



WEST MICHIGAN
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FEDERAL BAR
ASSOCIATION

BAR & BENCH

NEWSLETTER

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President's Letter

Chris O'Connor, President
Federal Bar Association, W.D. Michigan

As the tulips emerge from the ground, I am reminded of the importance of, and need for, renewal and growth in our profession. Our FBA chapter proudly sponsors a variety of educational programming to help you stay at the leading edge of your practice. For instance, at our chapter's Bench-Bar Conference on Mackinac Island last fall, Warner Norcross + Judd partner Brian Wassom and I presented a session on the perils of the internet, including hacking, internet fraud schemes, ransomware, misappropriation of likeness, defamation, and eavesdropping. For example, since July 2019, the FBI observed a 65 percent increase in reported actual and attempted losses from sophisticated "business email compromise" schemes. Such schemes are varied in nature but include instances when a hacker gains access to your email account to monitor your communications and mimic you to convince a third party to send money to an account the hacker controls. Analyzing complaints and filings by financial institutions, the FBI now estimates that such schemes involved more than \$43 billion in actual and attempted loss around the world between 2016 and 2021. Additionally, there are reports of an emerging ransomware vector called the "disgruntled employee" vulnerability: someone who may be tempted by a hacker's email invitation to install ransomware on the employer's network in exchange for a reward, such as a percentage of the ransom paid by the employer to unlock the data.

By the looks on the faces of our audience and the questions posed after the session, solo practitioners and attorneys at firms of all sizes understand the critical need to secure their work product, client data, and assets yet remain uncertain about how best to do so. Someone gaining access to your email account, the firm's server, or your client's confidential information to use that information to harm you or your client is a frightening scenario. As we all know, Rule 1.6 of the Michigan Rules of Professional Conduct requires a lawyer to exercise reasonable care to prevent employees, associates, and other service providers used by the lawyer from disclosing confidences or secrets of a client. Indeed, a "fundamental principle in the client-lawyer

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President's Letter

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relationship is that the lawyer maintain confidentiality of information relating to the representation." Comment to Rule 1.6.

These are issues we cannot ignore and simply hope for the best. In the past few weeks, one of our chapter officers received an email from someone pretending to be me. The email appeared to come from "Chris O'Connor" and the officer's first name was mentioned in the salutation. The email requested an outgoing wire payment that needed to be made for some administrative expenses. Fortunately, the scam was obvious in part because the officer's email system included the following warning: "Ensure you trust and expect email from [redacted]@gmail.com before clicking links/attachments," which was an account I have never used to communicate with the officer. No money was lost, but the experience reminds us that we are all potential victims of criminals located throughout the world who are connected to us by mere keystrokes, a click of the mouse, or a tap on the screen of a device. Nobody is immune from the global reach of cybercrime.

Our vice president of programs, Sean Tilton, and Varnum partner Kyle Konwinski are planning a lunch-and-learn program for our chapter on Wednesday, August 3 that will provide you with the latest information on these risks and practical suggestions to prevent intrusions and the loss of your money or client information. The panel will include an experienced attorney, a cybercrimes special agent from the Federal Bureau of Investigation, and a representative from a local cybersecurity company that provides IT security services. Even if you believe you are currently employing best practices to secure your data, the security of your law practice and your client's information wanes as IT professionals and law enforcement discover new and evolving methods of intrusion. Please join us on August 3 to learn how to better protect your business and your clients from these persistent and growing threats.

Chris O'Connor is the 2022 president of the West Michigan Chapter of the FBA, an Assistant U.S. Attorney in the Western District of Michigan, and a Deputy Chief of the Criminal Division, supervising the Financial Crimes and National Security Section. He has been a federal prosecutor for 14 years, during which time he has investigated and prosecuted a wide range of crimes, including fraud offenses, money laundering, tax fraud, government program fraud, regulatory offenses, public corruption, violent crimes, and national security offenses. Prior to joining the U.S. Attorney's office, he practiced civil and criminal litigation at Jenner & Block LLP in Chicago.

