Commercial Litigation Report

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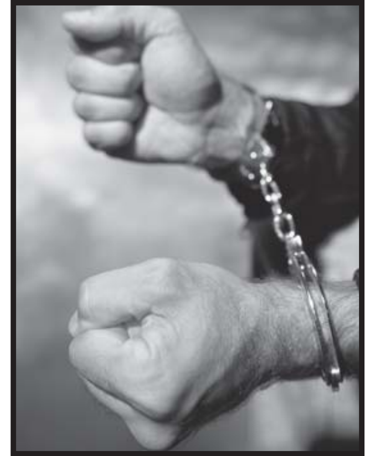
Trying to Read the Tea Leaves in *Blakely*

The nation's courts and criminal bar are in turmoil over the U.S. Supreme Court's landmark decision in *Blakely v. Washington,* 542 U.S. ____, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), which has thrown into doubt the constitutionality of an untold number of sentences in criminal cases around the country, as well as nearly all of the nation's determinate sentencing schemes, including the U.S. Sentencing Guidelines. In *Blakely*, the Court held that Washington State's determinate sentencing scheme as applied to Mr. Blakely violated the 6th Amendment's guarantee of right to trial by jury. Here's a brief look at what's happened and what may happen next.

Confusion Follows the *Blakely* Decision

Since the June 24 decision in *Blakely*, the Seventh Circuit in *United States v. Booker* concluded that *Blakely* applies to the U.S. Sentencing Guidelines and remanded its case to the district court to determine the procedure to be followed for resentencing. In *United States v. Ameline*, the Ninth Circuit applied *Blakely* to the Sentencing Guidelines, but found that they were not facially unconstitutional, and remanded the sentence for jury findings on issues that



increased the sentence. The Eighth Circuit in *United States v. Mooney* held the Guidelines unconstitutional, and found they were not

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Employment Restrictions That Suspend Payment of Accrued Benefits Violate ERISA's Anti-Cutback Rule

If your company restricts former employees from certain types of post-termination employment, make sure those restrictions don't affect the payment of already accrued retirement benefits. If they do, the U.S. Supreme Court recently ruled, the restrictions will violate ERISA's anti-cutback provisions.

In *Central Laborers' Pension Fund v. Heinz,* 2004 U.S. LEXIS 4028, *5 (Sup. Ct. June 7, 2004), two participants of the Central Laborers' Pension Fund had accumulated sufficient pension credits to qualify for monthly early retirement payments. The payment of those early retirement benefits was conditioned on the retirees' agreement to refrain from engaging in "disqualifying employment" as defined by the plan. At the time the retirees' retired, "disqualifying employment" was defined as any job as "a union or non-union construction worker," but excluded supervisory positions. Under the plan, engaging in "disqualifying employment" would result in the suspension of the early retirement

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Everything You Ever Wanted to Know About Electronic Records Discovery But Were Afraid to Ask

The information revolution is spawning a litigation revolution. As information migrates from paper to bytes, the litigation process increasingly focuses on discovery of electronic data. Many companies are still planning how to prepare their information and electronic-records systems for the eventuality of litigation.

Once litigation is commenced, it is too late for planning. Companies must slog through the discovery process and live with the consequences of haphazard prior actions (or inaction) involving electronic records. Even worse, a poorly conceived or implemented document "retention" program can easily boomerang. A court or jury may conclude that it was undertaken to "cover up" rather than "clean up" the company's electronic records.

Companies are generally under a duty to preserve records that are likely to be relevant to pending or threatened litigation, and some courts extend this to litigation that is reasonably foreseeable. If companies fail to satisfy this duty, and evidence useful to a later lawsuit is destroyed, courts may impose sanctions for spoliation of evidence.

Companies should ensure that they can efficiently access information they have chosen to preserve. Hardware and software changes occur now in short cycles, so that data recorded one way two or three years ago may be difficult to retrieve now, with the difficulty level increasing with time.

These problems can be reduced if steps are taken to ensure that databases potentially needed for litigation are converted or updated as a company transitions its hardware or software systems. Never assume that this will be done by itself, or that the information systems department will appreciate the significance that counsel places on a category of documents.

When a user presses the "delete" key, the e-mail message can then be overwritten, but it may take several overwrites to actually erase the message on a single computer and other copies may exist elsewhere.

Companies also must keep an organized record of the electronic records they have preserved. In one recent case, a major pharmaceutical firm faced a sanctions motion because it did not produce records in a product liability case that it had produced in another piece of litigation.

Ensure that privileged communications — including e-mails to or from lawyers — also can be easily identified. This can dramatically reduce the screening process necessary in responding to document requests in litigation.

E-mail poses the greatest threat to companies in litigation (but see the related article on page 3 about Uniform Messaging systems and voice mail discovery). Employees often treat e-mail as an informal mode of communication and assume that — like most telephone calls — e-mail is not recorded. E-mail messages are often crude, painfully blunt and poorly conceived. They have proven critical in many lawsuits, most famously in the *Microsoft* litigation where Bill Gates was publicly stumped and impeached by his own e-mail messages.

E-mail is the cat with nine lives. When a user presses the "delete" key, the e-mail message can then be overwritten, but it may take several overwrites to actually erase the message on a single computer and other copies may exist elsewhere. Among other things, companies should carefully consider their policies about retaining backup tapes of electronic records.

