Case No. _____

IN THE SUPREME COURT OF NEVADA

UNITE HERE HEALTH, a multi-employer health and welfare trust, as defined in ERISA Section 3(37); and NEVADA HEALTH SOLUTIONS, LLC, a Nevada limited liability company,

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT COURT JUDGE,

Respondent,

- and -

STATE OF NEVADA EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP,

Real Party in Interest.

District Court Case No. A-17-760558-B, Department XVI

PETITION FOR EXTRAORDINARY WRIT RELIEF

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June 30, 2021

NRAP 26.1 DISCLOSURE

Pursuant to Nevada Rule of Appellate Procedure 26.1, Petitioners Unite Here Health and Nevada Health Solutions, LLC (jointly, "UHH") submit this Disclosure:

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Unite Here Health is a multi-employer health and welfare trust, as defined in ERISA Section 3(37). It has no parent company, and no publicly held companies own ten (10) percent or more of its stock.

2. Nevada Health Solutions, LLC is a Nevada limited liability company. It is wholly-owned by Unite Here Health. No publicly held companies own ten (10) percent or more of its stock.

3. The law firm of Bailey❖Kennedy represents UHH in the underlying action and continues to represent them for the purposes of this Petition.

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4. Neither Unite Here Health nor Nevada Health Solutions, LLC are using a pseudonym for the purposes of this Petition.

DATED this 30th day of June, 2021.

BAILEY❖KENNEDY

By: _*/s/ Dennis L. Kennedy*
JOHN R. BAILEY
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Pursuant to NRS 34.160 and NRAP 21, Petitioners Unite Here Health and Nevada Health Solutions, LLC (jointly, "UHH") petition this Court to issue an extraordinary writ of mandamus:

- Vacating the District Court's[1] Order Denying Motions (I) for Leave to File Third-Party Complaint; and (II) to Consolidate ("Order Denying Motions for Leave and Consolidation"), (11P.A.46[2]);

- Instructing the District Court to grant UHH's Motion for Leave to File Third-Party Complaint ("Motion for Leave"),[3] permitting UHH to implead Xerox State Healthcare, LLC ("Xerox") and Silver State Health Insurance Exchange ("Silver State"), (6P.A.28; 6P.A.29; 7P.A.32); and

- Instructing the District Court to grant UHH's Motion to Consolidate Case No. A-20-816161-C[4] ("Motion to Consolidate"), joining the Silver State

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[1] "District Court" refers to Department XVI of the Eighth Judicial District Court, which is presiding over the underlying action of *State of Nevada ex rel. Nevada Health Co-Op vs. Milliman, Inc.*, No. A-17-760558-B ("Milliman Lawsuit").

[2] For citations to the Petitioners' Appendix, the number preceding "P.A." refers to the applicable volume of the Appendix, while the number succeeding "P.A." refers to the applicable tab.

[3] The Motion for Leave and Motion to Consolidate are jointly referred to as "Motions for Leave and Consolidation."

[4] Case No. A-20-816161-C, titled *State of Nevada ex rel. Nevada Health Co-Op v. Silver State Health Insurance Exchange*, pending in Department VIII of the Eighth Judicial District Court, is referred to as the "Silver State Lawsuit."

Lawsuit with the Milliman Lawsuit, as the plaintiff in both actions (State of Nevada ex rel. Commissioner of Insurance, Barbara D. Richardson, in her official capacity as Receiver for Nevada Health Co-Op ("Receiver")) seeks identical damages from two different defendants (Unite Here Health and Silver State), (7P.A.31).

This Petition for Extraordinary Writ Relief ("Petition") is directly related to a consolidated appeal/writ petition currently pending before this Court (*Unite Here Health v. State of Nevada ex rel. Nevada Health Co-Op*, No. 82467/82552 (the "Conflicts Appeal")). The Conflicts Appeal concerns the Receivership Court's[5] denial of UHH's Motion to Disqualify Greenberg Traurig, LLP ("Greenberg") due to undisclosed and actively concealed conflicts of interest.[6] (7P.A.33 at 1323-1353; 9P.A.39.)