FBA Hosts Event with Opera Grand Rapids and the Grand Rapids Bar on *Stinney: An American Execution*

By Stephanie Carowan

Music can spark a conversation. It can bring communities together. It can allow us to confront difficult issues. In February of this year, Opera Grand Rapids' world premiere of *Stinney: An American Execution* did just that. *Stinney* tells the true story of 14-year-old George Stinney, a black boy living in South Carolina who, in April 1944, was wrongfully convicted and executed for the rape and murder of two young white girls.

On February 25, 2022, just before the opera's opening night, Opera Grand Rapids, the Federal Bar Association, and the Grand Rapids Bar Association hosted a community conversation to talk about the opera and about larger issues of race and the criminal justice system. The panelists for the event included Lt. Governor Garlin Gilchrist II; former U.S. Attorney for the Western District of Michigan Patrick Miles Jr.; Cooley Law School faculty member Tracey Brame, who also heads the school's Innocence Project; and *Stinney*'s composer, Frances Pollock.

Pollock began the panel by talking about what led her to write *Stinney*, noting that the case is an obvious example of how the state mishandled the investigation and prosecu-

tion on many different levels. In the wake of the rape and murder of two young white girls, officers arrested Stinney and interrogated him without a parent present until they forced him to confess. At the trial, which lasted just 90 minutes, the only evidence presented against the teen was the coerced confession. The all-white jury found Stinney guilty after a mere 10 minutes of deliberation. In June 1944, the state of South Carolina executed Stinney by electric chair, using books to prop the boy up to the full height needed for the execution. Stinney remains the youngest person to be legally executed in the United States in the 20th century. Seventy years later, in 2014, a South Carolina judge overturned Stinney's conviction, ruling that he had been deprived of due process and did not receive a fair trial, concluding, "I can think of no greater injustice."

The other panelists focused on the ongoing debate about the role of race in the criminal justice system, noting that wrongful convictions disproportionately affect communities of color and that, at times, our system of justice can and does dehumanize defendants. That system, noted Miles, is only as good as the people who operate it, which is why elections and accountability matter.

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From left: Lt. Governor Garlin Gilchrist II, Prof. Tracey Brame, Patrick Miles Jr., Frances Pollock, and Emilee Syrewicze

FBA Hosts ...

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Overall, the panel focused on the performance of *Stinney* as a positive and necessary first step in prompting a larger conversation. The opera, said Lt. Governor Gilchrist, is a chance to present truth and give audience members an opportunity for deeper understanding of the issues. Pollock echoed the sentiment, noting that the performance of *Stinney* offers audience members a space to come together and struggle with those issues together. The piece, however, is not an end unto itself. All of the panelists agreed that additional work is needed to ensure that the tragic story of George Stinney Jr. is never repeated.

The panel concluded with a performance by two of the opera's stars—Chasiti Lashay and Daniel Sampson—who portrayed Stinney's parents. In the brief duet, the two argue over what is best for their son and what is best for their larger family. Should they stay in their small community to support George through the trial or leave in an effort to keep their other children safe? It is a decision no parent should ever have to make.

Ultimately, in presenting *Stinney* to our community, Opera Grand Rapids told an incredible story and sparked an encouraging conversation. In the words of Opera Grand Rapids' Executive Director Emilee Syrewicze, with *Stinney*, "We are recognizing the horror of what happened to George Stinney, his family and two young girls. We are seeking forgiveness and strength. We are pleading for change and a better future."



Stephanie Carowan works as an Assistant U.S. Attorney. She has been a federal prosecutor for more than a decade, serving in the United States Attorney's Offices for the Western District of Michigan and the District of Alaska and also serving as a trial attorney with the U.S. Department of Justice's Tax Division. In her spare time,

Stephanie sings opera, having performed with Opera Grand Rapids, the West Michigan Opera Project, Indianapolis Opera, and the Anchorage Opera.

Welcome Mark Totten!

By Rachel Frank

The Federal Bar Association is pleased to welcome Mark Totten as the new U.S. Attorney for the Western District of Michigan!

