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FEBRUARY 2009

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The U.S. Court of Appeals for the Second Circuit recently rendered a decision on an issue that is the subject of a complicated circuit split – whether, in domestic arbitration, there is appellate jurisdiction over a district court's denial of a motion to compel arbitration or stay litigation pending arbitration, where one of the parties is a non-signatory to an arbitration agreement. The Supreme Court recently granted certiorari to review the Sixth Circuit's most recent opinion on the same issue. This article summarizes the dispute among the circuits and the competing rationales with which the Supreme Court will now have to wrestle.

The Second Circuit recently held that an investment advisor that did not purchase securities for its own accounts, and had brought suit only on behalf of its clients, lacked constitutional standing to sue under the federal securities laws. The decision indicates – contrary to some district court precedents – that such investment advisors will no longer be able to serve as lead plaintiffs in securities fraud class actions.

Disappointed participants in busted deals have increasingly used tortious interference claims as one of their litigation strategies. As markets become more volatile, courts are increasingly willing to permit such tort claims. In one recent example, the Eastern District of New York widened the door for tortious interference liability arising from merger agreements to public shareholders, even though the agreements explicitly disclaimed third-party beneficiaries of the agreement.

Trademark collisions are widespread in the banking field, principally because banks tend to choose their names from a pool of common terms such as "Commerce" and "Citizens." Courts often decline to find actionable infringement in these circumstances, both because they afford narrow protection to commonly used terms and because they recognize that banking consumers employ a high degree of care and so are not likely to be confused by similar names.

The Supreme Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna* that arbitrators, not state courts, should determine questions of contract validity, left open the question whether this rule also would be applied to state agencies having jurisdiction over particular matters. This question recently was answered "yes" in *Preston v. Ferrer.*

A Muddle In Need Of A Solution: Availability Of Interlocutory Appeal To A Party That Is Not A Signatory Of The Arbitration Agreement

BY JONATHAN I. BLACKMAN AND AMY A. BARCELO

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On October 21, 2008, the U.S. Court of Appeals for the Second Circuit issued the most recent contribution to a multi-faceted circuit split – the debate over whether sections 16(1)(A) and (B) of the Federal Arbitration Act (FAA) permit interlocutory appeal of a district court's denial of a motion to compel arbitration, or to stay litigation pending arbitration, where the would-be appellant is not a signatory to the arbitration agreement at issue.

In *Ross v. American Express Co.,*[1] such a non-signatory moved to compel arbitration of an action against it by the signatories of the agreement, and to stay the action pending arbitration, arguing that the signatories were bound to arbitrate the dispute by principles of equitable estoppel. The district court accepted that argument, but refused to compel arbitration on other grounds. In a prior ruling, the Second Circuit had denied a motion to dismiss the non-signatory's appeal from that refusal, holding that appellate jurisdiction exists "when a district court finds that a signatory to a written arbitration agreement is estopped from avoiding arbitration with a nonsignatory."[2] In its October 21, 2008 decision, now ruling on the merits of the appeal, the Second Circuit explicitly reaffirmed its jurisdictional decision, but went on to hold that the conditions for finding equitable estoppel had not in fact been satisfied, and that the district had been wrong in concluding otherwise. In substance, the Court of Appeals held that at least when a district court makes a finding of equitable estoppel under a written arbitration agreement, its decision denying arbitration will be immediately appealable by a non-signatory as a matter of appellate jurisdiction, even if the non-signatory ultimately is unable to invoke that agreement because the district court's finding is erroneous.

This holding permitting an interlocutory appeal by a non-signatory, at least under these limited circumstances, conflicts with holdings of the D.C., Sixth, Seventh and Tenth Circuits addressing the same issue; each had held that sections 16(1)(A) and (B) *never* permit interlocutory appeal of denial of a motion to compel arbitration or stay litigation where one of the parties is a non-signatory to the arbitration agreement. Adding to the complexity of this split, the Third and Fifth Circuits agree with the Second Circuit that there are circumstances in which a non-signatory to an arbitration agreement is entitled to such an interlocutory appeal, but they disagree about what those circumstances may be.

Presumably in order to resolve this circuit split, on November 7, 2008, the United States Supreme Court granted certiorari to review the Sixth Circuit's most recent opinion on this issue, *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP*.[3] *Carlisle* held that section 16(1)(A) does not allow an interlocutory appeal of the denial of a motion for a stay pending arbitration by a non-signatory to an arbitration agreement.[4] This article summarizes the dispute among the circuits, and the competing rationales that are now before the Supreme Court.

Background

Section 16 of the FAA provides a "pro-arbitration" exception to the general rule that federal courts of appeals have jurisdiction only over "final decisions" of the district courts, by granting appellate jurisdiction over interlocutory appeals of orders "refusing a stay of any action under section 3" of the FAA, or "denying a petition under section 4 of [the FAA] to order arbitration to proceed."[5] (By contrast, there is generally no appellate jurisdiction over decisions compelling arbitration and granting a stay pending arbitration.) Sections 3 and 4 of the FAA in turn presuppose a written agreement to arbitrate.[6]

It is well-settled, however, that non-signatories to a written arbitration agreement can nonetheless be compelled to arbitrate or can compel a signatory to arbitrate under theories such as incorporation by reference, agency, assumption, ratification, alter-ego/veil-piercing or equitable estoppel.[7] The question then arises whether denial of a motion to compel arbitration or for a stay pending arbitration under one of these theories also gives rise to appellate jurisdiction when one of the parties to the litigation is not a signatory to the arbitration agreement.

The Conflicting Circuit Courts' Decisions

The D.C., Sixth, Seventh and Tenth Circuits have each clearly answered that question in the negative.

The Seventh Circuit was the first to address this issue in *IDS Life Insurance Co. v. SunAmerica, Inc*.[8] It recognized some inconsistencies in case law regarding whether a non-party to an arbitration agreement is entitled to a stay under section 3 of the FAA, but ultimately concluded that the "movant for a stay" and the "person sought to be stayed" must both be parties to the arbitration agreement for section 3 to apply to the motion, even though on its face the language of section 3 was not "expressly so limited."[9] On that basis, it rejected appellate jurisdiction over the non-signatory's appeal of the denial of its stay motion.

Relying in part on the Seventh Circuit's holding, the D.C. Circuit reached the same conclusion in *DSMC Inc. v. Convera Corp.*[10] The court reasoned that: "'[i]n general, statutes authorizing appeals should be narrowly construed,' and that this is particularly true with respect to statutes allowing interlocutory appeals."[11] It also explained that "jurisdictional rules should be, to the extent possible, clear, predictable, bright-line rules that can be applied to determine jurisdiction with a fair degree of certainty from the outset."[12] Applying these general principles to the facts before it, the court wrote:

> Asking whether the parties are signatories to a written agreement to arbitrate satisfies these criteria. On the other hand, the application of equitable estoppel – if permitted in this context – requires a multifactor factual and legal inquiry to determine whether the issues to be litigated by a non-signatory and signatory are sufficiently intertwined with the issues subject to arbitration. That type of analysis, in turn, would require this court to delve deeply into the merits of a case before deciding whether we had interlocutory appellate jurisdiction – an unattractive prospect.[13]

Over the next few years, the Tenth Circuit, in *Universal Service Fund Telephone Billing Practice Litigation v. Spring Communications Co., L.P.*,[14] and the Sixth Circuit in *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP*,[15] aligned themselves with the holdings and rationale of the D.C. Circuit's opinion in DSMC. The D.C. and Tenth Circuits have explicitly clarified that their holdings were limited to the applicability of sections 3, 4 and 16 of the FAA to the issues of appellate jurisdiction, rather than to the more general question of whether a non-signatory to an arbitration agreement may ever successfully compel arbitration[16] or stay litigation pending arbitration.[17] Although the Sixth Circuit did not make its own statement to that effect, it cited the Tenth Circuit's language on that point with approval.[18]

The holdings in these circuits therefore do not necessarily limit a party's right to compel arbitration or stay litigation pending arbitration where one of the parties is a non-signatory; they simply preclude appellate review of the district court's decision of the issue. At least one district court in the circuits that refuse appellate jurisdiction over such appeals has in fact granted a stay pending arbitration at the behest of a non-signatory, although explicitly not basing it on the FAA.[19]

On the other hand, the Second, Third and Fifth Circuits have each held that under certain circumstances appellate jurisdiction *does* exist over the appeal of the denial of a motion to compel arbitration or a motion for a stay pending arbitration under sections 16(1)(A) and (B) of the FAA where one of the parties is not a signatory to the arbitration agreement. These three circuits nonetheless disagree on what these circumstances should be.

