



ASSOCIATION OF THE BAR OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Special Session

The historic Broadmoor in Colorado Springs, Colorado, will be the setting for the upcoming **Eighth Circuit Judicial Conference October 18-21, 2005**.

The first two days of the Conference are set aside for internal court meetings, with the general session scheduled to start the morning of Thursday, October 20. The general session program features a variety of individual speakers and panel discussions on issues ranging from Guantanamo Bay to e-discovery.

The general session will conclude at noon on Friday, October 21, 2005, with U.S. Attorney General Alberto Gonzales and the Honorable U.S. Supreme Court Justice Clarence Thomas the last two speakers on the schedule.

Additional topics for the general session include the new Class Action Fairness Act, alternative dispute resolution, federal sentencing in the "post-Booker" era, and major decisions from the recent Supreme Court term. Also, Theodore B. Olson will offer "Reflections of a Former Solicitor General," and Linda Greenhouse of the New York Times will discuss her book on former Eighth Circuit Judge and Supreme Court Justice Harry Blackmun, with comments from Senior Eighth Circuit Judges Donald Lay, Gerald Heaney and Myron Bright.

Over 500 attended the last Eighth Circuit Judicial Conference, in 2003 in Minneapolis, and even more are expected to attend this time.

Social events at the Conference will include a lawyer's reception the evening before the opening of the general session and a country western buffet and dance the next night. Those in attendance at the Conference also will enjoy beautiful Colorado Springs, which sits at the base of Pikes Peak and offers scenic trails, gardens, and a wide variety of shopping.

Facilities at the Broadmoor – which was built in 1819 and was originally a gambling casino – include three golf courses, tennis courts, hiking trails, and a spa and fitness center.

For further details, visit the Eighth Circuit web site at www.ca8.uscourts.gov and look for the Judicial Conference link on the home page. To obtain a registration packet, send an e-mail to judconf@ca8.uscourts.gov or call the Circuit Executive's Office at 314-244-2600.

Room reservations must be made separately to the Broadmoor by mail, and attorneys are advised to have their reservation cards in by September 15.

The Judicial Conference is sure to be a fun and informative experience for all who attend.

Association News

Eighth Circuit **Judge William Riley** will be the **featured guest** at the **Association-sponsored breakfast** at this fall's Eighth Circuit Judicial Conference.

"General sessions" – i.e., attorney educational programs – are scheduled for October 20 and 21, and the Association breakfast will precede the first day's session, running from approximately 7 a.m. to 8:30 a.m.

The breakfast will be free to those Association members who paid dues at the special “charter member” level in the Association’s first year and who remain current on their dues. Other Association members who are current on their dues will receive a discount on the cost of the meal, while non-members may attend by paying full cost (or joining the Association (if eligible)).

Judge Riley is expected to speak for 15 to 20 minutes but has not yet announced a topic for his remarks.

The breakfast, as well as the rest of the Judicial Conference, will be held at the Boardroom in Colorado Springs. See the “Special Session” heading in this newsletter for additional information.

Additional information about the breakfast will be sent to members shortly, by e-mail.

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Lawrence Friedman, who is in private practice in St. Louis, has been appointed as Association **director** for the **Eastern District of Missouri**. He will fill the remaining term of Bob Herman, who resigned due to lack of time.

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The Association’s **membership renewal campaign** continues in progress. Nearly two hundred members have already paid their dues for the July 1, 2005, through June 30, 2006, member year.

Membership dues are \$35, with an exemption for judicial and law clerk members of the Association. All members need to renew except those who joined after January 1, 2005.

Members who have not yet renewed for 2005-06 will be continued on the Association’s mailing list through the end of the year but will be dropped at that time without further notice.

For renewal information, visit the Association web site at www.law.ualr.edu/eighthcircuitbar and click on the “membership form” link.

Time, Place & Manner

The Eighth Circuit **clerk’s office** in **Saint Paul** will **move temporarily** to 180 East 5th St. **effective Monday, October 3, 2005**. The move is made necessary by scheduled remodeling at the Saint Paul Courthouse.

The temporary address for the Eighth Circuit is the same as for those district courts that also will be displaced by the remodeling. The Eighth Circuit clerk’s office will be on the **sixth floor**, in suite 640.

