



FIRST QUARTER ISSUE

*Association of the Bar
of the United States Court
of Appeals for the Eighth Circuit*

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ASSOCIATION TO HOST CLE AND RECEPTION IN OMAHA ON MAY 13

The Eighth Circuit Bar Association invites you to its upcoming CLE program and reception in Omaha, Nebraska on May 13, 2009. The CLE will be held at the Roman L. Hruska U.S. Courthouse from 4:00 to 6:00 p.m. Michael Gans, the Clerk for the Eighth Circuit Court of Appeals, will present the Court's plans for expanding the Electronic Case Filing procedures, and Judges Colloton, Riley, and Smith of the Eighth Circuit Court of Appeals will discuss issues facing the bar and Court in a "speed date" format. A reception with members of the Court and bar will follow at the Omaha Henry Doorly Zoo beginning at 7:00 p.m. The reception is co-sponsored by the Eighth Circuit Bar Association, Spencer Fane Britt & Browne LLP, Fraser Stryker PC LLO, and Kutak Rock LLP. Please join us.

SUPREME COURT REVIEWS EIGHTH CIRCUIT DECISIONS

The Supreme Court granted certiorari to consider two Eighth Circuit decisions during the present term (October 2008 term) of the Court. The Court granted a petition for a writ of certiorari in *Flores-Figueroa v. United States*, No. 08-108, on October 20, 2008. The parties presented oral argument to the Court on February 25, 2009. On May 4, 2009, the Court issued its opinion reversing the decision of the Eighth Circuit. *Flores-Figueroa v. United States*, 556 U.S. ___, No. 08-108, 2009 WL 1174852 (May 4, 2009). In the district court, defendant plead guilty to three separate counts prior to trial (illegal entry into the United States and two counts of misuse of immigration documents). The one remaining count, a charge of aggravated identity theft, was tried to the bench. The district court convicted the defendant. He had moved for acquittal based on his argument that 18 U.S.C. § 1028A(a)(1) requires a defendant to know that the identification number used belonged to another person, and that the record failed to establish he had such knowledge. The Eighth Circuit affirmed, concluding that the United States need not show the defendant knew the identification he used belonged to another person, as it had held in its earlier decision on the issue in 2008. The Supreme Court unanimously reversed. It found "strong textual reasons," based upon "ordinary English usage," to construe 18 U.S.C. § 1028A(a)(1) as requiring that the defendant know the identification number he used was that "of another person."

In addition to *Flores-Figueroa*, the Court granted certiorari in *Gross v. FBL Financial Services, Inc.*, No. 08-441, on December 5, 2008. In *Gross*, plaintiff alleged he had been illegally discriminated against in violation of the Age Discrimination in Employment Act when he was demoted by his employer. At trial, defendant offered five non-discriminatory bases for its action with respect to plaintiff. Defendant argued that in the absence of direct evidence of discrimination (which it claimed was not present), plaintiff

must bear the burden of proving that defendant would not have made the same employment decision in the absence of discrimination. The district court, however, rejected that argument and gave the jury a "mixed motive instruction" that required, if the jury found that age had been a factor in the defendant's employment decision, the defendant to bear the burden to prove it would have made the same decision in the absence of discrimination. The Eighth Circuit reversed the judgment holding that in an ADEA case, unless there is direct evidence of illegal age discrimination, the plaintiff must prove that defendant's employment decision would not have been the same in the absence of illegal discrimination. The question presented to the Court is whether in a non-Title VII discrimination case, a plaintiff must present direct evidence of discrimination in order to obtain a mixed motive instruction. The parties presented oral argument to the Court on March 31, 2009.

In the prior term, the Supreme Court issued opinions reversing two decisions of the Eighth Circuit Court of Appeals. In *Greenlaw v. United States*, 554 U.S. ___, 128 S.Ct. 2559 (2008), the Supreme Court held that in the absence of an appeal or cross-appeal by the United States, the Eighth Circuit could not, on its own initiative, order an increase in the defendant/appellant's sentence. In *Plains Commerce Bank v. Long Family Land & Cattle*, 554 U.S. ___, 128 S.Ct. 2709 (2008), the Supreme Court held that a Tribal Court lacked jurisdiction to adjudicate civil claims against the non-tribal member bank that owned real property on the tribal reservation.