The Third Circuit, in *Ehleiter v. Grapetree Shores, Inc.*,[20] held that appellate jurisdiction exists under sections 16(1)(A) and (B) of the FAA in any appeal where there as there has been a "prima facie" showing that an FAA section 3 or 4 motion was made and denied in the district court.[21] It reasoned that if it were to deny appellate jurisdiction where the non-signatory's motion had merit but was erroneously denied by the district court, the "vindication of the litigant's contractual right to arbitrate would come only after he had been forced to expend substantial time and expense fully litigating the matter in court, which is precisely what he sought to avoid in the first place by bargaining for a speedy and efficient dispute resolution procedure that the arbitral forum offers."[22] It therefore concluded that "the FAA's strong policy favoring arbitration will still be best served, at least in cases where the appeal is not frivolous or forfeited, by allowing the party to obtain a definitive ruling on the denial of its Section 3 motion by way of interlocutory appeal to this Court, rather than requiring it to continue litigating the case to final judgment before obtaining a full round of appellate review . . . ."[23]

In *Waste Management, Inc. v. Residuos Industriales Multiquim, S.A.*,[24] the Fifth Circuit applied a different test. It rejected the argument that only signatories to an arbitration agreement may move for a stay of litigation pending the arbitration, noting that the "the grammatical structure of [section 3 of the FAA] would seem to make clear that *any* of the parties to the suit can apply to the court for a mandatory stay, and the court must grant the stay if the claim at issue is indeed covered by the arbitration agreement."[25] However, the court was not satisfied that it had jurisdiction over the non-signatory's interlocutory appeal of the district court's denial of its motion for a stay until it had determined for itself that the district court's ruling was incorrect, *i.e.*, that the non-signatory *was* entitled to a stay under section 3 of the FAA because the litigation was so closely related to an ongoing arbitration that that "proceeding with litigation [would] destroy the signatories' right to a meaningful arbitration."[26] In sum, the court performed a full review of the motion for a stay on the merits before deciding whether it had appellate jurisdiction over the appeal. In effect, it collapsed the jurisdictional inquiry into a *de facto* review of the merits of the district court's ruling.

The Second Circuit, in *Ross v. American Express Co.*,[27] took yet another approach. In *Ross*, plaintiff brought an antitrust class action by MasterCard and Visa credit cardholders against American Express for allegedly conspiring to fix fees for card purchases in foreign currencies. The district court upheld Amex's claim that although it was not a party to the MasterCard/Visa cardholders' arbitration agreements, the plaintiff signatories of the agreements were equitably estopped from refusing to arbitrate with it under the arbitration clauses in these agreements. The district court nonetheless denied Amex's motion to stay the litigation or compel arbitration immediately because it concluded that a jury trial was necessary to determine the validity of the arbitration clauses in the MasterCard/Visa agreements in the face the cardholders' claim that the agreements violated the antitrust laws. Amex appealed, and the Second Circuit denied the cardholders' motion to dismiss the appeal, finding that appellate jurisdiction existed.

The Second Circuit began with the premise that equitable estoppel satisfies the "writing" requirement of the FAA. It then reasoned that not to recognize appellate jurisdiction would be tantamount to holding that district courts lacked the power to compel arbitration on the basis of equitable estoppel in the first place. In effect, it held that recognizing the substantive right of a non-signatory to require a signatory to arbitrate based on equitable estoppel principles necessarily also required recognizing appellate jurisdiction over denial of that right.

Amex's victory on the issue of appellate jurisdiction proved to be pyrrhic when the Second Circuit reached the merits of its motion to compel arbitration in its most recent decision in *Ross*. After first concluding that its earlier decision in favor of appellate jurisdiction under the FAA over Amex's appeal from the district court's refusal to compel immediate arbitration also conferred pendent appellate jurisdiction over the cardholder plaintiffs' interlocutory appeal from the district court's "inextricably intertwined" ruling that they could be compelled to arbitrate at all, the Second Circuit reversed that very ruling. Rejecting Amex's equitable estoppel argument, it held that the arbitration agreement between the plaintiffs on one hand and MasterCard/Visa on the other was not sufficiently related to their separate antitrust claims against Amex to make it appropriate to require them to arbitrate those claims simply because Amex was alleged to be a conspirator with MasterCard/Visa in violating the antitrust laws.

Notwithstanding this reversal on the merits, the Second Circuit did not revisit its earlier decision that it had appellate jurisdiction over Amex's own (now moot) appeal, and in fact reiterated its prior reasoning that a non-signatory invoking equitable estoppel may appeal from denial of a motion to compel arbitration at least where the district court has agreed (albeit erroneously) that equitable estoppel is available. The Court of Appeals thus put itself in the somewhat odd position of rejecting on the merits the very basis – and the only basis – on which it had previously found that it could exercise appellate jurisdiction in the first place. The irony was heightened by the fact that had Amex *not* appealed the district court's original decision to hold a jury trial on the issue of the validity of the arbitration agreement under the antitrust laws, the Court of Appeals would never have had jurisdiction to consider the underlying issue of whether there was any basis to compel arbitration of the non-signatory cardholders' claims, on the basis of equitable estoppel or otherwise.

To sum up: the law on the issue of appellate jurisdiction over decisions to compel arbitration with a non-signatory to an arbitration agreement is in hopeless confusion. Some circuits reject the idea *in toto*; others allow such jurisdiction under a variety of standards that range from a simple showing that the appeal is non-frivolous, to a standard that would effectively conflate the decision on appealability with a decision on the merits of the district court's conclusion that the non-signatory should be compelled to arbitrate. Presumably the Supreme Court will bring some order out of this jurisprudential chaos.

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1 547 F.3d 137 (2d Cir. 2008).

2 *Ross v. Am. Express Co.*, 478 F.3d 96, 100 (2d Cir. 2007).

3 521 F.3d 597 (6th Cir. 2008).

4 *Arthur Anderson LLP v. Carlisle*, 129 S. Ct. 529 (2008) (granting writ of certiorari).

5 9 U.S.C. §§ 16(a)(1)(A), (B).

6 *See* 9 U.S.C. § 3 (A stay is appropriate for "any issue referable to arbitration under an agreement in writing for such arbitration . . . ."); 9 U.S.C. § 4 (Arbitration will be compelled if there is a "refusal of another to arbitrate under a written agreement for arbitration . . . .").

7 *See, e.g.*, *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995) (citation omitted) ("[A] nonsignatory party may be bound to an arbitration agreement if so dictated by the 'ordinary principles of contract and agency,'" including "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.").

8 103 F.3d 524 (7th Cir. 1996).

9 *Id*. at 529-30 (internal citations omitted).

10 349 F.3d 679 (D.C. Cir. 2003).

11 *Id.* at 683 (citation omitted).

12 *Id.*

13 *Id*. at 684-85.

14 428 F.3d 940 (10th Cir. 2005).

15 521 F.3d 597 (6th Cir. 2008).

16 *DSMC*, 349 F.3d at 684 ("We need not and do not decide whether [a motion to compel signatories to an arbitration agreement to arbitrate with non-signatories] can ever succeed."); *Universal Serv. Fund*, 428 F.3d at 945 ("We also agree with the DSMC court that dismissing this appeal does not mean equitable estoppel cannot be employed to compel arbitration.").

17 *DSMC*, 349 F.3d at 684-85 ("District courts may certainly consider stays in circumstances such as these as a matter of discretionary control of their docket.") (citations omitted).

18 *Carlisle*, 521 F.3d at 602.

19 *Toledano v. O'Connor*, 501 F. Supp. 2d 127, 154 (D.D.C. 2007) ("Given that this Court must under the FAA stay the claims against the [signatories to the arbitration agreement], it will also exercise its discretion to stay the claims against [the non-signatory] pending that arbitration.").

20 482 F.3d 207 (3d Cir. 2007).

21 *Id*. at 212-21.

22 *Id*. at 214.

23 *Id*. at 214-15.

24 372 F.3d 339 (5th Cir. 2004).

25 *Id*. at 342 (emphasis in original).

26 *Id*. at 343.

27 478 F.3d 96 (2d Cir. 2007).

When May Investment Advisors Serve As Lead Plaintiffs In Securities Class Actions?

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I. Introduction

On December 3, 2008, the United States Court of Appeals for the Second Circuit held in *W.R. Huff Asset Management Co., LLC v. Deloitte & Touche LLP* that an investment advisor that did not purchase securities for its own accounts and had brought suit entirely on behalf of its clients, lacked constitutional standing to sue under the federal securities laws.[1] The court ruled that such an investment manager ("Huff") had not suffered the "injury-in-fact" required to confer constitutional standing.[2] Although the court noted that it "need not decide when, in the context of a class action under the [Private Securities Litigation Reform Act ("PSLRA")], an investment advisor could qualify as a suitable lead plaintiff,"[3] it implied that the answer is never. The decision puts in serious doubt the continued vitality of district court precedents appointing such investment advisors as lead plaintiffs under the PSLRA, cases upon which the *Huff* district court heavily relied.