As set forth in the Conflicts Appeal, Greenberg is and/or was concurrently representing ***the Receiver*** for the CO-OP; ***Valley Health System*** ("Valley"), a

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[5] "Receivership Court" refers to Department XXI of the Eighth Judicial District Court, which is presiding over the receivership of Nevada Health Co-Op ("CO-OP"), an insolvent insurance company in the process of liquidation, in *State of Nevada ex rel. Commissioner of Insurance vs. Nevada Health Co-Op*, No. A-15-725244-C ("Delinquency Proceeding").

[6] Greenberg is counsel for the Receiver in the Delinquency Proceeding and the Milliman and Silver State Lawsuits.

significant creditor of the CO-OP's receivership estate ("Receivership Estate"); and ***Xerox***, a substantial target defendant in both the Milliman and Silver State Lawsuits. Greenberg, the Receiver, and the Special Deputy Receiver ("SDR")—the Texas firm of Cantilo & Bennett, LLP[7] — as fiduciaries to the Receivership Court, the Receivership Estate, and the creditors of the Receivership Estate, had a duty to disclose Greenberg's conflicts of interest to the Receivership Court at the time Greenberg sought appointment as the Receiver's counsel. Instead, they actively concealed Greenberg's conflicts. As a result, these conflicts have (i) severely hampered the Receiver's ability to satisfy the creditors' claims, (ii) put the defendants in the Milliman and Silver State Lawsuits at risk of being held liable for the harm caused by Xerox, and (iii) eroded the public's confidence in the impartiality of the Delinquency Proceeding and the Milliman and Silver State Lawsuits.

This instant Petition provides another concrete example of how Greenberg's ongoing conflicts of interest have directly impacted and prejudiced parties such as UHH who have been sued by the Receiver. Specifically, the District Court

[7] Greenberg, the Receiver, and the SDR are referred to collectively as the "Greenberg Group."

confirmed that the only reason it denied UHH's timely Motions for Leave and Consolidation was Greenberg's conflicts of interest — as both motions would have added Xerox into the Milliman Lawsuit, making it even more clear that Greenberg must be disqualified as counsel for the Receiver. (11P.A.46 at 1997:25-1998:2, 1998:14-15.)

The District Court manifestly abused its discretion in allowing the ***self-inflicted prejudice*** by the Receiver, due to the anticipated disqualification of her counsel, to outweigh the prejudice that Greenberg's conflicts have caused UHH. UHH is not responsible for the Receiver's and the SDR's decision to retain Greenberg in the face of known conflicts, nor is UHH responsible for the Greenberg Group's concealment of these conflicts from the Receivership Court. Yet, the District Court is forcing UHH to bear the brunt of Greenberg's conflicts by denying the Motions for Leave and Consolidation.

DATED this 30th day of June, 2021.

BAILEY❖KENNEDY

By: /s/ *Dennis L. Kennedy*
JOHN R. BAILEY
DENNIS L. KENNEDY
SARAH HARMON
JOSEPH A. LIEBMAN

Attorneys for Petitioners

I. NRAP 21(a)(3)(A) ROUTING STATEMENT

The issues raised in this Petition should be retained by the Supreme Court pursuant to NRAP 17(a)(9), (11), and (12). First, this Petition concerns an Order issued by a business court. Second, it presents questions of first impression concerning a district court's discretion to deny timely and meritorious motions for leave to file a third-party complaint and for consolidation merely because the requested relief may exacerbate opposing counsel's self-inflicted conflicts of interest. Third, it is a matter of statewide public importance that the Delinquency Proceeding and its related asset-recovery actions (the Milliman and Silver State Lawsuits) are fair and impartial. Fourth, this Petition does not fall within any of the categories of cases presumptively assigned to the Court of Appeals pursuant to NRAP 17(b). Finally, due to the overlapping issues between this Petition and the Conflicts Appeal, UHH intends to move to consolidate the two matters in the interest of judicial economy and efficiency.

II. INTRODUCTION

In January 2017, the Receivership Court approved the Receiver's retention of Greenberg as its counsel for the Delinquency Proceeding and any related asset-recovery lawsuits. (1P.A.4 at 0024:25-27.) The Greenberg Group admits that they

were aware, at the time of Greenberg's appointment, that Greenberg suffered from a conflict of interest relating to its concurrent representation of both the Receiver and Xero***x — a potential defendant likely responsible for the failure of the CO-OP***. (9P.A.35 at 1598:15-17; 8P.A.34 at 1363:6-8.) Despite their undisputed roles as fiduciaries to the CO-OP's creditors (including UHH), the Receivership Court, and the Receivership Estate, the Greenberg Group concealed Greenberg's conflict of interest in order to secure Greenberg's appointment as counsel for the Receiver.