Mr. Totten is a lifelong native of West Michigan and resides in Kalamazoo. He received a B.A. from Cedarville College and his law degree and Ph.D in ethics from Yale University. He served as a law clerk on the U.S. Court of Appeals for the D.C. Circuit and an Appellate Staff attorney in the U.S. Department of Justice. He served as a Special Assistant U.S. Attorney for the Western District of Michigan from 2011 to 2013, focusing on criminal appeals. Mr. Totten taught criminal law and procedure at the Michigan State University College of

Law from 2008 to 2018, where this writer was a student in his criminal law class. Most recently, Mr. Totten served as chief legal counsel for Governor Gretchen Whitmer.



Mark Totten

Look for a more detailed article about Mr. Totten in the future, but for now, please join us in welcoming him to the Western District!

Rachel Frank is a criminal defense attorney at Springstead Bartish Borgula & Lynch PLLC. She frequently represents clients in complex state and federal criminal cases. Rachel also serves as the co-chair of the Young Lawyers Section of the West Michigan Chapter of the Federal Bar Association.

Suit Swap a Success!

By Rachel Frank

On March 30, the Young Lawyers Section of the West Michigan Chapter of the Federal Bar Association and Warner Norcross + Judd hosted a Women's Suit Swap to benefit the Women's Resource Center. The women lawyers of Grand Rapids came out in full force with their gently used professional clothing and enjoyed mingling with drinks, appetizers, and getting some new-to-them suits!

The items that were not taken were donated to the business boutique at the Women's Resource Center, which helps women to achieve employment and career growth. With these donations, women who come to the Center will be able to select free professional clothing for job interviews and professional careers. It was a lovely evening for a good cause, and the Young Lawyers Section hopes to host a similar event in the future.

Our thanks to Warner Norcross + Judd for hosting and to everyone who came to support the event!



Rachel Frank is a criminal defense attorney at Springstead Bartish Borgula & Lynch PLLC. She frequently represents clients in complex state and federal criminal cases. Rachel also serves as the co-chair of the Young Lawyers Section of the West Michigan Chapter of the Federal Bar Association.

Court Holds Formal Investiture Ceremony for Judge Beckering

The U.S. District Court for the Western District of Michigan held a special session at the Gerald R. Ford Presidential Museum on June 3, 2022, for the formal investiture ceremony of District Judge Jane M. Beckering. Chief Judge Robert J. Jonker swore Judge Beckering into office on December 24, 2021, making her the 23rd person—and only the third woman—to serve as District Judge since President Abraham Lincoln appointed the District's first Judge in 1863.

We are grateful that Judge Beckering has given us permission to publish the full remarks she planned to deliver, which she cut short due to the extended length of the ceremony. Congratulations, Judge Beckering!

* * *

Investiture Remarks

By Judge Jane M. Beckering

Thank you all so much for being here today. After two years of challenges associated with even being in the same

room together due to the Covid pandemic, I am honored by your presence and delighted that we have an opportunity to gather.

First off, a few thank yous are in order. I would not be standing before you today without the tremendous support of so many others.

I would like to thank President Joe Biden, as well as Senators Debbie Stabenow and Gary Peters, for the faith they have placed in me to serve the federal judiciary for the Western District of Michigan. Every day I pull into the parking garage at the courthouse and marvel to myself at how fortunate I am. I assure you, Senator Stabenow, that I will never forget the privilege as well as the commensurate responsibility I have to faithfully and impartially discharge the duties of my office.

Marlee, thank you for starting us out with a beautiful song. Judge Jonker, thank you for presiding over today's ceremony as one of your last acts as Chief Judge. You have been a superb Chief Judge for the Western District of

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From left: Judge Borrello, Judge Murray, Judge Neff, Senator Stabenow, Judge Beckering, and Chief Judge Jonker

Court Holds Formal Investiture Ceremony ...

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Michigan, and I cherish having you as a colleague and floor mate. And thank you, Judge Neff, for swearing me in and, more significantly, setting the stage for other judicial candidates, including me.

Many thanks to my speakers: Chris O'Connor, our FBA president; Rob Buchanan, my brother, former law partner, and close friend; Mary Haas, my dear friend since college and a fellow juggler of law and motherhood; Judges Chris Murray and Stephen Borrello, two of my former Michigan Court of Appeals colleagues and friends, one of whom is just plain nice and the other who always brings the spice; Ray Beckering, my loving husband and endless source of inspiration and support; and John C. Buchanan, my father, mentor, and role model. I am touched by their kind remarks.

