FOR THE RECORD

BY CRAIG M. SANDBERG

U.S. Court of Appeal for the Seventh Circuit Holds that District Court Judges May Consider the Absence of a Fast-Track Program in Crafting an Individual Sentence

On October 7th, Circuit Judge Michael S. Kanne, writing on behalf of a unanimous three-judge panel of the U.S. Court of Appeals for the Seventh Circuit (*United States v. Reyes-Hernandez and United States v. Sanchez-Gonzalez*; Docket Nos. 09-1249 and 09-1551), granted the defendants' requests to abandon the court's precedent and provide district courts with the latitude to consider fast-track-type sentences as part of their 18 U.S.C. § 3553(a) analyses. The court vacated both sentences and remanded to the district court for resentencing consistent with its opinion.

In the first case, Jaime Reyes-Hernandez pled guilty for illegally re-entering the United States after he had been removed twice following a conviction for the aggravated felony of robbery. The district court (Judge Samuel Der-Yeghiayan) sentenced him to forty-one (41) months' imprisonment, the most lenient sentence available under the applicable guideline range for his offense level and criminal history category. The judge, in addressing Reyes-Hernandez's fast-track sentencing disparity argument, cited *United States v. Galicia-Cardenas*, 443 F.3d 553, 555 (7th Cir. 2006), said that the Seventh Circuit has addressed and rejected arguments about discrepancies or disparities for lack of a fast-track program, which had been previously determined to be not unreasonable.

In the second case, Pedro Sanchez-Gonzalez pled guilty to illegally re-entering the United States after being removed following a conviction for the aggravated felony of domestic battery. The district court (Judge Matthew F. Kennelly) sentenced him to seventy-seven (77) months' imprisonment, which was at the lowest end of the guidelines range for his offense level and criminal history category. Judge Kennelly entered a memorandum opinion discussing Sanchez-Gonzalez's request for a below-guidelines sentence. Although Judge Kennelly found that he was bound by our decisions in *Galicia-Cardenas* and *United States v. Martinez-Martinez*, 442 F.3d 539 (7th Cir. 2006) and was not therefore permitted to take into account the fast-track argument, he opined that "as a matter of policy…it is unjust to permit sentencing disparities based on the fortuity of the judicial district in which a defendant in an illegal reentry case is charged."

In its opinion, the court of appeals provided an abridged history of fast-track programs. Fast-track, or "early disposition" programs, were used in federal district courts as early as 1994. The programs emerged in states bordering Mexico in an effort to curtail overwhelming immigration caseloads. At the time, United States Attorneys used "charge-bargaining" as a mechanism to speed the disposition of these cases. In essence, they offered to recommend more lenient sentences in exchange for pre-indictment guilty pleas and waivers of appellate rights. Almost ten years later, Congress formalized the practice by enacting the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. No. 108-21, 117 Stat. 650 (2003). Later, the Sentencing Commission created U.S.S.G. § 5K3.1, which provides: "Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides."

On appeal, the appellants argued that both district courts committed reversible procedural error because the courts found that Seventh Circuit precedent precluded them from considering the sentences given in fast-track districts as part of their 18

Vote for Qualified Judges on November 2

Election Day is November 2. Nine candidates for judge have been found "Not Recommended" by The Chicago Bar Association. Make your vote count by voting for qualified judges. Visit www.chicagobar.org for a list of qualified judges and print your voter's guide.

U.S.C. § 3553(a) analyses, despite recent Supreme Court decisions. Indeed, the court of appeals concluded that the absence of a fast-track program and the resulting difference in the guidelines range should not be *categorically excluded* as a sentencing consideration. Its holding "merely" permits the sentencing judge to consider a facially obvious disparity created by fast-track programs among the totality of § 3553(a) factors considered. The court, however, cautioned that a departure from the guidelines premised solely on a fast-track disparity may still be unreasonable and to withstand scrutiny, a departure should result from a holistic and meaningful review of all relevant § 3553(a) factors.