II. Factual Background And The District Court's Decisions

In March 2002, Adelphia Communications Corporation ("Adelphia") publicly disclosed that it had billions of dollars in off-balance sheet debt.[4] Later disclosures and investigations by the Department of Justice and the Securities Exchange Commission into allegations of fraud by Adelphia's senior management led to Adelphia's collapse and bankruptcy in June 2002. Numerous Adelphia investors filed lawsuits alleging various forms of securities fraud against various defendants.[5]

Huff, an investment advisor, never purchased any Adelphia securities. Instead, at Huff's behest, its clients did. On behalf of those clients – though Huff's complaints never identified which ones – Huff filed suit against certain investment banks that underwrote Adelphia securities, Adelphia's outside accountants, and Adelphia's outside law firm, alleging violations of sections 11 and 12(a)(2) of the Securities Act of 1933 and sections 10(b) and 18 of the Securities Exchange Act of 1934.[6] Although Huff alleged that it had obtained powers of attorney from its clients and had unlimited investment discretion, its clients retained ownership of the investments in Adelphia securities, and they were the ones that had "suffered financial losses as a result of Adelphia's collapse."[7]

The defendants moved to dismiss Huff's action on the ground that Huff, not having suffered any injury of its own, lacked constitutional standing to bring suit. The district court denied the motion and a later motion for reconsideration, holding that Huff's powers of attorney and investment discretion established standing.[8]

In reaching its conclusion, the district court relied heavily on a line of cases appointing investment advisors as lead plaintiffs in securities class actions governed by the PSLRA. These cases generally found that an investment advisor's power of attorney for its clients and unrestricted decision making authority were sufficient to make the advisors in some sense "purchasers" within the meaning of the federal securities laws, affording them standing to serve as lead plaintiffs in securities class actions.[9] The *Huff* district court held that although *Weinberg* did not directly address constitutional standing, "[t]he reasoning of *Weinberg* applies with equal force to standing under the securities laws and standing under Article III. That *Weinberg* was decided in the context of the appointment of a lead plaintiff in a class action does not mean that the case does not apply here. A lead plaintiff, plainly, must have standing, and that is why Judge Conner addressed the standing issue in *Weinberg*."[10]

III. The Second Circuit's Decision In *Huff*

The Second Circuit reversed. Starting from the "bedrock" proposition that "Article III of the Constitution limits the jurisdiction of federal courts to the resolution of 'cases' and 'controversies,'" the court held that "Article III standing consists of three 'irreducible' elements": (1) injury-in-fact, (2) causation, and (3) redressability.[11] The court wrote that "[t]hese requirements ensure that a plaintiff has a sufficiently personal stake in the outcome of the suit so that the parties are adverse."[12] Conducting an analysis under the applicable Article III standing precedents, the circuit court reasoned that where an investment advisor – like Huff – does not have ownership or legal title to its clients' investments, it has not suffered an injury-in-fact as required by Article III, even if it has obtained powers of attorney from those clients.[13] "Huff's only interest in this litigation as an attorney-in-fact," the court noted, was "the recovery of its legal fees, which are a 'byproduct of the suit itself' and cannot serve as a basis for Article III standing."[14]

The court rejected Huff's argument that its authority to make investment decisions on behalf of its clients satisfied a prudential exception to the injury-in-fact requirement, noting that such exceptions have been recognized only under limited circumstances where a plaintiff "can demonstrate (1) a close relationship to the injured party and (2) a barrier to the injured party's ability to assert its own interests."[15] The Court of Appeals also found unpersuasive Huff's argument that it satisfied the "injury-in-fact" requirement by alleging that it suffered injury to its reputation as a result of its decision to invest in Adelphia securities and "informational injury" that impaired its performance as an investment advisor. Neither of these "injuries" were those for which Huff was seeking redress (nor are such unique injuries typical of the relief sought by investors in securities class actions); in its action, Huff simply sought "money damages associated with the losses suffered by Huff's clients."[16]

In reaching its decision, the Second Circuit specifically rejected the district court's reliance on cases analyzing statutory standing, as opposed to Article III constitutional standing. The Court of Appeals noted that "[a]s an initial matter, we disagree with the District Court's ruling that constitutional standing may be assessed using the test for statutory standing developed in *Weinberg*,[17] a case involving the appointment of a lead plaintiff pursuant to the Private Securities Litigation Reform Act. … [The] statutory factors [addressed in *Weinberg*] are separate and apart from the elements of constitutional standing … and cannot be used to avoid constitutional requirements."[18] The Court of Appeals stated, in a footnote, that it was not reaching the question of when an investment advisor could qualify as a lead plaintiff in a securities class action, while issuing some guidance on the issue to district courts facing the issue:

> For purposes of this case, we need not decide when, in the context of a class action under the PSLRA, an investment advisor could qualify as a suitable lead plaintiff. We note, however, that district courts should be mindful that *named plaintiffs* in a class action 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless [they] can thus demonstrate the requisite case or controversy between themselves personally and [defendants], none may seek relief on behalf of himself or any other member of the class.'[19]

IV. The Effect Of *Huff* On Investment Advisors' Ability To Serve As Lead Plaintiffs

While the Second Circuit did not literally determine "when, in the context of a class action under the PSLRA, an investment advisor could qualify as a suitable lead plaintiff,"[20] its *Huff* decision necessarily will have significant implications in that very context. At a minimum, by holding that investment advisors that did not purchase securities for their own accounts (or otherwise take ownership in or title over their clients' investments) do not have constitutional standing to bring suit, the court effectively precluded any such investment advisor in the future from serving as lead plaintiff in securities class actions, because none will have constitutional standing to prosecute such actions in the first place.

The important differences between individual actions (like *Huff*) and class actions should not alter the constitutional analysis. As an individual action brought only by Huff (on behalf of certain of its unnamed clients), Huff's own lack of standing ended the discussion. In a class action – even one brought solely in the name of an investment advisor that, like Huff, did not ever beneficially own the subject securities – there are at least some plaintiffs (the absent class members) who enjoy constitutional standing to bring suit. But even though in such a class action there will be some plaintiffs with constitutional standing, the question remains – must the PSLRA "lead plaintiff" have constitutional standing to prosecute claims being asserted? The answer *Huff* provides appears to be "yes." In the footnote addressing the implications of its holding to the context of lead plaintiff appointments under the PSLRA, the Court of Appeals specifically noted "that district courts should be mindful that *named* plaintiffs in a class action 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless [they] can thus demonstrate the requisite case or controversy between themselves personally and [defendants], 'none may seek relief on behalf of himself or any other member of the class.'''[21]

Thus, the Second Circuit's *Huff* decision calls into question the precedential value of decisions in which an investment advisor that did not purchase any securities for its own account nonetheless was appointed lead plaintiff in a securities class action.[22] In *Weinberg*, three parties moved for appointment as lead plaintiff in the securities class action, including an investment advisor.[23] The court, without conducting a constitutional standing analysis, determined that the investment advisor had statutory standing as a "purchaser" under the federal securities laws because it was the attorney-in-fact and had unrestricted decision making authority.[24] Finding that the investment advisor was otherwise best suited under the other relevant factors, the court appointed the investment advisor lead plaintiff.[25]

Similarly, in *EZRA Charitable Trust*, the court appointed an investment advisor that "purchased [the subject] securities on behalf of its clients rather than on its own behalf" as lead plaintiff in a securities class action.[26] Without mentioning Article III standing, the court determined that the advisor had standing as a "purchaser" under the federal securities laws and found that it was best qualified to serve as lead plaintiff under the PSLRA. The court reasoned that the investment advisor had "a significant financial interest in attempting to recover the $10.1 million allegedly lost by its clients in order to maintain their goodwill and future business" and that it had sufficient "incentives to vigorously litigate this case."[27]

Neither the *Weinberg* nor the *EZRA Charitable Trust* decisions can be reconciled with the Second Circuit's decision and reasoning in *Huff*. By holding that factors that might have been sufficient to establish statutory standing as a "purchaser" under the federal securities laws do not establish constitutional standing, and by expressly rejecting an investment advisor's claim that its power of attorney and investment discretion give it standing to sue for losses suffered by its clients, the Court of Appeals has restricted investment advisors' ability to serve as lead plaintiffs in securities class actions: investment advisors that did not purchase any of the subject securities for their own accounts or did not acquire actual ownership of or title over their clients' investments do not have standing to bring suit, and thus cannot reasonably be expected to serve as lead plaintiffs.

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1 549 F.3d 100 (2d Cir. 2008).

2 *Id.* at 105-07.

3 *id.* at 106 n.5.