Courts have offered very little guidance on discovery of electronic records. Some of the most important rulings to date have come in *Zubulake v. UBS Warburg*, No. 02- Civ. 1243 (S.D.N.Y.). In July 2003, the *Zubulake* court, applying a new formula for cost-shifting in discovery disputes involving electronic data, ordered UBS Warburg to pay most of the cost of restoring backup tapes that the plaintiff claimed were relevant to her case. On July 20, 2004, the court imposed sanctions on UBS Warburg for destroying e-mail records after its counsel had directed it to save e-mail. In addition to requiring it to pay the plaintiff's attorneys fees incurred in seeking the e-mail records and other missing data, the court announced that it would give the jury an adverse inference instruction regarding the destroyed e-mail records.

Today, discovery of electronic records comes up in nearly every commercial litigation case. For a company defending litigation, discovery of electronic records usually presents only risks and no benefits. The moral of this story is that, when it comes to information and electronic record keeping systems, don't wait until the lawsuit is filed. Follow the Boy Scout motto and "be prepared."

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The Hidden Discovery Danger in Uniform Messaging

Telecommunication advancements offer benefits and raise potential legal issues for businesses. One of the new technological advancements that is likely to reduce transaction costs, but also increase discoverable material, is Uniform Messaging (UM) systems.

By integrating all of a company's existing communication devices, UM systems offer the possibility of solving that maddening problem of missing an important message in the shuffle of voice mail, e-mail or fax, one of which you invariably forgot to check. The UM server acts as the central repository for all voice mail from the telephone systems as well as data from fax and e-mails. The server then provides centralized access for all of the information stored on these various mediums. The user would be able to access all of this information through a single instrument, such as a laptop, hand-held device or cell phone.

Any company considering upgrading to a UM system also should update its record retention policies to reflect the new capability to store voice mail messages in easily accessible digital format. Without an effective policy, your company could learn to its chagrin that a treasure trove of new discoverable material is available.

How UM Works

With a UM system, you can arrive at your office in the morning and access your voice mail in digital text the same way you view your e-mail. If you are on the road, text-to-speech technology would allow you to hear your e-mail read to you through your cell phone. You also would have the ability to command the system to read just the subject lines or the whole message of the e-mails.

The allure of UM systems is increased convenience and employee efficiency.

Any company considering upgrading to a UM system also should update its record retention policies to reflect the new capability to store voice mail messages in easily accessible digital format.

Some authorities estimate that UM could cut the time for retrieval of faxes, e-mails and voice mails in half for office-based users. The savings for mobile workers or geographically spread workgroups can be even greater. Depending on the size of the company and the number of employees, UM could produce substantial savings in time and costs.

But of course, these advances come with a price. Implementation of a UM system requires replacing existing hardware and software or adding middleware. In addition, many companies will need to train employees and encourage them to actively use the system to reap the benefits. The long-term savings in time and increased productivity must be weighed against the initial implementation costs. In the short term, UM systems are likely to be more popular with certain businesses — such as large enterprises with geographically spread workgroups — than with others.

Voice Mail Discovery Made Easier?

UM systems also pose potentially serious legal issues for companies and their lawyers. The most obvious is the impact UM systems will have on voice mail discovery. Voice mail has always been subject to discovery (and frequently has been critical in high-stakes litigation), but historically, voice mail has been difficult to obtain because the desired message usually was purged through routine system maintenance. Voice mail systems lacked the same long-term storage capacity of e-mail.

But voice messages in digital format, like e-mail, can be stored indefinitely. Digital voice mails create the strong possibility that in the near future, a careless message may tip the balance in litigation. Increasingly, companies are likely to face discovery requests for digital voice messages as well as traditional information sources. And while technology is improving constantly, complying with onerous discovery requests for voice mail are extraordinarily time-consuming and costly, even with a UM system.

As this new technology is implemented and improved, companies should:

- ensure that their IT and telecommunications professionals understand the legal ramifications BEFORE purchasing/installing a UM system
- update their record retention policies to reflect the new reality, and make sure employees are educated in compliance with the policies
- create a plan to respond to discovery requests for digital voice mails, and conduct tests to determine how difficult it is to comply.

While employees are slowly acclimating to the need for care in drafting e-mails, such awareness is absent for voice messages. As a result, companies also must be increasingly vigilant about educating employees to exercise care with all communication systems.

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Arbitration Developments

Third Circuit Offers Guidance on Severance of Unconscionable Arbitration Provisions

In *Parilla v. IAP Worldwide Services VI, Inc*., 368 F.3d 269 (3d Cir 2004), the Third Circuit provided important guidance for determining when unconscionable arbitration terms may be severed or whether the entire arbitration agreement should be invalidated. This decision will have implications for arbitration agreements outside the employment context.

In *Parilla*, a former employee brought suit against IAP and others alleging discriminatory conduct in violation of Title VII. IAP invoked the arbitration agreement in Parilla's employment contract and filed a motion to compel arbitration. The district court denied the motion, holding that parts of the arbitration agreement were unconscionable, and that the entire agreement was hence unenforceable. The Court of Appeals reversed and remanded.

