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dbr DAILY BUSINESS REVIEW

A Pool and Gym Won't Cut It: Developers Are Upping Their Game on Amenities to Stay Competitive in South Florida

by Melea VanOstrand

Competition is fierce among multifamily developers as the influx of residents to South Florida is motivating them to attract tenants with community-building amenities. Developers are adjusting their approaches accordingly, with many exploring alcohol licenses—something normally only seen in commercial real estate.

About 25% of surveyed renters said they left an apartment to find better apartment amenities and about one-fifth wanted improved community amenities in general. That's according to the 2022 National Multifamily Housing Council/Grace Hill Renter Preferences Survey Report.

The typical pool and gym are what tenants have come to expect, but in order to attract tenants, developers now need to think outside of the box to stand out.

Those that don't stay competitive may have a hard time attracting new tenants or even getting construction financing, according to Anthony Kang, a partner with Saul Ewing Arnstein & Lehr in Miami.That's because lenders

SEE AMENITIES, PAGE A2

A Swift $1 Billion Settlement Shows 'It Can Be Done': Lead Counsel Discuss Surfside Condo Collapse Class Action

Rachel Furst, a partner at Grossman Roth Yaffa Cohen, left, and Harley Tropin, founding partner of Kozyak Tropin & Throckmorton, took lead roles.

by Raychel Lean

It was an event too horrifying to imagine, even as the world watched footage of a 12-story condominium building becoming a pile of rubble in the South Florida oceanfront town of Surfside. There were people in there, sleeping, watching TV, talking on the phone. But when Champlain Towers South partially collapsed on June 24, 2021, at 1:15 a.m., 98 of them died.

The subsequent lawsuits, consolidated into one giant piece of class action litigation in Miami-Dade Circuit Court, presented a complex task for those taking it on. And yet, they were able to reach a $1 billion settlement over the tragedy in less than a year—something that normally takes about four to six years for a case of its magnitude.

Here's how lead counsel for the plaintiffs—Harley Tropin, founding partner of Kozyak Tropin & Throckmorton, and Rachel Furst, a partner at Grossman

SEE SURFSIDE, PAGE A2

New Ruling on Sovereign Immunity Could Set Precedent on Duty of Care Appeals

by Michael A. Mora

Manny Dieguez of Armand & Dieguez, left, and John C. Lukacs Jr. of Raposo & Lukacs represent the estate of Annie Becerra in a wrongful death lawsuit.

A Florida Supreme Court ruling triggered an automatic appeal following a trial judge's denial of summary judgment based upon sovereign immunity. And the appeal could have a precedent-setting outcome in Florida's Third District Court of Appeal, according to two Miami attorneys.

John C. Lukacs Jr. and Manny Dieguez, partners at Raposo & Lukacs and Armand & Dieguez, respectively, represent the Estate of Annie Becerra in a wrongful death lawsuit. They successfully argued in the Miami-Dade Circuit Court that first responders neglected Becerra for approximately 75 minutes as she sat hunched over in the passenger seat of a crashed vehicle.

But Miami-Dade County and the Florida Department of Highway Safety and Motor Vehicles appealed the ruling by Miami-Dade Circuit Judge William Thomas denying summary judgment based upon sovereign immunity, and found the defendants owed Becerra, 21, a duty of reasonable care at the scene of the accident.

At issue is the Florida Supreme Court ruling amending Florida Rule of Appellate Procedure 9.130. Dieguez said in the case of first impression, the rule is silent as to whether the statute included the right to appeal a duty of care issue, which the plaintiffs attorney claimed it does not.

SEE RULING, PAGE A4

With Latest Ex-Greenberg Lateral Hire, Winston & Strawn Is Putting Local Bands Back Together

by Dan Roe

Two months after announcing its Miami office with the hiring of six local partners, Winston & Strawn is leveraging long-standing relationships in the city's tight-knit legal market to staff up with the alumni of a few large firms. After a fresh litigation partner hire Monday that brings the firm to 16 lawyers in Miami, 14 are alumni of Greenberg Traurig, Shutts & Bowen and Jones Day.

Adam Foslid, who joins from Miami litigation boutique Stumphauzer Foslid Sloman Ross & Kolaya, is reuniting with a handful of former colleagues from Greenberg Traurig, where he chaired the Miami litigation department before leaving for the boutique in 2019 with fellow partners Ian Ross and Timothy Kolaya. (Sidley Austin hired Ross from the boutique last week as it too grows its Miami presence.)

"The people they were putting together was very important to me," Foslid said in an interview. "They're not only a great group of lawyers, but a great

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ON APPEAL

10th Circ. Looks to Sister Courts in Ruling Police Officer Can Be Liable for Blocking Filming of Traffic Stop

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AMENITIES

now want buildings to have an edge, so that they can be sold or leased quickly and the loans can be repaid.

The main focus is on enhancing common spaces to allow residents to interact more and feel good about working from their buildings, according to Kang.

"I know that buildings now offer classes, they organize holiday events, and they utilize common spaces that are purposely built to be able to host larger gatherings," said Kang. "Some are now hopping on the co-working environment trend as well, where they're doling out spaces with printers and scanners dividers for people to work and interact with each other."

Many developers are hoping to offer areas like community courtyards, which can be used for multiple activities.

"There was some before, but even more so now. There are people building areas for a dog park within a building, or a space for them to wander and socialize. It's in high demand," said Kang.

In his own residence, Kang said he appreciates being able to host events at social spaces such as multiple theaters, game rooms and rooms for hosting catered events.

"Those features are always appealing for residents," said Kang. "They not only have the gyms but they invite trainers and offer classes, like spin classes and yoga classes and other classes for their residents."

ALCOHOL LICENSES

Marbet Lewis of alcohol law firm Spiritus Law said she's seen increased inquiries from developers on liquor licensing options for their buildings since 2020.

"As we saw this huge migration of California and New York residents, demand quickly picked up," said Lewis. "Having those additional amenities onsite or close by in these communities really became essential. People really don't want to have to travel too much anymore to get basic necessities and, for many, alcohol is on that list."

Lewis said many property managers and developers are hoping to include restaurants and lobby bars as amenities. It was a trend that used to only be popular in commercial properties.

"We've never seen this influx of need for alcohol licensing," said Lewis. "The price has at least doubled in most counties and these are your liquor licenses that go to a bar or some smaller restaurant, lounges, or even hotels."

In light of the rising demand, Lewis said she believes the price for liquor licenses will remain high as migration continues.

"We're in that phase where a lot of these businesses have finished their due diligence and they're ready to either break ground, remodel or expand whatever property they've acquired, so we're still very much in that race to find alcohol licenses and complete those transactions," said Lewis. "We don't see it dying down. We still have a long list of clients that are waiting for liquor licenses for one reason or another."

Melea VanOstrand is ALM's South Florida real estate reporter. Contact her at mvanostrand@alm.com. On Twitter: @meleavanostrand.

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SURFSIDE

Roth Yaffa Cohen—approached the litigation.

IT'S A FULL-TIME JOB

For a class action case like this to go smoothly, at least for the lead counsel, it has to be their full-time job.

"Harley and I did not work on any new matters while this case was pending, and we couldn't have," Furst said. "It required our complete focus."

One of the responsibilities of that job was to constantly impress upon everyone—during weekly video calls and almost daily telephone calls with members of the steering committee—that a swift and efficient resolution was imperative.

Tropin said Furst, in particular, was good about "gently but forcefully reminding people about the need to get things done quickly."

'ROW IN THE SAME DIRECTION'

The biggest challenges included resolving two very different forms of damages (property loss and wrongful death) and gathering the evidence to prosecute the case in an expedited time frame, required by Miami-Dade Circuit Judge Michael Hanzman's deadlines.

Furst said she learned how crucial it is to have a clearly-defined structure from the outset. Once the steering committee was selected, she and Tropin organized that into subcommittees, then appointed chairs and co-chairs and immediately assigned them work and deadlines.

"It keeps people from performing duplicative work, overlapping work, and helps everyone row in the same direction efficiently," Furst said.

Creating subclasses allowed Tropin and Furst to manage potential conflicts between the property owners and wrongful death classes, and they also moved to certify a liability-only class. Quickly establishing expert committees also helped, as they could begin interviewing and vetting experts to work on the case.

"I think this case just gave us a model that it can be done," Furst said. "Things that can be drawn out over many months can be done quickly. It just takes focus and commitment of attorneys who have undivided attention to devote to a matter."

THE JUDGE CAN MAKE A BIG DIFFERENCE

From day one, Hanzman made it known that he wanted to expedite the litigation. And he meant it, as Tropin and Furst said he held 40 hearings in less than a year and honored deadlines. When weighing motions to dismiss, for example, Furst said the judge held attorneys to tight briefing deadlines, then ruled within a week or 10 days.

The most helpful thing Hanzman did, in Tropin's opinion, was revealing which way he was leaning on big issues: "Then you could try and persuade him, then you weren't left guessing about where he stood, or what he thought the issue was or where he might come out on it."

"And finally, he ruled, " Tropin said. "I think that is one of the most important things a judge in a case like this can do, is just rule. Rule for me, rule against me, but just rule. Hanzman was very, very good about hearing from both sides and then ruling, so that you could move on and just push litigation."

If you aren't blessed with an expeditious judge, Furst recommended requesting early mediation. In this case, Hanzman ordered the first wave of mediations to begin about four months in—much earlier than the typical couple of years.

IT'S OK TO GET EMOTIONAL

This was an unusual case for Tropin, a commercial litigator who has decades of experience with fraud, Ponzi schemes and business disputes, but not personal injury or wrongful death.

In this case, Hanzman invited people who'd lost loved ones in the collapse to speak in court.

"This tragedy really was emotional, and it was something to hear the stories from some of these survivors, some of these victims, and I know I was not unique in this. We cried in the courtroom for the first time in my career," Tropin said.

And that's OK, according to Furst, who focuses on personal injury, wrongful death, professional malpractice and products liability.

"There's no way to divorce the emotion from the work of the case," Furst said. "It weighs on you every day and it's the driving force behind the work that we do."

SELECT DIVERSE LEADERS

Class action attorneys should prioritize proposing diverse slates of leadership attorneys, according to Furst, who said Hanzman took a chance on her.

"I think I'm qualified and experienced, but I've never served as a lead counsel. I'm a younger woman and I'm not a repeat player," Furst said. "And I did a good job and I worked hard, and I think Harley and I, our leadership style complemented one another's, and we worked well together. Younger, diverse attorneys can be included in these teams and you should be looking for it, because I think the judges are looking for it and they want attorneys who represent the class."

CONSIDER THE LEGACY OF THE CASE

Though Tropin and Furst took lead roles, they said a resolution wouldn't have been possible without the spirit of cooperation and collaboration that everyone shared. That includes the team of 17 firms on the steering committee; mediator Bruce Greer; receiver Michael Goldberg; Lea Bucciero of Podhurst Orseck, who was instrumental in discovery; and Philadelphia lawyer Jeffrey Goodman, who unearthed many of the experts.

"I think this case will stand as a testimony to what this judge has shown can be done," Tropin said. "I think it was so important, not just because the victims will get awards sooner rather than later, but because they'll get closure, of at least the litigation, sooner rather than later, so that they wont have to relive this over and over again for four or five years as they have to go to court hearings and depositions, and so forth. That, I think, is the legacy of the case."

Raychel Lean is ALM's Florida bureau chief, overseeing the Daily Business Review. Email her at rlean@alm.com or follow her on Twitter via @raychellean.

FLORIDA **LEGAL REVIEW**

FSU, UF Weigh In on Bar Accident Case

by Jim Saunders

SHUTTERSTOCK

"FSU and UF face many challenges in their responsibilities to their large student populations, which include thousands of students who are not of lawful drinking age," lawyers for the universities said.

Florida State University and the University of Florida plan to file arguments at the state Supreme Court in support of a woman who suffered catastrophic injuries when she was hit by a pickup truck in an incident that involved underage drinking.

Attorneys for the universities submitted a notice Tuesday that is a first step toward filing a brief supporting Jacquelyn Faircloth, who was 18 when she was hit by the truck in 2014 while crossing a Tallahassee street. Faircloth had been drinking, as had the 20-year-old driver of the truck, who had been at Potbelly's, a bar near the Florida State campus.

"FSU and UF face many challenges in their responsibilities to their large student populations, which include thousands of students who are not of lawful drinking age," Tuesday's notice said. "One of the most serious challenges facing the universities, like all colleges and universities, is unlawful, underage drinking, intoxication and alcohol abuse. FSU and UF have each devoted substantial resources and engaged in concerted and significant efforts to address the public health crisis on their campuses posed by unlawful, underage drinking, intoxication and alcohol abuse."

The guardian for Faircloth took the case to the Supreme Court last week after a panel of the 1st District Court of Appeal overturned a $28.6 million judgment against the owners of Potbelly's and another establishment, Cantina 101. Faircloth drank alcohol at Cantina 101, while pickup driver Devon Dwyer had been at Potbelly's, according to court documents.

Faircloth's guardian filed the lawsuit against owners of both establishments, alleging that they illegally served alcohol to underage people and caused the accident. A circuit judge issued a default judgment against Cantina 101 for failing to respond and later entered a $28.6 million judgment jointly and severally against the bars, which meant both could be legally responsible for paying all the damages.

But in an appeal, the owners of Potbelly's argued, in part, that the circuit judge had improperly rejected what is known as a "comparative fault" defense, which could lead to determining a share of fault. A majority of the appeals-court panel agreed, saying the case involved a question of negligence, which would allow for comparative fault.

