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Worth Covering: News, Tips, and Thoughts for Professional Liability Carriers

Welcome back to "Worth Covering: News, Tips, and Thoughts for Professional Liability Carriers"! In this month's issue, we discuss (i) the enforceability of contract provisions shortening the statute of limitations for employment claims; (ii) breaking EPL News – the Seventh Circuit's recent decision on Title VII and sexual orientation discrimination; (iii) ERISA and forum selection clauses; (iv) Rule 68 of the Federal Rules of Civil Procedure -- the "offer of judgment" rule -- as an effective weapon in the defense lawyer's arsenal; and (v) practical tips regarding cyber-liability insurance.

You Snooze You Sometimes Lose: Court Enforces 6 Month Statute of Limitations with Respect to Section 1981 Claim *But Not* with Respect to Title VII Claim

Did you know that an agreement shortening the time within which to bring an employment law claim may be enforceable? Indeed, in *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 608, 67 S. Ct. 1355, 91 L. Ed. 1687 (1947), the Supreme Court stated with respect to contracts generally that "in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action … to a period less than that prescribed in the general statute of limitations, [if] the shorter period [is] a reasonable period." This principle has been applied and enforced in the employment law context.

For example, recently in *Njang v. Whitestone Grp., Inc.*, 2016 U.S. Dist. LEXIS 65370, 129 Fair Empl. Prac. Cas. (BNA) 362 (D.D.C. May 18, 2016), plaintiff filed an action alleging race discrimination in violation of both Section 1981 and Title VII. In its motion for summary judgment, the former employer argued that plaintiff's claims -- which were filed more than two years after the termination -- were time barred because the employment contract required the employee "to file all claims or lawsuits in any way relating to employment with the Company no more than six months after the date of the employment action that is the subject of the claim or lawsuit." Id. at *5.

Breaking EPL News!

In *Hively v. Ivy Tech Cmty. Coll.*, 2016 U.S. App. LEXIS 13746, **54-56 (7th Cir. July 28, 2016), the Seventh Circuit affirmed the district court's decision granting defendant's motion to dismiss the plaintiff's Title VII sexual orientation claim based on the doctrine of *stare decisis* – relying on the jurisdiction's precedent determining that Title VII does not protect against same-sex discrimination. In doing so, however, the court made clear its reservations, noting the incongruity whereby a same-sex couple can marry legally in the United States on a Saturday and be fired on Monday for having done so. The court's conclusion is instructive:

> *Perhaps the writing is on the wall. It seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry. The agency tasked with enforcing Title VII does not condone it … many of the federal courts to consider the matter have stated that they do not condone it … and this court undoubtedly does not condone it…. But writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent, and therefore, the decision of the district court is AFFIRMED.*

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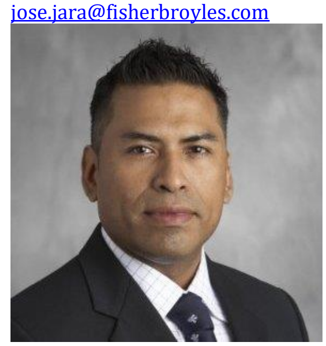

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The court held that the shorter limitation period was enforceable with respect to the Section 1981 claim but not with respect to the Title VII claim. With respect to the Section 1981 claim, the court relied on precedent in finding that "six months is a reasonable period of time . . . both because nothing within Section 1981 indicates that Congress intended for a longer window to bring such a claim, and also because the statute lacks other features that would make filing a claim within six months impracticable, such as an administrative exhaustion requirement." Id. at *15.

By contrast, the court held that Title VII's time-consuming administrative requirements, including (i) plaintiff's need to first file a charge with the EEOC within 180 days after the alleged unlawful conduct, (ii) the EEOC's investigation of the charge, and (iii) the EEOC's issuance of a right to sue letter, make a 6-month limitation period unreasonable. Id. at **18-19. As the court in *Njang* explained, "merely by complying with the administrative exhaustion requirements of Title VII, plaintiffs are typically precluded from bringing their claims in court within six months of the challenged conduct, which means that a six-month limitations period has the practical effect of waiving employees' substantive rights under Title VII." Id. at *20.