The temporary location is only a couple of blocks away from the Saint Paul Courthouse.

The Eighth Circuit clerk’s office will remain open at the Saint Paul Courthouse through the end of the business day Friday, September 30, 2005, with the move taking place over the weekend.

The clerk’s office in its temporary location will maintain the **same hours** and provide all the **same services**, according to Maureen Watts Gornik, deputy clerk in charge in Saint Paul.

Telephone numbers will remain the **same**, and attorneys may still use the Saint Paul Courthouse address – i.e., 316 North Robert Street – when sending papers to the Saint Paul clerk’s office by regular U.S. mail. However, attorneys sending papers by special or overnight delivery or by commercial delivery service to arrive after September 30 should use the new 180 East 5th Street address, said Gornik. The zip code for the temporary location is the same (55101) as for the Saint Paul Courthouse.

The **Saint Paul branch** of the Eighth Circuit **library** also will relocate temporarily from the Saint Paul Courthouse to 180 East 5th Street and will have space there on the sixth floor near the temporary clerk’s office.

While the library will continue to be open to the public and will maintain the same hours, the materials available necessarily will be limited, said Saint Paul branch librarian Nancee Halling.

Materials available in the temporary library will include Supreme Court decisions from the past five years, other federal cases from the past two years, the most recent regional reporters and Minnesota materials, court rules, treatises and

general non-legal reference materials, said Halling. Photocopying facilities will be available, as will the branch's collection of daily newspapers.

Materials that will not be available include legal encyclopedias and annotations, law reviews, and legislative history, said Halling. She noted that Minnesota attorneys will have access to such materials through the Eighth Circuit branch library in Minneapolis.

The telephone number for the Saint Paul branch library will remain the same, and attorneys can call in advance to determine whether the materials they need are available at the temporary location.

The Eighth Circuit's courtrooms and chambers in the Saint Paul Courthouse also will be unavailable during the remodeling; and the **Court, after its September 2005 court week, will not sit regularly in Saint Paul until it can return to the Courthouse**, said Eighth Circuit Clerk of Court Michael Gans.

The Court must sit at least three or four days in a particular location to make a sitting cost-effective, said Gans; yet when the Judges sit in a location that many days, they need chamber space, computer hook-ups and other facilities to allow them to keep up their other work in the afternoons, when they are not hearing arguments.

The **St. Thomas School of Law** in Minneapolis, Gans said, will be able to host the Court for **two or three full court weeks** during the 2005-06 court year. In addition, Gans said there is still a possibility that the Court will be able to sit for a full week at one of the other Saint Paul-area law schools.

To compensate for the limited ability to sit in Saint Paul, Gans said four panels of judges will sit in St. Louis most court weeks. In addition, he said that at some point during the term a panel will sit for a full week in Kansas City and for a full week in Omaha.

By current estimate, the Eighth Circuit will be **displaced** from the Saint Paul Courthouse for **two years**, said Gans. He noted, however, that the scope of the remodeling project has not yet been finally determined, such that the estimated time until re-opening of the Courthouse could change.

Information regarding the temporary relocation will be posted at the Saint Paul Courthouse as well as on the Eighth Circuit web site at www.ca8.uscourts.gov.

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The Eighth Circuit will open its **new court term** with an unusual sitting in **Saint Paul** beginning September 12, 2005.

Clerk of Court Michael Gans said that he could not remember the Court previously opening a term in Saint Paul, rather than in St. Louis, and that he is certain no prior Saint Paul sitting has ever featured four simultaneous panels.

The Saint Paul Courthouse in fact has only three courtrooms, so the fourth **panel each day** will sit at **one of four area law schools** – St. Thomas School of Law in Minneapolis on Monday and Thursday; William Mitchell College of Law in Saint Paul on Tuesday; University of Minnesota Law School in Minneapolis on Wednesday; and Hamline University School of Law in Saint Paul on Friday. Thirteen different Eighth Circuit judges are scheduled to sit on at least one of the various law school panels.

In addition, the Eighth Circuit while in Saint Paul will hear **two cases en banc**.