The opinion, written by Judge Thomas Winokur and joined by Judge Timothy Osterhaus, said that "because Potbelly's is derivatively liable for Dwyer's wrongdoing, the factfinder does not balance fault between a willful actor and a negligent one. Potbelly's was entitled to have the jury compare its fault (derived from Dwyer) to Cantina 101's (whose fault was derived from Faircloth), or if circumstances permitted, to Faircloth's itself."

But Judge Scott Makar dissented, writing that the allegations involved "intentional misconduct" by Potbelly's and not negligence. Dwyer was an employee of Potbelly's.

"The Legislature did not intend its comparative negligence statutes to treat negligent actions and intentional, criminal acts — such as Potbelly's — in the same way; instead, it made clear that comparative negligence has no role when intentional conduct is alleged and proven," Makar wrote.

The appeals-court decision directed the case back to circuit court for a jury to consider Potbelly's degree of fault. But Faircloth's guardian wants the Supreme Court to take up the issue.

Attorneys for FSU and UF, including former Supreme Court Justice Kenneth Bell, did not provide detailed arguments in Tuesday's filing. But they wrote that applying comparative-fault laws "against a vendor who willfully and unlawfully sold alcohol to an underage patron, resulting in the patron's intoxication and related injury, would undermine the universities' considerable efforts to address a significant public health threat."

Jim Saunders reports for the News Service of Florida.

Georgia Backs Florida in Elections Law Fight

by Jim Saunders

Pointing to broader implications of the case, Georgia is backing Florida in a fight about a 2021 elections law that a federal judge said is unconstitutional.

Georgia Attorney General Christopher Carr filed a brief Monday at the 11th U.S. Circuit Court of Appeals supporting the Florida law, which, in part, placed additional restrictions on "drop boxes" for mail-in ballots and prevented groups from providing items such as food and water to voters waiting in line at polling places.

Chief U.S. District Judge Mark Walker ruled March 31 that the law was unconstitutionally intended to discriminate against Black voters. A panel of the federal appeals court is scheduled to hear arguments Sept. 15 in Florida's appeal of Walker's ruling.

In the 36-page brief Monday, Carr and lawyers in his office wrote that a court precedent requires plaintiffs to show "discriminatory results," along with intent, to establish a violation of part of the federal Voting Rights Act. Also, the brief took issue with Walker's conclusions about the intent of Florida lawmakers.

"(The) district court improperly used its disagreement with the Legislature's judgment (regarding the need to foreclose potential avenues of fraud, maintain election integrity and efficiency, and bolster voter confidence) to conclude that such valid legislative interests were mere pretext for racial discrimination," the brief said. "Courts cannot use simple disagreement with legislatures as a basis for inferring discriminatory intent, and it is corrosive of the judicial role, not to mention democracy, to suggest as much."

Also, the brief indicated that the appeals court's ruling in the Florida case could affect a pending challenge to elections laws in Georgia. The Atlanta-based 11th U.S. Circuit Court of Appeals hears cases from Florida, Georgia and Alabama.

"In particular, Georgia, like many other states, has enacted restrictions on soliciting persons waiting in line to vote, including for the purpose of offering them things of value such as money, gifts, food, or beverages," the brief said. "And it has other laws and regulations governing voting by mail, drop boxes, and other aspects of elections that could be affected by this court's eventual decision in this case. Accordingly, Georgia has a keen interest in both the outcome of this case and the reasoning of this court's decision even apart from the result."

Republican lawmakers and Gov. Ron DeSantis approved the Florida law (SB 90) amid a broader push by the GOP nationally to change elections laws after former President Donald Trump lost in 2020 to Democrat Joe Biden.

Trump's narrow defeat in Georgia helped fuel the Republican effort to revamp laws. Florida had relatively few problems in the 2020 elections, but lawmakers and DeSantis argued they needed to add safeguards to help prevent fraud.

In challenging the law, however, voting-rights groups argued it was intended to restrict minority voters' access to the ballot. As an example, the number of Black voters using drop boxes significantly increased in 2020 amid the COVID-19 pandemic. Black voters are a key Democratic Party constituency.

Walker, in a 288-page ruling, agreed with the voting-rights groups about the discriminatory intent of the law and found parts of it unconstitutional. In addition, he took the rare step of putting Florida under a process known as "preclearance," meaning that a court would have to approve changes to parts of elections laws.

The appeals court in May issued a stay of Walker's ruling — allowing the law to be in effect during this year's elections. But the underlying court fight continued.

Attorneys for the state and the Republican National Committee and the National Republican Senatorial Committee, which intervened in the case, filed briefs last week in the case. Lawyers for the voting-rights groups have not filed their arguments.

In addition to Georgia, several organizations supporting Florida have filed friend-of-the-court briefs during the past week.

As an example, the Indiana-based Public Interest Legal Foundation filed a brief Monday that said Florida's "initiatives to prevent voter fraud, instill voter confidence in the election process, and maintain an orderly, efficient, and peaceful election process justify the minimal, reasonable restrictions the new laws may place on plaintiffs."

Jim Saunders reports for the News Service of Florida.

FROM THE COURTS

Meta v. Meta: Owner of Facebook, Instagram Sued Over Rights to 'Meta' Trademark

by Jane Wester

A small company focused on immersive technology on Tuesday sued Meta Platforms Inc., the company formerly known as Facebook, in Manhattan federal court, alleging that the larger company violated its federal trademark for the name Meta.

Pryor Cashman partner Dyan Finguerra-DuCharme represents the plaintiff, METAx LLC, which was founded in 2010 and has hosted "experiential and immersive experiences" involving virtual and augmented reality at major festivals including Coachella and South by Southwest.

Finguerra-DuCharme argued that when Facebook announced its new name in fall 2021, it explicitly connected the new name to its "new, core business focus on AR, VR, XR, and other immersive and experiential technologies, goods and services—the identical technologies, goods, and services that Meta is using, and has used, for over a decade."

MARC OLIVIER LE BLANC

The complaint also alleged that leaders of Facebook chose the company's new name despite being aware of Meta and its work.

Finguerra-DuCharme cited Meta Platforms' 2021 Form 10-K as one example of the overlapping business areas. In the document, the company said it was "moving beyond 2D screens toward immersive experiences like augmented and virtual reality to help build the metaverse, which we believe is the next evolution in social technology."

The complaint alleged that Meta's business has been "eviscerated" by the name confusion and "toxicity" surrounding the company formerly known as Facebook, including political controversies and government investigations into the social media platform's impact on young people.

"Facebook has deployed its almost limitless resources to saturate the marketplace with its infringing META mark. This is textbook reverse confusion, which has caused, and is likely to continue to cause, significant and irreparable harm to META. Facebook cannot be allowed to continue its infringing conduct with impunity," Finguerra-DuCharme said in a statement.

The complaint also alleged that leaders of Facebook chose the company's new name despite being aware of Meta and its work.

In 2017, according to the complaint, "senior" Facebook employees reached out to Meta founder Justin "JB" Bolognino and praised one of its recent immersive experiences.

"Facebook and Bolognino then engaged in further discussion about Meta's products and services, leading Facebook to solicit Meta to collaborate with Facebook on future work. In fact, Meta and Facebook went on to jointly pitch their services for a project involving the use of AR and artificial intelligence technologies in an immersive dome experience," Finguerra-DuCharme wrote.

Palo Alto, California-based Meta, the company formerly known as Facebook, did not immediately respond to a request for comment.

Jane Wester is a litigation reporter for the New York Law Journal, an ALM affiliate of the Daily Business Review. Contact her at jwester@alm.com. On Twitter: @janewester.

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RULING

"If the appellant's position is correct, sovereign defendants can raise both issues on an interlocutory appeal," Dieguez said. "If the appellants cannot immediately appeal the duty issue, then they would have to wait until after a final judgment to appeal the issue."

Richard Schevis, assistant county attorney for the Miami-Dade County Attorney's Office, declined to comment.

In Schevis' brief, he called for the Third DCA to reverse the trial court ruling and remand the case with instructions to enter judgment in favor of the defendant.

"There is no evidence that any of the police officers failed to promptly render first aid and emergency life-saving techniques to the decedent immediately upon the police officers discovering her in the Nissan," Schevis argued, adding that sovereign immunity shielded the defendants from their discretionary decisions in "investigating this accident."

Now, it is up to the Third DCA to rule on this precedent-setting dispute.

The case dates back to Nov. 30, 2018, when Freddy Mieryteran, ran a red light and caused a multiple vehicle crash that left Becerra — who was not wearing a seatbelt — "wedged between the passenger side front floorboard and the dashboard," according to Florida Highway Patrol.

However, authorities, who arrived on the scene within minutes, did not discover and pull Becerra from the mangled vehicle until 75 minutes later, as swelling in her brain increased. Becerra's probate estate attributed the negligence to causing her death.

And during those 75 minutes, Miami-Dade Police Officer Joshua Brunner first arrived on the scene and located Mieryteran hiding nearby in some bushes. Brunner recalled that Mieryteran said, "Where is my baby mama?"

However, when Brunner checked the vehicle, he was the first of over five first responders who failed to find Becerra hunched over in the passenger seat. Becerra's attorney claimed that when Brunner informed Mieryteran that there was nobody else in the vehicle, the driver responded that he must have dropped Becerra off at home before the crash.

In the meantime, officers claimed Mieryteran was intoxicated and allowed him to munch on pizza in the backseat of the vehicle, which was later determined to be stolen. Fire rescue rendered assistance to people involved in the accident and left the scene as Becerra sat in the passenger seat unconscious.

Eventually, when FHP performed an inventory search of the vehicle, a trooper discovered Becerra. Fire rescue immediately returned to the scene and transported Becerra to Kendall Regional Medical Center, where she died three days later.

Plaintiff attorneys alleged negligence. However, Miami-Dade County said it "merely failed to timely discover her in the course of their investigation."

Michael A. Mora covers litigation in the Sunshine State. You can email him at mmora@alm.com.

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WINSTON

group of people that get along and like each other and want to work together."

Additionally, Foslid said Winston's "best-in-class" platform and resources would deliver value and efficiency to his clients, which include a broad array of companies involved in complex commercial litigation, business disputes, class-action defense, and products liability litigation.

Ex-Greenberg commercial litigator David Coulson was among six local partners who joined Winston's Miami office in May. The next month, Greenberg litigation partner Jared Kessler and associates Elisa Baca and Claudia Ojeda joined the office, as well as Greenberg financial regulatory and compliance practice co-chair Carl Fornaris.

In addition to knowing all of the Greenberg laterals personally, Foslid said he's also known office managing partner Enrique Martin and litigation partner Gustavo Membiela for years.

Martin joined Winston from Jones Day's Miami office several months after litigator Christopher Pace left the office to join Winston in Dallas (Pace is now listed on both Winston offices). Richard Puttré, one of the six original partners Winston hired in Miami, had only joined Hogan Lovells' Miami office in January after 21 years at Jones Day. In June, corporate partner Nicholas Rodríguez came over from the Jones Day office, too.

Shutts & Bowen also lost additional attorneys after the May departure of digital assets and blockchain technology group co-chairs Kimberly Prior and Daniel Stabile. Of counsel Paul Jezierny and associate Gabriela Plasencia joined in Winston in June.

Sidley Austin has also poached groups of local attorneys, albeit smaller ones, as it continues its own Miami expansion, although the firm has yet to formally recognize the Miami office.

The largest group is composed of Akerman litigation partners Lawrence Silverman and Dianne "Dee Dee" Fisher, who joined in April, followed by associates Ivan Feris and Carmen Ortega-Rivero. Otherwise, Sidley's Miami presence comes from a wider variety of firms, including Weil, Gotshal & Manges, O'Melveny & Myers, Jones Day, Greenberg Traurig, Holland & Knight, Morrison & Foerster, and the Stumphauzer boutique.

Dan Roe covers the business of law, focusing on Florida-based and national law firms. Contact him at droe@alm.com. On Twitter: @dan_roe_.

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FROM THE COURTS

Public Approval, Confidence in the US Supreme Court Nose-Dived in July

by Marcia Coyle

The public's approval of the U.S. Supreme Court, already declining since 2020, took a sharp dive to a new low of 38% this month following a series of controversial decisions in June, according to a national survey.

Public confidence in the court also has been decreasing since 2019. In that year, 37% of those surveyed had a "great deal/quite a lot" of confidence while 62% had "some" or "very little/none at all." The ratings in those two categories this month were 28% and 44%, respectively.

The approval and confidence ratings confirm other recent polls that support concerns voiced by many court watchers and some of the justices that the court is facing a crisis in its legitimacy. The justices' divided rulings along ideological lines in abortion and gun rights, in particular, triggered increasing divisiveness in an already polarized nation.

And when asked what most often motivates the justices' decisions—mainly law or mainly politics—those saying that the justices' decisions are based mainly on politics has increased from 35% in 2019 to 52% in July 2022, the survey reported.

The new Marquette Law School survey charts the court's downward trend in approval ratings from 60% in July 2021 to this month's rating.

The public's approval is now more sharply polarized along party lines than it was in March, the survey said.

DIEGO M. RADZINSCHI

The public's approval is now more sharply polarized along party lines than it was in March, a new survey found.

"In March, partisan differences were modest, with a majority of both Republicans (64%) and Democrats (52%) approving of the court's handling of its job. This changed after the leaked draft (abortion) opinion in May, with approval among Republicans rising to 71% and approval among Democrats falling to 28%."

But the divide widened further after the justices issued their abortion ruling, *Dobbs v. Jackson Women's Health Center,* on June 24, according to the survey: approval among Republicans remained high at 67% and virtually collapsed among Democrats to 15%.