I am so appreciative of my judicial colleagues who are here today, from both the federal and state benches. As much as it has been a privilege to serve the public as a judge, it has been a tremendous honor to know and work with all of you.

As I look out into the audience, I see friends and family members who have come from near and far to celebrate with me. That includes past and present coworkers, my wonderful former law clerks and staff, esteemed members of our legal community, and former clients who are now chosen family. Knowing all of you and sharing life's journey, be that personally or professionally, is as meaningful to me as the privilege of my new position.

I would like to introduce and publicly thank my immediate family. First, my husband Ray. They say the secret to a happy marriage is being one another's biggest fan. Ray lives and breathes this philosophy. Anyone who knows him can attest that he is the greatest "hype man" there is. While I am the main beneficiary of this gift, he is the rare person who goes out of his way to boost up so many others, including our children, their friends, and his coworkers. His unwavering and enthusiastic support has anchored me throughout my career and empowered me to navigate the pressures of a high-stakes litigation practice, followed by what many consider to be a lonely business of being a judge and making tough decisions that you know some won't like, but it is the right thing to do under the law. His strength has grounded me throughout my career, and I am forever deeply grateful for that. Thank you, Ray, for your enduring love, friendship, and support as a spouse and best friend.

I also wish to thank our incredible children, Marlee, Katie, and Ray IV. No job, no title, no professional reward even comes close to the greatest treasures I could ever hope to possess in the form of my relationships with each of these three individuals. As a professional, I constantly fretted over whether I was being the best mom I could be while striving to be the best lawyer I could be. In the end, I learned that our love shines through no matter how inadequate our last-minute spaghetti dinners may be. And teaching them a healthy sense of humor certainly helps. Thank you, kids, for your abiding love and for turning out so darn well despite having two lawyers for parents. The upside is that you will never meet a debate you cannot handle.

I would like to share with you today what *I* am here to celebrate. While an investiture ceremony is held to formally recognize the presentation of an official title, it is also an opportunity to celebrate our system of justice in America and all who play a part in it. Hundreds of years ago, our founders eschewed the British crown and designed a system in which we could govern ourselves and manage our society using words and rules as our tools.

Fast forward 235 years from the forming of the Constitution: our system of justice is the crown jewel of our democratic society. But it is based on only one precious thing.

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Judge Neff readministeres the oath of office to Judge Beckering

Court Holds Formal Investiture Ceremony ...

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Trust in the system. I want to herald our system of justice and its importance, especially in what is undoubtedly a time of heightened societal tensions and calls for reform.

Right around the time my grandfather, William D. Buchanan, became a lawyer, Justice Brandeis proclaimed that “*if we desire respect for the law, we must first make the law respectable.*” In other words, we need to instill trust in the law and trust in the people who run the legal system.

We need to celebrate today the fact that this room is filled with lawyers and judges who still understand and seek to uphold that principle, who even in the throes of the inherently adversarial process strive to treat one another with respect, honor the rule of law, and crucially, mentor the next generation of lawyers by way of example. We should never take what we have for granted here in West Michigan, and we should fight to keep it that way. The collegiality we enjoy not only makes this a great place to live and work, it serves the clients of our system well by focusing on the law and merits of a case, not games and grudges.

I would be remiss not to mention just a few of the modern era legal giants of West Michigan who have led by example and sacrificed their time to serve as mentors and models for my generation of lawyers, whether it be by teaching at the Hillman Advocacy Program or otherwise, including Bill Jack, Jon March, Steve Drew, Ann Cooper, Doug Wagner, and the late Douglas Hillman himself, as well as the late Jon Muth, and Joe Sweeney. They have embodied what it means

to be an honorable lawyer. And there are dozens of you in this room who have become mentors to the next generation of lawyers. It is much easier for all of us to hold ourselves to a high standard of conduct when our community has so many fine role models.

