holding that the Hague Service Convention prohibits service of process by mail. The Texas Supreme Court denied discretionary review and the U.S. Supreme Court granted certiorari to resolve a split among the federal circuit courts. The Fifth and Eighth Circuits prohibited service by mail while the Second and Ninth Circuits allowed it.

Mark E. Wojcik

Mark E. Wojcik is a professor at The John Marshall Law School in Chicago. He also teaches International Civil Litigation in Switzerland at the University of Lucerne Faculty of Law. This article was originally published in the Spring 2018 issue of the International Law News, published by the ABA Section of International Law.
The issue before the U.S. Supreme Court turned on Article 10(a) of the Hague Service Convention, which states that unless the state of destination objected, the Convention would not interfere with “the freedom to send judicial documents, by postal channels, directly to persons abroad.” Articles 10(b) and 10(c) of the Convention did not address the ability “to send judicial documents” but “to effect service of judicial documents” by judicial officers or other officials. By using “send” rather than “effect service” in the provision addressing service by registered mail, did the Hague Service Convention prohibit sending documents for the purpose of service of process?

Justice Gorsuch did not take part in the case, and Justice Alito wrote the otherwise unanimous opinion finding that the Hague Service Convention did not prohibit service by mail if the receiving state has not objected to service by mail and if service by mail is authorized under otherwise-applicable law.

The Supreme Court began its analysis with familiar cannons of construing treaties, namely that the court would look to the treaty’s text and the context in which the words were used. The Court found that there was no apparent reason why using the word “send” instead of “serve” would exclude the transmission of documents for the purpose of service. Indeed, the Court found it would be odd if a treaty known as the Hague Service Convention would exclude the service of documents. The Court rejected the former employee’s argument that the Hague Service Convention did not authorize the service of process but only the service of “post-answer judicial documents.” Because the ordinary meaning of the word “send” was broad enough to include the transmission of any judicial document, the Supreme Court found that the text and structure of the Hague Service Convention indicated that Article 10(a) encompassed service by mail.

The Court also considered what it called “[t]he only significant counterargument” that unlike other provisions of the Hague Service Convention that used the word “service,” Article 10(a) should have a different meaning because it did not use that word. The Court found that the argument failed because of the context in which the written words were used, that the word “send” was broader than “serve,” and that the equally-authentic French version of the Hague Service Convention used the world adresser, which has consistently been interpreted as meaning service or notice. Even if the term was ambiguous, the Court noted that it could then “look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.” These additional tools of treaty interpretation resolved any ambiguity in favor of allowing service by mail.

It also mattered as to whether the receiving country objected to service by mail. The Supreme Court also noted that when Canada ratified the Hague Service Convention, it “[did] not object to service by postal channels.” The Court also noted
that other countries, such as the Czech Republic (now officially known as Czechia) did object to service by mail. If a country objected to service by mail, then process could not be served by mail.

The Supreme Court concluded that “the traditional tools of treaty interpretation unmistakably demonstrate that Article 10(a) encompasses service by mail.” The Court emphasized that the Hague Service Convention did not affirmatively authorize service by mail, but that so long as the receiving state had not objected when ratifying the treaty, the Hague Service Convention “[did] not ‘interfere with . . . the freedom’ to serve documents through postal channels.” Service by mail would therefore be permissible under two conditions: (1) that the receiving state had not objected to service by mail; and (2) that service by mail was authorized under otherwise-applicable law.

Because the Texas Court of Appeals did not consider whether Texas law authorized service by mail, the Supreme Court vacated the Texas decision and remanded for that court to consider whether Texas law authorized service by mail.

The Supreme Court’s decision may provide a useful roadmap for how the Court will interpret treaties and other international agreements. The Supreme Court did not cite the Vienna Convention on the Law of Treaties, which includes several provisions on the interpretation of treaties. (Although many U.S. courts and federal government agencies follow and cite the Vienna Convention on the Law of Treaties, the United States has only signed and not yet ratified that “treaty on treaties.”) The Supreme Court’s decision also does not cite the rules on treaty interpretation found in the Restatement (Third) of the Foreign Relations Law of the United States.