The survey also found that public perceptions of the ideology of the court have shifted substantially since 2019.

Over the three-year period, the percentage saying the court is "moderate" has fallen from 50% in September 2019 to 21% in July 2022, while the percentage saying the court is "very conservative" has increased from 5% to 34%.

The survey also asked participants about their view of the court's decisions on gun carry outside the home, public tuition funding for attendance at religious schools., same-sex marriage and protections for LGBTQ persons from workplace discrimination. The survey found:

Gun Decision (New York Rifle & Pistol Association v. Bruen)

• A majority, 56%, favored the ruling, while 44% opposed it, among those with an opinion. Compared to the May survey, this was a 10-percentage-point decrease in those favoring the ruling and a 10-point increase in those opposed.

Public Tuition for Religious Schools *(Carson v. Makin)*

• A majority of survey respondents said they had heard nothing about the ruling or heard of it but didn't know enough to give an opinion. Of those with opinions, 59% favored the decision and 41% opposed it.

• In July, support for the ruling was highest among born-again Protestants (92%), followed by Roman Catholics (79%) and mainline Protestants (61%). Compared to September 2021 when asked about a possible decision, the percentage favoring this decision rose among born-again Protestants, while declining among other religious groups.

Same-Sex Marriage and LGBTQ Discrimination Decisions

• A large majority (66%) favor the 2015 Supreme Court decision, *Obergefell v. Hodges*, that ruled the Constitution guarantees a right to same-sex marriage.

• 84% favor the 2020 Supreme Court decision, *Bostock v. Clayton County, Georgia*, that federal civil rights law, Title VII, protects gay and transgender workers from workplace discrimination.

Marcia Coyle covers the U.S. Supreme Court. Contact her at mcoyle@alm.com. On Twitter: @MarciaCoyle.

Prosecutor Accuses Steve Bannon of 'Thumbing His Nose' at Congress as Contempt Trial Begins

by Andrew Goudsward

Prosecutors began their contempt of Congress case against Steve Bannon on Tuesday by accusing the former adviser to former President Donald Trump of "thumbing his nose" at the authority of the U.S. government when he defied a subpoena from the House Jan. 6 select committee.

In brief opening statement, Assistant U.S. Attorney Amanda Vaughn described Bannon as someone who had an obligation to help Congress in its investigation of the attack on the U.S. Capitol but refused to cooperate.

"Because it was a subpoena, Congress was entitled to the information it sought. It wasn't optional. It wasn't a request. It wasn't an invitation," Vaughn said. "As you will learn in this trial, the defendant refused to turn over the information he might have anyway. Instead, he chose to show his contempt for Congress' authority and its processes."

The select committee subpoenaed Bannon in September 2021 for documents and testimony, noting that Bannon was part of a group of Trump allies who were planning to prevent Congress' formal certification of the election and had vowed that "all hell is going to break loose" on Jan. 6, 2021.

Opening statements kicked off the trial of a former top adviser to Trump and longtime right-wing provocateur who initially vowed to turn the case into a "misdemeanor from hell" for the Biden Justice Department. The trial is unusual, because DOJ has rarely acted on contempt referrals from Congress in recent years.

Bannon's defense attorney M. Evan Corcoran, a white-collar partner at Silverman Thompson Slutkin & White, told the jury the situation was more complicated. Corcoran argued that Bannon did not disregard the subpoena and instead his attorney at the time, Robert Costello, was involved in a back and forth with the select committee's top lawyer, Kristin Amerling, to raise objections to the subpoena.

"They did what two lawyers do," Corcoran said. "They negotiated."

Corcoran noted that negotiation between committee attorneys and lawyers for witnesses is common in congressional investigations and that many other witnesses in the select committee's investigation did not appear for depositions on the date they were initially subpoenaed.

PETE KIEHART/BLOOMBERG NEWS

Steve Bannon is on trial, charged with two counts of contempt of Congress.

"You'll find from the evidence that the date was the subject of ongoing discussions and negotiations," he said. "The dates were not fixed. They were flexible."

Corcoran also told jurors that they should consider that 202 members of the House, all Republicans, voted against referring Bannon to DOJ for contempt, prompting an objection from prosecutors.

The potential malleability of the subpoena deadline was one of the few remaining defenses available to Bannon. Judge Carl Nichols of the U.S. District Court for the District of Columbia ruled last week that Bannon could not argue that the subpoena was legally invalid because of executive privilege or prior opinions from the U.S. Justice Department that largely immunize close presidential advisers from congressional testimony. Bannon had initially claimed that Trump had invoked executive privilege, preventing him from testifying or turning over documents.

Vaughn and Corcoran each skirted around the issue of executive privilege during opening statements. Vaughn noted that Bannon had claimed a "privilege" in refusing to comply, but told the jury that the privilege was irrelevant, because it was up to the committee, and not Bannon or his attorneys, to determine whether the privilege applied.

Vaughn painted Bannon as someone who felt he didn't have to follow the same rules as other Americans. She framed cooperation with congressional subpoenas as an essential part of its legislative function.

"The defendant didn't get the date wrong. He didn't get stuck on a broken down Metro car. He just refused to follow the rules," Vaughn said.

Andrew Goudsward covers the Justice Department and regulatory affairs. Contact him at agoudsward@alm.com. On Twitter: @agoudsward.

FROM THE COURTS

Trump Ally Lindsey Graham Set to Testify in Georgia Election Probe

by Cedra Mayfield

Fulton County District Attorney Fani Willis is one step closer to questioning U.S. Sen. Lindsey Graham, R-South Carolina, inside an Atlanta courtroom to face allegations of election-tampering.

Graham agreed Tuesday to appear before a special grand jury in Atlanta, as sought by Willis. But the Republican ally of former President Donald Trump did not waive his right to challenge the district attorney's subpoena.

Lindsey Graham agreed to accept service of Fulton County District Attorney Fani Willis' subpoena.

'PURSUED IN FULTON COUNTY'

Willis is seeking Graham's testimony before a special grand jury in Fulton County in connection to at least two phone conversations Graham and members of Trump's legal team had with Georgia Secretary of State Brad Raffensperger and his staff following the November 2020 presidential election.

But attorneys for Graham maintained in a July 12 filing that the senator had not been seeking to interfere in Georgia's election by asking the Secretary of State to reexamine certain absentee ballots amid Trump's loss to Democrat Joe Biden. Instead, defense counsel for Graham argue that, as chairman of the Senate Judiciary Committee, he'd been within his right to investigate election processes in individual states.

Under the agreement reached between Graham and Willis, all process and proceedings pending in the United States District Court for the District of South Carolina and the United States District Court for the District of Columbia will be withdrawn.

"Senator Graham has agreed to accept service of a subpoena for testimony from the Fulton County Special Purpose Grand Jury in Atlanta, Georgia, without waiving any challenges or any applicable privilege and/or immunity," the agreement read. "The parties agree that any such challenges to the subpoena will be pursued in Fulton County Superior Court and/or the United States District Court for the Northern District of Georgia."

Prior to the agreement, Graham's grand jury appearance had moved from Atlanta to Greenville and then to Charleston, South Carolina. His legal team also motioned to quash Willis' subpoena last week, prompting Fulton County Superior Court Judge Robert McBurney to issue a ruling ordering Graham to testify on Aug. 2.

Meanwhile, McBurney excused 11 presidential elector nominees who'd been subpoenaed in the case from having to personally appear before the grand jury. In addition to arguing such appearances are "unreasonable and oppressive" under Georgia law, the individuals joined in a motion to disqualify filed by Georgia Republican Sen. Burt Jones on July 15.

McBurney's proposed order also directed Willis to provide what the movants considered exculpatory information to the grand jury.

The order states the district attorney is expected to also provide "ex-parte and in camera, the evidence or testimony upon which it is relying to claim that the movants status in this investigation was properly changed from that of witnesses to targets of the investigation."

Cedra Mayfield is a litigation reporter with the Daily Report, an ALM affiliate of the Daily Business Review. Contact her at cmayfield@alm.com. On Twitter: @cedramayfield.

6th Circuit: 'Overwhelming Majority' of Case Law Says COVID-19 Closures Are Not 'Unconstitutional Takings'

by Mason Lawlor

The U.S. Court of Appeals for the Sixth Circuit ruled in favor of Michigan state officials on Tuesday, finding a roller-skating rink's lawsuit over COVID-19 executive orders was correctly dismissed by the district court.

The plaintiff, Skatemore Inc., a corporation managing roller rinks in Michigan, along with Slim's Rec Inc., a bowling alley and restaurant manager, were forced to close their doors to patrons on March 16, 2020, when Gov. Gretchen Whitmer signed an executive order in an effort to reduce the spread of COVID-19.

The temporary closures of bowling alleys and roller-skating rinks lasted for a few weeks. Then on June 1, 2020, Whitmer ordered permanent limitations on bowling alleys and roller rinks, allowing only certain organized sporting events to be held there, according to the Sixth Circuit's opinion.

The plaintiffs' businesses remained closed until December 2020.

The plaintiffs filed a suit against Whitmer, former Michigan Department of Health and Human Services Director Robert Gordon, and the Michigan Department of Health and Human Services, alleging that their forced "closure" of their establishments during the pandemic constituted an unconstitutional taking in violation of the Fifth Amendment and Article X, §2 of the state constitution. They brought Fifth Amendment takings claims against Whitmer and Gordon under 42 U.S.C. §1983.

U.S. District Judge Hala Y. Jarbou of the Western District of Michigan held that the defendants were entitled to immunity under the Eleventh Amendment, granting their motion to dismiss.

"Plaintiffs have not offered any argumentation as to why Defendants are not entitled to qualified immunity," Judge Eric L. Clay wrote on behalf of the panel. "Nor do they direct the Court to any caselaw indicating that Defendants' various orders violated a clearly established constitutional right. And for good reason: there is no clearly established precedent that pandemic-era regulations limiting the use of individuals' commercial properties can constitute a Fifth Amendment taking. In fact, the overwhelming majority of caselaw indicates that such regulations are not takings."

And even if the plaintiffs were allowed to amend their complaint, the defendants would still be entitled to qualified immunity, the appellate court held.

The Sixth Circuit cited two other cases which expanded immunity to state officials under the Eleventh Amendment. In *Hans v. Louisiana* (1890), the court found that immunity applies to private suits brought against a state by its own citizens. In *Kentucky v. Graham* (1985), it was applicable to state officials "in their official capacity."

Meanwhile, Skatemore cited the Supreme Court precedent in *Knick v. Township of Scott* (2019) to support its arguments. In it, the court stated that "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it."

The circuit court's July 19 opinion stated that the court's ruling in *Knick* only referred to municipalities, not states, which differed from the plaintiffs' claims.

"We rejected this argument and explicitly held that 'the Fifth Amendment's Takings Clause does not abrogate sovereign immunity," Clay wrote, with Judges Richard Allen Griffin and Helene N. White concurring. "In reaching this conclusion, we noted that *Knick* was a case against a municipality, and municipalities are not entitled to the protection of Eleventh Amendment immunity.

"It would be a significant expansion of *Knick* to now extend its reasoning to state officials, who typically are entitled to Eleventh Amendment immunity," Clay added.

Plaintiffs also argued that the ratification of the Fourteenth Amendment "abrogated" the Eleventh Amendment, incorporating the Fifth Amendment to all of the individual states. However, the court rejected this, calling the argument "meritless" by relying on the Fifth Circuit's 2000 decision in *Yselta Del Sur Pueblo v. Texas*.

"The 14th Amendment only provides Congress with power to enforce the Amendment through legislation, which provides the basis for congressional abrogation. Remedies against states under the 14th Amendment are created by legislation, not by other constitutional amendments," Clay wrote.

According to the opinion, plaintiffs made the argument that by ratifying the amendment, Michigan gave up the right of immunity for its state officials, citing *PennEast Pipeline v. New Jersey* (2021). The court ruled in *PennEast* that New Jersey consented to federal court jurisdiction and couldn't invoke Eleventh Amendment immunity. The present case is much different however, according to Clay.

"In a takings suit between the federal government and a state, it is reasonable to assume, as the Supreme Court did, that the 'judicial Power of the United States' extends to such suits. U.S. Const., art. III," he wrote. "But in the present appeal, citizens of Michigan seek compensation from the State of Michigan. The dispute is a purely intra-state matter. To agree with Plaintiffs would be to go beyond the holding of *PennEast*."

Counsel for plaintiffs, Stephan P. Kallman of the Kallman Legal Group, could not be reached for comment.

The Department of the Attorney General for Michigan also could not be reached for comment.

Mason Lawlor reports for Law.com, an ALM affiliate of the Daily Business Review. Contact him at mlawlor@alm.com.

INTERNATIONAL

Gunderson Dettmer Launches in São Paulo, Citing Innovation Economy in Latin America

by Jessie Yount

Gunderson Dettmer Stough Villeneuve Franklin & Hachigian is hedging its bet on the innovation economy in Latin America, opening an office in São Paulo, Brazil.

Corporate partners Brian Hutchings, Adan Muller and Christel Moreno will lead the office. Hutchings and Muller will split their time between New York and São Paulo, while Moreno will reside in São Paulo along with three associates.

Hutchings, the co-leader of the firm's Latin America practice and a member of its management committee, said the firm has represented entrepreneurs and investors in the region since 2006 and counts over 200 clients in Latin America today.

The new office signals the firm's continued commitment to the region, he said.