The Third Circuit applied the law of the Virgin Islands, which employs the familiar two-part test for unconscionability. This test asks, first, is the agreement procedurally unconscionable (*i.e.,* a contract of adhesion) and, second, is it substantively unconscionable in any respect (*i.e.,* unreasonably favorable to the drafter). The employer conceded that the agreement was procedurally unconscionable and the court held that it was substantively unconscionable in two respects: it required the employee's claim to be presented to the company in writing within 30 days of the events forming the basis for the claim, and it required each party to bear its own costs and expenses.

The court then addressed whether the unconscionable provisions should be severed or whether they would result in invalidation of the entire arbitration agreement. In this analysis, the court relied on existing case law and section 184 of the Restatement (Second) of Contracts.

Companies would be wise to review the arbitration clauses in their contracts to delete provisions that could be viewed as conferring an unfair advantage on the company, and to include a severability clause.

According to the court, "where disregard of the offending conditions leaves a fair agreement that will accomplish the primary objective of the parties, enforcement of that agreement will normally be appropriate." The general rule of severability, however, "is inapplicable when declining to enforce only the unconscionable terms will defeat the primary purpose of the agreement."

> The party urging the enforcement of the arbitration agreement "must show that the essence, the essential term, of the bargain was to arbitrate, while the unconscionable provisions were merely a minor consideration. Relevant to the intent issue is the presence or absence . . . of a contract provision calling for the severance of the invalid provisions.

The court included an important caveat and a warning to parties seeking to use arbitration agreements to gain an unfair advantage: "[a] multitude of unconscionable provisions in an agreement to arbitrate will preclude severance and enforcement of arbitration if they evidence a deliberate attempt by an employer to impose an arbitration scheme designed to discourage an employee's resort to arbitration or to produce results biased in the employer's favor."

Many companies are using arbitration clauses in their contracts, not only employment contracts, but contracts with suppliers, customers and consumers. Companies would be wise to review the arbitration clauses in their contracts to delete provisions that could be viewed as conferring an unfair advantage on the company, and to include a severability clause.

Third Circuit Joins Fifth, Ninth, and Tenth Circuits in Holding That District Courts Must Stay and Not Dismiss Actions Pending Arbitration

In *Lloyd v. Hovensa, LLC*, 369 F.3d 263 (3d Cir. 2004), the Third Circuit held that under the plain language of the Federal Arbitration Act, a district court that grants a motion to compel arbitration must stay the action pending arbitration and may not dismiss the action. The Fifth, Ninth, and Tenth Circuits had previously reached this same conclusion, while the First, Fourth, and Sixth Circuits have held that dismissal is appropriate when all the issues in the case are arbitrable.

The distinction has important consequences. Outright dismissal requires a new action to be filed if it is necessary to seek court intervention regarding appointment of an arbitrator, filling of an arbitrator vacancy, compelling a witness, punishing a witness for contempt, or enforcing, modifying or vacating an award. More importantly, a stay ordinarily prevents the party opposing arbitration from taking an immediate appeal and thus "relieves the party entitled to arbitrate of the burden of continuing to litigate the issue while the arbitration process is ongoing."

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Class Action Fairness Act Killed in Senate

In a very disappointing development for proponents of class action reform, the Class Action Fairness Act failed to get the 60 votes needed to proceed, apparently killing it for this legislative session. If enacted, the Act would have created a consumer bill of rights and expanded federal court jurisdiction over class actions. It would have gone a long way toward ending some of the most egregious class action abuses, particularly the phenomenon of certain "magnet" state courts pre-disposed to certifying national class actions.

Last year, the Act passed the House, but failed in the Senate. Then, three senators who had opposed the Act last year (Senators Dodd, Landrieu and Schumer) entered into discussions with supporters of the Act, which led to a compromise entered into the *Congressional Record* by Sen. Dodd on December 9, 2003. It appeared as if 62 senators were ready to support a compromise bill this year. The bill died after Republican leaders denied Democratic attempts to link it to several major legislative priorities. Sen. Dodd has stated that he hopes the bill might be resurrected later in the year.

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Wal-Mart Decision Illustrates Class Action Risk Potential

On June 21, 2004, in a decision that illustrates the risk potential inherent in employment discrimination class actions, a federal district court in San Francisco certified a class of 1.5 million Wal-Mart employees for injunctive relief, lost pay and punitive damages. This is by far the largest class ever certified in the employment discrimination context.

The class claims rest on two interrelated theories of gender discrimination. First, the plaintiffs assert that Wal-Mart's policy of subjective decision-making in setting levels of compensation for employees and in promoting employees allows gender discrimination. The court found that subjective criteria dominated compensation and promotion decisions in both managerial levels and hourly employment, providing a means for gender bias to affect all class members in a similar fashion. Second, the court found the plaintiffs presented sufficient evidence that Wal-Mart cultivates and maintains a strong corporate culture that includes gender stereotyping. The court also found that Wal-Mart's corporate culture of uniformity provides a sufficient nexus between the subjective decision-making and the alleged discrimination suffered by all class members.

Despite instituting extensive diversity and equal opportunity policies over the past few years, Wal-Mart not only faces the possibility of being forced to completely overhaul its employment policies, but it could also be on the hook for over $1 billion in liability.

The court certified claims for declaratory and injunctive relief under Federal Rule of Civil Procedure 23(b)(2), including lost pay claims for many class members. The court also certified the claim for punitive damages under Rule 23(b)(2), holding that the equitable relief sought by plaintiffs predominates over the claims for punitive damages. Nevertheless, the court ordered that the class be given notice and an opportunity to opt out, which are not required by the terms of Rule 23(b)(2), to satisfy due process concerns.