As a practical matter, **employers should consider implementing a clause in their employment contracts and employee handbooks reducing the statute of limitations to a shorter, yet still "reasonable" time**. While 6 months might be too short a period – particularly given the administrative requirements of Title VII – a 1-year period might very well pass muster as a reasonable period of time. – *Jonathan Evan Goldberg*

"*And if the Wind is Right You Can Sail Away and Find Tranquility…*" - Unless You Are Forced to Litigate in an Unwanted Forum!

Over 20 years ago, the Supreme Court found that, even though there was unequal bargaining power between the parties, a forum selection clause on cruise tickets was reasonable and valid requiring a couple from Washington State to litigate in Florida personal injuries sustained on a cruise from L.A. to Mexico. *Carnival Cruise Lines, Inc., v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed. 2d 622 (1991). Recently, a court has held that a forum selection clause added to the company's retirement plans was invalid because, unlike the plaintiffs in *Carnival Cruise Lines* -- who could have chosen another cruise line for their travels -- in this case the plaintiff could not simply have chosen to work for another employer. *Dumont v. PepsiCo, Inc.*, 2016 U.S. Dist. LEXIS 84853 (U.S.D.C. ME June 29, 2016).

In reaching its decision, the court in *Dumont* focused on the fact that the plaintiff had worked 31 years for the company, was already vested in his retirement benefits, did not negotiate the terms of the plans, and did not sign off on any clauses in the plans. Thus, when the plan sponsor amended the plans in 2011 to include a forum selection clause, the plaintiff at that time "could [not] have walked away with impunity if [he] did not want to be bound by the forum selection clause." *Dumont*, at *13.

In providing broad access to the federal courts, ERISA's venue provision provides that an action "may be brought in the district (1) where the plan is administered, (2) where the breach took place, or (3) where a defendant resides or may be found. ERISA 502(e)(2). The Court in *Dumont* noted that the clause "where the breach took place" has been interpreted to mean "where benefit payments are received" and, thus, allowed the plaintiff to keep his claim in Maine.

As with most areas of ERISA, the case law is not settled. In another recent case, a court ruled that ERISA forum selection clauses are not *per se* invalid and transferred the case to the court designated in the forum selection clause. *Malagoli v. AXA Equitable Life Ins. Co*., 2016 U.S. Dist. LEXIS 39112 (U.S.D.C. S.D.N.Y. Mar. 24, 2016). Yet, in another recent case, a court "decline[d] to endorse the legal fiction that all the terms of ERISA plans are freely negotiated …." *Harris v. BP Corp. N. Am.,* 2016 U.S. Dist. LEXIS 89593, at *23 (U.S.D.C. N.D. Ill., July 8, 2016). In doing so, the Court found the forum selection clause unenforceable because while the language of ERISA 502(e)(2) is ambiguous, ERISA's overriding purpose of guaranteeing participants ready access to federal courts and legislative history is not. *Id*. at *25-26.

As discussed in last month's article on sexual orientation discrimination claims, more often than not, the choice of forum matters. **In ERISA cases, it appears that while judges are not against forum selection clauses in ERISA plan documents *per se*,**

plan sponsors should nonetheless review their plan documents to assess whether the forum selection clause bears a reasonable relationship to the plan and its participants. – *José M. Jara*

The Next Best Thing to Attorneys' Fee Shifting? Rule 68 Can Drive a Wedge Between Plaintiffs' Counsel and Their Clients

Recently in Sydney, Michelle Leanne Dibbs sued Emirates airline for injuries she allegedly sustained when a hot drink spilled on her lap during a flight between Malta and Dubai. The court found that her spinal injury was not caused by her squirming in her seat after the spill, and ordered Ms. Dibbs to pay Emirates' legal fees in defending against her suit. The court ordered the payment of fees under the so-called "English Rule," where the loser is often ordered to pay the fees incurred by the winner of the case.

So what does an Australian case over a hot drink spill have to do with Federal Rule 68? In the U.S., courts are loath to award fees against losing plaintiffs in what are often termed "nuisance" cases. Rule 68 provides an essential tool in any defense attorney's arsenal because while it is not as big of a deterrent to nuisance cases as the "English" loser pays rule, it does permit a defense attorney to drive a wedge between a contingent-fee attorney and his client.

