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## Special Session

U.S. Supreme Court Justices past and present supplied two of the many highlights at the **2005 Eighth Circuit Judicial Conference** held October 20-21 at the Broadmoor in Colorado Springs.

**Justice Clarence Thomas**, who has been the Eighth Circuit's "Circuit Justice" since approximately 1994, gave the closing presentation on October 21, as has been his tradition at recent Judicial Conferences.

The previous day, Conference participants received insights into the life and tenure of former Supreme Court **Justice Harry Blackmun** from writer Linda Greenhouse and three senior Eighth Circuit judges – Donald Lay, Gerald Heaney and Myron Bright – who served with Justice Blackmun on the Eighth Circuit prior to the Justice's elevation to the Supreme Court.

Conference participants also received a complimentary copy of the book *Becoming Justice Blackmun* written by Greenhouse, a former law clerk for Justice Blackmun and reporter for the *New York Times*.

Justice Thomas throughout his presentation was informative and humorous, and he expressed thanks for the opportunity to meet with Eighth Circuit judges and practitioners – even though the meeting was on Tenth Circuit turf.

Justice Thomas noted that this was his fourteenth year on the Supreme Court and his twelfth year as the Eighth Circuit's Justice. He indicated that he came before this Judicial Conference with "gray hair," "twenty pounds lighter" and "having a lot fewer answers" and "many more questions."

In discussing his many years on the Court, Justice Thomas stated that he now found greater meaning in a comment by Justice Byron White early in his Supreme Court career: "You haven't arrived at the Court until your opinions come back to haunt you."

On the issue of judicial philosophy, Justice Thomas dismissed the labels that have been attached to him by the media and said that his judicial philosophy is simply that the Court's decisions should turn not on the question of what is best for society but, rather, on the question of who gets to decide what is best for society. In many cases, he said, the Court is urged to make hard decisions that should be made by Congress or another legislative or executive body.

Justice Thomas described the 2004-05 Court term as having been very difficult because of the Court's work load and the unavailability for a time of the late Chief Justice William Rehnquist. Justice Thomas stated that when the Chief Justice returned to the Court for the second half of the term it was, to the extent possible, "business as usual." Thomas stated that he never heard the Chief Justice complain once.

Justice Thomas described the appointment of John Roberts as the new Chief Justice as an "outstanding choice" and indicated that the current Court considered the new Chief Justice to be one of the finest advocates, if not the finest advocate, to have come before it.

Justice Thomas further stated, to laughter and applause, that, even though he thought the new Chief Justice was an outstanding choice, he was "so glad not to be the nominee, anyone would have been a great choice."

Justice Thomas in further remarks indicated that, in his opinion, the current judicial selection process was doing "irreparable harm to the judiciary." Justice Thomas at the conclusion of his presentation entertained a number of questions from the audience.

Greenhouse in her remarks about Justice Blackmun identified the top four issues about which the Justice was passionate: the death penalty, sex discrimination, the commercial speech doctrine, and the rights of the poor.

The Justice, however, said Greenhouse, was forever changed by an opinion on a different topic – the controversial *Roe v. Wade* abortion decision. Although the vote of the Justices was 7-2, Justice Blackmun as the author of the majority opinion faced death threats and picketers.

Greenhouse rebutted rumors and innuendo that Justice Blackmun's clerks made his decisions and/or dictated his judicial philosophy. Greenhouse in writing her book reviewed papers left by Justice Blackmun to the Library of Congress, and she said those papers belie the rumors and speculation.

Greenhouse described her book as devoted to the evolution of Justice Blackmun's thinking on important legal issues. The book also covers the lifelong relationship between Justice Blackmun and Chief Justice Warren Burger, who were childhood friends but later became estranged.

After Greenhouse completed her remarks, former Eighth Circuit Judge William Webster joined Senior Judges Lay, Heaney and Bright in giving anecdotal comments regarding Justice Blackmun.

In another highlight of the Judicial Conference program, a panel consisting of the chair and the three vice-chairs of the **U.S. Sentencing Commission** addressed "Whither the Sentencing Commission and Federal Sentencing in the *Post-Booker* Era."

