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TRIAL NOTEBOOK

STEVEN P. GARMISA
Hoey & Farina

Arbitration hearing gets court's OK

Gore v. Alltel Communications

There was no arbitration provision in Christopher Gore's two-year contract with First Cellular Southern Illinois. But Alltel Communications acquired First Cellular while Gore had 17 months left on his subscription — and Gore received an invoice from Alltel saying that, by paying the bill, he was agreeing to all of the terms and conditions of the "customer service agreement" posted on Alltel's website.

The Alltel contract said: "Any dispute arising out of this agreement or relating to the services and equipment must be settled by arbitration. All claims must be arbitrated individually and there will be no consolidation or class treatment of any claims."

After his service was switched to a network that required him to purchase new equipment, Gore filed a class action against First Cellular and Alltel alleging breach of contract, consumer fraud, conspiracy, aiding and abetting tortious conduct and unjust enrichment.

The state court case was removed to federal court and the district judge rejected a defense request for arbitration.

Reversing, the 7th U.S. Circuit Court of Appeals concluded that the arbitration provision in the Alltel contract applied, "because Gore's claims are based in part on the products and services he received under the Alltel agreement." *Gore v. Alltel Communications.* No. 11–2089 (Jan. 19, 2012).

Here are highlights of Judge Ann Claire Williams' opinion (with omissions not noted in the text):

To determine whether a contract's arbitration clause applies to a given dispute, federal courts apply state law principles of contract formation. Once it is clear, however, that the parties have a contract that provides for arbitration of some issues between them, any doubt concerning the scope of the arbitration clause is resolved in favor of arbitration as a matter of federal law. *Moses H. Cone Mem'l Hosp. v. Mercury Constr.* 460 U.S. 1 (1983).

"To this end, a court may not deny a party's request to arbitrate an issue unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Kiefer v. Tarkett.* 174 F.3d 907 (7th Cir. 1999).

In cases like this, where the parties enter into two agreements — though only one contains an arbitration clause and the plaintiff brings a cause of action based, at least in part, on conduct contrary to the agreement that does not have the arbitration clause, the parties can be compelled to arbitrate only if 1) the clause itself is broad enough to encompass their dispute or 2) the agreement containing the clause incorporates the other by reference. *Rosenblum v. Travelbyus.com.* 299 F.3d 657 (7th Cir. 2002).

The Alltel agreement does not incorporate the First Cellular agreement by reference. We must decide, therefore, only whether the clause itself is broad enough to encompass this dispute. And it is undisputed that Illinois law governs our inquiry.

In Illinois, "the objective in interpreting a contract is to ascertain and give effect to the intent of the parties." *Carey v. Richards Bldg. Supply.* 367 Ill.App.3d 724 (2006). Most important are "the objective manifestations of the parties, including

NOTEBOOK, *Page 5*

IN THE NEWS

BY BETHANY KRAJELIS

(From left to right) Haywood E. McDuffie of the Department of Homeland Security talked with Patricia Brown Holmes of Schiff, Hardin LLP and a past president of the Black Women Lawyers Association of Greater Chicago; and Cook County Associate Judge Patrice Munzel Ball-Reed, also a past president of the bar group, at the Black Women Lawyers Association's 25th Anniversary Gala on Friday. (See the accompanying story and photo on page 3.) *Ben Speckmann*

IN THE LAW FIRMS

Caitlin R. Fitzpatrick has joined Rubin & Norris LLC as an associate. She comes to the firm from Allstate Investments LLC and will concentrate her practice on commercial and residential real property tax issues.

Caitlin R. Fitzpatrick

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Alan R. Greenfield has joined Greenberg, Traurig LLP as a shareholder. He comes to the firm from DLA Piper and will focus his practice on franchising, licensing and distribution matters.

Janine M. Landow-Esser

AROUND TOWN

Janine M. Landow-Esser, a partner and chairwoman at Quarles & Brady LLP, recently received Chicago United's "2011 Ambassador Award."

She serves on the group's Leaders Council along with her colleague and fellow partner **Kevin E. Slaughter**. He was recognized with a "2011 Visionary Honorary Mention" at the group's annual meeting late last month.

Landow-Esser and Slaughter were honored for their efforts in support of the Chicago United/Chicago Scholars' Career Mentoring Initiative.