For those who are unfamiliar with FRCP 68, it permits a party defending a claim to make an offer of judgment to the other party. The opposing party can accept the offer and the clerk must immediately enter judgment per the offer's terms. If the opposing party rejects the offer and later obtains a less favorable judgment than was offered, that party must pay the costs (including attorneys' fees if the statute or offer clearly so provides) incurred by the offering party after the offer was made.

Similar rules apply in most state courts as well, although there is wide variation in the way each state's rule works in practice and the effect it has had on litigation. See, e.g., New York (C.P.L.R. § 3221), California (California Code of Civil Procedure § 998), Florida (F.S. § 768.79), Colorado (C.R.S. 13-17-202), and Nevada (N.R.C.P. 68).

Although it was intended to reduce litigation through early settlement of claims, Rule 68 has probably had a neutral effect on the amount of litigation. Litigants fight over how much is included in a Rule 68 offer (especially where attorneys' fees are claimed), so one top tip is to make sure that your offer is clear about whether fees are included. It is also prudent to discuss in that letter the weaknesses of plaintiff's case.

In operation, the effect of Rule 68 can be most powerful under fee-shifting statutes, such as in copyright claims. But even where there is no fee-shifting to add incentive, Rule 68 can act as a powerful wedge between a plaintiff's attorney who will be forced to consider his interest in immediately settling a case for a sum certain (i.e. a quick payout), as opposed to the interest of his client, who in most cases wants his "day in court."

Carefully drafted, a Rule 68 offer can be a powerful tool to shift the balance of power in a case toward defense counsel and away from a plaintiff represented by a contingent fee-driven lawyer. If the plaintiff's lawyer has a clear understanding of the weaknesses in his case, he should be willing to at least consider if not accept a reasonable offer. While it's not a "loser pays" rule, it is the next best thing available in the U.S. – *Chris Pey*

Got Information? Cyber-liability Coverage Can Help

Given the proliferation of data breaches and identity theft emanating from seemingly every corner of the world, companies who generate their own sensitive trade secret and other data and/or who handle the sensitive material of others (such as personal health information ("PHI") and personal identifiable information ("PII"), such as credit card information, social security numbers and the like) need to protect themselves against unauthorized access. While prevention through *technical measures*, including purging no-longer-needed material as well as encryption, tokenization, firewalls and intrusion detection devices, and *proper screening of staff* are critical, there are no foolproof alternatives in the face of ever-more sophisticated criminals. A data breach

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can result in civil fines and settlement payments, consumer notice and credit monitoring services, cost to restore corrupted data bases, indemnity obligations and reputational damage, just to name a few consequences.

More often than not, general liability policies do not cover this exposure and, thus, many companies need to pursue dedicated coverage at an additional cost.

Cyber coverage is to be sharply distinguished from error and omission coverage. The former pertains only to third party intrusion into data bases and files, while the latter pertains in this context to flaws in the output of consultants and software developers having nothing to do with any third party incursion. In many cases, both are essential, but they are not substitutes for each other.

Procurement of cyber coverage is usually a prudent step for businesses, but there are many "flavors" of such coverage and it is imperative that those seeking it, work closely with experienced insurance advisors to ensure that they are pursuing what is actually needed. In view of the nuances associated with this coverage, it is usually preferable that it be written by and procured from a broker who specializes in cyber insurance as opposed to one whose primary focus in on commercial or residential coverages. – *Martin Robins*

The application and underwriting process for cyber liability coverage goes well beyond completion of a paper application and warrants several comments:

- **Review of the technical computing environment and pertinent policies, practices, and post-incident response procedures is required;**
- **The same is true of the applicant's history with respect to the above;**
- **Consideration of the appropriate policy limit in the particular case is clearly essential;**
- **Analysis of the coverage is also essential (e.g., if PHI is being handled, a special endorsement to a cyber policy might be needed; if PII is being handled, a special endorsement might be needed for coverage involving notice and credit monitoring);**
- **Since legal defense costs and fines are often a major element of companies' exposure, the issue of whether such items are inside or outside of policy limits must be clearly understood;**
- **All concerned must distinguish between first party exposure – the applicant's direct, out-of-pocket costs for fines, legal fees and data base corruption/destruction – and third party exposure for customer costs of notice and credit monitoring; and**
- **Special analysis is required if the coverage is intended to encompass the applicant's contractual indemnities to its customers or other third parties.**