Panel members said the Commission spent much of the past year dealing with issues raised by

the *Blakely* and *Booker* decisions, including the gathering of statistical information about the effects of those decisions. They report that about 62 percent of sentences remain within the guidelines when the guidelines are treated as advisory, with slightly more than 36 percent of sentences below guidelines and about 1½ percent above guidelines.

The panel considered only a small portion of the "below guidelines" sentences to raise concerns.

The Commission's priorities for the coming year, according to the panel, include refinement of the guidelines as applied to intellectual property, obstruction of justice, and steroids. Other agenda items include victim's rights, immigration, cocaine policy, firearms, and issues relating to "compassionate release."

Panel members said that nationally, up to one half of the federal criminal docket includes some immigration issue.

The Judicial Conference began with the traditional introduction of new judges, honoring of recent retirees, and memorials to deceased judges and court personnel, including this year a moment of silence for the late Supreme Court Chief Justice William Rehnquist and a memorial resolution for the late Eighth Circuit Judge Richard Arnold, who passed away in September 2004.

## Bench Briefs

The Eighth Circuit will experience at least **two changes in judicial personnel in the next year.**

**Judge Morris Arnold** has notified President Bush that he will assume senior status October 9, 2006, according to Eighth Circuit Clerk of Court Michael Gans.

In addition, **Senior Judge George Fagg** announced at the "Iowa" breakfast at the Judicial Conference that he will retire in August 2006, at the completion of the current court term.

Judge Arnold, who maintains his chambers in Little Rock, joined the Eighth Circuit in May 1992 after a career in academia and service as a U.S. district court judge in Arkansas.

Judge Fagg, who maintains his chambers in Des Moines, joined the Eighth Circuit in 1982 after

a career in private practice and service as a state trial court judge. Judge Fagg took senior status in May 1999.

There has been no change in the composition of the Court since the additions of Judges Raymond Gruender and Duane Benton in June and July 2004, respectively.

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Eighth Circuit **Judge Raymond Gruender** joined two of his counterparts from the Missouri Court of Appeals for a **panel discussion** “You’d Rather See It Done How?” at a recent Missouri Bar CLE seminar.

Judges Clifford H. Ahrens and Kathianne Knaup Crane, both from the Missouri Court of Appeals Eastern Division, appeared with Judge Gruender. The CLE program, which was held in St. Louis in September, was directed at appellate practitioners at all levels of experience.

In addition to discussing brief writing and oral argument, Judge Gruender noted the planned adoption of **electronic filing** in the federal circuit courts and described the Eighth Circuit’s role as a “guinea pig” in the implementation of electronic filing. Judge Gruender said the Judges believe the new system will be a great improvement over paper filing.

The Eighth Circuit, according to Judge Gruender, expects to begin implementing electronic filing in mid-2006 and plans to issue revisions to the Eighth Circuit Local Rules sometime after that. Judge Gruender emphasized that as with any new procedure, the clerk’s office would welcome comments from practitioners.

On the subject of **brief writing**, Judge Gruender observed that he reads approximately 3,000 pages of briefs every month, and he emphasized the importance of brevity: As Mark Twain once said: “If I had more time, I would have written a shorter letter.”

Judge Gruender stated that it is important to focus on the three or four winning points, to identify the appropriate standard of review, to put key documents in the addendum, and not to bury good arguments within other arguments or footnotes.

Judge Gruender stated that well-written briefs create more credibility with the Court. With respect to matters of style, Judge Gruender recommended the use of simple and short sentences, the use of active rather than passive voice, and the avoidance of distracting typographies, such as the use of all capital letters for emphasis.

Judge Gruender noted that **oral argument** is important but said that the brief is more important because usually the judges have at least a preliminary view of the case before oral argument.

Judge Gruender said, however, that it is important not to “snatch defeat from the jaws of victory” at oral argument. For example, do not be afraid to sit down before you have used all your time if your opponent is getting bombarded with questions and the panel is not asking you anything.

Also you should attempt to engage all of the judges on the panel, and to answer every question.