In today’s world, people talk about “influencers.” One particular influencer in the advancement of women in the law is Judge Janet Neff. She and her female peers fought hard to be on equal footing with men in the legal profession. Law was the last of our professions to admit women in more than just token numbers. It was not until the 1970s that the percentage of women in law school and practice reached the double digits. By the time I graduated from law school in 1990, the glass ceiling had been cracked open, providing me and other women incredible opportunities created by the blood, sweat, and tears of our predecessors like Judge Neff. While my generation didn’t fully appreciate how hard it would be to do everything the profession demanded while also trying to do all that a mother is traditionally expected to do, it is because of Judge Neff and others like her that significant opportunities for women were created in the wake of their advances. I am proud to say that West Michigan’s district bench is half men and half women. Thank you, Judge Neff, for your part in making that possible.

I will leave you with one last story today that exemplifies what is still so right about our system of justice. It also happens to epitomize where my passion lies and why I became a trial lawyer and then a judge.

In April 2022, I presided over my first jury trial as a judge. It was a criminal case that lasted two weeks. Before it started, I worried about what kind of pushback we would receive from potential jurors, such as whether they would try to get out of jury duty and how I would navigate that problem. Jury service is undoubtedly a sacrifice of one’s time and sometimes one’s income, and our current political climate has many people on edge about a lot of things.

During my initial questions at voir dire, I could tell that many folks were not eager to be picked when called to the box. When I asked all too broadly “raise your hand if you have a serious scheduling conflict with a two-week trial,” three quarters of the hands shot up in the air. But I reframed the question with a heavier emphasis on *serious* conflict and gave several examples. Some hands dropped.



From left: Judge Borrello, Judge Murray, Senator Stabenow, Judge Beckering, and Ray Beckering

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Once we got into the thick of voir dire, with most of the questions being asked by the lawyers—which is my desire to allow as a trial judge—the potential jurors’ faces began to change. They began to display a genuine understanding of the importance of the moment. They were in a court of law, and *they* were going to be the ones deciding the defendant’s fate from a conviction perspective. Not me. Them. The dynamics of jury selection itself were amazing to watch and are stories for another day. After several hours of questioning, the lawyers picked their jury, and we started the trial.

For two weeks, I had a front row seat in observing the critical Constitutional right to a jury trial and witnessed the seriousness with which every juror took their sobering responsibility. They deliberated for over two days, sent out several notes with questions or wanting to see some of the tangible evidence, and asked for a calculator to do math associated with one of the charges. They ultimately rendered their verdict, and the defendant’s case was thus determined by 12 members of the community.

After the verdict, I visited with the jurors. I wanted feedback about their experience and how we could make things better in the future. They had clearly bonded and were exchanging phone numbers with one another. When I asked how many of them had *initially* not wanted to serve on jury duty, they laughed as if I had asked a rhetorical question; of course most hadn’t. But when I asked how many were *now* glad they’d served, to a person, they said they were. They told me that if we could just get people together in a room like that to talk face-to-face and address the problems in our

society, we could actually solve our conflicts. One juror even said she was “a better person” for having served on jury duty.

While not every trial will be that way, I submit that jury trials are crucially important to the viability of our democratic society. At least two of the benefits were exemplified in that trial. First, the defendant was able to have his guilt or innocence determined not by one man or one woman, but by a fair cross-section of the members of his community. As John Henry Wigmore stated in 1924, “*The grand solid merit of jury trial is that the jurors . . . are selected at the last moment from the multitude of citizens. They cannot be known beforehand, and they melt back into the multitude after each trial.*” That is the epitome of a process without preconceived notions or an agenda.

The second benefit of the trial was that the *jurors themselves* realized, firsthand, that we truly are a government run of, by, and for the people. Serving on a jury is the most direct and impactful way for citizens to have power in their own government. I saw that realization on display among the jurors after the trial.

I became a lawyer because my father’s and grandfather’s passion for trial law was infectious. I became a judge because I wanted to be a part of protecting our precious commodity called public trust. Namely, I wanted to be that fair and impartial jurist I always hoped to see on the other side of the bench as a lawyer. And now, I get to be a part of ensuring the Constitutional right to a jury trial. I am so deeply grateful to have this opportunity to represent you in that capacity.



From left: Judge Borrello, Judge Murray, Judge Neff, Senator Stabenow, Judge Beckering, and Chief Judge Jonker

District Court Roundup

By C.J. Schneider and Richard Perez

Parker v. Battle Creek Pizza, Inc.