Greenberg's loyalty to Xerox — its client in ***multiple, related matters*** — (4P.A.24 at 0683:16-28, 0684:9-23, 0685:1-4, 0686:7, 0701:9-10, 0702:1-25), prevented Greenberg from impartially evaluating the true cause of the CO-OP's demise — or the alleged culpability of other potential defendants, such as UHH. *In re S. Kitchens, Inc.*, 216 B.R. 819, 829 (Bankr. D. Minn. 1998) ("Litigation like this cannot go ahead under the pall that its architects may not have analyzed, structured, and pled it with full detachment, and may be influenced by continuing loyalty to an unsued agent of the Debtor's downfall."). Thus, when Greenberg began to file asset-recovery actions against various defendants (including UHH), Xerox was conspicuously omitted as a defendant. (1P.A.5; 2P.A.14.) Accordingly, once UHH obtained sufficient evidence of Xerox's culpability and

responsibility for the CO-OP's failure, UHH filed a Motion for Leave to implead Xerox and Silver State. (6P.A.28 at 1122:16-1123:14.)

UHH also filed a Motion to Consolidate the Milliman and Silver State Lawsuits in order to eliminate the risk of a double recovery by the Receiver. (7P.A.31 at 1280:3-17.) Specifically, the Receiver seeks to recover $510,651.27 in premium payments allegedly owed to the CO-OP from Silver State; yet, the Receiver's experts have opined that these same damages are owed by Unite Here Health. (2P.A.14 at 0311:15-18; 7P.A.30 at 1185 at ¶ 6.)

While the District Court found that UHH's Motion for Leave was timely, it nevertheless denied the motion ***based solely on the potential prejudice to the Receiver resulting from Greenberg's disqualification for a self-inflicted conflict of interest***. (11P.A.46 at 1997:18-19, 1997:25-1998:2, 1998:6-10.) The District Court denied the Motion to Consolidate for this same reason. (*Id.* at 1998:14-15.) Thus, the District Court chose to protect the Greenberg Group (despite their active concealment of the conflict and breach of their fiduciary duties), to UHH's detriment, by forcing UHH to litigate related claims against Xerox and Silver State in separate actions and to bear the risk of inconsistent judgments. In doing so, the District Court ignored NRCP 14's and NRCP 42's goal of promoting judicial

economy and efficiency. Even worse, UHH now faces the prospect of having to pay a judgment in excess of ***$142 million*** before even being permitted to initiate a contribution claim against Xerox and Silver State. (7P.A.30 at 1183.) For all these reasons, the District Court's refusal to permit UHH to implead Xerox and Silver State, and its refusal to consolidate the Silver State and Milliman Lawsuits, was a manifest abuse of discretion.

III. REASONS WHY EXTRAORDINARY WRIT RELIEF IS PROPER

A. Standard of Decision for Seeking Writ Relief.

This Court has original jurisdiction to issue writs of mandamus. NRS 34.160. A writ of mandamus is proper to compel a public officer to perform an act that the law requires "as a duty resulting from an office, trust[,] or station," where no plain, speedy, and adequate remedy of law is available. *Id.*; NRS 34.170.

This Court has broad discretion to entertain a petition. *Leibowitz v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 119 Nev. 523, 529, 78 P.3d 515, 519 (2003). Writ petitions have typically been entertained: (1) "where considerations of sound judicial economy and administration militate[] in favor of granting such petitions," *Smith v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 113 Nev. 1343, 1344, 950 P.2d

280, 281 (1997); (2) "where the circumstances reveal urgency and strong necessity," *Barngrover v. Fourth Jud. Dist. Ct. ex rel. Cnty. of Elko*, 115 Nev. 104, 111, 979 P.2d 216, 220 (1999); and/or (3) where "an important issue of law needs clarification," *Chur v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 136 Nev. 68, 70, 458 P.3d 336, 339 (2020) (internal quotation omitted).