Judge Gruender concluded that it is important to focus your attention at oral argument on one or two points and to know the record very well. Be prepared to answer this question: “If I find fact *x*, why don’t you lose?”

[Thanks to Association director Lawrence Friedman and Association member Matthew Landwehr, both of Thompson Coburn in St. Louis, for this report]

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On March 4, 2005, the Eighth Circuit Court of Appeals convened in the U.S. Courthouse in Cedar Rapids, Iowa, to commemorate and celebrate the transition of **Judge David Hansen** to senior status with the **presentation** of his **portrait**.

The overflow crowd in attendance included all but one of the Circuit’s active judges, three Eighth Circuit senior judges, and judges from the U.S. District Courts, the Iowa Supreme Court, and the Iowa District Courts.

Also in attendance were Judge Hansen’s family and friends and – from across the country – almost all of Judge Hansen’s law clerks who have served him over the years, first on the U.S. District Court for the Northern District of Iowa from 1986

to 1991, and since then on the Eighth Circuit Court of Appeals.

The speakers at the event included Eighth Circuit Chief Judge James Loken, Eighth Circuit Senior Judge George Fagg, and, representing Judge Hansen's law clerks, Samuel Thumma of Phoenix and Jennifer Brooks of Washington D.C.

The participants spoke of Judge Hansen's distinguished career and the traits that have contributed to making him an outstanding jurist. Those traits, all agreed, include Judge Hansen's intelligence, his fairness, his skill as a legal writer whose opinions can be understood by laypeople, his thoroughness, and his common sense.

The speakers also agreed about the importance to Judge Hansen of his wife Ginger and their family.



Judge Fagg, who has known Judge Hansen for more than thirty years, characterized Judge Hansen as one of the "elite group" of Eighth Circuit judges distinguishing themselves as "exceptional."

Former law clerks Mr. Thumma and Ms. Brooks stressed Judge Hansen's excellence as a mentor and the atmosphere of

respect and equality that he created in his chambers – which Ms. Brooks referred to as the "Hansen Graduate School of Law." Mr. Thumma and Ms. Brooks also expressed their gratitude that the Judge and Mrs. Hansen make the Judge's law clerks feel as if they are part of the Hansen family.

Mrs. Hansen and the Judge's three grandsons unveiled the portrait. Prior to the unveiling, the artist, Jason Bouldin, expressed the hope that the audience would see what he saw in Judge Hansen: a "man interested and interesting, a

man who embraces life and is dedicated to his profession and the importance of the task that is set before him."

Judge Hansen officially assumed senior status in April 2003. He served as Chief Judge for approximately the last 14 months of his tenure as an active judge.

A transcript of the March 2005 proceedings will appear in a future volume of the West Federal Reporter.

[Thanks to Association Director Diane Kutzko of Shuttleworth & Ingersoll in Cedar Rapids, IA, for this report.]

## Time, Place & Manner

The Eighth Circuit in November held its first **full "Saint Paul" court week** since temporarily vacating, at the end of September, its regular Saint Paul clerk's office, courtrooms and chambers to facilitate the scheduled remodeling of the Warren E. Burger Federal Courthouse there.

A single panel heard cases for five days at St. Thomas School of Law in Minneapolis, with the school providing not just a courtroom but office spaces for the judges to work when not on the bench.

The Eighth Circuit **clerk's office remains open at an address – 180 East 5<sup>th</sup> St. – just a couple of blocks from the Saint Paul Courthouse.** The clerk's office, as well as the Circuit Library, has space on the sixth floor at that address, with the re-located district courts occupying other floors.

The clerk's office maintains the same hours and provides the same services as before, and the phone number remains unchanged. Regular mail may even be sent still to the Roberts Street address of the Courthouse – but the temporary 5<sup>th</sup> Street address must be used for overnight and special deliveries and deliveries by commercial carrier.

The home page of the Eighth Circuit web site ([www.ca8.uscourts.gov](http://www.ca8.uscourts.gov)) contains a link to information about contacting the Saint Paul clerk's office at its temporary location.