Gans said that the Court is using the September Saint Paul sitting, and the expanded argument calendar, to clear its docket of as many Minnesota and other "northern" cases as possible before the Court's operations in Saint Paul are limited by the temporary closing of the Saint Paul Courthouse for remodeling (see the related article above for details on the temporary closing and the relocation of court services).

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The Committee on Rules of Practice and Procedure of the U.S. Judicial Conference at its June 2005 meeting **moved forward** with **two amendments to Rule 25** of the Federal Rules of Appellate Procedure.

FRAP 25 deals with filing and service, and a proposed amendment to FRAP 25(a)(2)(D) would

authorize the adoption of **mandatory electronic filing** on a circuit-by-circuit basis, by local rule.

This proposed amendment was circulated for public comment in late 2004; and the Appellate Rules Advisory Committee, at its April 2005 meeting, made two changes in response to the comments received. First, the Advisory Committee added an express requirement that any local rule instituting mandatory electronic filing include “reasonable exceptions” to avoid potential hardship to certain litigants. The new language leaves the identification of the exact exceptions to local choice and experience.

Second, the Advisory Committee added two sentences to the FRAP 25(a)(2)(D) official comment to make clear that even with mandatory electronic filing, a circuit may require a duplicate filing – for example of a brief – in the traditional paper format.

The Rules Committee approved proposed amended FRAP 25(a)(2)(D) as revised by the Advisory Committee. This proposed amendment now goes to the U.S. Judicial Conference for consideration at its September 2005 session.

The second proposed amendment to FRAP 25 calls for the addition of a new subpart – FRAP 25(a)(5) – to address the issue of **privacy protection**. Pursuant to this proposed amendment, cases arising in district and bankruptcy courts would continue, on appeal, to be governed by the privacy provisions of the civil, criminal and bankruptcy rules, respectively. Extraordinary writs sought in criminal cases would be governed by the privacy provisions of the criminal rules, while all other matters filed initially in the circuit courts would be governed by the privacy provisions of the civil rules.

The Rules Committee approved proposed FRAP 25(a)(5) for publication in August 2005, with written comments to be accepted through February 15, 2006. The proposed privacy provisions for the civil, criminal and bankruptcy rules (FRCP 5.2; FRCrP 49.1; Bankr. R. 9037) were to be published for comment at the same time. These privacy provisions respond to the E-Government Act of 2002.

To review the text of the proposed rules amendments, or for details on how to submit

comments on the proposed privacy amendments, visit the U.S. Courts Administrative Office web site at www.uscourts.gov and click on “federal rulemaking.”

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Proposed new FRAP 32.1 regarding the **citation of “unpublished” opinions** has now been approved by the Committee on Rules of Practice and Procedure of the U.S. Judicial Conference.

The proposed rule, which was initially published for comment in August 2003, would prohibit local circuit rules limiting or discouraging the citation of federal judicial opinions which are designated as “unpublished,” “non-precedential,” or the like. The proposed rule also would require an attorney who cited an “unpublished” federal judicial opinion not available in a publicly accessible electronic database to file and serve a copy of that opinion.

The proposed rule, however, would neither prohibit, nor require, nor otherwise regulate the issuance of “unpublished” decisions. In addition the proposed rule would not require that a court give any particular precedential weight to any particular decision.

Proposed FRAP 32.1, when published, drew extensive comment; and the Rules Committee in June 2004 returned proposed FRAP 32.1 to the Appellate Rules Advisory Committee with directions to seek empirical data on certain issues.

The Advisory Committee, based on studies by the Federal Judicial Center and U.S. Courts Administrative Office, in April 2005 approved proposed FRAP 32.1 with two changes. First, the Advisory Committee changed the text of the proposed rule to make clear that it applied only to federal judicial decisions; and second, the Advisory Committee revised the comment to the proposed rule to include references to the two new studies.

The Federal Judicial Center survey, as summarized by the Advisory Committee in its report to the Rules Committee, found that judges in circuits already allowing at least some citation of “unpublished” opinions (1) do not spend substantially more time preparing “unpublished” opinions and do not prepare significantly longer

“unpublished” opinions; (2) do not have to engage in significantly more work in cases where parties cite “unpublished” decisions; and (3) find the parties’ citation of “unpublished” opinions at least occasionally helpful.