"We're showing our clients we are there for the long haul," Hutchings said. "This puts attorneys on the ground within arm's reach, and will help us remain closer to changes and trends in the market."

Serving clients in Latin America, even remotely, has been "incredibly successful," Gunderson Dettmer managing partner David Young said. "But there is a different level of relationship to a market [when] you have a physical location. We saw this in other expansions. There is another layer of work that becomes available."

Gunderson Dettmer represented companies or investors in over 125 financings in Latin America in 2021—more than twice as many as the next closest law firm, according to Pitchbook.

Christel H. Moreno, Brian C. Hutchings, and Adan C. Muller and of Gunderson Dettmer.

The firm has handled over 600 cross-border venture and growth equity financings in Latin America since 2017 and advised Latin America-based companies in more than $3.8 billion in mergers and acquisitions since 2014.

Its work has included Didi's acquisition of 99 Taxi, Uber's acquisition of Mexico-based Cornershop, Etsy's acquisition of Elo7 and SoFi's acquisition of Technisys.

Young noted that Gunderson Dettmer has a number of partners interested in serving the Latin America market, and expects São Paulo to act as a platform to expand work for clients in other countries such as Mexico, Chile and Argentina.

Gunderson Dettmer has earned a "strong reputation for not only world-class work but also as a bridge between Latin America and the larger international venture community," Moreno said in a statement, noting the firm's strong relationships with "leading venture capital firms investing in the region" will foster growth.

Despite the current economic down cycle, there are several indicators that demand will remain strong in Brazil, according to Hutchings.

"The rate of technology growth, the level of entrepreneurship, the availability of capital and access to support networks [are all] going in the right direction," he said. "That gives us room to grow."

At the same time, the rate of technology usage and adoption based on individual internet users is high. In fact, Brazil is one of the largest markets for internet giants such as Meta and Google, and the firm expects to continue to see demand from U.S. companies looking to expand in Latin America, according to Hutchings.

With the opening of its São Paulo office, Gunderson Dettmer now has 11 offices, with more than 420 lawyers in the global venture capital, growth equity and emerging companies sectors.

"This is a significant, long-term opportunity for us," Young said. "We're excited about going down there despite economic conditions across the globe. The firm is doing quite well, and we're excited about this investment."

Jessie Yount covers law firms and the intersection of law and technology. Contact her at jyount@alm.com. On Twitter: @Jessie_Yount.

Insurer Ended Cover for Law Firms for Litigating Against Insurance Industry

by Paul Hodkinson

A key insurance provider to the legal industry ended its professional indemnity cover for two major law firms after they started working on litigation against the insurance industry during the COVID lockdown, it has emerged.

Insurer QBE decided not to renew cover for U.K. law firms Fieldfisher and Mishcon de Reya after the firms attempted to build group claims to push for business interruption insurance payouts in the early stages of the pandemic in 2020, according to several people with knowledge of the matter.

Normally, firms stay with an insurer for a number of years with policies renewing at the end of the policy term, according to law firm leaders, though one person said QBE does not automatically renew policies.

The controversial move meant both firms had to find new insurance providers, causing them problems given they then had to disclose to new providers that they had previously been rejected for cover.

QBE, Fieldfisher and Mishcon declined to comment.

Many U.K. companies made insurance claims under business interruption policies as they were affected by the pandemic. Several insurers responded that their policies were not intended to cover such unprecedented lockdown situations. A number of cases continue.

SHUTTERSTOCK

Insurer QBE decided not to renew cover for U.K. law firms Fieldfisher and Mishcon de Reya after the firms attempted to build group claims to push for business interruption insurance payouts in the early stages of the pandemic in 2020, according to several people with knowledge of the matter.

It is unclear if the claims would have involved the firms litigating directly against QBE.

Either way, some believe QBE's move holds implications for access to justice as it could mean insurance providers try to avoid lawsuits by threatening to pull professional indemnity cover for law firms that act for claimants.

One person in the insurance industry said he had never heard of such a situation before.

One rival law firm leader said: "This sounds like a very extreme way to behave. There are always going to be matters against insurers. If you take that line that you are not going to insure firms that act against insurance providers that's pretty horrific. Firms cannot trade without cover."

Another rival law firm managing partner said QBE's decision sent "shockwaves" across the legal industry and called the situation "an example of insurance overreach". They said: "It wouldn't surprise me if the [legal] industry started to look at setting up captive insurers or a mutualisation."

Professional indemnity insurance providers are said to be huge drivers of behavior in the legal industry. When Russia invaded Ukraine, several partners said insurers put exclusion clauses into indemnity policies for law firms, or pulled cover for Russia-related work altogether, which some say influenced firms' decisions to leave Russia.

The managing partner added: "This is a slippery slope. Once they have withdrawn cover for one thing, can they withdraw cover for others as well? For example, with ESG, could they pull cover for representing the fossil fuel industry?"

Paul Hodkinson is the editor-in-chief of Law.com International, an ALM affiliate of the Daily Business Review. Contact him at phodkinson@alm.com.

PRACTICE FOCUS / APPELLATE LAW

New Appellate Ruling—Rule 11 Sanctions May Be Sought and Awarded After a Judgment Has Been Entered

Commentary by Charles M. Tatelbaum and Corey D. Cohen

Tatelbaum

Cohen

On July 12, the U.S. Court of Appeals for the Eleventh Circuit issued a precedential ruling that can have significant import for civil litigants in Florida, Georgia and Alabama. In the case of *Wilbur Huggins v. Lueder, Larkin & Hunter,* the appellate court reversed a ruling by the U.S. District Court in the Northern District of Alabama, which held that once a summary judgment had been granted in favor of the defendant, the defendant was precluded from seeking an award of sanctions or damages under Rule 11 of the Federal Rules of Civil Procedure.

The separate plaintiffs, in a series of six consolidated appeals of companion civil cases, sought damages against a law firm for alleged violations of the Federal Fair Debt Collection Practices Act. The defendant law firm believed that the plaintiffs' claims were frivolous and without merit, and in connection with the separate filing of motions for summary judgment, the defendant law firm served on the plaintiffs the "safe harbor" notice required by Rule 11. The safe harbor notice, once required by Section 57.105 of the Florida Statutes for Florida state court civil cases, requires an aggrieved party to provide 21 days' notice to the opposing party (with an accompanying copy of the proposed Rule 11 motion) prior to seeking sanctions for frivolous or unsupported pleadings. Ultimately, the safe harbor notice allows the opposing party an opportunity to withdraw or correct the potentially sanctionable/offensive pleading prior to the motion for sanctions being filed.

REBECCA BREYER

BOARD OF CONTRIBUTORS

In a detailed analysis of the drafting history of the current Rule 11, the circuit court of appeals found that there is nothing in the current rule or its history that mandates that the motion seeking the award of sanctions be filed prior to the court's ruling on the substance of the offending motion or pleading.

As circuit Judge Britt Grant succinctly stated:

"Nothing in Rule 11's text suggests that a party may not file an otherwise proper sanctions motion after final judgment. But even if there were any question, *Baker v. Alderman* settled the issue. That case explains that because "Rule 11 motions are collateral to an action" they may be filed and considered even after the merits are resolved. The motions thus "are not barred if filed after a dismissal order, or after entry of judgment."

This ruling reinforces a strategic advantage that may and should be utilized by counsel when contemplating the filing of a Rule 11 motion. Many experienced counsel believe that there is a perception, if not the reality, that judges may be unwilling to favorably rule on motions to dismiss, motions for summary judgment and other pretrial motions granting the relief requested if they know that the losing party may then be subject to sanctions based upon the prior filing of a Rule 11 motion. By waiting until after the court has ruled on the substance of the allegedly offensive pleading to file the Rule 11 motion, the aggrieved party will be secure that there will be no subjective influence based upon the pendency of a Rule 11 motion for sanctions.

In distinguishing a bankruptcy case opinion that was cited by the plaintiffs as support for their position, the appellate opinion also confirmed that based upon the virtual identical language contained in Rule 9011 of the Bankruptcy Rules of Procedure, the same holding would be true in a bankruptcy proceeding. Since bankruptcy cases tend to have more interlocutory type ancillary motions and pleadings in adversary proceedings and contested matters that are tangential to the main bankruptcy case, being able to wait until after the bankruptcy court has ruled upon the claimed offensive pleading can provide a benefit to the aggrieved party.

With the anecdotal perceptive increase in frivolous pleadings noticed by many long-time civil litigation practitioners, the increased use and utilization of Rule 11 sanctions may be an important tool in order to protect clients' rights and help to eliminate unnecessary time and expense in connection with the litigation.

Charles M. Tatelbaum, director at Tripp Scott in Fort Lauderdale, leads the firm's bankruptcy practice and Corey D. Cohen is an associate with the firm.

FROM THE COURTS

A SCOTUS Artist Recounts 4 Decades of Sketches

by Marcia Coyle

For more than four decades, artist Art Lien's sketches have been a reliable window into the courtroom of the U.S. Supreme Court, where they sometimes captured the anger of a dissenting justice, the meaning in a justice's jabot, or the passion of an advocate. Lien put aside his sketchbook and familiar opera glasses and retired at the end of this past term.

Lien has sketched courts since 1976, including such high-profile arraignments and trials for the Oklahoma City bomber, the Boston marathon bomber, Ronald Reagan shooter John Hinckley Jr., and Sept. 11 al-Qaida terrorist Zacharias Moussaoui. But the Supreme Court has been his regular beat almost exclusively since 1980 for NBC news and then for SCOTUSblog.

"That year of COVID when I didn't have to go in [to the Supreme Court building] and commute, it's really the commute that convinced me to retire," said Lien, who lives in Maryland. "I was going to stay on until cameras came in. I wanted to be the last court artist."

Lien recently shared his thoughts on drawing the justices and advocates, standout moments in the artist's eyes and the future of courtroom artists. His body of work can be found here. The following interview has been edited lightly for style and length.

Did you enjoy drawing at an early age?

I was an only child, a latchkey child, so I did a lot of drawing. When I was 7 years old, I moved with my mother to Geneva, Switzerland. She put me in public school there and I didn't speak a word of French and so I did a lot of drawing. I didn't do much drawing at all during high school. I didn't know what I was going to do for college, but I could always draw so I applied to several art schools. I made up a portfolio. My formal training began with college—the Maryland Institute College of Art (MICA).

There were the artists there who were like New York, abstract. I was more old school. I did a lot of print making and painting. I didn't know what I was going to do when I graduated. I remember sitting in bed crying because I didn't know what to do with my life. I was painting roofs and houses. But along came our governor—Marvin Mandel was going on trial. I saw a job posted at MICA—a local TV station was looking for a sketch artist. I went to the newsroom and sketched the people in the newsroom and they hired me.

I went to my first pretrial hearing and did such a bad job, the station fired me. The materials I was using weren't good for the courtroom. I had nonabsorbent paper and was using water colors and every time I moved, the colors would run. I switched to absorbent paper and showed them more sketches and they hired me back. Don't give up.

How did you break into the Washington, D.C., market?

I didn't work locally very long. I wrote letters to three networks in D.C., and CBS let me try out. Howard Brodie is the guy who took me under his wing. He was a World War II combat artist—an incredible guy. The first place he took me to was the Supreme Court. I didn't know what was going on. Then we went over to the Senate, and that was just really hard. I was with CBS for three years on a freelance basis. It was the Senate in those days. I was stuck in the Senate.

While there, I was working alongside Betty Wells, an NBC sketch artist. She talked NBC into offering me a contract. I was backup to Betty. It was always courtroom art—all the last-minute things. Betty did the big trials and the Supreme Court. Then in 1990, I was let go. Everybody was cutting back. It was a hiatus of four years. I came back to NBC because they called me up. Betty had retired. The day they called me, I went to the Supreme Court and that was the time the Murrah building in Oklahoma City was bombed.

What was the most difficult assignment for you?

That's easy. It was Oklahoma City, the McVeigh trial. We did a story every single night. It was intense. The testimony was very intense. I basically moved to Denver. I moved my son. We brought the cats. At the end of the week, the weekend wasn't long enough to recover. It was really grueling. There was one night when the nightly news didn't do a story, but still used my sketches. Thirty witnesses were to testify in the morning. I sketched every one of them and they showed the sketches.

What sorts of challenges did you face in sketching the Supreme Court?

For the first few years, I really had no idea what was going on. I was trying to figure out where the meat of the arguments was. I tried reading the briefs a little bit. But I found that was just too much, and even reading that, the briefs referred to other cases and you had to read those. It took me years to realize the important part of arguments was not the lawyer but the justices.

And there is the physical part. We're squeezed into the alcove in the courtroom press section, behind a couple of rows of reporters and there are all those admissions to the bar lawyers sitting in the special bar section. Your view of the bench isn't good.

Then, you're trying to draw them in new ways. I did that by changing materials and trying to imagine different points of view, like wide shots. There's a model of the courtroom downstairs that I've used for perspective to give a bird's-eye view.

Things really changed when I started doing SCOTUSblog. I loosened up and could have fun. They do every argument. The quieter cases, I can take my time.

Who was the easiest justice to draw?

Right now, I have a very easy time with Justice Sonia Sotomayor. I like her hair. I like her earrings. I like her bracelets, and she used to be the first to come in on the argument.

Justice Stephen Breyer is a tremendous amount of fun because of his body language and he asks very long questions, and you have time to draw him. I always found Justice Anthony Kennedy was very easy for me to do.