Wal-Mart is certain to appeal this decision to the Ninth Circuit under Rule 23(f). Pending any appellate ruling, however, the trial court's holding will not sit well with employers. Despite instituting extensive diversity and equal opportunity policies over the past few years, Wal-Mart not only faces the possibility of being forced to completely overhaul its employment policies, but it could also be on the hook for over $1 billion in liability. To avoid facing class action liability, employers would be wise to carefully review the subjective aspects of their employment decision-making processes and consider whether their corporate culture may be viewed as fostering gender stereotyping.

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Supreme Court Upholds ERISA Preemption in HMO Case

In a broad pronouncement confirming ERISA's sweeping preemptive force, the U.S. Supreme Court held that state court claims against health maintenance organizations (HMOs) for failure to exercise ordinary care in handling insurance coverage issues were completely preempted by ERISA.

In *Aetna Health Inc. v. Davila*, Civ. A. Nos. 02-1845, 03-83, 2004 WL 1373230 (U.S. June 21, 2004), plaintiffs asserted claims under the Texas Health Care Liability Act (THCLA) for the HMO's decision not to provide coverage for certain treatment and services by plaintiffs' treating physicians. In reversing the Fifth Circuit, the Court determined that plaintiffs' claims were "completely preempted by the 'interlocking, interrelated and interdependent remedial scheme' found at Section 502(a)" of ERISA.

In its decision, the Court emphasized that the "purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive preemption provisions, which are intended to ensure that employee benefit plan regulation would be 'exclusively a federal concern.'" So, "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore preempted."

The Court noted that the "preemptive force of ERISA section 502(a) is still stronger" than ERISA's general legislative scheme. In reviewing section 502(a), the Court noted that "if an individual, at some point in time, could have brought his claims under ERISA section 502(a)(1)(B), and where there is no other independent legal duty that is implicated by a defendant's actions, then the individual's cause of action is completely preempted by ERISA section 502(a)(1)(B)." It concluded that where plaintiffs "bring suit only to rectify a wrongful denial of benefits promised under ERISA-regulated plans, and do not attempt to remedy any violation of a legal duty independent of ERISA," those suits are completely preempted by ERISA section 502.

The Court rejected the Fifth Circuit's reasoning that tort claims for tort damages are not preempted, while contract claims for contract damages would be preempted. "[D]istinguishing between preempted and non-preempted claims based upon the particular label affixed to them would 'elevate form over substance and allow parties to evade' the preemptive scope of ERISA simply 'by relabeling their claims as claims for tortious breach of contract.'"

***Aetna Health** is a clear signal by the Court that ERISA's comprehensive regulatory scheme maintains strong preemption presumptions.*

The Court also rejected a broad reading of *Pegram v. Herdrich*, 530 U.S. 211 (2000), which held that "inextricably mixed" decisions of eligibility and treatment do not relate to ERISA plans, are not fiduciary in nature and so cannot be preempted. The Court clarified that what was "essential to *Pegram's* conclusion [was] that the decisions challenged there were truly 'mixed eligibility and treatment decisions.'" Where, as in the *Aetna* case, the defendants were "neither [plaintiffs'] treating physicians nor the employers of [plaintiffs'] treating physicians" and, as a result, the "coverage decisions, then, are pure eligibility decisions" that do not implicate *Pegram*.

Aetna Health is a clear signal by the Court that ERISA's comprehensive regulatory scheme maintains strong preemption presumptions. Absent either a clear legal duty independent of ERISA or determinations by non-ERISA fiduciaries, plaintiffs are well-advised to bring their claims under traditional ERISA remedies.

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Supreme Court Resolves Split on Foreign Antitrust Claims

In *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S.Ct. 2359, the Supreme Court unanimously held that in most cases, foreign plaintiffs with injuries suffered abroad cannot assert an antitrust claim in U.S. courts by alleging they were harmed by conduct that also harmed consumers in the United States.

As noted in our last newsletter (available at www.pepperlaw.com/pepper/publications_update.cfm?rid=465.0), the Supreme Court in *Empagran* was faced with a serious split among three circuit courts of appeals about the meaning and proper application of the Foreign Trade Antitrust Improvements Act (FTAIA), which limits the subject matter jurisdiction of federal courts. In its ruling, the Court sided with the Fifth Circuit, which interpreted the language of Section 2 of the FTAIA to mean that the antitrust laws of the United States will not apply to non-import foreign conduct unless the defendant's action has a "direct, substantial and reasonably foreseeable" effect on U.S. commerce and such effect "gives rise to" the plaintiff's own antitrust claim.

The decision rested on two basic principles. First, the Court noted that it interprets ambiguous statutes to "avoid unreasonable interference with the sovereign authority of other nations." Based on this rule of statutory construction and notions of comity, the Court found that it was unreasonable to allow U.S. antitrust laws to apply where independent foreign harm alone gives rise to a plaintiff's claim.