ISSUES ON APPEAL: RECENT DECISIONS OF THE EIGHTH CIRCUIT

EIGHTH CIRCUIT CLARIFIES WHEN DISTRICT COURTS MUST DECIDE SCOPE OF ARBITRATION PROVISIONS

In *U.S. ex rel. Lighting & Powers Servs., Inc. v. Interface Constr. Corp.*, 553 F.3d 1150 (8th Cir. 2009), an electrical sub-subcontractor (Lighting & Powers Services, "LPS") brought suit against the electrical subcontractor, the general contractor and the payment bond issuer, under the Miller Act (40 U.S.C. § 3131 et seq.) to recover unpaid invoices for labor and materials LPS had provided to renovate portions of a federal building in St. Louis under a contract with the federal government. The general contractor moved to compel arbitration of that suit based upon a clause in the sub-contract, arguing LPS was bound by the arbitration clause because LPS's proposal provided that if accepted, it was "to be made an Attachment to the Sub-contract." The district court denied the general contractor's motion. The Eighth Circuit first concluded that questions of arbitrability – including whether a party may be bound by another contract's arbitration clause – must generally be decided by courts under Federal law "unless the parties clearly and unmistakably

provide otherwise.” On that basis, the Court affirmed the district court’s holding that LPS was not bound by the sub-contract’s arbitration provision because it was not a party to that agreement. The Court concluded the proposal’s “attachment” language was not sufficiently unambiguous under Missouri law, and the arbitration clause was thus not incorporated by reference into the proposal.

In *Fallo v. High-Tech Institute*, 559 F.3d 874 (8th Cir. 2009), current and former students of the vocational school defendant filed suit seeking damages based on a breach of the enrollment agreement they entered with defendant and three separate tort claims. On defendant’s motion, the district court compelled arbitration of the contract claim but denied the motion with respect to the tort claims. On defendant’s second motion to compel arbitration of the remaining tort claims, the district court again denied the motion. It rejected defendant’s argument that the question of arbitrability was for the arbitrator under the enrollment agreement’s clause. The Eighth Circuit reversed and directed the district court to enter its order compelling arbitration of the tort claims. It held that the clause’s incorporation of the Commercial Rules of the American Arbitration Association – Rule 7(a) thereof gave the arbitrator “the power to rule on his or her own jurisdiction” – was a clear and unmistakable agreement that the arbitrator must decide arbitrability. The Court held that the parties’ choice of Missouri state law – which requires questions of arbitrability to be decided by the courts – could be harmonized by limiting that provision to the substantive rights and obligations of the parties but construing it not to apply to the authority of arbitrators under the arbitration clause.

In *Franke v. Poly-America Medical and Dental Bens. Plan*, 555 F.3d 656 (8th Cir. 2009), the defendant benefits plan appealed from the denial of its motion to compel arbitration in a lawsuit arising from its denial of plaintiff’s request for payment of his medical bills. The plan agreement included an arbitration clause with two provisions that “appear[ed] to be unlawful” under the Employee Retirement Income Security Act (ERISA) but the plan stipulated that those provisions should be deleted by the district court pursuant to the severability clause in that agreement. The district court held the “mere existence” of the illegal provisions would hamper the processing of appeals and so held the arbitration requirement unenforceable. The Eighth Circuit reversed and directed entry of an order compelling arbitration under the Plan as modified by stipulation.

EIGHTH CIRCUIT AFFIRMS INJUNCTION MANDATING “CHOOSE LIFE”-SPONSORED MISSOURI SPECIALTY LICENSE PLATE

In *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009), the Court considered a First Amendment facial invalidity challenge to the Missouri statute that governs which symbols or mes-