4 *Id.* at 103-04.

5 *Id.*

6 *Id.*

7 *Id.*

8 *See In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.,* Nos. 03-MD-1529 (LMM), 03 Civ. 5752, 03 Civ. 5753, 2005 WL 2087811, at *3 (S.D.N.Y. Aug. 30, 2005) (*"Adelphia I"*); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.,* Nos. 03-MD-1529 (LMM), 03 Civ. 5752, 03 Civ. 5753, 2005 WL 2667201, at *1 (S.D.N.Y. Oct. 19, 2005) (*"Adelphia II"*).

9 *See Adelphia I,* 2005 WL 2087811, at *2 (citing, among other decisions, *Weinberg v. Atlas Air Worldwide Holdings, Inc.,* 216 F.R.D. 248, 255 (S.D.N.Y. 2003) and *EZRA Charitable Trust v. Rent-Way, Inc.,* 136 F. Supp. 2d 435, 442 (W.D. Pa. 2001)); *Adelphia II,* 2005 WL 2667201, at *1 (citing *Weinberg*).

10 *Adelphia II*, 2005 WL 2667201, at *1.

11 *Huff,* 549 F.3d at 106.

12 *Id.* at 107.

13 *Id.* at 107-09.

14 *Id.* at 109.

15 *Id.* at 109 (citing decisions where prudential exception was recognized for suits brought by trustees on behalf of trusts, guardians ad litem on behalf of their wards, and receivers on behalf of their receiverships).

16 *Id.* at 111.

17 216 F.R.D. at 255.

18 *Id.* at 106.

19 *Id.* at 106 n.5 (internal citations omitted).

20 *Id.*

21 *Id.*

22 *See Weinberg v. Atlas Air Worldwide Holdings, Inc.*, 216 F.R.D. 248, 255 (S.D.N.Y. 2003); *EZRA Charitable Trust v. Rent-Way, Inc.*, 136 F. Supp. 2d 435, 442 (W.D. Pa. 2001). Although the district court cited a number of other decisions involving the appointment of investment advisors as lead plaintiff under the PSLRA, in the cases other than *Weinberg* and *EZRA Charitable Trust*, the investment advisor was itself a purchaser of securities and the issue was whether it could aggregate its losses with those of its clients, *see, e.g.*, *In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 98-100 (S.D.N.Y. 2005), or the district courts did not allow the advisor to serve as a lead plaintiff. *See In re Turkcell Iletisim Hizmetler, A.S. Sec. Litig.*, 209 F.R.D. 353, 357-58 (S.D.N.Y. 2002); *Competitive Assocs., Inc. v. Int'l Health Scis., Inc.*, No. 72 Civ. 1848, 1972 WL 350, at *3 (S.D.N.Y. Oct. 10, 1972).

23 216 F.R.D. at 251.

24 *Id.* at 255.

25 *Id.* at 256.

26 136 F. Supp. 2d at 441.

27 *Id.* at 443.

The Resurgence Of Tortious Interference Claims Relating To Busted Mergers

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I. Introduction

Disappointed participants in busted deals have used tortious interference claims as one of their litigation strategies since at least the 1980s; *Pennzoil Co. v. Texaco, Inc.* represents the best-known example.[1] Litigation arising in the context of the current freeze-up of the financing markets demonstrates that tort claims continue to be a tactic of choice to seek to compel performance of the deal or to seek damages, despite limitations in the underlying contracts.

Two recent cases illustrate this point. In *Clear Channel v. Citi*, the financing sources for the proposed acquisition of Clear Channel were sued in Texas state court by both the target and the proposed buyer for tortious interference with the merger agreement.[2] The court allowed the tort claim to proceed, rejecting an argument that the underlying contracts prohibited suit in that forum.

In *Lasker v. UBS*, the court allowed a tort claim seeking damages in connection with a failed deal on behalf of a purported class of public shareholders.[3] Like *Clear Channel*, *Lasker* involved a suit against the prospective financing sources for the acquisition. Unlike *Clear Channel*, the plaintiffs in *Lasker* were the target company shareholders. In denying a motion to dismiss, the court held (under Tennessee law but drawing on New York and Delaware precedent) that the defendant could be held liable to target company shareholders for tortious interference of a prospective business relationship, even though the shareholders were not third-party beneficiaries under the terms of the merger agreement.[4] By widening the door for tortious interference claims arising from merger agreements to public shareholders, the *Lasker* decision underscores the role of such tort claims in commercial and financial contexts.

II. Background

The road to *Lasker* began with *Pennzoil v. Texaco*.[5] Pennzoil had entered into an agreement with Getty to purchase about three-sevenths of Getty's outstanding shares for about $110 a share.[6] Texaco Corp. swooped in with a significantly higher offer and bought the shares for $128 a share. Pennzoil then filed suit in Texas state court alleging that Texaco had tortiously induced Getty to breach its contract with Pennzoil.[7] Pennzoil won and was awarded the (then) largest tort award in history, about $11 billion, ultimately forcing Texaco to file for bankruptcy. The suit was groundbreaking in the size of the award and gave instant credibility to the use of that tort.

Over twenty years later, the plaintiffs in *Clear Channel v. Citi* relied on similar tort allegations to successfully secure a temporary restraining order and then an agreed temporary injunction, preventing the defendants from taking steps to meaningfully adjust their financing commitment.[8] The case arose out of CC Media's agreement to purchase the stock of Clear Channel.[9] CC Media had entered into a commitment agreement with several banks to provide debt funding for the acquisition.[10] As alleged by Clear Channel and CC Media, when the credit market constricted, the defendant banks responded to the market conditions by (1) creating pretextual reasons to not proceed, (2) refusing to execute necessary documents in an effort to "run out the clock" on the merger agreement, (3) threatening to disrupt another unrelated transaction with the purchaser, CC Media, and (4) demanding that the financing arrangement be amended.[11] Based on these allegations, Clear Channel and CC Media sued the banks in Texas state court for tortious interference with contract. They sought injunctive relief to prohibit the defendant financers from interfering with the merger, to extend the termination date in the financing commitment letter until such time as the merger had closed, and in the alternative, damages in excess of $26 billion. (The buyer also brought suit in New York on a claim for breach of contract of the financing commitment.)

In initially opposing the plaintiffs' application for a temporary injunction and later in their motion for summary judgment, the defendants argued that the intent requirement for a claim of tortious interference with contract was missing, citing the plaintiffs' own application which stated that the defendants' actions were motivated by *economic self-interest* with an eye toward renegotiating the financing commitment letter — not by the requisite intent to harm or to interfere with the merger agreement. The defendants argued that, at worst, they violated their contract with the purchaser, and breach of a contract to which one is a party cannot be tortious interference with others' agreements, particularly in the absence of intent. The court never evaluated this argument because the parties agreed to a temporary injunction enjoining the banks from interfering with the merger agreement or the commitment letter. But the defendant banks' motion to dismiss the Texas tort action[12] and combine the Texas litigation with concurrent New York litigation was denied, and the case was eventually settled on revised financing terms that permitted closing of the transaction.

III. The *Lasker* Decision

The *Lasker* decision represents an extension of the use of tortious interference against financers by exposing them to liability not just to the target or buyer, but also to target shareholders. While the case was decided on the basis of Tennessee law its importance extends beyond that state because the court in the Eastern District of New York drew on both New York and Delaware precedent.[13]

In *Lasker*, defendant entered into a commitment agreement to raise debt for financing Finish Line's purchase of Genesco.[14] The merger agreement specifically excluded the existence of third-party beneficiaries.[15] As alleged by plaintiffs, once credit woes related to the subprime crisis began to affect Genesco's profits, defendant UBS took steps to extricate itself from its funding commitment.[16] These alleged steps included informing Finish Line that Genesco had suffered a material adverse effect, and shortly thereafter halting work on the closing documents. Genesco shareholders filed two lawsuits—one in Tennessee and one in New York.

In Tennessee, the shareholders sued Finish Line and UBS, claiming entitlement to the benefits of the merger agreement as third-party beneficiaries. The complaint alleged that UBS tortiously tried to derail the merger agreement, prevented it from closing, and as a result damaged Genesco's shareholders. The Tennessee Chancery Court dismissed the claims because the merger agreement expressly disclaimed third-party beneficiaries and, thus, the shareholders had no standing or expectation to benefit.[17]

In the New York *Lasker* litigation, the Genesco shareholders alleged that UBS tortiously interfered with the Genesco shareholders' business relationship with Finish Line.[18] Judge Charles P. Sifton, U.S. District Judge for the Eastern District of New York, disagreed with the Tennessee Chancery Court decision and decided that the plaintiff shareholders had stated a claim. Judge Sifton drew a distinction between a claim for interference with a prospective business relationship and a claim for interference with a contract.[19] The court wrote that under Tennessee law the claim for tortious interference with a business relationship requires "an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons."[20] The court recognized that the factual basis for the shareholders' expectancy was the "novel theory" that they expected to benefit by receiving $54.50 per share once Genesco satisfied the conditions for closing.[21]

Judge Sifton determined nevertheless that a business expectancy may have existed because if Finish Line had refused to deposit the necessary funds with a paying agent for direct transfer to the Genesco shareholders, the shareholders would have had an "absolute right to sue" Finish Line.[22] But the right of the shareholders to sue Finish Line would be based on Finish Line's decision not to pay once the merger was consummated, not on successful consummation of the merger itself. In other words, the shareholders' expectation of payment from Finish Line would arise when and only if the merger was consummated and if Finish Line refused to pay.