Second, the Court found that through the FTAIA, Congress intended to "clarify, perhaps to limit, but not *to expand*" the scope of the Sherman Act in relation to foreign commerce. The Court noted that it was unable to find any evidence in the statute's legislative history that Congress intended the FTAIA exception to apply to completely foreign harm. To the Court, it made linguistic sense to interpret the words "a claim" as if they refer to the "plaintiff's claim" or the "claim at issue." The Court's decision in *Empagran* requires that a plaintiff suffer domestic harm for a U.S. federal court to exercise jurisdiction over the claim.

The Court, however, left unanswered the question of application of the FTAIA to the case where the foreign injury is not independent of the anticompetitive conduct's domestic effects.

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Anti-Cutback Rule, continued from page 1

payments for the duration of the "disqualifying employment."

After retiring, the retirees took positions as construction supervisors and continued to receive their monthly early retirement payments. Two years later, the plan's definition of "disqualifying employment" was enlarged to include any job "in any capacity in the construction industry (either as a union or non-union construction worker)." Based on that amendment, the plan determined that the retirees' employment was "disqualifying" and suspended their monthly early retirement payments. The retirees sued the plan, arguing that the suspension of their benefits under the amended definition of "disqualifying employment" violated ERISA's anti-cutback rule. A unanimous Supreme Court agreed with the retirees.

In an opinion written by Justice Souter, the Court noted that, while ERISA does not require employers to establish benefit plans, it protects plan participants and requires employers to follow certain guidelines. The Court explained that one of the primary objectives of ERISA is to ensure that benefits, including early retirement benefits, promised to an employee will not be taken away. By placing materially greater post-employment restrictions on a former employee's ability to obtain already accrued retirement benefits, the Plan impermissibly took away the promised benefits.

Based on the holding in *Heinz*, plan administrators must recognize that amendments to plans that enlarge or increase the restrictions on payment of already accrued retirement benefits will likely violate ERISA's anti-cutback provisions.

However, this does not mean that plan administrators are precluded from making plan amendments. The Supreme Court expressly recognized that its holding in *Heinz* should not be interpreted to prohibit plan administrators from increasing restrictions on payment of retirement benefits, so long as the amendment affects only benefits that will accrue in the future. See *Heinz*, 2004 U.S. LEXIS 4028, *15-16 (relying on the IRS regulations interpreting Internal Revenue Code's identical anti-cutback rule (§411(d)(6)) to permit amendments that merely affect post-amendment accrual of benefits, but not benefits accrued before the amendment).

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severable. In *United States v. Montgomery*, a panel of the Sixth Circuit held that the Guidelines were constitutionally invalid, but could be used as an advisory source by a sentencing judge. The decision in *Montgomery* was vacated awaiting en banc review by the Sixth Circuit, but the appeal was withdrawn. In contrast, the Fifth Circuit in *United States v. Piniero* and the Fourth Circuit in *United States v. Hammoud* held that *Blakely* does not apply to the Sentencing Guidelines. Adding to the mix, on July 12, the Second Circuit in *United States v. Penaranda* and *United States v. Rojas* took the unusual step of certifying to the Supreme Court three questions regarding the application of *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Blakely* to the federal sentencing process.

In the meantime, scores of District Courts also have issued rulings, many of which are inconsistent. Some courts have found the Guidelines facially unconstitutional, and sentenced without reference to the Guidelines, while some have also employed the Guidelines as an advisory source. Some have issued alternative sentences – imposing sentence under the Guidelines and, in the alternative, not under the Guidelines. Some courts have empanelled sentencing juries to make findings about disputed upward adjustments, including, in one New Jersey case, facts required to determine which Guideline Manual would apply. Some courts have held *Blakely* inapplicable to the Sentencing Guidelines, and found the issue to be currently determined by pre-*Blakely* governing Circuit court rulings. At least two courts have continued all sentencing proceedings while the unresolved implications of *Blakely* get further consideration. At least one court has held that pre-*Blakely* plea agreements do not waive *Blakely* objections, and that explicit *Blakely* waivers by defendants are ineffective with respect to finding relevant facts beyond a reasonable doubt.

Among the many other important issues engendered by Blakely is whether the decision might apply retroactively to cases in various stages of the criminal process, and the extent to which plea agreements and the failure of defendants to specifically make and preserve Blakely objections constitute waivers of Blakely claims.

The Supreme Court Agrees to Expedited Review

In the wake of the uncertainty and different approaches, on July 21, 2004, the Solicitor General sought expedited review from the Supreme Court of two federal sentencing guidelines cases, *United States v. Fanfan*, a district court case from the First Circuit, and *United States v. Booker* from the Seventh Circuit. On August 2, 2004, the Supreme Court granted writs of certiorari in these cases, and scheduled oral argument on October 4, 2004.

Congress is getting into the act as well. On July 13, 2004, the Senate Judiciary Committee held hearings to consider possible legislative responses to *Blakely*. With the Senate now out of session, there is no chance that any of the proposals offered before the Committee will be acted upon until the fall.

On July 21, a Concurrent Resolution was adopted by the Senate urging quick Supreme Court action on the *Blakely* issues. The Concurrent Resolution also expresses the intent of Congress that *Blakely* not apply to the Sentencing Guidelines since "the statutory maximum penalty is the maximum penalty provided by the statute defining the offense of conviction . . . ." The Concurrent Resolution also asserts that Congress intended the Guidelines "to be applied as a cohesive and integrated whole, and not in a piecemeal fashion . . . ." This provision of the Resolution seeks to address the issue of severability—that is if *Blakely* applies to the Guidelines whether they can be used at all in sentencing if any part of the sentencing scheme violates the Sixth Amendment.