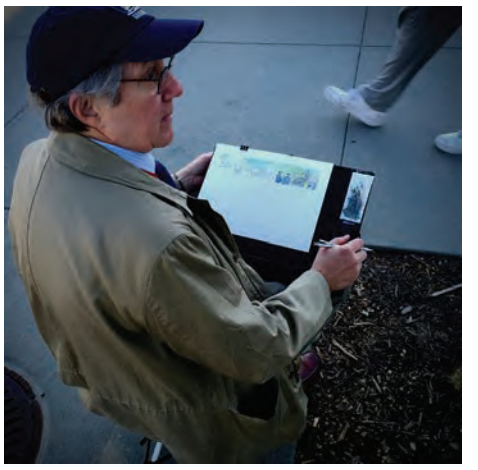
And the hardest justice to draw?

Justice Sandra Day O'Connor was the all-time hardest. We all struggled with O'Connor. She's very attractive but it was very hard to capture O'Connor.

How did you work with the totally remote Supreme Court during the pandemic?

It was suggested by SCOTUSblog that maybe we should contact the lawyers arguing over the telephone and ask if they could send us a photograph of their argument. I wrote to all of them and almost all of them agreed and sent us photos. I got to work from home and sit there with my coffee instead of having to commute. It was a nice break.

Do any particular moments in the courtroom stand out in your memory?



Art Lien retired in June after sketching the U.S. Supreme Court for more than four decades.

One that always stands out for me is the Affordable Care Act argument, that first day when Donald Verrilli choked. It was "Oh no!" He recovered well, but for some reason, that sticks with me.

It's such a different feel today. I was just at the court last weekend and they still have barriers up. There was that whole period of stability at the court. It seemed like for a long period with Chief Justice William Rehnquist, not much happened, no new members. I had this feeling this Supreme Court is conservative but sometimes leans left. They really are independent. Now I think I was just totally wrong.

Is there a future for court artists?

I would say it's pretty much a dying art. I have young artists writing to me and asking about breaking into court art. I used to encourage them but not anymore. The news organizations are not using sketches anymore.

And how about Art Lien's future now?

I don't think retirement will really sink in until October. I've always been off in the summer. I don't feel any kind of anxiety about next term, at least as far as drawing. I'm very happy to be leaving now. I've got plenty to keep busy. I work on bicycles. I find old ones, fix them up and give them away. I also ride them. I've got an old house that needs a lot of work. Maybe in the future, I'll start painting and break some of the bad habits I learned. When sketching, you're always racing to finish something.

Marcia Coyle covers the U.S. Supreme Court. Contact her at mcoyle@alm.com. On Twitter: @MarciaCoyle.

Attorneys Applaud Wolson's Critique of Individual FLSA Settlement Approval Requirement

by Aleeza Furman

A Philadelphia federal judge's recent criticism of a rule requiring judicial approval of individual Fair Labor Standards Act settlements is a significant move toward more efficient dispute resolutions, wage-and-hour attorneys said.

Lawyers for plaintiffs and defendants alike said the rule has long created obstacles for employers, workers and their counsel. They said providing the parties discretion to settle simple FLSA matters out of court saves time and money for everyone involved.

In his July 12 decision, U.S. District Judge Joshua Wolson of the Eastern District of Pennsylvania determined that the long-established requirement that a judge sign off on individual FLSA settlements was not supported by the FLSA's text. He concluded that disputes between individual plaintiffs and their employer do not require that approval.

Winebrake & Santillo's Peter Winebrake, who represented the plaintiffs in the case that gave rise to Wolson's memorandum, said he sees the decision as part of a larger movement away from the requirement. "Many plaintiffs lawyers have expressed frustration with this process of having to submit sometimes small-value FLSA cases to federal judges, and many defense counsel have also expressed frustration with the whole process," he said.

He said that for firms like his that represent plaintiffs on a contingency-fee basis, eliminating the approval requirement gets rid of disproportionate case costs and may ultimately incentivize more lawyers to take on FLSA claims on behalf of low-wage workers.

Post & Schell's employment and labor practice group chair Andrea Kirshenbaum, who was not involved in the case, called Wolson's decision "a positive step in the right direction,"

She said requiring settlement approval, in addition to being inefficient, can create concerns for defendants who don't want to broadcast their disputes.

"Typically when employers and employees resolve disputes, the agreements provide for confidentiality. With the requirement for court approval, such agreements often become public record and the parties cannot provide for confidentiality," she said.

She said the decision also addresses confusion around pre-lawsuit dispute resolution, a process she said can leave employers unsure about whether agreements they reach are actually enforceable. "Clarity benefits everyone involved, because if there are clear requirements then it's easier to govern yourself," said Kirshenbaum.

The requirement is unique to FLSA cases, said Winebrake, who noted that most other kinds of litigation allow parties to settle without a court's approval. He said the rule's widespread acceptance appears to stem from one Eleventh Circuit decision from the 1980s.

Aleeza Furman is a litigation reporter with The Legal Intelligencer, an ALM affiliate of the Daily Business Review. Contact her at afurman@alm.com.

COMMERCIAL REAL ESTATE

Class A Multifamily Tenants Face Highest Rent Increases

by Paul Bergeron

While higher-income renters are facing the largest percentage increases in rent, lower-income renters are paying a larger share of their income toward rent, according to a new research report issued this week by RealPage.

Its 2022 Market-Rate Apartment Affordability Report, presented Monday at RealPage's RealWorld users conference in Las Vegas, is based on 7 million leases signed through RealPage customers.

The median rent-to-income ratio for the luxury Class A segment measured 20.5% compared to 22.1% in the Class B segment and 24.5% in the lowest-price Class C properties.

Carl Whitaker, director of research and analysis for RealPage, tells GlobeSt.com that Class A renters are showing to be well-educated, with good jobs, earning higher salaries in non-service industries.

Pittsburgh Has Lowest Income-to-Rent Ratio

Pittsburgh fared best overall in the rent-to-income ratios by metro areas at 18% with Riverside, Calif., at the highest mark of 26%.

"The vast majority fall within the 20% to 25% range," according to Jay Parsons, chief economist and head of industry principals at RealPage, in prepared remarks.

"The results show that, as expected, pricier markets require much higher incomes," Parsons said. "The median income for a market-rate apartment household measured around $150,000 in San Jose, San Francisco, and New York. Incomes also reached six-figures in Los Angeles, Anaheim, Oakland, and Boston."

Renter household incomes were lowest in Memphis, New Orleans, and Greensboro at about $42,000.

"Apartment renters are not (yet) doubling up with roommates more frequently to share rising rental costs," Parsons said, citing a trend that developed during the Great Recession in 2008-10.

Leases signed in 2022 averaged 1.63 occupants, compared to 1.65 in 2020 and 2021.

There's a 'Massive' Well-Qualified Demand for Apartments

The median age of apartment renters came in at 31.4, equaling 2019's pre-pandemic norm, Parsons said. "This suggests older, would-be homebuyers are not propping up apartment demand and renter incomes."

The study shows that market-rate apartment affordability is not yet a major concern,

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The RealPage report shows Pittsburgh with the overall lowest income-to-rent ratio and Riverside the highest.

"and won't be so long as wages continue growing," Parsons said. "There's been massive, well-qualified demand for apartments even as rents have increased, and that's why vacancy remains low and rent collections high."

Paul Bergeron reports for GlobeSt.com.

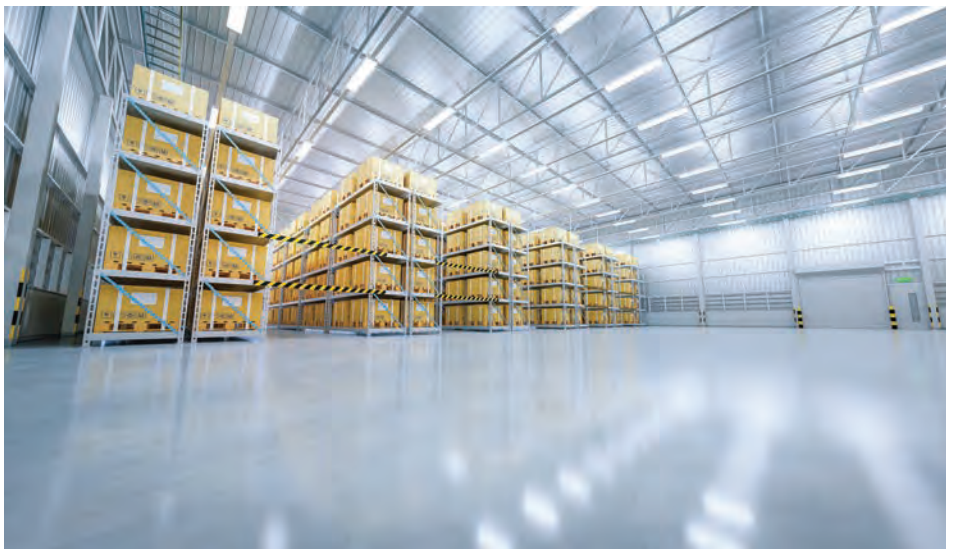
A Dose of Reality in the Warehouse Space

by Erik Sherman

Industrial, and especially logistics and warehouses, was one of the big winners of the pandemic. It's still going strong, but expect some changes soon, according to executives at Prologis in its quarterly earnings call.

The company saw 79% retention in the most recent quarter, with occupancy climbing to 97.7% and same-store NOI growth of 7.6%. There were proposals on the desk for just over half of remaining availabilities versus 38% pre-Covid average. And 71% of leases expiring in the next 12 months are either pre-leased or being negotiated. But negotiation periods are back to normal pre-pandemic levels. And where e-commerce had been 25% of new leases, that's down to 14%.

"In the end, we believe we're seeing a normalization in the volume and pace of demand which we expected as the world reopened from COVID and consumers seek more in-person experiences," Prologis CFO Tim Arndt said. "But given exceptionally tight markets and availability, the fundamentals remain excellent."



STOCK.ADOBE.COM

The Prologis earnings call offers some insight into the market.

However, recent performance has been something that was extraordinary and maybe not repeatable. "On the demand side, the way I think about it is that I've been doing this for 40 years," CEO Hamid Moghadam said. "And I would say, prior to last quarter and the quarter before, let's call the peak in terms of strength of market on the demand side as a 10 on a one to 10 scale. I think the last quarter and the quarter before were like on 12 or 13. They were just crazy good. And I think this quarter, there may be 9.5 to 10."

That's still in the 95th percentile of performance over the last 40 years, but it's not something that exceeds the guitarist in the 1984 mockumentary *This Is Spinal Tap* painting an 11 on his amp so the volume would be higher.

A tenant will "just take your time a little bit more, just to be sure that you're not making a stupid mistake," Moghadam added. There's unlikely to be a case where, say, an Amazon snaps up everything in sight only to turn around as it did in May and start releasing 5% of the space it added during the pandemic.

Moghadam doesn't see Prologis deploying the same amount of capital in development as it had been. "I think we're on the good side of the cycle. Where will that moderate? I don't know," he said. "But construction costs today are probably up 50%, land values are up significantly." And, as he'd later add, construction times are up by a third. So, rents have to be higher, which increases the caution of client CEOs.

Erik Sherman reports for GlobeSt.com.

What the Latest Inflation Numbers Mean for CRE Investors

by Lynn Pollack

Last week's inflation numbers, which clocked in at 9.1%, will "certainly" impact interest rates which potentially increases recession risk—and it could also affect the flow of capital to different property types in different parts of the US.

That's according to Marcus & Millichap's John Chang, who notes that headline CPI inflation reached its highest level in 41 years, thanks in large part to energy prices,

"But if you strip out the cost of energy and food, just looking at core inflation, the picture is a bit more promising," Chang says. Core inflation was only 5.9%, and that's down 60- basis points from its peak in March. And "that tells me a lot," Chang says.

To wit: most of the inflation lift is in the energy sector, while many commodity prices have been coming down—including lumber, which is down 49% from January, and steel, which is down 41% since March. The cost of shipping a container from China has fallen to $7,000 from a peak above $20,000 in September (but still five times pre-pandemic levels). And gas prices are also declining.

"It looks like the inflationary pressures may be leveling off, but we're not in the clear yet," Chang says. The war in Ukraine will almost certainly continue to impact oil and food prices, he says, and even if inflation does level off, it still remains high and will force the Fed to take additional measures via future rate hikes.

Chang says "blinking recession indicators are spooking Wall Street," putting downward pressure on the stock market and in turn driving long term interest rates. And the yield in the two-year Treasury has risen above the 10-year Treasury yield, sparking the inversion that is "commonly recognized as a sign of an impending recession," he says. But he also notes that the three-month Treasury is a better indicator than the 10-year, and that spread has not yet inverted.

"Remember, a yield curve inversion is not a bulletproof indicator that a recession is coming," he says.

The takeaways for CRE investors are five-fold, Chang says. Capital is moving to less volatile assets, like CRE, and balance sheet lenders like banks and credit unions may offer lower rates than credit market lenders like CMBS. Chang also says the most inflation resistant property types—like hotels, apartments, and self-storage—remain in favor, while capital is also targeting commercial properties that have strong rental upside like suburban office. Finally, he says capital flows are migrating from the regions that were most in demand last year to higher yield secondary and tertiary markets.

"There's a lot of capital out there looking for the durable inflation resistant returns offered by real estate," Chang says.

Lynn Pollack reports for GlobeSt.com.

THE FIRM

Norton Rose Is the Latest to Show How Washington Firms See Antitrust as a Key Offering

by Bruce Love

As Big Law continues to tap the Beltway vein of antitrust talent to fill increasing demand, Norton Rose Fulbright has beefed up its presence in Washington, D.C., with the arrival of a 15-year veteran of the U.S. Department of Justice's Antitrust Division.