The full Eighth Circuit sat in Saint Paul in September, with a total of four panels hearing cases at the Courthouse and at local law schools to clear

as many “northern state” cases from the docket as possible prior to the remodeling disruption.

During October court week, a panel of the Eighth Circuit heard cases for five days in Kansas City, with Judge Raymond Gruender actually sitting in Kansas City the first three days before returning to St. Louis to join one of the panels there for the rest of the week.

\* \* \* \*

Unless Congress acts within the next few days, a variety of **amendments** to the **Federal Rules of Appellate Procedure** will go into effect **December 1, 2005**.

The most significant change, from a practical standpoint, involves the addition of a new rule, FRAP 28.1, collecting in one place all briefing and similar requirements relating to **cross-appeals**. The pending rule addresses, for example, the sequence, timing and length of briefs.

According to Eighth Circuit Clerk of Court Michael Gans, the cross-appeal provisions of new FRAP 28.1 are similar to the existing cross-appeal provisions of the Eighth Circuit Local Rules, with two exceptions. First, under FRAP 28.1, the cover of the appellant’s second brief – i.e., the brief responding to the cross-appeal and replying, if desired, in support of the appeal – is to be yellow.

Second, new rule FRAP 28.1 will increase the page-count and word-count limits for the appellee/cross-appellant’s initial brief and for the appellant’s cross-appeal/reply brief. Gans said that new FRAP 28.1, when it becomes effective, will override any conflicting provision of the Eighth Circuit Local Rules and that the Court may simply repeal its Local Rule 28A(e).

**Additional pending FRAP amendments** set to go into effect December 1 involve the **re-opening of time** for a **civil appeal** under FRAP 4(a)(6) and the determination of a “majority” for purposes of a vote, pursuant to FRAP 35, on whether to hear a case en banc.

Also, pending new FRAP 27(d)(1)(E) will make clear that the typeface and type-style requirements of FRAP 32(a)(5) and (6) apply to **motion papers**, while pending amendments to FRAP 26 and 45 will restore the term

“Washington’s Birthday,” in place of “Presidents’ Day,” in references to legal holidays affecting court operations.

Four FRAP subparts – FRAP 28(c) and (h), FRAP 32(a)(7)(C) and FRAP 34(d) – will be amended or deleted to take into account the new cross-appeal provisions of FRAP 28.1.

Under FRAP 4 (a)(6), when a party to a civil action does not receive notice of judgment within 21 days of judgment entry, the party may, within 7 days after receiving notice and subject to other requirements, file a motion with the district court for a re-opening of the time for appeal. The pending amendment to FRAP 4(a)(6) clarifies the requirements for re-opening and expressly provides that “notice,” in both instances, means the service of written notice of judgment consistent with Federal Rule of Civil Procedure 77(d).

Under FRAP 4(a)(6) as currently written, a circuit split exists as to the adequacy of informal or oral notice to trigger the seven-day period for filing the motion to re-open. The Eighth Circuit position on this split, limited to dicta, has been that “actual notice” – and thus not necessarily written notice – is adequate to trigger the seven-day period for filing a motion to re-open. *See Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (2000); *see also* Committee Note to 2005 Amendment.

The pending amendment to FRAP 35 will make clear that the “majority” of judges needed to grant hearing or rehearing en banc is merely a majority of those active judges not disqualified from sitting on the particular case, and not a majority of all active judges of the circuit. The approach thus adopted under the pending amendment is generally referred to as the “case majority” approach and already is in use in six circuits, according to the FRAP 35 committee note.

The Eighth Circuit, in contrast, currently uses the “absolute majority” approach, said Clerk of Court Gans. Under this approach, the Eighth Circuit gives a case en banc consideration only upon the favorable votes of six of the Circuit’s 11 active judges, even if some of the active judges are disqualified from voting on the particular case.

Gans said the use of the “case majority” approach, rather than the “absolute majority” approach, would have resulted in the granting of en

banc consideration in a few additional Eighth Circuit in the past. He emphasized, however, that absent unusual circumstances, the choice between the two approaches does not affect the grant or denial of en banc consideration.