What's Next for the Sentencing Guidelines?

Although the *Blakely* decision specifically did not reach the application of its holding to the Sentencing Guidelines, there is good reason to believe that the *Blakely* 5-4 majority will find that *Blakely* applies to the Sentencing Guidelines.

First, the majority in *Blakely* wrote a decision that appears to be deliberately broader than necessary to have reached the result as to Washington State's sentencing scheme. For example, in stating that the Court's commitment to *Apprendi* reflects "the need to give intelligible content to the fundamental constitutional right of jury trial" and that the "case is not about the constitutionality of determinate sentencing, but only about how it can be implemented in a way that respects the Sixth Amendment," the Court offered broader pronouncements about its view of Sixth Amendment jurisprudence that signals it is prepared to apply the implications of *Apprendi* and *Ring v. Arizona*, 536 U.S. 584 (2002), to the Sentencing Guidelines.

Second, the *Blakely* decision was supported by Justices Scalia, Stevens, Souter, Thomas and Ginsburg, while the dissenters were Justices O'Connor, Breyer, Rehnquist and Kennedy. The split in *Blakely* was not along more traditional ideological lines that often separate the views of the Justices, but seemingly between those Justices willing to extend the theoretical reach of *Apprendi* and *Ring* whenever it may lead, dubbed by Acting Solicitor General Paul Clement as the "theorists," and those dissenting Justices who

regard the extension of *Apprendi* and *Ring* as both unnecessary and pragmatically not worth the cost—dubbed by Mr. Clement as the "pragmatists."

There is no indication the theorist Justices will defect from *Blakely* due to the concerns of the pragmatist Justices that the cost of applying *Blakely* to the Sentencing Guidelines is not worth the constitutional values being promoted. Given the textual breadth of the *Blakely* decision, and the composition of the majority in *Blakely*, it seems unreasonable to believe that any of the majority Justices will be persuaded by what is likely to be the tortured threshold argument of the Government in *Booker* and *Fanfan*—that Washington State's determinative sentencing scheme had features distinguishable from the Sentencing Guidelines. In short, in the words of Acting Solicitor General Clement, "The Court may well strike down the Guidelines."

If *Blakely* is determined to apply to the Sentencing Guidelines, it is a finer issue as to whether the Guidelines would be held constitutionally invalid, or whether they would be found to be applicable provided there are appropriate jury determinations beyond a reasonable doubt of issues that would enhance the relevant "statutory maximum." In *Blakely*, the majority stopped short of holding that Washington State's determinative sentencing scheme was unconstitutional, and instead remanded the case for further proceedings not inconsistent with the opinion.

The *Blakely* holding suggests that the severability issue may be resolved by not finding the Guidelines constitutionally invalid, but by a holding that permits their survival provided there are jury determinations of disputed issues that could increase the otherwise applicable maximum sentence. For the Government, such a holding would apparently be the worst case scenario, as the Department of Justice has already issued a directive that prosecutors are to argue that *Blakely* does not apply to the Guidelines, and if it does, that the Guidelines are not severable and that sentencing should be imposed in the discretion of the court within the maximum and minimum terms established by the statute for the offense of conviction.

Among the many other important issues engendered by *Blakely* is whether the decision might apply retroactively to cases in various stages of the criminal process, and the extent to which plea agreements and the failure of defendants to specifically make and preserve *Blakely* objections constitute waivers of *Blakely* claims.

Whatever the outcome in *Booker* and *Fanfan*, it remains to be seen how the federal government, as well as the states, will respond to *Blakely's* requirement that determinate sentencing schemes be implemented in ways that respect the 6th Amendment as interpreted in *Apprendi* and *Blakely*. It is possible that determinate sentencing regimes may be abandoned by many in favor of more indeterminate sentencing procedures that existed for most of our nation's history.

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Will *Intel* Open the Door to American-Style Discovery Abroad?

A recent U.S. Supreme Court case offers interesting implications for the authority of federal courts to order discovery for use in foreign proceedings. On June 21, 2004, in *Intel Corp. v. Advanced Micro Devices, Inc.*, ___ U.S. ____, 124 S.Ct. 2466, 72 U.S.L.W. 4528, the Court interpreted the federal statute permitting domestic discovery for use in foreign proceedings, 28 U.S.C. § 1782(a). The ruling has the potential to expose companies to additional discovery in the United States in connection with foreign proceedings.

The origins of *Intel* lie in Europe, where Advanced Mirco Devices, Inc. (AMD) filed an antitrust complaint against its microchip rival Intel with the Directorate-General for Competition of the European Communities (the DG). The DG is responsible for conducting investigations into alleged violations of EU competition law. AMD asked the DG to obtain discovery produced in a private antitrust suit brought by another firm against Intel in federal court in Alabama.

After the DG declined to seek judicial aid from the United States to obtain the documents, AMD took the matter into its own hands by applying to the U.S. District Court for the Northern District of California for an order requiring Intel to produce documents. AMD petitioned the California court under Section 1782(a), which provides that a federal court "may order" a person "resid[ing]" or "found" in the district to provide testimony or documents "for use in a proceeding in a foreign or international

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Seventh Circuit: Non-Purchasers Can Suffer Antitrust Injury

Traditionally, utilities have viewed their regulated status as conferring some sort of *de facto* antitrust immunity. As a result, sometimes utility managers are less sensitive than they should be to antitrust issues, particularly as utilities begin operating in newly deregulated energy sectors. A recent Seventh Circuit decision is a good case in point.