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The Illinois Campaign for Political Reform will present a panel discussion, "Out of the Shadows of Corruption," at 12:30 p.m., Wednesday, at the East Bank Club, 500 N. Kingsbury St.

Panelists will include Attorney General **Lisa M. Madigan, Reid J. Schar, Joel R. Levin** and **Scott R. Lassar.**

As former assistant U.S. attorneys, Schar prosecuted ousted Gov. **Rod R. Blagojevich** and Levin served on the team that prosecuted former Gov. **George Ryan**.

Lassar, a former U.S. attorney for the Northern District of Illinois, handled the prosecution of the ADM price-fixing case.

IN THE NEWS, *Page 2*

Lisa M. Madigan

Judge bans tweets from criminal trial involving the Hudson family

BY JERRY CRIMMINS
Law Bulletin staff writer

The judge in the trial of a man accused of killing three members of singer Jennifer Hudson's family has banned reporters from tweeting from the trial courtroom although some other judges allowed it.

Cook County Circuit Judge Charles P. Burns seems to be saying, "I don't want the media to be a distraction," said litigation consultant Alan Tuerkheimer of Zagnoli McEvoy Foley LLC.

"Basically this judge is running a tight ship," Tuerkheimer said, "to curtail the prospect of this becoming a circus atmosphere."

The judge's "concern is A, courtroom decorum, and B, jurors not being distracted by people sitting in the gallery constantly tweeting," said Irving Miller, a criminal defense attorney who is also media liaison for the judge.

Jurors are also forbidden to say anything about the case in e-mails, texting, Twitter or other social media.

More national news media have asked for credentials to cover the trial of William Balfour, scheduled to start April 23, than covered the 2008 trial of singer R. Kelly on child pornography charges, said Penny Mateck, trial media coordinator for Sheriff Thomas J. Dart.

She said 110 media personnel from 30 media outlets asked for credentials.

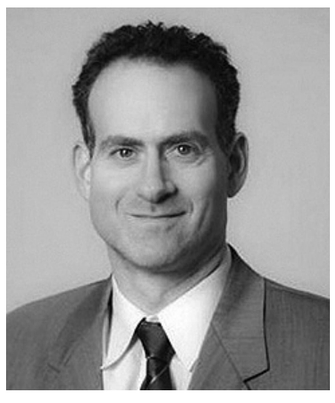
The judge's decorum order for the news media is unusual for the Leighton Criminal Courts Building at 26th Street and California Avenue, Miller said.

"The way things are usually done out here is that no telephones are allowed in the courtroom at all," Miller said. Typically, deputies will either confiscate a phone if a reporter uses one in the courtroom or make the reporter leave.

But Burns' written decorum order for news media says, "limited and discrete e-mails will be permitted subject to the court's discretion."

This was a compromise suggested by a Chicago Tribune reporter to allow reporters in the courtroom to contact their editors or broadcast reporters contact their co-workers via e-mail, Miller said.

The judge had three meetings with news media representatives who wished to attend the Balfour trial "to get a general consensus" on what the rules would be, Miller said.



Alan Tuerkheimer

Burns' written decorum order does not specifically say reporters may not tweet from the trial courtroom, but Miller said this is the case.

Reporters who want to tweet live during the trial can do so from the overflow courtroom, Miller said.

Mateck said "streaming, real time transcriptions" of testimony, arguments and legal discussions from the courtroom will be available on a screen in the overflow courtroom.

Reporters can also use laptop computers in the overflow courtroom, Miller said.

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TURN INSIDE

AMICUS CURIOUS

Civil rights leader shares her story

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ILLINOIS PRISONS

Good behavior program may return

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LAWYER DISCIPLINE

ARDC panel hears attorney fraud case

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"Helping attorneys with the mechanics of practicing law requires me to examine regularly what it takes to be an effective lawyer."

LAWYERS' FORUM, PAGE 4

NATO will trim court dockets

Some report lighter caseloads during summit

BY PAT MILHIZER
Law Bulletin staff writer

Lawyers who practice in the Daley Center should expect several light dockets when the NATO summit and the expected wave of demonstrators arrive here next month.

"I think it's reasonable to anticipate that if they're going to cause a fuss, it's going to be around the Daley Plaza," said William D. Maddux, presiding judge of the Cook County Circuit Court Law Division.