According to an Appellate Rules Advisory Committee report, Eighth Circuit judges generally opposed the FRAP 35 amendment when the amendment was circulated for public comment, believing that a consistent national approach was not required and that the “case majority” approach would lead to an increase in the number of en banc hearings.

The advisory committee comment to the pending FRAP 35 amendment favors the “case majority” approach as giving a consistent meaning to similar language in FRAP 35 and 46 and faults the “absolute majority” approach as giving a disqualified judge, as a practical matter, a vote against en banc consideration and as potentially leaving a court unable to review a panel decision with which a majority of the court’s active judges disagreed.

The FRAP amendments scheduled to go into effect December 1 were published for comment in August 2003 and, after limited revision, were approved by the Standing Committee on Rules in June 2004, by the U.S. Judicial Conference in September 2004, and by the Supreme Court in April 2005.

Reports and commentary cited in this article can be viewed at [www.uscourts.gov](http://www.uscourts.gov), under “Federal Rulemaking.”

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The U.S. Judicial Conference in September approved proposed new FRAP 32.1 regarding the **citation of “unpublished” federal opinions**. The proposed rule still must be approved by the Supreme Court and will become effective, at the earliest, on December 1, 2006.

New FRAP 32.1 would (a) override in part current local rules that prohibit, limit or discourage the citation of unpublished opinions; and (b) require the attachment of certain unpublished opinions to the briefs and motions in which they are cited.

As approved by the Judicial Conference, new FRAP 32.1 would override local rules, and allow parties to freely cite unpublished federal court opinions, only with respect to federal court opinions issued on or after January 1, 2007. The circuits would remain free to prohibit or limit by local rule the citation of unpublished opinions issued before that date.

The provision of new FRAP 32.1 regarding attachment of copies of unpublished opinions would apply regardless of the date of the unpublished opinion. The provision, however, contemplates the attachment of a copy only when the unpublished opinion cited is not available in a publicly accessible electronic database.

The Standing Committee on Rules, in its report recommending approval of new FRAP 32.1, stated that unpublished opinions already are “often read and cited by both judges and attorneys precisely because they do contain valuable information or insights.” The Committee noted three examples where the U.S. Supreme Court even granted review of unpublished U.S. circuit court opinions.

The Committee concluded that none of the arguments against citation of unpublished opinions was adequate to justify precluding attorneys and judges from “talk[ing] with each other about the unpublished opinions that both are reading.”

To read the Committee’s full discussion of proposed FRAP 32.1, go to the U.S. Courts Administrative Office web site, [www.uscourts.gov](http://www.uscourts.gov), and access the September 2005 Rules Committee report, beginning at page 4, by clicking on “federal rulemaking” and then on “researching rules amendments.”

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The Eighth Circuit has now received about a half dozen applications for **discretionary interlocutory review** under the new **Class Action Fairness Act** of 2005, according to Clerk of Court Michael Gans.

He said the Court has granted a couple of those applications but has not yet ruled on the merits in those cases or issued any opinion identifying those types of fact and circumstances

which are likely to induce the Court to grant immediate review.

The new right to petition for discretionary interlocutory review, which is codified at 28 U.S.C. §1453, is limited to orders granting and denying motions to remand class actions to state court.

The new provision contains a deadline for appellate decision, after which time the interlocutory appeal is deemed automatically denied.

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Parties to **bankruptcy** proceedings potentially can **place novel issues before the Eighth Circuit more quickly** under amendments to bankruptcy law that went into effect October 17, 2005.

Section 1233 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. No. 109-8) amended 28 U.S.C. §158 to provide a limited exception to the requirement that a party appeal a bankruptcy court ruling first to the district court or bankruptcy appellate panel.

Under new subsection 158(d)(2), the Eighth Circuit may at its discretion accept an appeal direct from a qualifying bankruptcy court ruling when the appeal is certified to the Circuit as involving either (a) a question of law as to which there is no controlling Circuit or U.S. Supreme Court precedent or which involves a matter of public importance; (b) a question of law which requires the resolution of a conflict between existing decisions; or (c) a ruling the immediate resolution of which will materially advance the bankruptcy proceeding.