The Hague Service Convention has been ratified by 73 countries. Practitioners can learn more about the Convention at the website of the Hague Conference on Private International Law, including updated information on which countries have filed reservations to service by mail. The website, www.hcch.net, also includes model forms, practical operation documents, and information on seminars on the Hague Service Convention. Another fantastic resource for lawyers is the International Judicial Assistance page on the U.S. State Department Website. That website, https://travel.state.gov/content/travel/en/legal-considerations/judicial.html, includes country-specific information not only on service of process but also on obtaining evidence, enforcing judgments, authentications and apostilles, and other Countries and jurisdictions that have not objected to service by mail are Albania, Andorra, Antigua and Barbuda, Armenia, the Bahamas, Barbados, Belarus, Belgium, Belize, Bosnia and Herzegovina, Botswana, Canada, Colombia, Costa Rica, Cyprus, Denmark, Estonia, Finland, France, Hong Kong (China), Iceland, Ireland, Israel, Italy, Japan, Kazakhstan, Luxembourg, Macau (China), Malawi, Morocco, the Netherlands, Pakistan, Portugal, Romania, St. Vincent and the Grenadines, the Seychelles, Spain, Sweden, the United Kingdom, and the United States.
Countries that have objected to service by mail are Argentina, Bulgaria, the People’s Republic of China (except for Hong Kong and Macau), Croatia, Czechia (previously known as the Czech Republic), Egypt, Germany, Greece, Hungary, India, Kuwait, Lithuania, Malta, Mexico, the Republic of Moldova, Monaco, Montenegro, Norway, Poland, the Russian Federation, San Marino, Serbia, Slovakia, South Korea, Sri Lanka, Switzerland, Turkey, Ukraine, and Venezuela.

Some other countries, such as Australia, Latvia, Slovenia, and Vietnam, have filed “qualified opposition” to service by mail.

Lawyers looking to serve parties in Argentina, Brazil, Chile, Colombia, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela should note that the Inter-American Service Convention and its Additional Protocol also do not expressly allow service by mail. But when ratifying the Hague Service Convention, Argentina, Mexico, and Venezuela each objected to service by mail. Colombia did not object to service by mail. The other nations are not parties to the Hague Service Convention.

Even where service by mail is not expressly prohibited, lawyers should consider what effect such service might have when later trying to enforce a U.S. judgment in that other country. If service was made on a foreign party in violation of local law, it will likely be impossible to enforce a U.S. judgment against that party.

New Insurance Law Books from TIPS

Order by email
orders@americanbar.org

Order online
www.ShopABA.org
Judge Bradley (played by actor Delroy Lindo) is an African-American man. Without pause while in chambers, he bluntly tells the Pearsons,

“I don't believe that child belongs in your home. That child belongs with a black family Mr. and Mrs. Pearson. How else will he see himself? Understand who he is?”

He remains unconvinced about their suitability to raise that child and prefers the child go to a foster home until a “suitable” family can adopt him and explains that his opinion will not change. By that, he meant a black child should be with a black family.

When pressed for answers from Jack, Judge Bradley later explains

I was nine years old before I understood that I was black…now I understood my skin color, the color of my friends, my parents…but I never really understood what my blackness meant until a white man called me a n----r. And my father sat me down and explained to me what that word meant, he didn’t sympathize or feel sorry for me because he understood all the pain that that word elicits. My father had been called that word more times in his life than he can count. And you see what you have, in your possession, is a black child who will grow to be a black man and my fear is that he won’t have the tools he needs in his life if he stays in your home.

The uncensored use of the N-word caused an uproar on social media, but Judge Bradley’s unfettered statement about the moment he understood he was “black” in America is profound.