sages may be used on Missouri’s “specialty license plates” for automobiles. The Plaintiff was a pro-life group who applied unsuccessfully to sponsor a specialty plate bearing the group’s message – “Choose Life.” The district court entered an injunction directing defendants to approve Plaintiff as a sponsor and to issue the “Choose Life” plates. The Eighth Circuit affirmed, holding the statute was facially invalid under the First Amendment. After first concluding the messages on such plates are private – not public – speech, the Court concluded the statute gave the government “unbridled discretion to determine who may speak based on the viewpoint of the speaker.” The statute was thus held facially invalid. Appellants alternatively argued the injunction was invalid because if sustained, the First Amendment challenge should invalidate the entire scheme for issuing privately-sponsored specialty plates. The Court held that its decision only invalidated that provision of the statute that gave the Joint Committee on Transportation Oversight an unfettered right to deny an application. The Court held that under the parts of the statute that survived its decision, the State must issue Plaintiff’s specialty plate. For future applications, the Joint Committee must still vote. However, it may only do so by conducting ministerial duties such as ensuring applicants have satisfied the statute’s three prerequisites (filing a list of two hundred individuals who will purchase the plate; submitting the application on the proper form and paying the fee; and obtaining sponsorship from a member of the Missouri General Assembly). Under the decision, the State apparently must approve the application of any applicant who satisfies these criteria. In response to the decision, the Missouri Senate passed a bill that would return control over applications to the Missouri General Assembly, as was the case until 2004 when the statute found invalid first became effective.

EIGHTH CIRCUIT REVERSES ORDER DISMISSING COMPLAINT WITH PREJUDICE AS SANCTION FOR MISCONDUCT, AND ORDERS JUDGE’S RECUSAL

In *Sentis Group Inc. v. Shell Oil Co. LLC*, 559 F.3d 888 (8th Cir. 2009), plaintiffs (retail gasoline/convenience stores) brought consolidated lawsuits against oil company defendant under whose name they had operated, alleging both contract and tort claims for damages. Based upon alleged discovery abuses and other infractions, defendant moved to dismiss the action with prejudice as a sanction. The district court granted the motion and dismissed plaintiffs’ action with prejudice based upon four alleged bases of misconduct. The most serious alleged infraction was plaintiff’s purported bribes paid to witnesses for them not to testify. The sole record evidence of that infraction was defense counsel’s affidavit alleging independent counsel for one witness advised him of that misconduct. The district court did not conduct its own investigation nor hold a hearing on the allegation. The Eighth Circuit held such evidence insufficient to justify

imposing the sanction of dismissal with prejudice, holding that “it was error to rely upon the allegations in the infirm affidavit without holding an investigation or evidentiary hearing.” A divided panel of the Court similarly concluded that the other three allegations against plaintiff did not warrant dismissal of its case. Finally, the Eighth Circuit held the district judge erred in not granting plaintiffs’ motion for recusal and ordered that he do so based upon his appearance of partiality from the high degree of antagonism shown to plaintiffs.

EIGHTH CIRCUIT CONSTRUES MUTUAL FUND MANAGERS’ INVESTMENT COMPANY ACT-IMPOSED FIDUCIARY DUTIES WHEN NEGOTIATING FEES

In *Gallus v. Ameriprise Financial, Inc.*, 561 F.3d 816 (8th Cir. 2009), plaintiff mutual fund shareholders alleged breaches of fiduciary duty under §36(b) of the Investment Company Act of 1940 by defendants who were affiliated financial services companies responsible for managing funds. Plaintiffs alleged that defendants did not disclose relevant information in negotiations and charged excessive fees to mutual funds for their investment advice. The district court entered summary judgment for defendants based upon its finding that defendants’ fees were similar to fees other mutual fund managers charged which it concluded barred liability, and it also concluded that damages incurred after filing were not recoverable. The Eighth Circuit reversed summary judgment for defendants holding that the district court erred in concluding the fact that fees were in line with alleged industry norm made fees valid as a matter of law and erred in concluding plaintiffs could not recover damages incurred post-filing of their suit.

EIGHTH CIRCUIT AFFIRMS DECLARATION THAT LITTLE ROCK SCHOOL DISTRICT IS “COMPLETELY UNITARY”

In *Little Rock School District v. North Little Rock School District*, 561 F.3d 746 (8th Cir. 2009), the Eighth Circuit affirmed the district court’s order declaring that the Little Rock School District – the school district that has been subject to federal court supervision longer than any other in the nation – is “completely unitary” and no longer under any supervising or monitoring obligations to the district court.