The Federal Judicial Center survey also found, according to the Advisory Committee, that attorneys in a random sample generally favored or were neutral regarding the citation of “unpublished” opinions and did not believe the adoption of proposed FRAP 32.1 would have a substantial impact on their workloads.

The Administrative Office study, as described by the Advisory Committee, involved the analysis of case disposition times and number of summary case dispositions in circuits that have liberalized their local rules to allow at least some citation of “unpublished” opinions. The study, according to the Advisory Committee, found little change when the figures from the years immediately prior to a circuit’s liberalization of its citation rule were compared with the figures from the years immediately after the liberalization.

To view the Advisory Committee’s full report to the Rules Committee on proposed FRAP 32.1, go to www.uscourts.gov/rules/reports.htm and click on the May 2005 report of the Appellate Rules Advisory Committee.

To view the Federal Judicial Center study, go to www.fjc.gov and click on “recent publications” and then on “Citations to Unpublished Opinions in the Federal Courts of Appeals.”

Proposed FRAP 32.1 now goes to the U.S. Judicial Conference for consideration at its September 2005 sessions.

Bench Briefs

Eighth Circuit **Judge Lavenski Smith** in early 2005 gave the opening **luncheon address** before a meeting of the Southwest Association of Law Libraries, according to an article appearing in the Eighth Circuit Library Newsletter and posted on the library web site.

Judge Smith in his remarks commented on the continuing importance of law libraries and librarians despite the growth of the Internet.

Judge Smith also discussed the work of an appellate judge and emphasized the degree to which the job involves solitary reading and writing. He gave the following example of the public misconception of the role of an appellate judge: A friend of his son, when told that Judge Smith was a judge, asked Judge Smith what television channel he appeared on.

For the full account of Judge Smith’s talk, go to the Eighth Circuit home page at www.ca8.uscourts.gov and click on the link at the bottom to the Eighth Circuit library.

Issues on Appeal

The Eighth Circuit this summer issued **five en banc decisions**:

On June 20, the Court en banc in *U.S. v. Alvarado-Rivera*, 412 F.3d 943, upheld the district court’s finding that two defendants had not offered “full and truthful information” as necessary to qualify for “**safety valve**” relief from a **statutory mandatory minimum sentence**.

The Court noted that the burden of proof is on a defendant to show truthful disclosure and that the district court’s conclusion is subject to review only for clear error and concluded that the district court in this case could properly infer falsity from factors such as the defendants’ admissions in their plea agreements, the results of the police search for physical evidence, and the changes in the defendants’ statements during the course of the investigation.

The Eighth Circuit panel (386 F.3d 861) had reversed the denial of “safety valve” relief, holding that the government could not overcome the effect of a defendant’s disclosure merely by asserting that the defendant’s statements were too improbable to be true.

Two judges in dissent adhered to the panel position, emphasizing in particular that the district court did not see or hear the defendants’ disclosures but instead merely deemed them incredible based on summaries provided to the court by the prosecutor.

On July 22, the Court en banc in *King v. Hartford Life & Accident Ins. Co.*, 414 F.3d 994, reversed the district court’s summary judgment in

favor of an insurance company on a coverage issue but, under **ERISA**, directed that the case be **remanded** to the **plan administrator** for further consideration.

The Eighth Circuit panel, in a unanimous decision, had found an abuse of discretion in the denial of coverage. See 357 F.3d 840.

The claim was for accidental death benefits, under an ERISA-governed employee benefit plan, when the decedent was killed in a motorcycle crash; and the insurance company took the position that the death was not “accidental” because the decedent voluntarily chose to ride while intoxicated.

The insurance company, however, in defending the denial of benefits before the Court en banc did not rely on the same definition of “accident” as used by the administrator in explaining its decision; and the Court took the insurance company’s position as an admission that the administrator’s original rationale was unreasonable and an abuse of discretion. The Court thus ordered the case remanded to the administrator for re-evaluation under the newly argued definition.

Nine judges joined the majority decision, and three of those judges also joined in a separate concurrence addressing in more detail the choice of remand as the appropriate relief.

Four judges in dissent argued that the administrator did not abuse its discretion.