On April 12, 2018, an incident in a Philadelphia Starbucks put the issue of race back into the national conversation (yet again). Two men seated in the coffee shop, awaiting a real estate business meeting, were arrested by Philadelphia police after the Starbucks manager called them to report “two gentlemen in my café that are refusing to make a purchase or leave.” In two minutes, officers arrived. Without discussing what happened between them and the manager, the Philadelphia police arrested them. The charges? Trespassing and creating a disturbance, which were dropped that same evening.

Backlash erupted. Boycotts ensued. Starbucks faced negative press, declining sales, disastrous news and a mounting pressure to address a bad situation turned worse by race and bias. Starbucks, to their credit, took accountability for their leadership failures. Their CEO, Kevin Johnson, personally flew to Philadelphia to meet with the men and apologize to them face-to-face. They accepted. Starbucks also issued an apology through their social media and vowed to review their policies and continue to engage the community to ensure situations like that don’t happen again. Starbucks closed 8,000 stores nationwide for an afternoon on May 29, 2018.
for racial-bias training primarily discussing “unconscious bias training.” It impacted 175,000 employees and focused on racial-education geared toward preventing discrimination in their stores. As one of the arrested men explained, “[i]t’s not just a black people thing; it’s a people thing.” But, is “unconscious bias” training enough?

“Unconscious bias” is a preconceived idea we have formed over our lifetime as a result of our past experiences. Lai, Calvin K. What’s Unconscious bias training, and does it work? They are the subconsciously held prejudicial opinions towards certain people and groups of people based on demographics such as gender, age, race, and ethnicity. Id. “Unconscious bias” training is a form of diversity education focused on the hidden causes of everyday racial discrimination. Id. It is a popular approach to diversity education that starts with a discussion of the mind and how it operates outside of conscious awareness or control. Id. The training shows that people make and sometimes act on snap judgments based on the other person’s race without any conscious intent. Id. Research suggests this type of racial discrimination can be reduced and shows that employees are more receptive to it because it focuses on how bias is universal, but it will not solve the whole problem. Id.

Title VII of the Civil Rights Act of 1964 prohibits employers with fifteen or more employees from intentional employment discrimination based upon sex, race, color, national origin, or religion. The Americans with Disabilities Act (ADA) and Age Discrimination in Employment Act (ADEA) offer similar protections for applicants and employees. Fisher Phillips Getting Unconscious Bias Into Your Company’s Consciousness. Employers are not only prohibited from treating employees in protected categories differently than other employees but are also prohibited from making decisions that have a disparate impact on members of the protected class e.g. when neutral rules or practices prove to adversely affect protected groups. Id.

The Equal Employment Opportunity Commission (EEOC) started targeting unconscious bias nearly ten years ago. Id. The EEOC includes, “unconscious stereotypes about the abilities, traits, or performance” of individuals in protected categories in its definition of intentional discrimination. And, unconscious bias lawsuits are on the rise. Id. Similar to Starbucks, employers can make unconscious bias part of the company’s conversation and establish practices to help alleviate the fallout Starbucks suffers today. Some suggested practices are: talking about it and helping managers understand unconscious bias; educating managers on their own biases; using objective fact-based hiring techniques that establish objective criteria and clear consistent interviewing and decision-making procedures; and maintaining accountability through periodic evaluations of hiring decisions. Id. It may be impossible to eliminate unconscious bias altogether, but consciously recognizing it and taking affirmative steps to counter it in the workplace are critical to bettering the workplace.
Towards the end of “The Most Disappointed Man,” the Pearsons return to court and are surprised to find Judge Bradley has recused himself from the matter. They are now before the Hon. Theresa Shaw; an African-American female judge. She asks them to raise their right hand, then asks if they wish to adopt the child as their legally-adopted son. She smiles and reassuringly tells them, “you have done the hard work, you’ve chosen to love. I, on the other hand, have the pleasure of signing it into law.”