COURT AND LIBRARY NEWS

Former Justice Sandra Day O’Connor Participates in Opening of Judicial Learning Center

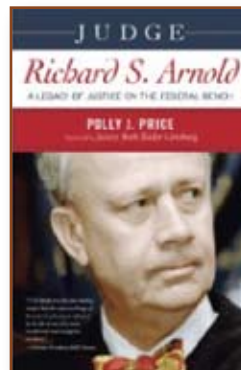
The planned permanent display for the Judicial Learning Center in the Thomas F. Eagleton Courthouse in St. Louis, Missouri, has been installed. Former Supreme Court Justice Sandra Day O’Connor was present for the official opening of the Center on Wednesday, February 25th. The Judicial Learning Center is the only educational center in the United

States devoted to the judicial process in the Federal Courts. The content of the display focuses on the importance of “The Rule of Law” and depicts how and why the Federal court system was created. The display also features interactive displays and highlights landmark Eighth Circuit cases. There is also a special display board where visitors can leave comments.



*Clerk of Court, Jim Woodward, Justice O’Connor,
Judge Edward Filippine, Judge Catherine Perry*

The display was developed in consultation with prominent educators, representatives of the bar, museum experts, community leaders, and judges. It was jointly sponsored by the federal courts of the Eighth Circuit and St. Louis lawyers serving on the board of directors of the not-for-profit corporation that raised funds to support it. The Center is located on the first floor of the courthouse and is open from 8:30 a.m. to 4:30 p.m., Monday through Friday (excluding FederalHolidays.) If you would like to arrange a tour of the Eagleton courthouse, call 314-244-2727.



Biography of Judge Richard Sheppard Arnold

Judge Richard S. Arnold: A Legacy of Justice on the Federal Bench; the long-awaited biography of Circuit Judge Richard Sheppard Arnold, became available on April 21, 2009.

Richard S. Arnold served on the U.S. Court of Appeals for the Eighth Circuit from 1980 until his death in 2004. He served as chief judge from 1992 to 1998 and assumed senior status in 2001.

During his time on the bench he cultivated a reputation in the legal community and beyond for his intellect, legal scholarship, and integrity.

Written by Polly J. Price, his former law clerk and now a professor of law at Emory University, the book draws from internal court documents, interviews with other judges and

law clerks, as well as the judge's own diaries to provide a detailed history of this remarkable person and his



Judge Bright Longest Working Judge in the Eighth Circuit!

The Honorable Myron H. Bright has reached an important milestone in Eighth Circuit history. As of April 2009, Judge Bright has been hearing cases with the Eighth Circuit Court of Appeals for 40 years and 8 months, which is longer than any other judge ever appointed to this court.*

This took place on April 15 when Judge Bright sat with Judge Murphy and Judge Bye in the third division's north-east courtroom in St. Louis' Thomas F. Eagleton U.S. Courthouse. Congratulations, Judge Bright!

* Judge Joseph W. Woodrough served on the 8th Circuit Court of Appeals for 44 years from 1933 to 1977, but he stopped hearing cases when he took senior status in 1961, working a total of "only" 28 years.

Cedar Rapids Federal Courthouse Groundbreaking Celebration

Although the skies were overcast, downtown Cedar Rapids saw signs of a real breakthrough in the revitalization of the river front area following last summer's devastating floods. On April 25, 2009, Iowa Senators Chuck Grassley and Tom Harkin joined in the groundbreaking celebration for the new United States Courthouse at 111 Seventh Ave. SE in downtown Cedar Rapids. Distinguished speakers included . Excavation of the site actually began about a month ago, including removal of a portion of First St. SE along the Cedar River to make way for the courthouse grounds, which will cover a two-block area between the River and Second St.

NOTES AND ACKNOWLEDGMENTS

This newsletter is compiled by the Communications Committee of the Association. Comments and suggestions may be addressed to Barry Pickens at 8thcirbar@spencerfane.com. Special thanks to Dana Oxley, Ann Fessenden, Larry Friedman, Debi Pickler, and Christine Higgins for their contributions to the First Quarter 2009 issue of the newsletter.



Exterior rendition of future Cedar Rapids Federal Courthouse



Artist's rendition of interior scene in vestibule of Cedar Rapids Courthouse

Renditions courtesy of William Rawn Associates, Architects, Inc. and OPN Architects, Inc.