In *United States Gypsum Co*. v. *Indiana Gas Co., and ProLiance LLC*, 350 F.3d 623 (7th Cir. 2003), the Seventh Circuit overturned a lower court's dismissal of a claim that a joint venture of two natural gas utilities violated antitrust laws. The Seventh Circuit rejected the defendants' arguments that the complaint should be dismissed on three separate grounds – lack of antitrust standing, issue preclusion based on prior administrative regulatory proceedings and statute of limitations.

ProLiance is a joint venture formed by utility companies Indiana Gas Company and Citizens Gas & Coke to manage the companies' gas purchases and transportation services from interstate pipelines. The defendants offered pro-competitive business justifications for the joint venture, stating that by buying more pipeline capacity than the companies need and holding the excess in reserve, it allows the companies to meet periods of increased customer demand without increasing the price. United States Gypsum (USG), an industrial gas user (but not a customer of ProLiance), contended that as a result of the joint venture, capacity was being withheld from the secondary market, forcing USG to pay more for its gas.

With respect to antitrust standing, the Seventh Circuit concluded that despite the *Illinois Brick* doctrine, and even though USG was not a direct purchaser of gas from the defendants, standing could exist where the complaint seeks only injunctive relief and alleges it was forced to pay higher prices as a result of less gas being available for spot purchases. In so doing, the court also reaffirmed its positive view of the umbrella pricing theory.

The defendants also argued that USG's claim should be dismissed because it was precluded by a finding of the Indiana Regulatory Commission that the joint venture was in the public interest. Although the court concluded that the complaint should not be dismissed based on the finding, the court rejected USG's argument that collateral estoppel cannot apply because a state regulatory agency does not have jurisdiction to resolve a federal antitrust claim. Applying Indiana law, the Seventh Circuit found that while a state agency lacks authority to decide whether defendants violated antitrust laws, it could resolve disputed issues, such as whether the joint venture had market power and thus affect the outcome of the federal antitrust litigation. Here, although the agency made some findings limited in time related to market power, no determination was made that that the joint venture lacks market power.

Decisions such as this one make clear the importance of considering the strategic value of the positions taken during the regulatory proceedings and the effect that such agency determinations could have on future antitrust claims.

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tribunal . . . upon the application of any interested person." The district court sided with Intel's argument that the directorate's investigation was not a foreign tribunal, but the Ninth Circuit reversed the lower court.

Citing division among the circuits on whether Section 1782(a) contains a foreign discoverability requirement, the Supreme Court granted certiorari. Although holding that Section 1782(a) did not necessarily impose such a requirement, the Court rejected Intel's attempt to limit the reach of the statute. Specifically, the Court held that one need not be a litigant to use Section 1782(a), and accordingly, that AMD's status as a complainant who triggered the DG investigation made it an "interested person.". Further, the Court cited to legislative history and the change in the text of Section 1782(a) from "any judicial proceeding" to "a proceeding in a foreign or international tribunal" as support for its conclusion that the DG qualifies as a tribunal for purposes of the statute. The Court also found that Section 1782(a) contained no requirement that an adjudicative action actually be pending or imminent.

Finally, while emphasizing that Section 1782(a) expressly shields privileged material, the Court held that it does not categorically bar a court from ordering discovery when such discovery would not be possible in the foreign jurisdiction. In so doing, the Court rejected Intel's arguments that permitting discovery in those circumstances would offend foreign governments. The Court noted that while such a factor may be considered by a court, it should not act as an absolute bar against permitting discovery. Interestingly, in an amicus brief, the EU stated it neither needed nor wanted the California court's assistance in this particular case.

The Court listed several factors to be considered in making a determination under Section 1782(a) including: whether the person from whom discovery is sought is a

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First Circuit Applies "Amount In Controversy" Requirement to All Permissive Joinder Plaintiffs

Every plaintiff in a diversity action must independently satisfy the amount-in-controversy requirement, according to a recent decision of the First Circuit Court of Appeals. *Ortega v. Starkist Foods, Inc.*, 370 F.3d 124 (1st Cir. 2004), narrowly defines how courts exercise supplemental jurisdiction over permissive joinder claimants, a sensitive and enduring issue of federal jurisdiction that has divided the federal courts of appeal.

In *Ortega*, a nine-year-old child cut her finger on a can of Starkist Tuna and sustained injuries that led to surgery and the prospect of permanent disability. The child sued Starkist Foods in federal court under its diversity jurisdiction, alleging damages of approximately $900,000. Ortega's family members sought to join the suit and assert their own claims for emotional distress and medical expense damages. None of these claims satisfied the amount-in-controversy requirement for diversity jurisdiction. Instead, the family members argued that supplemental jurisdiction should attach to their claims. The First Circuit disagreed.