Carsten Reichel, who for more than a decade prosecuted criminal antitrust cartels, has joined Norton Rose as a partner.

Reichel led some of the DOJ's most significant international criminal cartel matters, including in sectors such as air cargo, auto parts, foreign currency exchange, pharmaceuticals, and shipping.

He also negotiated the first-ever antitrust compliance monitor to be imposed as a result of an Antitrust Division corporate plea agreement, and helped expand the DOJ's Procurement Collusion Strike Force initiative to detect and deter criminal cartel activity by federal and state contractors.

Reichel has also prosecuted matters such as procurement fraud, corruption and related conspiracies.

Beyond his prosecutorial work, Reichel also worked at the DOJ on policy and interagency initiatives. He advised on the implementation of the Criminal Antitrust Anti-Retaliation Act, oversaw competition compliance in multi-agency efforts to implement the Defense Production Act responses to the COVID-19 pandemic, and trained foreign competition enforcers on cartel enforcement practices and policies.

Norton Rose's global head of antitrust and competition, Robin Adelstein, noted that as a senior criminal antitrust prosecutor serving under the Biden administration, Reichel has had "firsthand experience" with the "significant changes" in U.S. cartel enforcement priorities and policies, as well as the implications on a global scale.

"There is a great demand for the insight that Carsten offers, and we are thrilled to welcome him to our growing global antitrust team," said Adelstein, who also serves as Norton Rose's U.S. co-head of commercial litigation.

Reichel also served as special assistant U.S. attorney for the District of Maryland from 2017 to 2018, and was an attorney at Akin Gump Strauss Hauer & Feld from 2003 to 2008.

"Norton Rose Fulbright's antitrust group is known for its capabilities to advise clients on an international scale in significant investigations," said Reichel, adding he was "excited" to "leverage" his years of DOJ experience, and help "further expand" the firm's global antitrust and competition offering.

Norton Rose has been expanding its presence in the U.S. Earlier this month it added Daniel Pepper to its cybersecurity team in New York from Baker & Hostetler. In May it lured Elizabeth Sluder from Morrison & Foerster to join its renewable energy practice in Los Angeles. In April it opened a Chicago office.

In recognition of the growing importance of antitrust work, in June it appointed D.C. partner Amanda Wait as head of antitrust in the U.S.—a role Adelstein had before becoming global head of the practice area.

Other firms have also recently deepened their antitrust bench in the nation's capital, as demand in the Beltway for skilled antitrust attorneys continues to rise due to increasing client needs as regulators and enforcement agencies continue to focus on anti-competitive behavior.

In May, Covington & Burling snagged the Federal Trade Commission's deputy assistant director of the Technology Enforcement Division, Ryan Quillian, for its antitrust practice.

Carsten Reichel, who for more than a decade prosecuted criminal antitrust cartels, has joined Norton Rose from the DOJ.

In March, Ethan Glass joined Cooley in Washington from Quinn Emanuel Urquhart & Sullivan, where he was chair of that firm's antitrust investigations and government enforcement practice.

Bruce Love writes about the legal community and the business of law. Contact him at blove@alm.com. On Twitter: @loveonlaw.

Paul Hastings Anticipates 'Large and Exponential Effect' From Latham Lateral Team

by Patrick Smith

Paul Hastings has high ambitions for the four-partner finance team the firm lured from Latham & Watkins in London this month, noting on Monday that the group "brings key lending relationships with virtually every major investment bank and private credit institution."

The firm has named Mo Nurmohamed, who was co-chair of Latham's London finance department, a co-chair of Paul Hastings' global finance practice, along with existing co-chairs Jennifer Yount, John Cobb and Luke McDougall. He arrives alongside partners Ross Anderson, Karan Chopra and Rob Davidson from Latham.

While Paul Hastings managing partner and chair-elect Frank Lopez would not comment on the size of the group's book of business, he said the team is "number one in their market" and that they have "significant market share and I would expect the business to reflect that."

"We expect this group to have a large and exponential effect, not just in the London market, but through synergies with our practices in California and New York," Lopez added.

From left, Rob Davidson, Ross Anderson, Mo Nurmohamed and Karan Chopra, with Paul Hastings.

The partners focus on leveraged finance and direct lending deals across private equity sponsors, the firm said. Some of the team's recent deals, the firm noted, include representing the arrangers of the financing to support Bain's acquisition of ITP Aero (a carve out from Rolls Royce); the arrangers of the TLB financing to support Blackstone's acquisition of Huws Grey; and the lenders of the financing to support the Warburg Pincus' acquisition of The AA Group

The firm would not comment on whether other personnel, such as junior lawyers who worked with the partner group at Latham, would be making the move with them.

Paul Hastings is adding depth to a practice area it has previously identified as a core strength. Lopez has said that the firm's ultimate goal is to be in the "top three in each of our major practices," such as M&A, finance and capital markets. The group from Latham brings them closer to that end game, he said, while also providing a strong platform for the team.

"We are one of the few firms in the world that can touch the entire financial continuum," Lopez said.

"For a group like this, we are a firm where finance is the lead singer," he added. "There are other firms that are phenomenal in finance but it might take a back seat to some of their other practices."

Meanwhile, the move continues Paul Hastings' high-profile hiring strategy this year. While the firm hasn't necessarily increased its number of new hires, it is adding more notable names and making more of an impact in recruiting competitors' top talent.

"It's all bout momentum," Lopez said. "We are at an interesting moment where the broader legal market is contacting, but we look at this year and we could be up this year based on demand and trajectory."

Nurmohamed had been at Latham for over 12 years. He was previously an associate at White & Case, Winston & Strawn and Barlow Lyde & Gilbert.

In an emailed statement, Nurmohamed said the "complementary nature of our teams' practice" with Paul Hastings' global platform "allows us to seamlessly integrate and significantly grow and broaden the London finance offering."

Anderson, who served as global vice chair of Latham's banking practice, arrived at Latham at the same time as Nurmohamed in 2010, both coming from White & Case.

Anderson said in an emailed statement that Paul Hastings' growth "has been fascinating to watch from the sidelines and our team is eager to continue to help drive that upward trajectory."

A Latham spokesperson said the firm thanks the partners for their contributions "and wish them all the best for the future."

Latham, despite the four-partner exits, is on its own growth trajectory in London, with the firm overtaking long-term leader Baker McKenzie to become the largest U.S.-centered law firm in London by headcount.

Patrick Smith covers the business of law, including the ways law firms compete for clients and talent, cannabis law and marketing innovation. Contact him at pasmith@alm.com. On Twitter: @nycpatrickd.

BANKING/ FINANCE

For DeSantis, Money Flows from Alabama to Wyoming

by Jim Saunders

As Gov. Ron DeSantis runs for reelection in November, he has drawn attention across the country as a potential 2024 candidate for president.

With that has come cash. Lots of cash.

In big chunks and pocket change. From Tallahassee to Honolulu.

Since the beginning of this year, DeSantis' political committee, Friends of Ron DeSantis, has raised at least $56.2 million. Money has flowed into the committee from every state and Washington, D.C, with at least $29.2 million coming from outside Florida, according to a state campaign-finance database.

Here are some takeaways from DeSantis' national fundraising from Jan. 1 through July 8. This only looks at contributions to the Friends of Ron DeSantis committee and does not include separate dollars landing in DeSantis' campaign account.

— ANTEING UP: The largest amount of out-of-state cash, nearly $10,83 million, came from Nevada. A big part of that stems from a $10 million contribution that aerospace executive Robert T. Bigelow made to DeSantis' committee on July 7. But even without Bigelow's money, Nevada would have been one of the committee's top sources of funds. Nevada donors made seven contributions of $50,000 or more.

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Since the beginning of this year, Ron DeSantis' political committee, Friends of Ron DeSantis, has raised at least $56.2 million.

— BLUE TURNS TO GREEN: DeSantis frequently tries to score points with the Republican base by criticizing Democratic-controlled states such as New York, California and Illinois. But that hasn't stopped his committee from vacuuming up money from such blue states. New York donors trailed only Nevada and Washington, D.C. since the beginning of the year, pouring $1.565 million into the DeSantis committee. California was next at $921,219, followed by Illinois at $826,853.

— SWING STATE SUPPORT: DeSantis has tried to remain coy about whether he plans to run for the White House in 2024. But if he runs, he will need to do well in a handful of states that played a key role in Democrat Joe Biden winning in 2020. DeSantis' committee has been mining some of those states for cash. As of July 8, it had pulled in $596,055 this year from Georgia; $580,658 from Arizona; $309,059 from Michigan; and $241,862 from Pennsylvania.

— THE BELTWAY AND BIDEN: DeSantis' committee pulled in about $9.6 million from Washington, D.C., Virginia and Maryland. Granted, that is somewhat inflated because the Washington-based Republican Governors Association pitched in $8.75 million. But donors in Virginia contributed $638,240. Also, donors in Biden's home state of Delaware ponied up $140,264.

— FAR-FLUNG FIVE SPOTS: Every little bit helps in political campaigns. And that includes $5 contributions or other small amounts from far-flung states. The DeSantis committee received contributions totaling $40 from Maine donors; $55 from Vermont donors; $62 from Alaska donors; and $82 from West Virginia donors.

Jim Saunders reports for News Service of Florida,

Amazon Sues Admins of 10K Facebook Groups Over Fake Reviews

by Haleluya Hadero

Amazon has filed a lawsuit against administrators of more than 10,000 Facebook groups it accuses of coordinating fake reviews in exchange for money or free products.

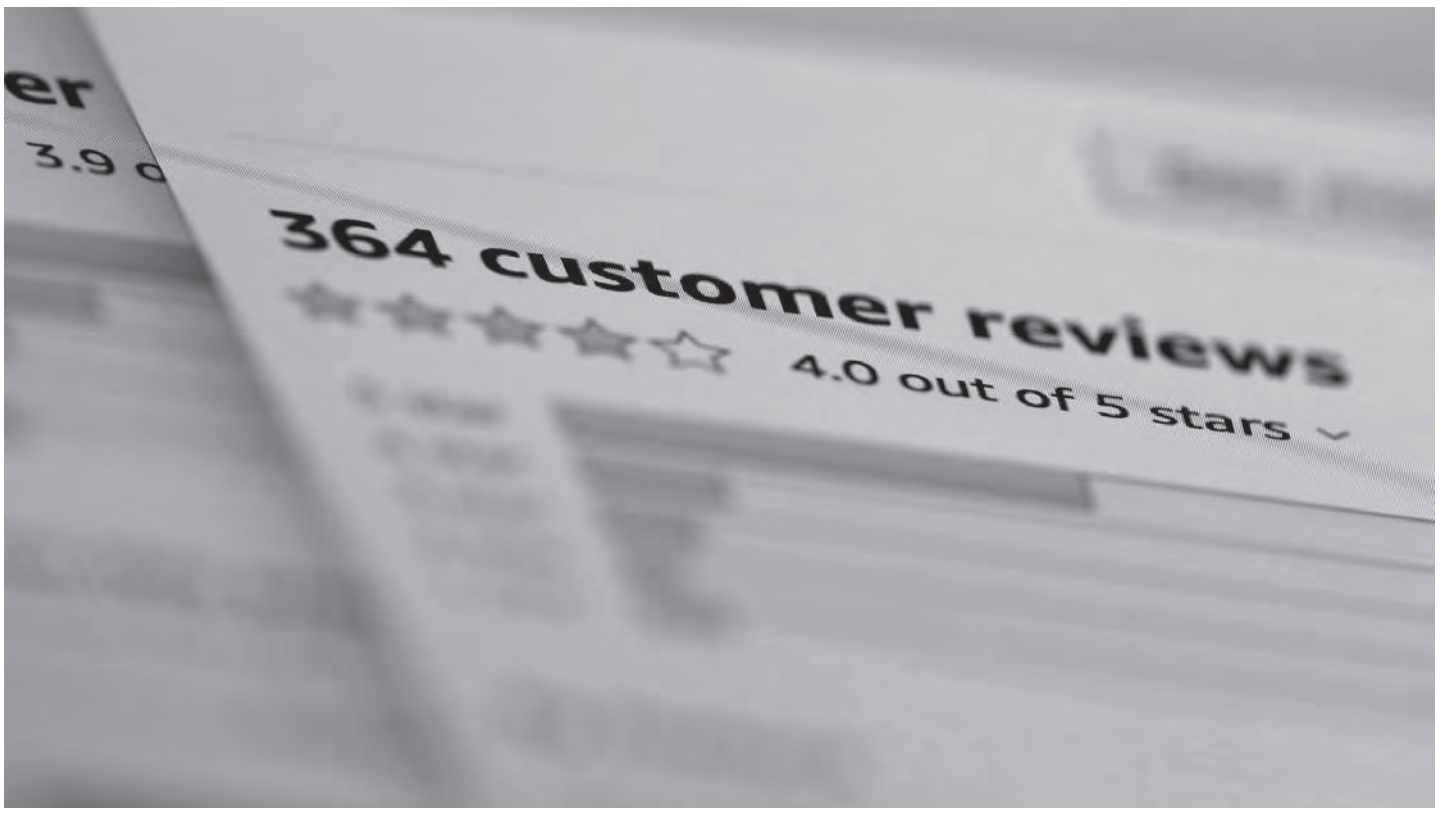
The Seattle-based e-commerce giant said in a statement posted on its website Tuesday the Facebook groups were set up to recruit people "willing to post incentivized and misleading reviews" across its stores in the U.S. the UK, Germany, France, Italy, Spain and Japan.