No. 1:20-cv-277, 4/28/22

Hon. Janet Neff

The plaintiffs are current and former pizza delivery drivers employed by the defendant pizza companies. They alleged that the defendants paid their pizza delivery drivers less than minimum wage in violation of federal and state law.

The issue before the court was which standard applies for calculating reimbursement of vehicle expenses in the delivery driver context. The court adopted the Department of Labor Handbook's approach to calculating vehicle expenses. Under that approach, to comply with the minimum wage regulations in the delivery driver context, employers can either (1) keep records of delivery drivers' actual expenses and reimburse for them, or (2) reimburse drivers at the IRS standard business mileage rate.

Andrew Paul Kimble, Emily Hubbard, Nathan B. Spencer, and Andy Biller of Philip Joseph Krzeski, Biller & Kimble LLC and Bradley K. Glazier of Bos & Glazier PLC represented the delivery drivers. Patrick C. Lannen, Erik Johnson, and Kelly Shefferly of Plunkett Cooney represented the employers.

Banerian v. Benson

No. 1:22-cv-54, 3/4/22 and 4/1/22

Hon. Raymond Kethledge, Hon. Paul Maloney,
and Hon. Janet Neff

The plaintiffs, 10 Michigan voters, sued Michigan Secretary of State Jocelyn Benson and the Michigan Independent Citizens Redistricting Commission commissioners challenging the congressional redistricting plan on a variety of grounds.

In March, the court—a three-judge panel—addressed the plaintiffs' claim that the congressional redistricting plan fragments the voters' "communities of interest" more than it does other communities of other voters, thereby diluting the strength of the plaintiffs' votes. The court concluded that this claim was a "blood relative" of the claims of partisan gerrymandering that the Supreme Court found nonjusticiable in *Rucho v. Common Cause*. The voters argued that their claim is not that the plan reflects excessive partisanship in districting, but rather that the plan fragments their communities of interest and diminishes their ability to elect candidates who represent the interest of both the individual and the community. The court held that the voters' "communities of interest" claim is nonjusticiable for the same reasons in *Rucho*, and that their claims were just a political-gerrymandering claim by another name. The court granted the commission and secretary of state's motion to dismiss as to that claim.

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District Court Roundup

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In April, the court denied preliminary injunctive relief on the plaintiffs' other claim. The court concluded that the small population differences in congressional districts were necessary to achieve legitimate state objective. As part of its reasoning, the court found that the plan had a small deviation from the ideal population for each district in Michigan, that the plan was consistent through its emphasis on communities of interests, and that the plaintiffs had not identified any alternative plan that would preserve the interest identified by the commission while approximating population equality more closely.

The court further concluded that the voters did not have a strong likelihood of success on the merits of their claim because the commission would very likely carry the burden to show that the plan's deviation from perfect equality of population among districts was necessary to achieve its goal of

maintaining communities of interest. Thus, the court found that the voters were not entitled to a preliminary injunction.

Charles R. Spies and Max Abram Aidenbaum of Dickinson Wright PLLC and Edward M. Wenger, Jason Torchinsky, and Shawn Sheehy of Holtzman Vogel Baran Torchinsky & Josefiak PLLC represented the voters. AAGs Erik Alexander Grill and Heather S. Meingast represented Jocelyn Benson. David H. Fink and Nathan Joshua Fink of Fink Bressack and Richard Bryan Raile of Baker & Hostetler LLP represented the commission.

*Alticor Global Holdings, Inc. v. American
International Specialty Lines Insurance Co.*

No. 1:17-CV-388, 2/7/22

Hon. Robert Jonker

The plaintiffs, Alticor Global Holdings and its three subsidiaries, Amway Corporation, Alticor Inc., and Amway

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District Court Roundup

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International, sued their insurers, American Lines Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA, alleging that they breached the insurance agreement with plaintiffs by denying coverage and refusing to provide a defense or by refusing to reimburse defense and claim expenses in a lawsuit by a record company that ultimately settled.

The court concluded that the insurer's duty to defend was triggered by the record company's allegation of copyright infringement against plaintiffs, as they were covered wrongful acts. The court further concluded that the insurers waived their ability to challenge the reasonableness of defense costs, reasoning that an insurer that wrongfully declines to defend is liable for the costs of defense as well as any reasonable good-faith settlement paid by the insured because the settlements and defense costs for the underlying lawsuits are presumed reasonable.