At the end of the episode, Judge Bradley sits reading a paper. Another judge, a Caucasian judge, turns to him and asks, “Do anything good lately?” Judge Bradley replies, “I don’t know.” But, the audience knows. With his recusal, he confronted his bias and withdrew himself from the case because of it. It is bittersweet. But, so are the choices our unconscious biases lead to. We never know if they’re the right decision unless we consciously confront them, take accountability for them, and make efforts to do what’s right. As one of the men in the Starbucks said, “I understand that – rules are rules. But what’s right is right and what’s wrong is wrong.” Perhaps it’s time for more of us to do right and not blindly follow our employment handbooks.

Welcome to the New Diverse Speakers Directory Page!

Open to both ABA and Non-ABA members.

The Directory is a great way to build your resume and expand your career!

- Expand your speaking experience both nationally and internationally.
- Show off your past speaking engagements.
- Create a customized Speakers Bio.
- Show off your technical skills.
- Market yourself to more than 3,500 ABA entities seeking speakers around the country and the world

https://www.americanbar.org/diversity-portal/SpeakersDirectors.html

For more information or questions regarding the directory email: diversity@americanbar.org
Injunction... Continued from page 7

A party has been wrongfully enjoined when it had the right to do the enjoined act. A party has been wrongfully enjoined when it had the right to do the enjoined act. In all but exceptional cases, wrongful injunction damages are limited to the bond amount. Malicious prosecution is an example of an exceptional case. A wrongful injunction claim can only be brought after a judgment on the merits. Good faith does not absolve a party from liability for obtaining a wrongful injunction.

Non-compete litigation is fertile ground for wrongful injunctions. Even if the employer comes to court with non-compete agreement signed by the former employee, and even if there is little dispute that the former employee now competes with the employer, non-compete agreements remain vulnerable to numerous attacks during the course of discovery. Evidence and briefing may reveal that the non-compete is altogether invalid for lack of consideration or because of the employer’s inequitable conduct. The non-compete may have insufficient time, scope, or geography limitations, making it partially invalid. Because the violation of a non-compete agreement is not always the violation of an enforceable agreement, hastily granted injunctions barring competition are often revealed to be wrongful. Similarly, injunctions that are found to be overbroad are also wrongful because they prevent the enjoined party from proper activities.

Bonds

Wrongful injunctions prevent the enjoined party from doing something that he is entitled to do. A wrongfully enjoined party, particularly in the context of non-compete agreements, often suffers lost income or revenue in the immediate term and a diminished ability to generate income in the future. Because the bond amount may cap wrongful injunction damages, it is crucial that the injunction bond be sufficient to cover the foreseeable damages. When in doubt, courts should err on the high side when setting the bond.

Unfortunately, in the early stages of litigation, it is usually the plaintiff who has unilaterally determined the timing of the case so that it has the greatest opportunity to gather favorable evidence. In other words, the evidence upon which a bond is set is usually incomplete, and often one-sided in favor of the plaintiff.

Policy Considerations

Why then, should the wrongfully enjoined party’s damages be limited by an amount informed almost solely by the plaintiff’s evidence? Surprisingly, the damages limit is not found in the Federal Rules of Civil Procedure. Instead, the limit is expressed only in case law. Courts have decided that the limit is necessary to protect the plaintiff and limit the plaintiff’s exposure to damages in the case of a wrongful
injunction. Protecting the plaintiff from its own haste and imprudence is virtually unknown in American law. It usually makes no sense that the plaintiff, who chooses timing, content, forum, and venue of a lawsuit—and whether to sue at all—needs protection from its own decisions. Arguably, the injunction defendant, having little control over this stage of the litigation, should be the one attracting the courts’ protection instead.