Judge Sifton's analysis of the expectancy looked to sister state precedent[23]: *Harger v. Price*,[24] decided under New York law, and *Malpiede v. Townson*,[25] decided under Delaware law. In *Harger*, the plaintiff's shares in the target company were cancelled while the target was engaged in acquisition talks with buyers. The Southern District of New York held that the plaintiff, "by virtue of his status as a shareholder" while talks were occurring, "had a prospective business relationship" with the purchaser.[26]

The facts in *Harger* differ significantly from *Lasker*. In *Harger*, merger negotiations had been underway for nine or ten months before the plaintiff shareholder's shares were cancelled—three weeks before the signing of the merger agreement.[27] In *Harger*, when the expectancy arose no merger agreement was yet in place and third-party beneficiaries had not been disclaimed. Moreover, in *Harger*, the target corporation was closely held and the other shareholders were negotiating directly with the acquiring company, making it more reasonable to find that a shareholder might develop an expectation of benefit or future relationship.[28]

In *Malpiede*, the Delaware Supreme Court held that shareholders in a target company could reasonably expect to benefit from the possibility of a higher offer to purchase the company in the midst of a competitive bidding war.[29] The target shareholders alleged that while they were receiving bids from two different bidders, one of the bidders, Knightsbridge, misrepresented its current ownership rights in the target.[30] The alleged interference also included tortiously threatening litigation against the target to force consummation of Knightsbridge's merger proposal.[31] Notably, the court held that the probability of the business opportunity must be assessed at the time of the alleged interference.[32] In *Malpiede*, no merger agreement had yet been reached, and the parties were engaged in a competitive bidding war, enhancing the expectation of higher bids that would benefit the target shareholders. Again, the facts in *Malpiede* differ materially from those in *Lasker*. When the interference allegedly occurred in *Lasker*, a merger agreement that disclaimed all third-party beneficiaries had already been signed, eliminating any reasonable expectation of benefit by target shareholders.

The facts in *Lasker* also differ significantly from the facts in the very few other decisions finding that a non-third-party beneficiary has a valid business expectation. For example, in *Brown v. AXA RE*, the plaintiff filmmakers sued AXA, alleging that AXA reneged on its commitment to reinsure a direct insurance policy that was, in turn, backing up the financing for the plaintiffs' film.[33] The court held that because AXA's contract was with the direct insurer and there was no evidence on the face of the contract to indicate that the parties intended to benefit the plaintiffs, they were not third-party beneficiaries.[34] Nevertheless, the court allowed plaintiffs' claim for tortious interference with a business relationship to survive the motion to dismiss. The court did so because the plaintiff had established several business relationships in connection with the film project on the expectation that the project was being funded.[35] Once the backing disappeared, those relationships that were entered into on the basis of the funding crumbled.

These facts contrast with the facts in *Lasker*, where, again, any expectancy of benefit from the merger agreement should have been eliminated by the disclaimer in the agreement. Moreover, AXA originally had been the direct insurer of the plaintiff but was recast as a re-insurer at the request of a new financer, Chase.[36] That move from insurer to re-insurer also may have engendered some doubt as to whether AXA's relationship with Chase was intended to benefit the plaintiffs. In *Lasker*, there was no shift in relationship that would have led to such an expectation.

In addition to finding an expectation of benefit, Judge Sifton in *Lasker* also found that despite the absence of improper *motive*, the defendant's fraud *counterclaim* in a lawsuit initiated by Genesco in Tennessee could constitute the improper *means* that allegedly caused the interference with the business expectation.[37] Assuming the allegations of the complaint to be true, the court held that engaging in unfounded litigation could amount to an improper means even though they did not initiate the lawsuit.[38] By expansively interpreting the improper motive or means element of the tort, Judge Sifton further expanded the breadth of tortious interference. Under his analysis, if a bank is sued by the target company and then counterclaims it may be found to be interfering with the business relationship of target shareholders even if its counterclaim is motivated properly by economic self-interest.

IV. Conclusion

The decision sustaining the Texas complaint in *Clear Channel* re-invigorates the role of tortious interference claims in the merger and finance context, while the decision in *Lasker* denying the motion to dismiss expanded the potential scope of the tort. The potential implications of the *Lasker* decision are significant. Certainly, lending institutions will want to consider explicitly disclaiming the existence of third-party beneficiaries in financing commitments and loan agreements. But by enlarging the group of prospective tort plaintiffs even in the face of such a disclaimer, the *Lasker* decision serves as a reminder that volatile markets can lead to bad law.

* * *

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1 No. 84-05905 (151st Jud. Dist., Harris County Tex., Dec. 10, 1985), *aff'd in part*, 729 S.W.2d 768 (Tex. App. 1987), *cert. denied*, 485 U.S. 994 (1988).

2 Plaintiff's Verified Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction; Request for Expedited Discovery; and Request for Expedited Trial at 1, *Clear Channel Commc'ns, Inc. v. Citigroup Global Markets, Inc.*, No. 2008CI04864 at 1 (225th Jud. Dist., Bexar County Tex., Mar. 26, 2008) (hereinafter Clear Channel Plaintiff's Petition).

3 *Lasker v. UBS Sec. LLC*, No. CV-08-0854 (CPS) (RER), 2008 U.S. Dist. LEXIS 35462 (E.D.N.Y. Apr. 30, 2008).

4 *Id.* at **24-25, **32-33.

5 *Pennzoil*, No. 84-05905.

6 *Id*.

7 *Id*.

8 Temporary Restraining Order and Order Setting Hearing for Temporary Injunction, *Clear Channel Commc'ns, Inc. v. Citigroup Global Markets, Inc.*, No. 2008CI04864 (225th Jud. Dist., Bexar County Tex., Mar. 26, 2008); Agreed Temporary Injunction Order, *Clear Channel Commc'ns, Inc. v. Citigroup Global Markets, Inc.*, No. 2008CI04864 (225th Jud. Dist., Bexar County Tex., Apr. 11, 2008).

9 Clear Channel Plaintiff's Petition at 1-3.

10 *Id.*

11 *Id.* at 14-16.

12 Order on Defendants' Motion to Dismiss, *Clear Channel Commc'ns, Inc. v. Citigroup Global Markets, Inc.*, No. 2008CI04864 (225th Jud. Dist., Bexar County Tex., Apr. 11, 2008). Similarly, in the concurrent New York anticipatory breach of contract litigation, the defendants' efforts to seek summary judgment regarding the plaintiffs' request for specific performance under the commitment letter was denied. The court reasoned that a triable issue existed as to whether specific performance was an appropriate remedy given the potential lack of funding alternatives in a constricting credit market. *BT Triple Crown Merger Co. v. Citigroup Global Markets Inc.*, No. 600699/08, 2008 N.Y. Misc. LEXIS 2682, at *28 (Sup. Ct. N.Y. County May 7, 2008).

13 *Lasker v. UBS*, 2008 U.S. Dist. LEXIS 35462, at **24-25.

14 *Id.* at *6.

15 *Id.* at *3.

16 *Id.* at *10.

17 *Lasker v. Finish Line, Inc.*, No. 07-2259-IV (III) (20th Div. Tenn. Chancery Ct.).

18 *Lasker v. UBS,* 2008 U.S. Dist. LEXIS 35462, at *1.

19 *Id.* at *19 n.17.

20 *Id*. at *32.

21 *Id*. at *33.

22 *Id.* at *35 n.26.

23 *Id*. at *33.

24 204 F. Supp. 2d 699 (S.D.N.Y. 2002).

25 780 A.2d 1075 (Del. 2001).

26 *Harger*, 204 F. Supp. 2d at 709.

27 *Id.* at 704.

28 *Id*. at 703.

29 *Malpiede*, 780 A.2d at 1099.

30 *Id.* at 1099 n.89.

31 *Id.*

32 *Id.* at 1099.

33 No. 02 Civ. 10138 (LTS) (AJP), 2004 U.S. Dist. LEXIS 7624 (S.D.N.Y. May 3, 2004).

34 *Id.* at *12.