The problem over phony reviews is not new for Amazon, or e-commerce as a whole. Amazon itself has previously sued people it said were offering fake testimonials, though lawmakers and regulators have questioned whether the company was doing enough to combat the issue. Last year, U.K. competition regulators launched a probe into whether the online retailer and Google were taking adequate actions to protect shoppers.

In the statement, Amazon said one of the Facebook groups it's targeting, called "Amazon Product Review," had more than 43,000 members. The company said Facebook removed the group this year, but it was able to dodge the platform's detection by "changing letters in phrases that might set off Facebook's alarms."

Amazon noted since 2020, it has reported more than 10,000 fake review groups to Meta, the parent company of Facebook. Meta has removed half of these groups and is investigating the others, Amazon said.

The retailer's announcement comes as another side of the company's operations is facing more scrutiny. On Tuesday, federal labor officials confirmed to the AP the Occupational



JENNY KANE/ASSOCIATED PRESS

Amazon noted since 2020, it has reported more than 10,000 fake review groups to Meta, the parent company of Facebook.

Safety and Health Administration has opened inspections at Amazon facilities in New York, Illinois, and Florida after receiving referrals alleging safety and health violations from the U.S. Attorney's Office for the Southern District of New York.

Nicholas Biase, a spokesperson for the U.S. Attorney's Office in New York, said federal labor officials entered the Amazon warehouses on Monday morning after their office made referrals about "potential workplace hazards," including "Amazon's required pace of work for its warehouse employees."

Labor and safety advocates have long criticized Amazon's injury rates and its "time off task" tool, which dings workers for taking too many breaks. Biase said the civil division of the U.S. attorney's office is investigating safety hazards at the company's warehouses across the country, as well as "fraudulent conduct designed to hide injuries from OSHA and others."

Amazon CEO Andy Jassy acknowledged in a shareholder letter this April the company's warehouse injury rates "were a little higher than the average" compared to other warehouses. But Jassy said the "courier and delivery" side of their operations saw lower injury rates, making the company "about average" compared to its peers.

"We'll of course cooperate with OSHA in their investigation, and we believe it will ultimately show that these concerns are unfounded," Amazon spokesperson Kelly Nantel said in a statement.

The U.S. Attorney's Office is encouraging current and former Amazon warehouse workers to report workplace safety issues directly to them.

Haleluya Hadero reports for the Associated Press.

Twitter Lawsuit Against Elon Musk Is Set for October Trial in Delaware Chancery Court

by Ellen Bardash

Twitter's lawsuit against Elon Musk over his decision to back out of a deal to take over the microblogging service will go to trial in October, Chancellor Kathaleen McCormick decided Tuesday.

Holding a trial within about 90 days of Twitter filing its complaint falls significantly closer to the September dates proposed by the company than the February timetable set out by Musk, with McCormick reasoning in part that the further out a resolution is pushed, the more Twitter could be harmed.

The exact five days on which the trial will be held are still to be determined.

Both Bill Savitt of Wachtell, Lipton, Rosen & Katz and Andrew Rossman of Quinn Emanuel Urquhart & Sullivan, arguing for Twitter and Musk, respectively, agreed the trial should be expedited, but McCormick wasn't persuaded by Rossman's claim that additional months were needed for discovery on the prevalence of bots and spam accounts on Twitter, noting the timeline she set is on par with other broken deal cases the court has overseen.

"Suffice it to say, in my view, the defendants underestimate the court and counsel for both parties to quickly process complex litigation," McCormick said. "I've witnessed the talent of counsel on this Zoom call representing all parties on these complex issues, and I am confident that you all will rise to the challenge again."

Attorneys for Twitter moved to expedite the trial last week, claiming a September trial was necessary to reach a resolution ahead of the Oct. 24 termination date set out in the merger agreement, while Musk's counsel argued that shouldn't be a deciding factor because the date is automatically stayed if either side files litigation. McCormick agreed with Rossman's argument that the language of the contract allows for some flexibility on that date.

Rossman was emphatic a significant amount of discovery on Musk's main reason for backing out of the $44 billion deal—a purported misrepresentation of how many active users Twitter actually has—will need to be conducted in order to properly determine Twitter's value.

Musk claims Twitter has actively been shielding that information since just after the agreement was signed and it won't be possible to access and sort through it all in just six weeks, though an earlier trial date might have been possible if Twitter provided Musk with information when he first requested it in May. The defense argued even its own proposal to hold the trial on or after Feb. 13, 2023 leaves a short timeline for a complex case.

Chancellor Kathaleen McCormick reasoned that the further out a resolution is pushed, the more Twitter could be harmed. Elon Musk's team wanted a trial in early 2023.

Savitt said Twitter didn't think that the requests were relevant to the merger but provided extensive information anyway, while Rossman said that information never provided evidence of exactly how Twitter's analysts arrived at 5% as the maximum proportion of false accounts on the platform, claiming he only reason Twitter would want to hold a trial in two months is to continue shrouding information about bot accounts while pushing the deal through.

Regardless of what has or hasn't already been produced, Savitt said, Musk and his team submitted the requests to keep up the pretense that they were planning to close the deal while having no intention of actually doing so.

"What we have here is a buyer looking for an exit ramp for a deal that doesn't have one," Savitt said. "In retrospect, it was clear that Musk was never going to take 'yes' for an answer."

What the court should have focused on Tuesday, Savitt said during his initial argument, was the merger agreement itself, not information about bots, which Musk could have negotiated into the agreement but didn't.

As for Twitter's claims that the company faces harm as Musk tweets about the deal, Rossman said they're simply alleged breaches manufactured to try to get Musk to comply with the agreement, and with Musk being Twitter's second-largest stockholder, he'd have no incentive to sabotage the company.

"It's rich indeed, your honor, for Twitter to be complaining about Mr. Musk's conduct here," Rossman said. "They didn't make a breach claim. They didn't notice a breach. The tweets that they claim now are disparaging the company, they did not claim that that was a breach of the merger agreement until we issued the termination letter. They did not claim that he failed to fulfill his reasonable best efforts obligation."

The hearing was originally set to be held in person but was moved to Zoom after McCormick tested positive for COVID-19, indicating Monday her symptoms were mild.

Ellen Bardash reports for the Delaware Business Court Insider, an ALM affiliate of the Daily Business Review. Contact her at ebardash@alm.com. On Twitter: @ellenbardash.

Snap's Warning Looms Over Battered Online Ad Stocks

by Ryan Vlastelica

Investors are learning that online advertising stocks may be just as vulnerable as old-school media companies amid a looming potential economic downturn.

Concerns over the sector have grown since Snap Inc. slashed its forecast in May, warning that a weaker economic outlook was weighing on its ad business. That sparked a selloff of more than 40%, its biggest one-day drop ever, and the stock is now down almost 70% in 2022. The parent of Snapchat releases second-quarter results Thursday after the market closes.

Facebook parent Meta Platforms Inc. is down 47% this year, and ad-tech provider Trade Desk Inc. is off almost 50%. The losses have come as the Federal Reserve aggressively raises interest rates to combat inflation, weighing on the growth outlook. The Nasdaq 100 Index is down about 25% in 2022.

Snap advanced 5% on Wednesday while Meta climbed 1.4% and Trade Desk rose 1.6%.

While the industry has benefited from the long-term tailwind of ad spending shifting to digital from print and broadcast, the growth in publicity budgets is likely to take a hit as business gets tougher. In addition, higher rates have hurt the valuations of companies that are priced based on expected growth far out in the future, while social-media stocks also have been struggling against a changed privacy policy at Apple Inc. that has diminished their ability to target ads.

"There are still too many headwinds to get excited in the near term," said Jordan Kahn, chief investment officer of ACM Funds. "Overall, you're going to need to see a new upcycle for earnings before these names start moving higher."

Industry watchers already are cutting their forecasts for this year. GroupM, a media investment company, expects ad revenue growth of 8.4%, excluding US political ads. That's slower than the 24.3% pace set in 2021, and down from the 9.7% that GroupM expected for 2022 at the end of last year.

While the onset of the pandemic triggered a recession in 2020, that was a brief, one-time shock, caused by an outbreak that kept people at home and in front of their computers -- a favorable environment for online businesses. A 2022 recession, should one hit, will be a classic cycle: Rapid growth and inflation prompts higher interest rates, cooling the economy and causing advertisers to cut their spending.

FIRST TASTE

Most of the companies that dominate online advertising went public after the Great Recession of 2008-2009, so investors are getting their first taste of how well their businesses and share prices will hold up in a tough economy. One exception: behemoth Alphabet Inc., which went public as Google Inc. in 2004. The stock lost two thirds of its value from the peak in late 2007 to the bottom a year later.

Kahn singled out Trade Desk as a stock that still looks risky despite strong long-term prospects; it trades at almost 45 times estimated earnings. "Even though it has beaten expectations for several straight quarters, that's still a premium valuation for a bear market," he said.

There is one ad stock that Wall Street remains almost unanimously favorable on: Alphabet. The Google parent has nearly 100% buy ratings among analysts, who note steady demand for its search and YouTube businesses, along with a stock trading at less than 18 times estimated earnings, a multiple that's below its long-term average and the market overall.

"The valuation is not at all demanding for such a great company," said Aaron Dunn, who oversees more than $4 billion at Eaton Vance Management. He said other stocks in the sector continued to look more speculative, even as he expects advertising to continue shifting online over the long term.

"Online ads are here to stay and likely to grow," he said. "That said, the trend over the past year or two was unsustainable, and we're getting payback for that today."

TECH CHART OF THE DAY

Shares of Netflix Inc. rose 0.9% Wednesday after the video-streaming giant reported that it lost fewer than half the number of customers that analysts had estimated it would shed. However, the Los Gatos, California-based company remains the worst-performing stock of the year in both the S&P 500 and the tech-heavy Nasdaq 100 by a wide margin. Netflix is down 66% this year.

TOP TECH STORIES

- After losing more than a million customers in the first half of 2022, Netflix Inc. has a message for investors: It could have been worse.
- ASML Holding NV cut its revenue growth guidance in half for this year because fast-track shipping of its chip-making machines led to delayed sales recognition.
- London data centers used by Google and Oracle Corp. buckled on Tuesday after a record-setting heat wave hit Britain, knocking some websites offline.
- Twitter Inc. scored an early win against Elon Musk in its fight to make him complete his $44 billion buyout of the company, as a Delaware judge agreed to fast-track the case with an October trial date.
- The US Senate voted by a wide margin to begin debate on legislation to provide more than $52 billion in grants and incentives for the American semiconductor industry, a major milestone for the long-stalled package that proponents say is vital to national security.
- Online grocery delivery firm Missfresh Ltd. is weighing selling stakes in a unit that offers services to fresh produce sellers such as business consultation and setting up online stores, according to people familiar with the matter, as the struggling firm looks for a lifeline.

Ryan Vlastelica reports for Bloomberg News.

BANKING/ FINANCE

Netflix's Million-Customer Loss Avoids Worst-Case Scenario

by Lucas Shaw

After losing more than a million customers in the first half of 2022, Netflix Inc. has a message for investors: It could have been worse.

The leader in paid streaming TV lost 970,000 subscribers in the second quarter, according to a statement Tuesday. That was less than half what Wall Street feared, thanks in large part to a new season of "Stranger Things," the service's most popular English-language series.

"We're talking about losing 1 million instead of 2 million -- our excitement is tempered by the less-bad results," Chairman Reed Hastings said on an earnings call. "But looking forward, streaming is working everywhere. Everyone is pouring in."

Shares of Netflix climbed 0.8% at 9:36 a.m. in New York, paring a larger gain earlier in the premarket session. The stock has lost two-thirds of its value so far this year.

This quarter, Netflix expects to sign up 1 million subscribers. While that's well short of the 1.83 million analysts forecast this period, it reverses the losses of the first half.

Despite concerns about increased competition and a potential recession, Netflix remains confident in its position. The company said its share of total TV viewing in the US hit an all-time high in June at 7.7%.

"We believe the prospect of a prolonged period of subscriber losses is becoming increasingly unlikely," Stifel analyst Scott Devitt wrote in a research report on Wednesday. He upgraded his rating on Netflix to buy from hold following the earnings release.

Management has responded to the subscriber slide by cutting costs and adjusting its strategy on several fronts. The company plans to introduce a lower-priced version of the service with advertising around early 2023, and is testing ways to charge customers for password sharing.

For the second quarter, revenue grew 8.6% to $7.97 billion, Netflix said. That missed Wall Street estimates of $8.04 billion, in part because of the strong dollar.

Read more: Streaming-video stocks rise on Netflix news

During the quarter, Netflix lost 1.3 million customers in the US and Canada, its largest region, and another 770,000 in Europe, the Middle East and Africa, its second-largest. Those are the steepest quarterly declines the company has reported in either place since it started supplying individual results from those markets.

Growth in the Asia-Pacific region offset those declines. Netflix added 1.1 million customers in APAC, after cutting prices in India.

Hastings had positioned Netflix as an advertising-free alternative to cable TV, but now says commercials are necessary to appeal to people who find the service too expensive. Netflix has raised prices several times and is now one of the most expensive streaming services.

KRISZTIAN BOCSI/ BLOOMBERG NEWS

This quarter, Netflix expects to sign up 1 million subscribers.

"At a high level, Netflix's ambitions are to accelerate revenue growth while moderating its content investment growth," Morgan Stanley analysts led by Benjamin Swinburne wrote in a note to clients. "If successful, shares should outperform. However, it remains early in its monetization initiatives and while success is not priced in, neither in our view is failure."