Although Rule 20 of the Federal Rules of Civil Procedure permits persons with separate claims to pursue a single lawsuit if the claims arise out of the same occurrence, the court must, of course, have jurisdiction to hear those claims. Before the 1990 enactment of the federal supplemental jurisdiction statute, 28 U.S.C. §1367, the Supreme Court required plaintiffs with separate and distinct claims to independently meet the "requisite jurisdictional amount." *See Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939). Section 1367 has caused confusion about the continued validity of *Clark*. Section 1367 states that if district courts have original jurisdiction over a claim, they also have supplemental jurisdiction over "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." Section 1367(a). Further, if jurisdiction is founded solely on diversity, the district courts cannot exercise supplemental jurisdiction over Rule 20 plaintiffs "when exercising supplemental jurisdiction would be inconsistent with the jurisdictional requirements of section 1332."

Courts of appeals have advanced two competing interpretations of Section 1367. One interpretation, adopted by the Seventh Circuit, would extend supplemental jurisdiction over claims asserted by diversity plaintiffs who cannot meet the amount-in-controversy requirement provided that at least one plaintiff in the action has a jurisdictionally sufficient claim.

The second interpretation, endorsed by the Third Circuit, emphasizes the requirement in Section 1367(a) that "original jurisdiction" must be in place before supplemental jurisdiction can attach, reasoning that the phrase "original jurisdiction" unambiguously invokes the language that Congress has used for more than 200 years to confer jurisdiction on the federal district courts in civil cases.

The First Circuit, deciding that the Third Circuit's approach is "the better reading" of Section 1367, commented that Congress did not intend Section 1367 to work a revolution in the law of diversity jurisdiction: "Congress…does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouse holes."

The issue is resolved, for better or worse, in the First, Third and Seventh Circuits. Until Congress or the Supreme Court resolves this issue, litigants in other circuits will be forced to analyze jurisdiction over permissive joinder claims on a circuit-by-circuit basis.

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participant in the proceeding; the nature of the proceeding and receptivity of the foreign tribunal to aid; and the scope and intent of the discovery request.

While it remains to be seen how lower courts will develop the factors crafted by the Court, *Intel* increases the exposure of firms to American-style discovery in an array of foreign proceedings. Further, a statute originally conceived to improve judicial cooperation among foreign nations may now have the ironic effect of reducing this goal by interfering with foreign judicial processes.

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Courts Enforce Single-Digit Ratio for Punitive Damages Awards

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Just over a year ago, the U.S. Supreme Court issued its landmark decision in *State Farm Mutual Automobile Insurance Co. v. Campbell,* questioning the constitutionality of punitive damages awards where punitive damages are more than a single-digit multiple of compensatory damages. Also in *State Farm,* the Court held that a plaintiff cannot use evidence of a defendant's other bad acts in other jurisdictions.

Over the past year, courts have grappled with how to apply these limitations. A recent California state court opinion, *Romo v. Ford Motor Company*, 113 Cal. App. 4th 738 (2003), demonstrates *State Farm*'s effect on state law. It shows that, in the wake of *State Farm*, courts are at least reluctantly recognizing that defendants cannot be punished for bad conduct in other jurisdictions and instead are focusing on punishing defendants for bad conduct directed at specific plaintiffs.

In *Romo*, family members who survived a motor vehicle accident brought a wrongful death action after their 1978 Ford Bronco flipped over when the driver swerved to avoid another vehicle. During the accident, the steel portion of the vehicle's roof collapsed and the fiberglass portion shattered, killing three of the six passengers. The jury awarded the survivors approximately $5 million in compensatory damages and $290 million in punitive damages (59 times compensatory damages). After exhausting various state court appeals, Ford filed a petition for certiorari to the U.S. Supreme Court. The Court granted the petition, vacated the judgment, and remanded the case "for further consideration in light of *State Farm*."

On remand, the California Court of Appeals dramatically reduced the punitive damages to just under $24 million or roughly 5 times the compensatory damages. The court held that, in light of *State Farm*, the jury was "fundamentally misinstructed concerning the amount of punitive damages it could award." The jury had been instructed, in addition to other factors, to consider the amount of punitive damages "which will have a deterrent effect on the defendant in light of the defendant's financial condition." Although the jury instruction was clearly supported by California state law, the court noted *State Farm*'s emphasis on "what [the] defendant did to the present plaintiff, rather than the defendant's wealth or general incorrigibility," and held that this instruction failed to restrict the jury to "punishment and deterrence based solely on the harm to the plaintiffs, as apparently required by federal due process." The court explained: "As we read *State Farm*, then, the legitimate state goal that punitive damages may seek to achieve is the 'condemnation of such conduct' as has resulted in 'outrage and humiliation' to the plaintiffs before the court; it is not a permissible goal to punish a defendant for everything else it may have done wrong."

Accordingly, the court interpreted *State Farm* to overrule long-standing California law holding that the amount of punitive damages awarded should be enough to deter the same conduct against consumers other than the plaintiffs. Nevertheless, the court expressed reluctance at the result it reached. "[W]hen considered in light of products liability actions against large corporate defendants for which single-digit multipliers may simply be a cost of doing business," the conclusion in *State Farm* that single-digit multipliers are more likely to comply with due process "is far from 'obvious.'"

More than a year and 1,000 reported cases later, the courts are still seeking to understand and apply *State Farm.* Its importance cannot be overstated. *State Farm* is effectively reining in punitive damages award. It will certainly play a role in any case – state or federal – where punitive damages are at issue.

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