35 *Id.* at *21.

36 *Id.* at *5.

37 *Lasker v. UBS*, 2008 U.S. Dist. LEXIS 35462, at *36.

38 *Id.*

Trademark Battles In The Banking Field: When A Bank Acquisition Gives Rise To A Trademark Dispute

BY DAVID H. HERRINGTON AND ARMINDA B. BEPKO

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When a bank expands its name and operations into a new geographic area by acquiring another bank, it sometimes is greeted not with a friendly welcome but with a trademark suit. If an existing local bank in the area has a name that is similar to the newly-arrived bank, the old bank may contend that the new bank's name will create trademark confusion. In the last year, at least three such lawsuits were filed. When TD Banknorth and Commerce Bancorp merged and planned to operate in Massachusetts as "TD Commerce Bank," another Massachusetts bank operating as "Commerce Bank" filed a trademark action to block their plans.[1] When Citizens Financial Group, a subsidiary of Royal Bank of Scotland ("RBS"), acquired Charter One Bank in Michigan and changed Charter One's name to "RBS Citizens Bank," another bank operating in Michigan as "Citizens Bank" brought a trademark infringement suit against it.[2] And when People's United Bank acquired The Bank of Western Massachusetts and planned to change the acquired bank's name to "The Bank of Western Massachusetts, a division of People's United Bank," another bank operating in western Massachusetts as "PeoplesBank" objected based on trademark grounds.[3]

Like all trademark disputes, these three suits were decided on their particular facts, but they illustrate issues and patterns that recur frequently in the banking field.

Too Many "Citizens"? The Crowded Field Of Bank Names

In the world of bank names, certain terms – like "Citizens" and "Commerce" – appear so frequently as to be almost ubiquitous. That alone makes trademark disputes more likely; the odds are high that two banks with "Commerce" in their name, for example, will find themselves operating in the same area. That near-ubiquity also affects the outcome when trademark disputes do arise, because courts generally afford narrower protection to names that are common in a particular field.[4]

Banks seldom choose arbitrary or fanciful names, such as "Yahoo" or "Sprite." Instead, they adopt names that suggest seriousness and connote an orientation toward business and the local community. The result, as courts have observed, is that "it is common within the financial industry for companies to share portions of their names."[5] The three lawsuits outlined above illustrate the point: a review of the Federal Deposit Insurance Corporation ("FDIC") website shows that 1328 banks have used "Citizens" in their name; 593 banks have used "Commerce" in their name; and 842 banks have used "Peoples" in their name.

Courts generally hold that the widespread use of a term in the names of companies providing similar services weighs against providing strong protection for that term.[6] Applying this principle, the court in *Citizens Banking* found that extensive use of the word "Citizens" in the banking field "substantially weaken[s] the strength of a mark."[7] The *Citizens Banking* court went on to find that the marks of "RBS Citizens Bank" and "Citizens Bank" are not confusingly similar, in part because the parties used different fonts, colors, graphics and additional words in their respective logos.[8]

In *Commercial Savings Bank v. Hawkeye Federal Savings Bank*, where two banks used "Commercial" in their names, but with different logos, the court held that no "ordinary consumer would be misled in banking decisions simply because two banks in the area have similar names." [9] And in *First Savings Bank F.S.B. v. First Bank System Inc.*, the court found two banks' respective marks were not confusingly similar, based on their different fonts, logos and use of additional words, even though both marks contained the word "First."[10]

That the field of bank names is crowded does not mean courts always reject trademark infringement claims brought by banks. In *Commerce Bank*, for example, the court found that the defendant's use of "TD Commerce Bank" was likely to cause confusion with the plaintiff's name of "Commerce Bank." That finding was based not only on the shared use of "Commerce Bank," but also on the fact that the parties' respective logos reinforced the similarities: the defendant's logo depicted "TD" in a box, followed by the words "Commerce Bank," while the plaintiff's logo depicted a lion in a box, followed by the words "Commerce Bank."[11] Thus, the court found, both logos "leav[e] the viewer with the strong visual impression of the words 'Commerce Bank.'"[12] Based largely on its conclusion that the marks and logos were highly similar, the court granted a preliminary injunction barring the use of the "TD Commerce Bank" name in the area where plaintiff Commerce Bank did business.[13]

What Is Trademark Confusion In The Banking Business?

The touchstone of trademark infringement is proof that the defendant's use of the allegedly infringing mark likely will confuse consumers into believing the defendant's goods or services are made or sponsored by the plaintiff, thus causing the plaintiff to lose "profits, goodwill [or] reputation."[14] An assessment of the likelihood of confusion is context-specific and takes account of the sophistication of customers in selecting the goods or services.[15] For inexpensive goods that might be bought on impulse in a grocery store, for example, courts recognize "a lesser standard of purchasing care" that in turn usually means "the possibility of confusion is even more likely than where the purchase results from care and deliberation."[16]

As a matter of common experience, consumers of banking services are likely to demonstrate a high level of care and sophistication when, for example, they open a new checking account, purchase a certificate of deposit, or take out a residential mortgage or commercial loan. Courts recognize this, noting that "consumers tend to exercise a relatively high degree of care in selecting banking services. As a result, customers are more likely to notice what, in other contexts, may be relatively minor differences in names."[17]

Given the relative sophistication of consumers of banking services, how does a bank asserting trademark infringement demonstrate a likelihood of confusion or find evidence of actual confusion? It is rare to see evidence of a customer actually entering into a banking relationship with a new bank based on confusion – for example, a customer opening a savings account with "First Commerce Bank" based on mistakenly thinking he was dealing with "First Citizens Bank." Instead, bank plaintiffs sometimes argue that mistakes made by *non-customers* can serve as evidence of confusion. For example, a person who is not a customer of First Citizens Bank may appear at First Citizens and seek to cash a check written on an account of First Commerce Bank. (Most banks cash checks for non-customers if written on an account of the bank, but will not do so for accounts written on accounts of other banks.) First Citizens may contend that the person has "confused" First Citizens Bank with First Commerce Bank and that this supports a trademark infringement claim. Similarly, First Citizens may argue that actual confusion is demonstrated by a customer of First Commerce mistakenly trying to use a First Citizens Bank ATM.

But some courts have expressed skepticism about the significance of such behavior by non-customers, regarding such incidents as reflecting human error that constitutes a minor business annoyance, not actionable harm. The *Citizens Banking* court explained this distinction as follows:

> Confusion causing an error in a purchasing decision, such as the selection of a bank, applying for a loan, or deciding on a specific bank's certificate of deposit would be the higher level of injury. Confusion in individual transactions, such as a consumer's use of the 'wrong' ATM, resulting in a charge a consumer does not expect, or entering the wrong bank to cash a check, is more in the realm of minor annoyance.[18]

The court went on to explain that, "[a]s noted in *Cinnabar Traders Ltd. v. Cinnabar Lane Ltd*., 223 U.S.P.Q. 726 (S.D.N.Y. 1983), '[t]here has been no showing of actual confusion as to products. The only evidence of confusion is a few misdirected telephone calls, but this is a minor annoyance of business life. There has been no showing of injury to plaintiff from loss of business or the like.'"[19]

The *Citizen Banking* court's observation is consistent with the broader principle that actionable trademark confusion is ordinarily limited to that which "create[s] a likelihood of confounding an appreciable number of reasonably prudent purchasers exercising ordinary care."[20] Thus, "instances of actual confusion may not weigh in favor of a finding of likelihood of confusion unless the confused consumer was acting with the care expected of consumers purchasing the type of good at issue."[21] Applying these principles here can lead to the same finding reached by the *Citizens Bank* court: that mistakes made by non-customers in their spontaneous (and potentially careless) attempts to cash a check or withdraw money from an ATM will carry little weight, if any, as evidence of actionable confusion.

When Complying With Regulatory Guidance Gives Rise To A Trademark Dispute

Sometimes bank regulatory guidance requires using a particular name that, in turn, gives rise to a trademark dispute. In May 1998, the FDIC and other bank regulators issued an Interagency Statement instructing that if a single bank with FDIC-insured accounts operates branches or divisions under different names, the bank should make clear to customers that the branches or divisions are part of a single institution. The reason for this instruction is that accounts held by a customer at the various branches or divisions will be aggregated for determining whether the total amount held by the customer is within the maximum amount protected by FDIC insurance. Thus, in the Interagency Statement, the regulators expressed concern that "if customers believe they are dealing with two separate institutions, they may inadvertently exceed FDIC insurance limits by depositing excess amounts in different branches of the same institutions."[22]

To guard against this risk, the Interagency Statement instructs that a depository institution that operates divisions or branches with different names should "[d]isclos[e], clearly and conspicuously, in signs, advertising and similar materials that the facility is a branch, division, or other unit of the insured institution."[23] The Interagency Statement also calls for "[u]sing the legal name of the insured institutions for legal documents, certificates of deposit, signature cards, loan agreements, account statements, checks, drafts, and other similar documents."[24]

Complying with this regulatory instruction may give rise to a trademark dispute, as illustrated by the *PeoplesBank v. Bank of Western Massachusetts, et al.* suit. When People's United acquired The Bank of Western Massachusetts and merged the acquired bank into itself, it continued to operate the acquired bank as a division, with its existing name of "The Bank of Western Massachusetts." But to comply with the Interagency Statement, People's United added the phrase "a division of People's United Bank" to the name, so that the full name became "The Bank of Western Massachusetts, a division of People's United Bank."