As one commentator noted:

It is one thing to say that, in ordinary trials, the winning party must still pay his own attorney’s fees and must even absorb the losses he may have had due to an erroneous trial court decision. But it is entirely something else to say that he must risk such losses without so much as a reasonable opportunity to develop the facts or the legal argumentation in the case. Perhaps one purpose of the injunction bond, then, is simply to recompense the defendant who has been subjected to a process of law that does not meet the kind of standards ordinarily adopted.

Unfortunately, it is usually the plaintiff that is protected if the lawsuit it initiated, and the injunction it presumably helped draft, is erroneous.

Increasing the Bond

In the flurry of litigating the substantive aspects of the injunction, the amount of the bond may get short shrift. If the injunction bond is insufficient to compensate for a wrongful injunction, then the enjoined party can ask the court to order a higher bond. Anytime before the injunction is lifted, a party may ask the court to reconsider the bond amount. The bond may even be reconsidered multiple times. An accelerated appeal may also be taken on the issue of an insufficient bond. But, once the court dissolves the injunction, no further increases may be had. This is to prevent the increase in the plaintiff’s potential liability after it is too late for the plaintiff to reject the risk by abandoning the injunction.

Opportunities to reconsider and increase the injunction bond are important because as a case progresses, discovery often leads to evidence of greater damages caused by a wrongful injunction. Increasing the bond also raises the ante for the injunction movant. The plaintiff should constantly reassess whether the amount of the bond, and its potential forfeiture, is an acceptable risk given the facts of the case, the applicable law, and the likelihood of the injunction to be ultimately wrongful. The injunction movant can always avoid the risks of a wrongful injunction by declining to post the bond and foregoing the injunction. Some courts have referred to this
feature of the injunction bond as the “price” of the injunction offered by the court. The injunction movant retains the choice of accepting or rejecting that offer.

It is also important to read the bond language carefully to make sure that the successive bond amounts cover the appropriate time periods. Ideally, the maximum bond amount should be available for any damages sustained during any part of the restraining order and injunction’s terms. This is not always the case. Bonds often contain language limiting coverage to certain time periods. If an increased bond is only effective on a going forward basis, that may not be as useful, especially because many losses arising from an injunction occur at the onset.

The bond limitation language should match the court’s order. If the court’s order does not contain such limitations, then the bond instrument itself may be an incomplete and non-compliant surety. In such a case, the injunction movant may have exposure for the difference or risk the injunction being ineffective.

The Wrongful Injunction Claim

The wrongful injunction claim simply requires the defendant’s success on the merits, even in part. The claim can be alleged in the same lawsuit, a separate lawsuit, and in any court with jurisdiction. It may be most practical to assert wrongful injunction as a counterclaim to the injunction case. This may avoid potential statute of limitations problems if the period between the injunction and a final determination on the merits takes several years depending on local tolling statutes and laws. While the wrongful injunction claim might not be ripe until a judgment on the merits, it is possible that entry of the injunction could put the wrongful injunction claimant on notice of facts that could start the limitations period.

Wrongful injunction damages are compensatory, not punitive. Thus, even if the proponent of a wrongful injunction acted in good faith, the enjoined party is entitled to damages.

Damages need not be calculated to a mathematical certainty. As long as the court receives evidence that allows it to make a rational and reliable estimate of damages, a damages award can survive review.

Conclusion

Many trade secret and non-compete cases start with a request for injunctive relief. The legal peculiarities of non-compete agreements, coupled with the fact intensive inquiries informing enforceability of the agreements, means that injunctions based upon non-compete agreements and trade secrets are particularly vulnerable to
being later held as improper or overbroad. Because of this, those defending against injunctions in this context should vigorously pursue injunction bonds that err on the high side. And, the enjoined party should keep a vigilant watch for opportunities to raise the bond. The injunction bond may serve as the only source of damages for the enjoined party. A bond set high enough may even discourage the movant from following-through on securing injunctive relief or seeking narrower relief.