B. Writ Relief Is Appropriate Here.

This Court should exercise its discretion to consider this Petition and grant the relief sought for the following reasons:

First, UHH has a direct and substantial interest in filing this Petition. Both UHH parties are defendants in the Milliman Lawsuit, in which the Receiver seeks to recover damages from parties it contends are responsible for the CO-OP's insolvency. (1P.A.6 at 0125:7-9.) Nonetheless, two of the parties primarily responsible for the CO-OP's demise — Xerox and Silver State — were not named as parties due to Greenberg's conflict of interest. UHH sought to implead them; however, the District Court abused its discretion and denied the Motion for Leave due to Greenberg's conflict of interest. (6P.A.28 at 1118:2-5; 11P.A.46 at 1997:25-1998:2.) UHH also sought to consolidate the Milliman and Silver State Lawsuits to prevent a double recovery by the Receiver, but the District Court also

denied this motion due to Greenberg's conflict of interest. (2P.A.14 at 0311:15-18; 7P.A.30 at 1185 at ¶ 6; 7P.A.31 at 1280:3-17; 11P.A.46 at 1998:14-15.)

Second, the issues raised herein are interrelated with the issues raised in the Conflicts Appeal. UHH intends to move to consolidate this Petition with the Conflicts Appeal, given that the District Court denied the Motions for Leave and Consolidation based solely on Greenberg's conflict of interest with Xerox.

Third, the District Court manifestly abused its discretion in denying the Motions for Leave and Consolidation. *See Walker v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, 136 Nev. Adv. Op. 80, 476 P.3d 1194, 1196-97 (2020). It is well-settled that motions for impleader or for consolidation should be freely granted to promote judicial efficiency and economy. *Shafarman v. Ryder Truck Rental Inc.*, 100 F.R.D. 454, 459 (S.D.N.Y. 1984);[8] *Nalder v. Eighth Jud. Dist. Ct ex rel. Cnty. of Clark.*, 136 Nev. 200, 207, 462 P.3d 677, 685 (2020). Yet, the District Court denied the Motions for Leave and Consolidation merely because Greenberg's representation of Xerox in several, related matters would have exacerbated the need for Greenberg's disqualification as counsel for the Receiver.

[8] Federal cases interpreting rules of civil procedure are "strong persuasive authority" in Nevada courts. *Exec. Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotation omitted).

While potential prejudice to the plaintiff resulting from impleader or consolidation is a relevant consideration, the District Court abused its discretion in allowing Greenberg's self-inflicted conflict of interest to outweigh UHH's right to implead Xerox and Silver State or to consolidate two overlapping matters to prevent double recovery by the Receiver.

Finally, this Court has previously entertained writ petitions relating to the denial of a motion to join new parties, finding that "when, as here, legal error leads the district court to decline to exercise discretion that it indisputably has regarding prospective additional parties, mandamus may lie, in the discretion of this court, to avert further avoidable error." *Lund v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 127 Nev. 358, 363, 255 P.3d 280, 284 (2011). Therefore, it is necessary for the Court to entertain this Petition to prevent Greenberg's undisclosed conflict of interests from prejudicing every action related to the CO-OP and the Delinquency Proceeding.

IV. RELIEF REQUESTED

UHH seeks a writ of mandamus vacating the Order Denying Motions for Leave and Consolidation and instructing the District Court to grant the Motions for Leave and Consolidation.

V. TIMING OF THIS PETITION

While there is no specific time limit for the filing of a petition for extraordinary writ relief, such relief should be timely sought. *Widdis v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, 114 Nev. 1224, 1227-28, 968 P.2d 1165, 1167 (1998). The Order Denying Motions for Leave and Consolidation was entered on June 11, 2021. (11P.A.46.) UHH filed this Petition on June 30, 2021. Thus, this Petition is timely.

VI. ISSUE PRESENTED FOR REVIEW

This Petition presents the following issue: Whether the District Court has the discretion to deny the timely, relevant, and meritorious Motions for Leave and Consolidation merely because the requested relief may exacerbate opposing counsel's self-inflicted conflicts of interest?

VII. STATEMENT OF FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

A. General Background.

In 2012, the CO-OP was created as a non-profit health insurance company under the Patient Protection and Affordable Care Act ("ACA"). 42 U.S.C. § 18001, et seq.; *see also* 6P.A.26 at 0953:2-22. Unite Here Health was the third-

party administrator for some of the CO-OP's medical claims. (1P.A.6 at 0127:20-21, 0177:20-22; 0178:10-23.) Similarly, Nevada Health Solutions, LLC — an entity affiliated with Unite Here Health — performed utilization management services for the CO-OP. (*Id.* at 0128:18-19, 0129:7, 0168:19-26.)