James D. Wilson of Wilson Young PLC and Edward J. Bardelli of Warner Norcross + Judd LLP represented the plaintiffs.

Harvey R. Heller, Julie Chenot Mayer, and Steven M. Wolock of Bolton Legal Group and Julius Carter, M. Keith Moskowitz, and Marilyn Rosen, of Dentons US LLP represented American International Specialty Lines Insurance Company.

Charles W. Browning and Josephine Antonia DeLorenzo of Plunkett Cooney and Daniel I. Graham, Jr., Richard Homer Nicolaides, Jr., and Thomas William Arvanitis of Nicolaides Fink Thorpe Michaelides Sullivan LLP represented National Union Fire Insurance Company of Pittsburgh, PA.



C.J. Schneider is a member at Miller Johnson in Grand Rapids. He practices in commercial crisis counseling and litigation, helping businesses and nonprofit organizations successfully navigate high-profile matters, including mass tort claims, high-stakes contract disputes, global supply chain emergencies, and corporate governance reform.



Richard Perez is an associate at Miller Johnson in Grand Rapids. His litigation practice primarily focuses on commercial, governmental, and criminal litigation in all phases of disputes and investigations

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Appellate Roundup

Noteworthy Cases from the Sixth Circuit and Beyond

By Charlie Quigg

Brown Jug, Inc. v. Cincinnati Insurance Co. Nos. 21-2644/2715/2718

The Sixth Circuit resolved, in a published decision, a question of first impression for the court regarding commercial property insurance coverage for losses related to the COVID-19 pandemic. The plaintiffs—a group of Michigan restaurants and entertainment venues—sought a declaratory judgment that their pandemic-related losses were covered under their commercial property insurance policies. Their claims forced the court to determine whether, under Michigan law, “direct physical loss” to property extends to loss of use of property.

Two separate judges in the Eastern District of Michigan held that the answer was no, and, in the consolidated appeals, the Sixth Circuit affirmed. In the absence of precedent from the Michigan Supreme Court, the Sixth Circuit made an “*Erie* guess” of how that court would resolve the question. Following an array of cases holding that “direct physical loss” requires destruction of, alteration of, or dispossession from property, the court reached the same conclusion as the district court. Accordingly, the district court properly dismissed the complaints for failure to state a claim on which relief can be granted.

James J. Kelly of Jim Kelly Law, PC represented the insureds. Dennis Dolan and Laurence J.W. Tooth of Litchfield

Cavo LLP and Bradford S. Moyer and Jeffrey C. Gerish of Plunkett Cooney represented the insurance company.

Schuler v. Adams No. 21-1613

In a case a federal courts professor would love, the Sixth Circuit answered a jurisdiction question “in a gray area between . . . two black-letter principles.” The first principle is that federal courts of appeals typically have jurisdiction only over final district-court judgments—not interlocutory orders. The second principle is that, notwithstanding the general rule, a party may immediately appeal a district court’s order granting preliminary injunctive relief. So what happens when a *state* court grants a preliminary injunction, then the case is removed to federal court? May a party appeal the state court’s injunction order to a federal court of appeals?

Relying on the text of 28 U.S.C. § 1292(a)(1)—the statute setting out the injunction exception to the final judgment rule—the court held that the answer is no. The statute extends appellate jurisdiction to “[i]nterlocutory orders of the *district courts of the United States*” granting injunctions. A state court, the court explained, obviously is not a federal district court. Accordingly, the Sixth Circuit lacked appellate jurisdiction and dismissed the appeal.

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Appellate Roundup

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David E. Hart and Matthew Mitchell of Maddin, Hauser, Roth & Heller, P.C. represented the appellants. Matthew T. Nelson of Warner Norcross + Judd LLP and Daniel P. Bock of the Michigan Department of Attorney General represented the appellees.



United States v. Ramirez-Figueroa No. 21-1221

In a published decision, the Sixth Circuit affirmed a Cuban defendant's guilty plea and sentence before **Judge Maloney** notwithstanding Judge Maloney's failure to advise

the defendant that the plea could make him deportable. The defendant did not raise the issue before the district court.