First District Appellate Court of Illinois Analyzes Illinois Anti-Strategic Lawsuits Against Public Participation (Anti-SLAPP) Act

On September 30th, Justice James Fitzgerald Smith writing on behalf of the Appellate Court of Illinois, First District (*Shoreline Towers Condominium Association v. Debra Gassman*; Docket Nos. 1-08-2438 and 1-09-2180, cons.) affirmed the circuit court's dismissal of certain claims and awarding Gassman attorneys' fees related to condominium association's actions.

In March 2007, Shoreline Towers Condominium Association ("Shoreline") filed a complaint against Debra Gassman ("Gassman") titled: "Verified Complaint for Injunctive Relief, Defamation, Civil Conspiracy, Malicious Prosecution, Intentional Infliction of Emotional Distress, and Civil Rights." According to Shoreline, Gassman waged a campaign of harassment and intimidation against Shoreline and used her position as an attorney in the office of the public defender to conspire with members of the Cook County sheriff's department and the Chicago police department (CPD) to further her purpose. Shoreline alleged that Gassman's behavior interfered with its day-to-day operations to such an extent that it was unable to allocate sufficient resources for the proper administration of the property.

Shoreline's allegations included, in pertinent part, that beginning in July 2005, Gassman supplied inaccurate and damaging information to the Jewish Star, a publication geared primarily to the Jewish community. Based on that information, the Jewish Star referred to Shoreline's rule as a "Mezuzah Ban" and Shoreline contended this characterization essentially labeled it anti-Semitic. Shoreline further alleged that, in October 2005, Shoreline arranged for a charter bus to transport residents to a meeting regarding the development of a nearby marina. Residents were notified of this meeting via flyers that were handed out and posted in the common areas of the building. Shoreline alleged that Gassman tore down the signs posted in the lobby and shouted that Shoreline should not be having the meeting. She then argued with Edward Frischholz, the president of Shoreline's board of directors, in front of five witnesses. The argument culminated in Gassman accusing Frischholz of threatening her with bodily harm. Gassman called the police after the argument. Responding CPD officers went into Gassman's condominium to speak with her. When Shoreline's property manager went to Gassman's condominium to check on the status of the investigation, she saw multiple wine glasses on the coffee table where the police had been sitting with Gassman. No charges were filed.

Shoreline claims that, in December 2005, Gassman used her influence with the Congregation of Beth Shalom of East Rogers Park (congregation) to provoke an altercation between the congregation and Frischholz during a meeting in Shoreline's hospitality room. Frischholz displayed a crucifix on the door outside his unit and, allegedly, the congregation covered it with a garbage bag.

Shoreline claims that Gassman told the front desk clerk that Frischholz was receiving drug deliveries. She also told him she had friends on the police force who would be monitoring Frischholz and his guests for suspicious behavior. Soon after, the front desk clerk saw an unmarked police car in front of the property. Later, Gassman told the desk clerk that Frischholz had a homosexual lover. She also told the desk clerk that Frischholz was involved in litigation regarding alleged misconduct with one of his patients.

In April 2006, Gassman told a Shoreline employee she was being harassed. She told him about the pending litigation and warned him to stay away from Frischholz because he was a "bad person."

Based on the above facts, Shoreline filed its 10-count complaint in which it: requested an injunction against Gassman from interfering with its day-to-day operations (count I); alleged defamation against Shoreline (count II); requested an injunction against Gassman from defaming Shoreline's character and reputation (count III); alleged defamation of Frischholz regarding the alleged misconduct with his patient, being involved in drug trafficking, and telling the Jewish Star that he was anti-Semitic (count IV); requested an injunction against Gassman from defaming Frischholz's character and reputation (count V); alleged the intentional infliction of emotional distress on the part of Frischholz (count VI); requested an injunction against Gassman from inflicting emotional distress upon Frischholz (count VII); alleged civil conspiracy where Gassman used her position as a public defender to conspire with members of the sheriff's department and the CPD (count VIII); alleged malicious prosecution for filing lawsuits after the Illinois Department of Human rights litigation was dismissed and where Shoreline prevailed on summary judgment in federal court regarding Gassman's religious discrimination claim and at trial regarding Gassman's retaliation claim (count IX); and alleged that Gassman used her position as a public defender in violation of section 1983 of the Civil Rights Act of 1964 (42 U.S.C. §1983 (2006)) (count X).