Maddux told the judges in his division — which handles personal injury, medical malpractice and other high-stakes disputes — to avoid setting any hearings or trials from May 14 through May 21.

"We just want to avoid the jurors getting trampled. ... We're just not going to subject the public to all that nonsense," Maddux said.

Law Division judges will use the time out of their courtrooms to review pending motions so the cases are ready for trial after the summit ends, Maddux said.

"It's something that can occupy the troops. ... They'll have the luxury of the time to actually read all that material and they can make their decisions and clear up their dockets that way. There's plenty they'll be able to do," Maddux said.

The summit runs on Sunday, May 20, and Monday, May 21, at McCormick Place. Crowds and public demonstrations are expected during and in the week leading to the event.

No default calls and case management status calls in foreclosures are scheduled in the Chancery Division on May 18 and 21. There also won't be any hearings on motions in the general chancery calls on those two days.

Presiding Judge Moshe Jacobius said most judges in his division will run light dockets on May 18 and 21.

"The calendars are open and there are some hearings scheduled," Jacobius said.

Edmund Ponce de Leon, presiding judge of the County Division, said lawyers who represent litigants in property assessment disputes are not scheduling cases around the time of the summit unless it's necessary. The judge also plans to meet with adoption lawyers to talk about not scheduling those cases during the summit so children don't come downtown.

"We'll probably have to put those off to another day," Ponce de Leon said.

"The employees, staff, deputies, clerks are all asking me if court's going to be open. I tell them right now, as far as I know, court will be open unless there's a change."

Probate Division Presiding Judge Mary Ellen Coghlan referred questions about any potential division

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Group seeks input on foreclosure ideas

High court panel examines loss mitigation, mediation

BY JOSH WEINHOLD
Law Bulletin staff writer

SPRINGFIELD — A special Illinois Supreme Court committee seeks feedback on potential recommendations aimed at making the foreclosure process fairer to homeowners.

The topics currently up for consideration include requiring a loss mitigation process to take place prior to a foreclosure and bringing uniformity to mediation programs throughout the state, committee members said.

"The foreclosure crisis is going to be with us for a while," said Clifford L. Meacham, an arbitrator/mediator at JAMS Inc. and a former Cook County judge. "Whatever we can do collectively to make the process more transparent, more fair, more expeditious — it's just in all of our interests to do that."

The 19-member Special Supreme Court Committee on Mortgage Foreclosures formed a year ago to examine state foreclosure methods and recommend ways to improve them. The group split into a pair of subcommittees, one focusing on practices and procedures and one examining loss mitigation and mediation.

At a June 8 public hearing, the loss mitigation and mediation subcommittee wants input on various

FORECLOSURE, *Page 22*

Tennessee toughens new judicial discipline panel

BY LUCAS L. JOHNSON II
Associated Press writer

NASHVILLE, Tenn. — Tennessee is about to adopt a new method for disciplining judges that supporters say contains more accountability and should help restore the public's faith in the judicial system.

"We got a lot of things in it that we wanted," said state Sen. Mae Beavers. "I think it ended up being a fairly good piece of legislation. There's more accountability than there is at the present time."

The Mount Juliet Republican has long been an outspoken critic of the Court of the Judiciary, which she said has dismissed too many citizen complaints against judges accused of serious misconduct.

The proposal that overwhelmingly passed both chambers of the legislature and is being reviewed by the governor would terminate the court in July and replace it with a 16-member Board of Judicial Conduct that would have a similar mission of ensuring that judges are ethical and fit to serve on the bench.

The difference, however, is that it has new provisions to hold judges more accountable, such as making it more difficult to dismiss complaints against jurists.

Beavers and Court of Criminal Appeals Judge Jeff Bivins shared their opinions about the disciplinary panel at a February forum sponsored by the Tennessee Press Association and The Associated Press.

While they had their differences, they did agree there have been problems with the Court of the Judiciary.

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Certain principles guide a person during estate planning

I'll get an estate plan when I have an estate to plan!"

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Estate planning attorneys hear this phrase all too often. The frustration, however, increases when we hear this from fellow licensed attorneys. We all are familiar with the old adage of the shoemaker whose son walks around barefoot. The legal arena is not the only practice plagued by this adage — but it may be time to say "enough!"