On plain error review, the Sixth Circuit held that the failure to advise the defendant of the collateral immigration consequences of his plea constituted an error that was plain. Because, however, the evidence of the defendant's guilt was overwhelming and the defendant agreed in his plea agreement that his counsel "fully advised" him of the "consequences of pleading guilty," the Sixth Circuit concluded that the error did not affect the defendant's substantial rights.

Daniel S. Harawa, Kyle J. Davis, Korbin W. Keller, and Jonathan D. Puricelli of Washington University represented the defendant. AUSAs Kathryn M. Dalzell and B. Rene Shekmer represented the government.




Charlie Quigg is a member of the Appellate and Supreme Court and White Collar Criminal Defense and Investigations practice groups at Warner Norcross + Judd LLP. He represents clients in complex civil and criminal matters in all phases of disputes, including investigations and appeals. Charlie also serves as the Editor-in-Chief of Bar & Bench.


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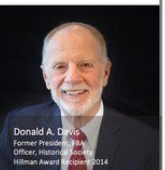
Matthew G. Botella
Former President, FBA
Incoming President, Criminal Society
Faculty, Hillman



Tessa K. Muir
Former Co-Chair, FBA Young Lawyers
Member, FBA Program Committee
Steering Committee & Faculty, Hillman



Rachel L. Frank
Executive Committee Member, FBA
Co-Chair, FBA Young Lawyers



Donald A. Davis
Former President, FBA
Officer, Hillman Award
Hillman Award Recipient 2014

Help Wanted—Pro Bono Trial Attorneys for Prisoner Civil Rights Cases

Each year, members of our chapter represent prison inmates whose civil rights claims have survived summary judgment and are headed to trial. The district court is again looking for attorneys to accept pro bono appointments in this worthwhile program. The Western District's prisoner civil rights pro bono program presents an excellent opportunity for trial work, without lengthy discovery. We encourage our members—and especially our young lawyers, for whom trial experience can be hard to find—to participate. The link to the court's pro bono plan is: <https://www.miwd.uscourts.gov/sites/miwd/files/Pro%20Bono%20Guidelines.pdf>.

Anyone interested, or with questions, can email stephanie_carpenter@miwd.uscourts.gov, and either Stephanie Carpenter or Judge Ray Kent can tell them about the process.



SAVE THE DATE

Upcoming Events

July 6, 5:00 pm
Young Lawyers Section Happy Hour
at Paddock Place

July 7, 3:00 pm
Passing of the Gavel Ceremony
at the Grand Rapids Federal Courthouse

August 3, 12:00 pm
Cybersecurity Lunch-and-Learn Program
at the Grand Rapids Federal Courthouse

Reminder: Time to Renew Your FBA Membership

Thank you for your continued membership in the West Michigan Chapter of the Federal Bar Association! If you haven't yet renewed your membership for 2022, please do so today.

You may renew your membership quickly and easily via PayPal on our website: <https://west-michiganfederalbar.org/annual-membership-checkout/>. If paying by check payable to the West Michigan Chapter of the Federal Bar Association, please mail it to the FBA, P.O. Box 2303, Grand Rapids, MI 49501-2303. Please include with your check a list of the names of all attorneys you are paying for along with your firm name, address, phone number, and email address.



Register for the 34th Annual FBA Bankruptcy Section Seminar

The Bankruptcy Section of the Federal Bar Association for the Western District of Michigan invites you to attend this year's educational seminar at the Mission Point Resort on Mackinac Island, Michigan, featuring:

- plenary and breakout sessions covering hot topics and recent developments in bankruptcy law,
- expert consumer and commercial insolvency professionals, including 17 sitting judges, and

- networking opportunities at one of Northern Michigan's most exciting destinations.

The seminar will take place from July 29 through July 31, 2022. To obtain a registration form and access additional information, please visit <https://www.miwb.uscourts.gov/news/34th-annual-fba-bankruptcy-section-seminar>. If you have any questions about the conference, please contact Liz Von Eitzen at evoneitzen@wnj.com or (616) 752-2418, or Lisa Hall at lhall@plunkettcooney.com or (616) 752-4615.