Gassman then filed a motion to dismiss (motion) pursuant to section 2-619, which is the subject of this appeal. In it, Gassman

continued on page 59

For The Record
continued from page 10

argued that the entire complaint should be dismissed pursuant to the Citizen Participation Act (the Act), also known as the Illinois Anti-Strategic Lawsuits Against Public Participation Act (Anti-SLAPP), the public policy of which states that "the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence" and "[i]t is in the public interest and it is the purpose of this Act to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, and otherwise participate in government." 735 ILCS 110/5. Gassman contended that she brought her original claims against Shoreline because she believed she was the victim of religious discrimination by Shoreline when it repeatedly removed her mezuzah from the doorpost of her condominium. Gassman argued that the amendment to the City of Chicago Fair Housing Ordinance as well as the enactment of the aforementioned Illinois law (765 ILCS 605/18.4(h)) that prevents condominium boards from interfering with the religious practices of building tenants was "a result, in part," of her actions in challenging Shoreline's conduct.

The trial court agreed, in part, and found that Shoreline's lawsuit as to the association counts (counts I, II, III, VIII, IX, and X) was, in fact, a strategic lawsuit against public participation (a SLAPP suit). In doing so, it noted that there is scarce Illinois case law on the subject, and it drew guidance from cases decided by the courts of sister states. The trial court denied the motion as to the remaining counts. Shoreline appeals the dismissal of counts I, II, III, VIII, IX, and X.

The court found that contrary to Shoreline's argument, the Act does not protect only public outcry regarding matters of significant public concern, nor does it require the use of a public forum in order for a citizen to be protected. Rather, it protects from liability all constitutional forms of expression and participation in pursuit of favorable government action. The court found that Shoreline's complaint, at least in regards to the counts involving the Association, was a SLAPP suit, as it was clearly predicated upon acts of petition, speech, association, and participation by Gassman in pursuit of a favorable government action, which is protected by the Act. Further, the Act does not require a lawsuit be filed while protected conduct is ongoing in order to qualify as a SLAPP suit. Rather, the Act expressly provides that it applies to a claim brought "in response to any act or acts" in furtherance of constitutional rights. 735 ILCS 110/15. Applying the Illinois retroactivity standards and being cognizant of the legislature's mandate to apply the Act liberally, the court found that the Act is procedural in nature and applies to the instant SLAPP lawsuit retroactively.

Finally, the court found that the circuit court did not abuse its discretion in awarding Gassman's attorneys (Seyfarth Shaw LLP) fees in the amount of $36,840 (Seyfarth Shaw originally requested approximately $52,000 in fees). Section 25 of the Act provides that the court shall award the prevailing moving party reasonable attorney fees and costs incurred "in connection with the motion." 735 ILCS 110/25. The petition for fees, in this case, provided the necessary detailed records containing facts and computations upon which the charges are predicated specifying the services performed, the time expended and the hourly rate charged. ■

CBA MEMBER DIRECTORY NOW AVAILABLE ONLINE

Looking for another CBA member? Search on the Association's new online membership directory at www.chicagobar.org. Fill out your profile today and start making connections!

Insurance Law Committee
continued from page 18

preexisting conditions is no longer a reason to deny coverage. In September, children up to age 19 with preexisting conditions will have to be covered, but a major concern raised is how much premiums will increase for families with such dependents, given the lack of rate approval abilities.

Finally, in September, McRaith said that the lifetime caps on medical limits for policies issued or renewed would be eliminated. The major question is whether states such as Illinois will have to review the minimum surplus and capital requirements that health insurers are required to maintain given that their exposure will now be uncapped. ■