Another bank operating in the area as "PeoplesBank" brought a trademark infringement suit and sought a temporary restraining order to enjoin the use of the "division of People's United Bank" tag, on the theory that this tag would create confusion with "PeoplesBank." The United States District Court for the District of Massachusetts denied an injunction, finding that PeoplesBank had "emphatically" failed to demonstrate a likelihood of success on its trademark infringement claim or satisfy any of the other requirements for injunctive relief.[25]

Although every trademark case is fact-specific, it seems likely that, as in *PeoplesBank*, a party objecting to the use of such a "division of" tag is likely to have an uphill battle in seeking relief. As noted, courts have recognized that consumers of banking services ordinarily act with care and therefore "are more likely to notice what, in other contexts, may be relatively minor differences in names."[26] Thus, as illustrated by *PeoplesBank*, careful consumers are unlikely to confuse "The Bank of Western Massachusetts, a division of People's United Bank" with "PeoplesBank." Further, as courts also have recognized, "graphic use of the banks' full legal names with their respective logos reduces the similarity between the marks," despite the use of identical words.[27] And finally, good faith on the defendant's part in the use of the name – as here, where a party is using a name not in an effort to create trademark confusion, but instead to comply with regulatory guidance – also weighs against a finding of infringement.[28]

* * *

In sum, that the field of bank names is so crowded tends to give rise to frequent trademark collisions. But, for the same reason, the outcome of trademark infringement suits in the banking context often is a finding of no actionable infringement. Courts recognize that bank names employing commonly-used terms usually cannot be protected as strongly as trademarks in other fields of business. And because banking consumers ordinarily act with a relatively high level of care and sophistication, they are less prone to be confused by names that share common words.

* * *

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1 *Commerce Bank & Trust Co. v. TD Banknorth, Inc.*, 554 F. Supp. 2d 77 (D. Mass. 2008).

2 *Citizens Banking Corp. v. Citizens Fin. Group, Inc.*, No. 07-11514 (AJT), 2008 WL 1995104 (E.D. Mich. May 6, 2008).

3 PeoplesBank brought suit in the United States District Court for the District of Massachusetts and sought a temporary restraining order ("TRO") to block the use of the "division of People's United Bank" tag with the name of The Bank of Western Massachusetts, but the court denied PeoplesBank's motion in an unpublished decision. *PeoplesBank v. Bank of Western Massachusetts, et al.*, Civ. A. No. 3:08-cv-30237MAP (D. Mass. Dec. 30, 2008) (Ponsor, J.). Cleary Gottlieb represented the defendants in their successful opposition to the TRO motion. It also advised RBS in the suit concerning the "Citizens Bank" name.

4 The strength of the plaintiff's mark is one of the most important factors in a trademark infringement suit, because it guides the court's decision as to the scope of trademark protection. In assessing a claim of trademark infringement, courts typically consider the so-called "Polaroid factors": (1) the strength of the plaintiff's mark as it is recognized for a particular good or service; (2) the similarity of the plaintiff's and defendant's marks; (3) the competitive proximity of the products offered by the parties; (4) the likelihood that plaintiff will "bridge the gap" and offer a product like defendant's; (5) actual confusion between products or services offered; (6) defendants' good faith in the use of the name; (7) the quality of defendant's product or service; and (8) the sophistication of customers in selecting the goods or services. *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir.), *cert. denied*, 368 U.S. 820 (1961).

5 *First Keystone Fed. Sav. Bank v. First Keystone Mortgage, Inc.,* 923 F. Supp. 693, 704 (E.D. Pa. 1996).

6 *See, e.g., Boston Duck Tours, LP v. Super Duck Tours, LLC,* 531 F.3d 1, 19 (1st Cir. 2008) (denying injunctive relief to "Boston Duck Tours" in a suit against "Super Duck Tours," where amphibious sight-seeing services commonly used the word "duck" in their names).

7 *Citizens Banking Corp.*, 2008 WL 1995104, at *7 (citation omitted).

8 *Id.* at *9.

9 592 N.W. 2d 321, 332 (Iowa 1999).

10 101 F.3d 645, 653 (10th Cir. 1996).

11 *Commerce Bank*, 554 F. Supp. 2d at 85.

12 *Id.*

13 *Id.* The decision to grant a preliminary injunction also was based on what the court deemed to be a considerable number of incidents of actual confusion that occurred over a period of days after a single newspaper advertisement announced the arrival of "TD Commerce Bank." *Commerce Bank*, 554 F. Supp. 2d at 86. While it would have been interesting to see whether the court's ruling would have been affirmed on appeal and would have led to a permanent injunction based on a full trial record, the litigation ended when the defendant chose to operate under the name "TD Bank."

14 *Societe Des Produits Nestle, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 640 (1st Cir. 1992).

15 *Polaroid*, 287 F.2d at 495.

16 *Nabisco Brands, Inc. v. Kaye*, 760 F. Supp. 25, 29 (D. Conn. 1991).

17 *First Nat'l Bank in Sioux Falls v. First Nat'l Bank, S.D.*, 153 F.3d 885, 889 (8th Cir. 1998).

18 2008 WL 1995104, at *13.

19 *Id.* at *12.

20 *Boston Duck Tours*, 531 F.3d at 12 (citation omitted).

21 *Versa Prods. Co. v. Bifold Co. (Mfg.) Ltd.*, 50 F.3d 189, 205 (3d Cir.), *cert. denied*, 516 U.S. 808 (1995); *see also Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 489-90 (1st Cir. 1981) (finding that frequent misuse of the names "Alpha" and "Alpa" in registration cards and advertisements do not amount to evidence of actual confusion).

22 Federal Deposit Insurance Corporation, Financial Institution Letter 46-98, Interagency Statement on Branch Names 1 (1998).

23 *Id.* at 2.

24 *Id.*

25 *PeoplesBank v. Bank of Western Massachusetts, et al.*, Civ. A. No. 3:08-cv-30237MAP (D. Mass. Dec. 30, 2008) (Ponsor, J.).

26 *First Nat'l Bank*, 153 F.3d at 889.

27 *Id.*

28 *Polaroid*, 287 F.2d at 495.

Supreme Court Holds That The Federal Arbitration Act Overrides State Law Administrative Jurisdiction

BY JONATHAN I. BLACKMAN, INNA ROZENBERG AND JOAQUIN TERCEÑO

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In *Preston v. Ferrer*, the United States Supreme Court clarified that when parties agree to arbitrate all disputes arising under their contract, the Federal Arbitration Act (the "FAA") requires issues of contract validity to be decided by the arbitrators, notwithstanding a state statute that would otherwise provide for this issue to be decided by an administrative agency.[1] In an earlier case, *Buckeye Check Cashing, Inc. v. Cardegna*, the Court held that questions of contract validity under a broad arbitration clause should be decided by the arbitrators, not by courts.[2] *Preston* takes this analysis further and applies it to situations where state law would give primary jurisdiction to an administrative agency.[3]

Preston arose when California entertainment lawyer Preston, claiming fees under a personal services contract with television personality Ferrer, invoked the contract's broad arbitration clause, under which the parties agreed to arbitrate "any dispute … relating to the terms of [the contract] or the breach, validity, or legality thereof … in accordance with the rules [of the American Arbitration Association]."[4] Ferrer countered with a petition to the California Labor Commissioner, claiming that the contract was void because Preston had acted as an unlicensed talent agent in violation of California's Talent Agencies Act. The California state courts enjoined the arbitration, holding that the state Talent Agencies Act vested the Labor Commissioner with "exclusive original jurisdiction" over the dispute. In so ruling, the California Court of Appeal distinguished *Buckeye* because it "did not involve an administrative agency with exclusive jurisdiction over a disputed issue."[5]

The Supreme Court reversed. It reasoned that the relevant issue was not whether the FAA completely preempted the California Talent Agencies Act, which it held was not the case, and instead framed the question as "simply who decides whether Preston acted as personal manager or as talent agent."[6] In holding that this question should be decided by the arbitrator, and not the California Labor Commissioner, the Supreme Court offered a primer on many of the fundamental arbitration principles it has developed over several decades.