Endnotes

1 Fed. R. Civ. P. 65(c).
2 Buddy-Sys., Inc. v. Exer-Genie, Inc., 545 F.2d 1164, 1169 n.10 (9th Cir. 1976).
3 Id.
4 Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032, 1036 (9th Cir. 1994).
5 Matek v. Murat, 862 F.2d 720, 733 (7th Cir. 1988).
7 Polymer Tech. Corp. v. Minran, 975 F.2d 58, 64 (2nd Cir. 1992).
8 Nintendo of Am., 16 F.3d at 1037.
9 Mead Johnson & Co. v. Abbot Labs., 201 F.3d 883, 888 (7th Cir. 2000).
11 Polymer Tech. Corp. v. Minran, 975 F.2d 58, 64 (2nd Cir. 1992).
12 Nintendo of Am., 16 F.3d at 1037.
14 Nintendo of Am., 16 F.3d at 1034.
15 Id.
16 Coyne-Delany Co. v. Cap. Dev. Bd. of State of Ill., 717 F.2d 385, 394 (7th Cir. 1983).
17 Mead Johnson & Co. v. Abbot Labs., 209 F.3d 1032, 1033-34 (7th Cir. 2000).
19 Nintendo of Am., 16 F.3d at 1038.
20 Id. at 1037.
### Calendar

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Contact Information</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 16-18, 2019</td>
<td><strong>Fidelity &amp; Surety Law Midwinter Conference</strong></td>
<td>Juel Jones – 312-988-5597</td>
<td>Hilton San Diego Bayfront</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>San Diego, CA</td>
</tr>
<tr>
<td>January 17-19, 2019</td>
<td><strong>Midwinter Symposium on Insurance and Employee Benefits</strong></td>
<td>Danielle Daly – 312-988-5708</td>
<td>Hyatt Regency</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Coral Gables, FL</td>
</tr>
<tr>
<td>January 23-27, 2019</td>
<td><strong>ABA Midyear Meeting</strong></td>
<td>Arthena Little – 312-988-5672</td>
<td>Las Vegas, NV</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Danielle Daly – 312-988-5708</td>
<td></td>
</tr>
<tr>
<td>March 20-22, 2019</td>
<td><strong>Transportation MegaConference XIV</strong></td>
<td>Janet Hummons – 312-988-5656</td>
<td>Sheraton New Orleans</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Danielle Daly – 312-988-5708</td>
<td>New Orleans, LA</td>
</tr>
<tr>
<td>March 22-23, 2019</td>
<td><strong>Admiralty and Maritime Law National Program</strong></td>
<td>Juel Jones – 312-988-5597</td>
<td>Sheraton New Orleans</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>New Orleans, LA</td>
</tr>
<tr>
<td>April 4-5, 2019</td>
<td><strong>Motor Vehicle Products Liability Conference</strong></td>
<td>Janet Hummons – 312-988-5656</td>
<td>Hotel Del Coronado</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Danielle Daly – 312-988-5708</td>
<td>Coronado, CA</td>
</tr>
<tr>
<td>April 5-6, 2019</td>
<td><strong>Toxic Torts &amp; Environmental Law Conference</strong></td>
<td>Janet Hummons – 312-988-5656</td>
<td>Hotel Del Coronado</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Coronado, CA</td>
</tr>
<tr>
<td>May 1-5, 2019</td>
<td><strong>TIPS Section Conference</strong></td>
<td>Janet Hummons – 312-988-5656</td>
<td>Westin New York Times Square New York, NY</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Juel Jones – 312-988-5597</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Speaker Contact: Arthena Little – 312-988-5672</td>
<td></td>
</tr>
<tr>
<td>May 8-10, 2019</td>
<td><strong>Fidelity &amp; Surety Law Spring Conference</strong></td>
<td>Janet Hummons – 312-988-5656</td>
<td>JW Marriott Hotel Austin, TX</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Danielle Daly – 312-988-5708</td>
<td></td>
</tr>
</tbody>
</table>