The company will introduce the advertising-supported option first in a handful of countries, and just tapped Microsoft Corp. to handle ad sales and technology. Advertising will start small and look a lot like other video businesses ads. But Netflix believes it can be substantial, Chief Operating Officer Greg Peters said.

Netflix has also started to release new episodes of shows in batches, breaking with its tradition of dropping every episode of a season at the same time. It released the drama "Stranger Things" and the final season of "Ozark" in two batches.

The batching strategy allows Netflix to extend the life of its biggest shows. When every episode is released at once, the majority of the viewing happens in the first couple of weeks. The number of people who cancel Netflix has jumped 87% since a year ago, according to Antenna.

The popularity of the fourth season of "Stranger Things" exceeded the expectations of Netflix executives. The supernatural drama has been one of the service's most successful titles since its debut in 2015, and turned star Millie Bobby Brown into one of the most in-demand female actors in Hollywood.

The release of "Stranger Things" meant that fans who had Netflix in the second quarter would want to keep the service until the start of the third quarter to finish the season. The company is looking to turn hits like "Stranger Things" into franchises that can outlast any individual show. The creators of the show are developing a spinoff series, and Netflix has also announced plans for a Broadway play.

On Tuesday, Netflix said it will acquire Animal Logic, an Australian animation studio that worked on "The Lego Movie."

"We have some headwinds right now; we're navigating through them," co-Chief Executive Officer Ted Sarandos said on the call. "This company and this team has navigated through a lot of change."

Total subscribers in the second quarter came to 220.7 million, compared with estimates of 220.2 million. Earnings of $3.20 a share beat analysts' projections.

This quarter, Netflix forecasts revenue of $7.84 billion, shy of Wall Street estimates of $8.1 billion. The company sees earnings of $2.14 a share, compared with estimates of $2.72, and says total membership will reach 221.7 million, also shy of estimates.

Lucas Shaw reports for Bloomberg News.

Apple Argues It's Now a Major Force in the Health-Care World

by Mark Gurman

Apple Inc. published a nearly 60-page report Wednesday outlining all its health features and partnerships with medical institutions, arguing that such offerings are key to the tech giant's future.

The company pointed to its breadth of existing services -- from sleep monitoring and fitness classes to atrial-fibrillation detection and cycle tracking -- and promised to build on that foundation. Chief Operating Officer Jeff Williams, who oversees Apple's health endeavors, said in a statement attached to the report that the company will continue to innovate in "science-based technology."

"The health innovations we've pioneered have aimed to help break down barriers between users and their own everyday health data, between health-care providers and patients, and between researchers and study participants," he said.

The report serves as a response to Apple critics, who have knocked the company for not doing as much as rivals in health care. Though the Apple Watch dominates the market, the device hasn't always gotten novel health features as quickly as competitors' products. And fellow tech titans such as Amazon.com Inc. and Google have made ambitious forays into the medical field -- with mixed results.

Apple is arguing that it's a pioneer in health technology and positioned to use it as a growth driver in the years ahead. Already, fitness features are a major selling point for the Apple Watch, and the company plans to add capabilities related to women's health and body-temperature monitoring as part of a new lineup coming this year, Bloomberg has reported. Apple also is working on technologies such as glucose and blood pressure monitoring that could come later.

Health technology is one of several categories that Apple hopes will help maintain sales growth. The company is also working on a mixed-reality headset for next year, along with augmented reality glasses, foldable devices and a self-driving electric car.

ADOBE STOCK

Apple is arguing that it's a pioneer in health technology and positioned to use it as a growth driver in the years ahead.

While the company doesn't charge for its health features directly, the enhancements could help fuel sales of future devices. The company also offers a Fitness+ subscription service that could eventually add more health tie-ins.

Cracking health services has been a challenging task for Silicon Valley companies. Google shuttered its dedicated health unit last year, though it does own companies in the space, such as Verily and Fitbit. Amazon has made strides, including with an online pharmacy service and partnerships with in-person health-care providers. Samsung Electronics Co., meanwhile, has its own health app and offers some similar features to Apple.

In its report, Apple said it has an edge creating new offerings because of its research studies. A feature to analyze an iPhone user's walking steadiness, for instance, was created based on data collected by over 100,000 users. The company also has partnered with several medical institutions and researchers, including UCLA.

The iPhone and Apple Watch now support features across 17 areas of fitness and health, according to the report. And the Health app can store more than 150 types of health-related data.

Moreover, there are tens of thousands of third-party apps on the App Store that can tap into the Health app, the report said. The company is adding medication tracking and reminders and new workout features to its devices this fall.

Mark Gurman reports for Bloomberg News.

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10th Circ. Looks to Sister Courts in Ruling Police Officer Can Be Liable for Blocking Filming of Traffic Stop

by Allison Dunn

The U.S. Court of Appeals for the Tenth Circuit joined six other circuits in considering whether a person has First Amendment rights to film a traffic stop in Colorado, ultimately reversing the lower court's holding that an officer who allegedly obstructed a YouTube journalist/blogger's camera view had qualified immunity protections.

In May 2019, Abade Irizarry was filming a DUI traffic stop with his cellphone and camera. When he arrived on scene, Lakewood Police Officer Ahmed Yehia allegedly stood in front of Irizarry and shined a flashlight into the blogger's camera, according to the circuit court's opinion filed July 11.

Despite the journalist's objection, the officer continued to "harass" Irizarry and another reporter. Once another officer told Yehia to stop, Yehia got into his cruiser and "'drove right at [Mr. Irizarry]" and another journalist, the opinion said.

Irizarry filed a lawsuit claiming First Amendment rights violations in the U.S. District Court for the District of Colorado against the officer.

Yehia moved to dismiss the complaint, asserting a qualified immunity defense, the opinion said.

In June 2021, Magistrate Judge Nina Y. Wang sided with the officer, holding that Yehia was entitled to qualified immunity because Irizarry had not shown a violation of clearly established law, the opinion said.

Irizarry appealed.

Last week, an appellate panel reversed the district court's ruling, finding that the blogger alleged a First Amendment retaliation claim under "clearly established law," and that the officer was not entitled to qualified immunity, the opinion said.

"The First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits have all concluded in published opinions that the First Amendment protects a right to film the police performing their duties in public," Judge Scott M. Matheson Jr. wrote on behalf of the Tenth Circuit panel. "Four of those opinions—*Fordyce*, *Glik*, *Fields*, and *Turner*—involved facts materially similar to those here: the plaintiffs, like Mr. Irizarry, were attempting to film the police performing their official duties but were dissuaded from doing so either because they were arrested, detained, or physically deterred. *Alvarez* involved a pre-enforcement challenge to a statute that made it a felony to film police officers in public. All six decisions held there is a First Amendment right to film the police performing their duties in public, which clearly establishes the law in this circuit."

SHUTTERSTOCK

A YouTube journalist/blogger sued a Lakewood, Colorado, police officer for allegedly blocking his camera view of a traffic stop and driving his police cruiser toward him.

In the *Western Watersheds Project v. Michael* case, the Tenth Circuit held in 2017 that filming the police performing their duties in public is protected under the First Amendment.

"Although this statement, on its own, may be insufficient to satisfy prong two of qualified immunity, it supports the conclusion that a reasonable officer would have known there was a First Amendment right to film the police performing their duties in public," Matheson wrote. "Finally, Mr. Irizarry's right to film the police falls squarely within the First Amendment's core purposes to protect free and robust discussion of public affairs, hold government officials accountable, and check abuse of power. We have no doubt that Mr. Irizarry had a clearly established First Amendment right to film the traffic stop in May 2019."

But the panel further relied on its decision in *Van Deelen v. Johnson* to determine that Irizarry overcame qualified immunity standards. In 2007, the *Van Deelen* court considered a case in which a sheriff's deputy threatened to use lethal force against the plaintiff if he brought more tax appeals and held that those who made alleged threats were not entitled to qualified immunity.

"Officer Yehia's conduct was at least as serious as the defendants' conduct in *Van Deelen* for two reasons. First, rather than merely discouraging Mr. Irizarry from engaging in protected First Amendment activity—as the defendants did in *Van Deelen*—Officer Yehia physically interfered with protected conduct by standing in front of Mr. Irizarry and shining a flashlight into his camera. ... Second, Officer Yehia went beyond threatening violence against Mr. Irizarry. When he drove his police cruiser 'right at' him, and 'gunn[ed]' the vehicle at his colleague, he could have caused serious injury or even death," Matheson wrote.

Senior Judge Paul J. Kelly Jr. and Judge Carolyn B. McHugh concurred.

"The Tenth Circuit's decision will protect the constitutional right of every citizen in Colorado and the Tenth Circuit to record police officers carrying out their duties in public," said Andrew Tutt, a senior associate with Arnold & Porter, on behalf of Irizarry. "The decision also has broader implications for First Amendment rights nationwide, because it adds to the consensus of authority on this important issue, bringing us a step closer to the day when the right to record police officers is recognized and protected everywhere in the United States."

On Monday, the Lakewood Deputy City Attorney Alex Dorotik, who is assigned to the case, declined to comment on behalf of the officer.

Allison Dunn reports for Law.com, an ALM affiliate of the Daily Business Review. Contact her at aldunn@alm.com.

8th Circuit: Child-Welfare Investigator Accused of Retaliatory Investigation of Parents Entitled to Qualified Immunity

by Jason Grant

Writing that the law is "anything but clear" on whether a child-welfare retaliatory investigation would violate a clearly established right, a federal appeals court said qualified immunity must apply to a welfare investigator who allegedly retaliated against parents after they exercised their First Amendment rights.

Qualified immunity "is available if the parents' complaint did not state a plausible claim for violation of a … right or the right was [not] clearly established at the time of the alleged infraction," wrote the U.S. Court of Appeals for the Eighth Circuit in reversing a magistrate judge who said the welfare investigator did not enjoy qualified immunity in the parents' retaliation civil suit against her.

The Eighth Circuit continued, "We have never recognized a retaliatory investigation claim of this kind," referring to a child-welfare investigation in which a set of parents were investigated for child neglect. "Nor have other courts around the country, which have either rejected the possibility outright or concluded, like we do today, that the law is still in flux" on whether the imposition of a child-welfare investigation could violate a constitutional or statutory right of parents.

"It is safe to say, in other words, that the law is anything but clear," the panel of three Eighth Circuit judges wrote.

In analyzing questions of potential immunity for the Missouri-based government investigator, the panel reversed a magistrate judge from the U.S. District Court for the Eastern District of Missouri by ruling the investigator's acts are entitled to qualified immunity as the litigation continues. But the panel, which reviewed the magistrate's immunity determinations de novo, meaning with no deference to the magistrate's rulings, upheld the magistrate decision that the welfare investigator is not entitled to absolute immunity when reviewing her investigative acts.

The parents, referred to in the opinion only as J.T.H. and H.D.H., threatened to sue a sheriff's deputy who sexually abused their 15-year-old son, according to the appellate opinion. One of the parents worked in law enforcement, the opinion noted.

Not long after the parents talked about possibly suing the deputy, Spring Cook, a child-welfare investigator from the Missouri Department of Social Services Children's Division, showed up at the family's home after someone apparently called a child-abuse hotline and accused the parents of neglecting their son, the opinion said.

After eventually making several home visits, Cook allegedly told one of the parents that "she would 'get[] his peaceofficer's license, which led the family to 'refuse[] further home visits,'" the opinion said.

Cook soon issued a preliminary written neglect-by-the-parents finding, and the parents, in turn, requested a formal administrative review, according to the decision. That triggered a circuit manager, who ended up being Cook, to decide whether to uphold the preliminary finding—her own—which she did, the decision said. Later, though, Missouri's Child Abuse and Neglect Review Board said Cook's findings against the parents were "unsubstantiated."

Having therefore "clear[ed] their name," the parents then sued Cook and the Department of Social Services Children's Division under a First Amendment retaliation theory, according to the Eighth Circuit panel's decision, while arguing the Cook's investigation and its aftermath were a government response to their lawsuit threat.

Cook moved to dismiss the parents' suit on absolute- and qualified-immunity grounds, the panel, comprised of Judges Duane Benton, Bobby Shepherd and David Stras, wrote.

In considering the question of qualified immunity for Cook's investigatory acts, the panel wrote in part that the parents' "complaint falls short of establishing that Cook violated a clearly established right. Even assuming that the facts in the complaint are true and drawing all reasonable inferences in the parents' favor, 'existing precedent' does not 'place[] … the constitutional question beyond debate,'" wrote the panel, citing the U.S. Supreme Court opinion of *Kisela v. Hughes*.

The panel also noted that "it makes no difference that, 'as a general matter, the First Amendment prohibits government officials from subjecting an individual to retaliatory actions … on the basis of … constitutionally protected speech," quoting *Solomon v. Petray*.

"The Supreme Court has instructed us 'not to define clearly established law at a high level of generality," it continued, quoting *Kisela*, and it added that "even if there is a general right to be free of retaliation, the law is not clearly established enough to cover the 'specific context of the case': retaliatory investigation," quoting *Brosseau v. Haugen*.

Hugh Eastwood, an attorney based in St. Louis, represents the parents, according to PACER information. He declined to comment.

Edward Crites and Michael Talent, both assistant attorney generals with the Missouri Office of the Attorney General, are counsel to Cook and the Missouri Department of Social Services, according to PACER information. They could not be reached for comment.

Jason Grant covers legal stories and cases for the New York Law Journal, an ALM affiliate of the Daily Business Review. Contact him at jgrant@alm.com. On Twitter: @JasonBarrGrant.