The *Preston* Court first invoked *Southland Corp. v. Keating*,[7] which held that the "national policy favoring arbitration,"[8] applies in state as well as federal courts, thereby "foreclose[ing] state legislative attempts to undercut the enforceability of arbitration agreements."[9] The Court also cited *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[10] for the proposition that challenges to the validity of the contract as a whole, as opposed to challenges aimed specifically at the arbitration clause, are within the domain of the arbitrator. Finally, the Court wrote that *Buckeye*, which it described as extending the *Prima Paint* principle to disputes originating in state court, "largely, if not entirely, resolves the dispute before us" since Ferrer "sought invalidation of the contract as a whole" and did not make any "discrete challenge to the validity of the arbitration clause."[11]

The Court thus reaffirmed that involvement of an administrative agency in the enforcement of a statute does not vitiate the parties' agreement to arbitrate. In doing so, it followed the approach first announced in *Gilmer v. Interstate/Johnson Lane Corp.*,[12] which held that agreements to arbitrate age discrimination claims are enforceable notwithstanding the statutory role of the Equal Employment Opportunity Commission. In dismissing the only real distinction between *Preston* and *Buckeye*, the Court concluded:

> In sum, we disapprove the distinction between judicial and administrative proceedings drawn by Ferrer and adopted by the appeals court. When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.[13]

Finally, the *Preston* Court rejected Ferrer's argument that the choice-of-law clause in the contract – stating that the "agreement shall be governed by the laws of the state of California" – called for application of the Talent Agencies Act's provision vesting jurisdiction in the state Labor Commissioner.[14] The Court explained that under *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,[15] and *Mastrobuono v. Shearson Lehman Hutton, Inc.*,[16] when an arbitration agreement both chooses a set of arbitration rules and contains a state choice-of-law clause, the best way to harmonize the two is to "read the latter to encompass prescriptions governing the substantive rights and obligations of the parties, but not the State's 'special state rules limiting the authority of arbitrators.'"[17]

The arbitration provision of the Preston/Ferrer contract incorporated the rules of the American Arbitration Association the ("AAA"), which include AAA Rule 7(b) that grants the arbitrator authority to determine the validity of a contract. Since they had agreed to this Rule, the Court held, the contracting parties were unlikely to have contemplated that their dispute would be heard in the first instance by the Labor Commissioner. This ruling represents an important cutting back on the continued significance of *Volt*, which had suggested a broader deference to state arbitration procedures when parties agree to arbitrate under a contract incorporating a state choice-of-law provision (and had attracted considerable criticism for that suggestion).[18]

By clarifying that *Buckeye* applies to administrative agencies as well as state courts, the Supreme Court in *Preston* has further narrowed the ability of parties to avoid arbitration when the contract at issue contains a broad arbitration clause. The *Preston* decision also continues the trend of allowing arbitrators to determine their own jurisdiction. It suggests that the Court will continue its preference for keeping courts out of both jurisdictional issues and the substance of disputes under contracts with broad arbitration clauses, and it will limit the role of courts to dealing with post-award challenges after the arbitration is completed.

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1 128 S. Ct. 978 (2008).

2 546 U.S. 440 (2006).

3 The April 2006 edition of the Litigation & Arbitration Report contains a more detailed discussion of *Buckeye. See* www.clearygottlieb.com, News & Publications.

4 *Preston*, 128 S. Ct. at 982 (citation omitted).

5 *Id.* at 979.

6 *Id.* at 983.

7 465 U.S. 1 (1984).

8 *Id*. at 2.

9 *Id*. at 3.

10 388 U.S. 395 (1967).

11 *Preston*, 128 S. Ct. at 984.

12 500 U.S. 20, 28-29 (1991).

13 *Preston*, 128 S. Ct. at 987.

14 *Id.* at 988 (citation omitted).

15 489 U.S. 468 (1989).

16 514 U.S. 52 (1995).

17 *Preston*, 128 S. Ct. at 989 (internal citation omitted).

18 Interestingly, the Court's recent decision in *Hall Street LLC v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), seems to point the other way, by suggesting that parties to an arbitration agreement, by choosing state law, can agree to a broader scope of judicial review of arbitral awards than is available under the FAA.

CG Wins Preliminary Injunction On Behalf Of The Heisman Trophy Trust

Cleary won a preliminary injunction for its client The Heisman Trophy Trust against the use of Heisman trademarks by Smack Apparel Company, which sold t-shirts featuring the Heisman name and logo and references to contenders to win the Heisman Trophy® award.

Cleary sued Smack Apparel in New York federal court for trademark infringement and dilution and breach of contract. The suit was based on a prior settlement between the parties, in which Smack Apparel agreed to stop all unauthorized uses of the Heisman trademarks. U.S. District Judge Victor Marrero granted a preliminary injunction against Smack Apparel's use of the Heisman trademarks, finding that the Trust is likely to succeed on both the breach of contract and trademark claims.

DC Circuit Court Affirms Dismissal Of $47.5 Million Claim Against CG Client, The Republic Of Iraq

Cleary represented The Republic of Iraq in defending against a $47.5 million claim for breach of contract brought by Agrocomplect, AD in the U.S. District Court for the District of Columbia. Judge Reggie B. Walton granted the Republic's motion to dismiss for lack of jurisdiction under the Foreign Sovereign Immunities Act ("FSIA") and the Court of Appeals for the D.C. Circuit affirmed.

Cleary argued, and both courts agreed, that jurisdiction under the "direct effects" test of the FSIA could not be founded on agreements alleged to require payment in the United States where those agreements were separate and distinct from the agreement on which plaintiff's claims were based. The Court of Appeals also concluded, based on the contract's exclusive forum selection clause and designation of both substantive and arbitral Iraqi law, that the parties had agreed to arbitrate in Iraq, meaning that the agreement did not fall under the "New York Convention," and that there was therefore no basis for jurisdiction under the FSIA's arbitration exception to sovereign immunity.

CG Obtains Summary Judgment For Citi

Ending more than five years of litigation, Judge Robert Sweet of the SDNY granted summary judgment to Cleary's client, Citigroup Global Markets, in *Lesavoy v. Lane, et al.,* an action brought by a successor trustee of two trusts that suffered significant losses trading commodity options and futures through a Smith Barney brokerage account.

After the Second Circuit affirmed his dismissal of seven of the eight counts in the original Complaint and the parties conducted discovery on the remaining count of aiding and abetting a breach of fiduciary duty, Judge Sweet found no evidence of aiding and abetting and finally rendered judgment for Citi. Judge Sweet also agreed with Cleary's argument that the trust instruments' offer of "full protection" to parties who carried out the trustee's instructions entitled Citi to indemnfication for its costs in defending the lawsuit and ordered the trusts' reimbursement of all attorneys' fees and expenses incurred by Citi.

CG Wins Immigration Relief For 87-Year-Old Tibetan Great-Grandmother

Cleary won "withholding-of-removal" relief in immigration court in New Jersey for Ms. D., an 87-year-old Tibetan great-grandmother. The U.S. government sought to deport Ms. D. on the grounds that she had been "firmly resettled" in India on the basis of her long period of residence there. Cleary argued that she had never been eligible for citizenship or permanent legal residence in India, and received only temporary documentation (later confiscated) that left her vulnerable to deportation from India to Chinese-occupied Tibet.

Ms. D. survived the Chinese invasion of Tibet in the 1950s before fleeing to India, where she lived for more than 40 years. A devout Tibetan Buddhist and follower of the Dalai Lama, Ms. D. spends most of her days in prayer at the home of her daughter and son-in-law, and enjoys spending time with her grandchildren, one of whom Cleary assisted in his own immigration proceedings.

CG Wins Denial Of Class Certification For Fresh Del Monte Produce

Cleary Gottlieb won a victory for its client Fresh Del Monte Produce when the Circuit Court for the First Circuit of the State of Hawaii denied plaintiffs' motion for class certification in *Patrickson v. Dole Food Company, Inc., et al.* Plaintiffs had moved to certify a multi-country class of workers claiming exposure to and injury from dibromochloropropane ("DBCP"), a pesticide used in banana and pineapple fields more than 20 years ago. The court accepted Cleary's argument that DBCP claims were inherently unsuitable for class certification, because of the host of individualized factual and legal questions raised by every person's claim.

This action is one of an ongoing series of similar cases in which Cleary has represented Fresh Del Monte Produce since 1994. In the decade since the *Patrickson* suit was filed, the case has wended its way from state court on Maui, to federal district court in Honolulu, to the Court of Appeals for the Ninth Circuit, to the United States Supreme Court, back to state court on Maui and now to state court on Oahu.

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FEBRUARY 2009

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