On August 2, the Court en banc in *Republican Party v. White*, 416 F.3d 738, held **unconstitutional** two additional portions of a Minnesota judicial **ethics canon** regulating **judicial elections**.

Specifically, the Court invalidated (1) the canon’s prohibition on the identification by candidates for elective judicial office of their political party affiliations, their attendance at political gatherings and their seeking of or use of political endorsements, plus (2) the canon’s limitation on the personal involvement of judicial candidates in fundraising. These provisions, the Court en banc held, were not sufficiently tailored to the purpose of preserving judicial impartiality and thus violated the First Amendment.

Six judges joined the majority opinion in full, and three additional judges joined most of the majority opinion and concurred in the result.

Three judges in dissent particularly criticized the majority’s “underinclusiveness” analysis and argued that the case should be returned to the district court for the taking of further evidence in light of the Minnesota Supreme Court’s recent deliberations on the canon in question.

An additional judge concurred in part and dissented in part, believing that only the solicitation provision should be remanded for further consideration.

The Eighth Circuit panel, in a split decision on remand from the U.S. Supreme Court, had ordered remand on the solicitation provision only. See 361 F.3d 1035.

The U.S. Supreme Court directly invalidated that portion of the Minnesota canon that prohibited the announcement by judicial candidates of their positions on issues. See 536 U.S. 765.

On August 16, the Court en banc in *Ali v. Cangemi* (No. 04-2490) ordered the dismissal on grounds of **mootness** of an **alien’s petition for habeas corpus**.

The alien had been in detention awaiting deportation for more than seventeen months, and the Eighth Circuit panel, in a per curiam decision, had affirmed the district court’s order for supervised release. See 384 F.3d 989.

The prompt grant of en banc review resulted in the vacation of the panel decision; but the government nevertheless released the alien, apparently by mistake, and subsequently was been unable to locate him. Because of the government’s announced intent to return the alien to custody if it found him, the Court en banc concluded that the appeal was not moot in the constitutional sense.

The Court instead, with two judges dissenting, invoked the discretionary doctrine of “prudential” mootness and directed the district court to dismiss the alien’s habeas petition without prejudice.

On August 19, the Court en banc in *ACLU Nebraska Foundation v. City of Plattsmouth*, (No. 02-2444) upheld the placement of a “**Ten Commandments**” **monument** in a public park, holding that the monument under the circumstances reflected an acknowledgment of the historical role of religion rather than a governmental effort to favor or endorse religion.

The Court concluded that the case was governed by the recent U.S. Supreme Court decision in *Van Orden v. Perry*, 125 S. Ct. 2854.

Two judges in dissent argued that the monument was an impermissible establishment of religion because it was not part of a larger historical display combining religious and secular images.

The Eighth Circuit panel, in a split decision, had found a First Amendment violation. See 358 F.3d 1020.

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A panel of the Eighth Circuit recently in *American Boat Co. v. Unknown Sunken Barge* (No. 04-3388, 8-16-05), held that the **presumption of delivery** applies to rulings and orders sent by the district court to counsel through use of an **electronic noticing** system.

The Court, however, held that the plaintiff, who sought a reopening of the time for appeal based on lack of notice of an unfavorable summary judgment ruling (see FRAP 4(a)(6)), presented enough evidence of lack of delivery to at least be entitled to an evidentiary hearing to rebut the presumption.

* * * *

A panel of the Eighth Circuit recently in *In re Farmland Indus.*, 397 F.3d 647, concluded that it had **jurisdiction** to hear an **appeal**, brought in a **bankruptcy** case, where “a delay in review . . . would serve no purpose.”

The appeal was from an order regarding the manner in which a financial advisor to a creditor’s committee was to be paid; and the bankruptcy court, subsequent to the date of appeal, had confirmed a plan of reorganization contingent only on the outcome of the appeal.

The panel, despite finding jurisdiction in the particular case, reminded attorneys that the appellate jurisdiction of the Eighth Circuit is not as broad as the appellate jurisdiction of the Bankruptcy Appellate Panel.