Estate planning is guided by the three following principles: Minimizing estate tax consequences, avoiding probate and increasing asset protection.

Estate tax consequences

With the current federal estate tax exemption at $5.12 million a person, many people put off estate planning. However, if Congress does not revise the current tax code, the federal exemption is scheduled to drop to just $1 million in 2013. For every dollar in excess of the federal exemption, the estate tax rate is 35 percent at the federal level or about 45 percent when you combine federal and state taxes. Furthermore, Illinois has an estate tax exemption of only $3.5 million. And for estates in excess of $3.5 million but less than the federal exemption of $5.12 million, the Illinois estate tax rate can be 22.5 percent. With proper planning, these taxes can often be minimized or even avoided.

Avoid probate

Regardless of whether you are concerned with estate tax consequences, anyone who has experienced probate understands the importance of avoiding it. Decedents with assets valued at $100,000 or more titled in their individual names are required to open a probate estate. Probate is expensive and everything becomes a matter of public record. Most challenging, however, is the fact that the estate is practically frozen during the six-month creditor claims period — and sometimes for several years afterward. Thus, beneficiaries do not have immediate access to funds. It is possible to avoid probate with strategic titling of assets — holding assets as joint tenants with rights of survivorship or tenants by the entirety. However, these forms of titling are not helpful if the parties die simultaneously, fail to maximize the use of estate tax exemptions and do not provide any asset protection for beneficiaries.

Asset protection

At death, we have a unique opportunity to provide phenomenal asset protection for beneficiaries. In today's litigation-crazed society, I advise clients to live by my mother's adage "hope for the best ... and prepare for the worst." Do you want the assets left to beneficiaries to be reachable by their creditors? For a surviving spouse, do you want your assets to be used on a future spouse or possibly passed to your in-laws upon your spouse's subsequent death? For children, it is important to not only protect them from creditors (whether third party or a future ex-spouse), but also to protect children from themselves. Do you want 7-year-old Susie to go to the bank at age 18 and withdraw all of her inheritance?

For these reasons, estate planning attorneys encourage clients to have an estate plan that incorporates a revocable living trust. Specifically, clients are advised to have the following four documents as the foundation of their estate plan: a revocable living trust, a pour-over will, power of attorney for health care and power of attorney for property.

THE BUZZ

LINDSEY PAIGE MARKUS

Lindsey Paige Markus, a principal at Chuhak & Tecson P.C., draws on her early career in business, finance and clinically applied neuroscience to communicate with clients and develop creative solutions to fit their estate planning and asset protection needs. Lindsey was named an Illinois Super Lawyers Rising Star in 2010, 2011 and 2012. She is licensed in Illinois and Florida.

Revocable living trust

A revocable living trust provides the most effective mechanism to maximize use of your estate tax exemption, avoid probate and provide asset protection for beneficiaries. A living trust provides no asset protection during your lifetime, but upon death the living trust becomes irrevocable and assets can be passed "in trust" to beneficiaries.

> *"Take the time to make sure you have the appropriate documents in place to minimize taxes, avoid probate, provide asset protection — and ultimately care for your loved ones."*

It can provide for the creation of a spendthrift or other types of trusts which can be used to promote values to heirs (encourage education and philanthropy) and protect the inheritance from the reach of creditors, judgments or divorces. Furthermore, in the event of incapacitation, the appointed successor trustee can manage the trust assets. This eliminates additional legal expenses traditionally incurred with guardianship/conservatorship proceedings.

Pour-over will

A pour-over will is a special kind of will that works in conjunction with a living trust. The key provision is "pour-over" provision which provides that any assets titled in the decedent's individual name will pour over into the decedent's trust at death. The will would also include guardianship provisions.

Power of attorney for health care/property

Powers of attorney name an agent who is empowered to make health-care or financial decisions on your behalf in the event you are unable to do so. New statutory forms which provide an increased standard of care for agents became effective last July. In addition, the new power of attorney for healthcare incorporates language that ensures an agent will have access to necessary medical records to make informed medical decisions in accordance with the Health Information Portability and Accountability Act.

There is never a "good time" to address death and taxes — but it is something that we all are guaranteed to confront. Take the time to make sure you have the appropriate documents in place to minimize taxes, avoid probate, provide asset protection — and ultimately care for your loved ones.