Any of the bankruptcy court, district court or bankruptcy appellate panel involved in the case may certify the ruling for appeal, either on the court's own motion or at the request of a party. In addition, all appellants and appellees acting jointly may certify a ruling for initial appeal to the Eighth Circuit.

Section 1233 of the new Bankruptcy Act, in addition to authorizing discretionary direct appeals to the circuits, includes temporary procedural rules to govern such appeals pending formal federal rulemaking. The temporary rules make FRAP 5 -- which governs, for example, 28 U.S.C. §1292(b)

discretionary interlocutory appeals – generally applicable to the new discretionary direct bankruptcy appeals.

The Bankruptcy Rules Committee of the U.S. Judicial Conference has developed additional interim rules to be adopted in the various jurisdictions as “local rules,” pending formal rulemaking.

The new bankruptcy appeal provision applies only to cases commenced under the Bankruptcy Code after the effective date of the 2005 Act.

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A **panel** of the Eighth Circuit will **hear a case in Des Moines**, Iowa, on December 2, 2005, as part of a seminar sponsored by the Iowa State Bar Association.

This is at least the third time a panel has heard a case in Des Moines as part of the ISBA's annual year-end Federal Practice Seminar. The most recent prior panel appearance at this seminar was in December 2003.

Judges Michael Melloy, Steven Colloton and Duane Benton are scheduled to sit on the case to be heard this year. The judges in the past generally have taken questions on appellate practice from seminar participants at the conclusion of the argument.

Judge Benton further is scheduled to be the luncheon speaker at the seminar.

## Association News

Approximately 65 attorneys, district court judges and appellate judges attended the **Association-sponsored breakfast** at the recent Eighth Circuit **Judicial Conference** at the Broadmoor in Colorado Springs.

Eighth Circuit Judge **William Riley**, as guest speaker, captivated the audience with his remarks on “Sanctioning Lawyers.”

Judge Riley commented that the increase in incivility between lawyers may be attributable to several factors such as greed, billable hours, commercialization, the litigation explosion, advertising and dishonesty. He queried, “Are

lawyer sanctions the answer?” and “What can be done?”

Most judges, Judge Riley said, want the attorneys to “work it out.” He suggested that Rule 11 sanctions may not be the answer because of the cumbersome process necessarily involved. In addition, he said judges may be reluctant to impose sanctions because of the vagueness of standards such as “protecting the public and the administration of justice” and “preserving confidence in the legal profession.”

Instead, Judge Riley suggested, lawyers should realize that unprofessional conduct is unproductive. He cautioned lawyers against becoming uncivilized themselves by retaliating against opposing counsel: Maintain your own professionalism and “kill them with kindness” and the other side will be a failure.

Other judges in attendance, in response to Judge Riley’s remarks, suggested that attorneys should be more engaged and judgmental of their colleagues; that attorneys should respect and honor, but not worship, the law; and that the legal profession should demand excellence and not mediocrity and should enforce this minimum standard through state disciplinary committees.

The Association breakfast was held Thursday, October 20, 2005, which was the first morning of public educational programs at the Judicial Conference.

The Association sponsored a similar breakfast at the 2003 Eighth Circuit Judicial Conference in Minneapolis.

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The Association in September **donated** \$5,000 to the Hurricane Katrina relief effort of the **Federal Court Clerks Association** (“FCCA”). The FCCA is a voluntary organization for federal court employees at all levels (i.e., circuit, district and bankruptcy). The FCCA in the aftermath of Hurricane Katrina established a relief fund to benefit members of the court “family” – for example, judges and staff, clerk’s office staff, and security and probation employees – who were affected by the storm.

## Issues on Appeal

Pending new Rule 59 of the Federal Rules of Criminal Procedure, which will go into effect December 1, 2005, absent congressional action, imposes explicit **error preservation** requirements for appellate review of **magistrate decisions** in **criminal** cases.

Specifically, new Criminal Rule 59 expressly requires that objections to magistrate decisions first be raised to the district court, and it establishes procedures for the filing of the necessary objections.