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A panel of the Eighth Circuit recently in *Warnock v. Archer*, 397 F.3d 1024, held that an appellant was a **“prevailing party,”** so as to be entitled to an **award of appellate attorney fees** under 42 U.S.C. §1988, when the appellant, despite the rejection of his arguments for greater damages, obtained a broader injunction and successfully defended a cross-appeal.

The panel reduced portions of the fee request by fifty percent to take into account the limited success but approved an hourly rate of \$200 for the lead appellate attorney and included in the award those expenses customarily and reasonably charged by attorneys to clients.

The panel rejected the suggestion that the request for appellate attorney fees should have first been filed with the district court.

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The Eighth Circuit in recent decisions has addressed the following **“appellate practice” issues:**

The Eighth Circuit reviews de novo a district court decision on review of a denial of vocational rehabilitation services (see 29 U.S.C. §722), at least when the district court receives no new evidence and makes no independent findings of fact. *Reaves v. Mo. Dep’t of Education* (No. 04-2352, 9-2-05).

A finding of “substantial similarity,” as necessary to a claim of copyright infringement, is a factual finding that can be reviewed only for clear error. *Taylor Corp. v. Four Seasons Greetings*, 403 F.3d 958.

The certificate of appealability requirement of 28 U.S.C. §2253(c) applies to an attempted appeal of a ruling on a post-trial motion in a habeas or §2255 case. *United States v. Lambros*, 404 F.3d 1034 (per curiam).

A district court’s amendment of its judgment does not implicate FRAP 4(a)(4), regarding tolling of the time for appeal, when the amendment is not made in response to an actual “motion.” *U.S. v. Stute Co.*, 402 F.3d 820.

The doctrine of “harmless error” cannot be invoked to uphold a conviction when the defendant was deprived of the Sixth Amendment right to

counsel of defendant's choice. *United States v. Gonzalez-Lopez*, 399 F.3d 924.

An appellant will rarely, if ever, be able to show prejudice from error in the admission of evidence, as necessary to reversal, when the improper evidence related to only one of several theories of recovery and the jury returned a general verdict. *Regions Bank v. BMW North America*, 406 F.3d 978.

A remand based upon the rejection of a fraudulent joinder argument is a remand for lack of federal jurisdiction within the contemplation of 28 U.S.C. §1447(d), such that an appeal from such a remand order will be dismissed for lack of appellate jurisdiction. *Whitley v. Burlington Northern & Santa Fe R. Co.*, 395 F.3d 829.

Higher Authority

The Supreme Court recently in *Exxon Mobil Corp. v. Allapattah Services*, 125 S. Ct. 2611, **rejected the Eighth Circuit position** on the issue of whether all plaintiffs in a **diversity** action must meet the **amount-in-controversy** requirement for federal jurisdiction to exist.

The Supreme Court, on review of conflicting decisions from the Eleventh and First circuits, held that even in a class action, so long as the claim of one plaintiff meets the jurisdictional amount requirement and there is no other jurisdictional defect, a federal court potentially can exercise supplemental jurisdiction over the claims of the remaining plaintiffs pursuant to 28 U.S.C. §1367.

The Eighth Circuit previously in *Trimble v. Asarco, Inc.*, 232 F.3d 946, while finding that no member of the plaintiff class met the amount-in-controversy threshold for diversity jurisdiction, further indicated that supplemental jurisdiction in any event would not have been available unless

each class member met the amount-in-controversy threshold. The Court reasoned that an exercise of supplemental jurisdiction first requires an underlying "civil action" over which the federal court has jurisdiction and that no such civil action exists, in the context of a diversity class action, unless each class member individually meets the amount-in-controversy threshold.

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The Supreme Court on October 31, 2005, will hear **oral argument** in the **Eighth Circuit case** of *Reeder-Simco GMC v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701.

Reeder-Simco is the only Eighth Circuit case accepted for argument last term but carried over until this fall.

The case involves the "purchaser" requirement in a Robinson-Patman Act (15 U.S.C. §13) price discrimination claim in the competitive bidding context and, if the finding of a violation is upheld, the scope of recoverable damages.

Footnotes

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) or vice-chair Annamary Dougherty (adougherty@cgwg.com).

Committee members Andrew Faulkner and Lajuana Counts contributed to this issue.

The committee would welcome additional members and/or occasional contributors.