According to the advisory committee note to new Criminal Rule 59, however, an objection is necessary only to preserve error in a magistrate ruling for appellate review, with the district court retaining discretion to review a magistrate ruling even absent the timely filing of an objection.

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The Eighth Circuit in its recent **en banc** decision in *U.S. v. Va Lerie*, 424 F.3d 694 (2005), identified a three-part test for determining when law enforcement’s interference with **checked luggage** constitutes a **seizure**.

*La Verie* involved the removal of a bus passenger’s luggage to a back room of a bus station during an intermediate stop, and the majority reversed the district court’s grant of a motion to suppress. The majority found both that the removal of the luggage did not constitute a seizure and that the defendant consented to the subsequent search of his bag.

Five judges in dissent argued that the law enforcement conduct in question was indistinguishable from the interference with a shipped package found by the U.S. Supreme Court to constitute a seizure in *U.S. v. Jacobsen*, 466 U.S. 109 (1984).

The Eighth Circuit panel, 385 F.3d 1141, had upheld the suppression order, with one judge concurring but writing separately to urge that the Court revisit its precedents, and with another judge dissenting.

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The Eighth Circuit in its recent **en banc** decision in *U.S. v. Mooney*, 425 F.3d 1093 (2005), addressed the issue of calculation of a defendant's "gain" from **insider trading** for purposes of **sentencing enhancement** under the federal sentencing guidelines.

The Court rejected the defendant's argument that market gain could and should be separated out from gain attributable to improper pre-disclosure use of inside information.

The Court further found that the defendant failed to preserve a "Booker" objection to the mandatory application of the guidelines and could not show "plain error."

Senior Judges Bright and Lay dissented on both sentencing issues, and Judge Bye concurred in part but joined the dissent on the issue of market gain and sentence enhancement.

The final panel opinion had called for a remand for further proceedings on sentencing. *See* 401 F.3d 940 (2005)(per curiam).

## Higher Authority

The Supreme Court recently **granted certiorari** in the **Eighth Circuit case** of *Ahlborn v. Arkansas Dep't of Human Services*, 397 F.3d 620 (2005).

The case involves the scope of a state's right to recover against the proceeds of a settlement between an injured party and a tortfeasor when the state paid the injured party's medical expenses through Medicaid.

The Eighth Circuit panel held that a state's recovery is limited to that portion of the settlement that represents the tortfeasor's obligation for the injured party's medical costs.

The State of Arkansas argued that it was entitled, under state law, to recover up to the full amount of related medical expenses paid on behalf of the injured party regardless of the types of damages covered by the settlement. The Eighth Circuit panel, however, held that the state statute on which Arkansas relied was unenforceable as contrary to the "anti-lien" provision of federal Medicaid law.

The panel opinion suggests that state courts have reached conflicting conclusions on the issue and that the relevant federal agency, at least at one time, embraced the position taken by Arkansas.

## Footnotes

According to the latest issue of the Eighth Circuit Library Newsletter, the sexual harassment case fictionalized in the new fall movie *North Country* is the Eighth Circuit case of *Jenson v. Eveleth Taconite Co.*

Publicity for the movie bills the case as the first major sexual harassment lawsuit. The case was filed in 1988 and reached the Eighth Circuit nine years later, with the Court finding errors below that unduly limited the plaintiffs' damages recovery. 130 F.3d 1287 (1997).

Earlier published opinions in the case include the decision on class certification, 139 F.R.D. 657 (D. Minn. 1991), and the district court's findings after trial on the merits, 824 F. Supp. 847 (D. Minn. 1993).

According to the Library Newsletter, the case also is the subject of a book, *Class Action: The Story of Lois Jenson and the Landmark Case that Changed Sexual Harassment Law*, by Clara Bingham and Laura L. Gansler.

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This **newsletter** is compiled by the communications committee of the Association of the Bar of the United States Court of Appeals for the Eighth Circuit. Comments and suggestions should be addressed to committee chair Margaret Callahan ([mccallahan@belinlaw.com](mailto:mccallahan@belinlaw.com)) or vice-chair Annamary Dougherty ([adougherty@cgwg.com](mailto:adougherty@cgwg.com)).

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