B. Xerox's Failures and the Damage It Caused to the CO-OP.

The ACA provided for the creation of American Health Benefit Exchanges, which were marketplaces in which consumers could evaluate and purchase insurance policies from ACA insurers, like the CO-OP. 42 U.S.C. § 18031(b). Nevada elected to create its own exchange, and it created Silver State to develop and oversee it. NRS 695I.200.

In 2012, Silver State awarded Xerox a $72 million contract to administer and operate the exchange (the "Xerox Exchange"). (1P.A.2 at 0008; 3P.A.23 at 0410, at ¶ 6; 9P.A.37 at 1722:26-27.) However, beginning with its initial rollout on October 1, 2013, the Xerox Exchange was an unmitigated disaster. (3P.A.23 at 0460-0550.) Xerox's failures led Silver State to engage Deloitte Consulting LLP ("Deloitte") to evaluate the Xerox Exchange, and Deloitte found more than 1,500 defects — over 500 of which were of a "higher severity." (*Id.* at 0462, 0469.) Xerox even publicly admitted, in 2014, in a letter from its Chairman and CEO to

"All Nevadans," that there were "challenges" associated with the Xerox Exchange, including "website errors and other processing delays."[9]

Because the CO-OP and UHH were heavily reliant on Xerox to timely provide them with necessary member data and premium payments gathered and received via the Xerox Exchange, (*see, e.g.*, *Id.* at 0564-0567; 9P.A.36 at 1676), the CO-OP encountered severe difficulties from the poorly designed and poorly managed Xerox Exchange. For instance in early 2014:

- The CO-OP's CEO had to participate in meetings with the Governor's office, other insurance carriers, and Xerox up to three times a week to discuss the challenges it was experiencing with the Xerox Exchange, (1P.A.5 at 0032:11-15; 3P.A.23 at 0552-0553);
- Xerox failed to transmit data concerning over 3,000 of the CO-OP's members and failed to transmit timely and accurate enrollment and payment data to the CO-OP, (3P.A.23 at 0553); and

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[9] https://www.xerox.com/downloads/usa/en/x/Xerox_Nevada_Healtlh_Link_Letter.pdf.

- Xerox admitted that its "payment collection process [wa]s only working at 45%" and, thus, "over 4,000 consumers" were unable to pay their premiums through the Xerox Exchange, (1P.A.1 at 0005; 4P.A.24 at 0609).

In fact, by May 2014, the CO-OP determined that "Xerox ha[d] drained the CO-OP's resources[,] as no less than 50% of the CO-OP's resources ha[d] been committed to Xerox and Xerox[-]related issues since October 2013." (*Id*.)

C. The Appointment of Greenberg as Counsel for the Receiver.

The receivership was commenced on October 14, 2015. (6P.A.26 at 0947-0992.) On December 19, 2016, the Receiver filed a motion seeking the Receivership Court's approval for the engagement of Greenberg to "evaluate and prosecute litigation," as the Receiver lacked the resources to accomplish these tasks. (1P.A.3 at 0012:8-12, 0014:24-25, 0015:1-2.) The Receivership Court approved Greenberg's engagement on January 18, 2017. (1P.A.4 at 0024:25-27.)

D. Greenberg's Representation of Xerox in Related Matters.

At the time the Receiver sought court approval for Greenberg's appointment, Greenberg was also serving as ***counsel for Xerox*** in the following ***related*** matters:

- *Basich v. State of Nevada ex rel. Silver State Health Insurance Exchange*, No. A-14-698567-C, Eighth Judicial District Court — a class action for all Nevada consumers who purchased insurance policies on the Xerox Exchange and did not receive the benefits of such policies, (4P.A.24 at 0683:16-28, 0685:1-4, 0686:7, 0702:18-23);

- *Casale v. State of Nevada ex. rel. Silver State Health Insurance Exchange*, No. A-14-706171-C, Eighth Judicial District Court — a class action for all Nevada brokers owed unpaid commissions for the sale of insurance policies on the Xerox Exchange, (*Id.* at 0684:10-23, 0685:1-4, 0686:7, 0702:18-25); and

- *In re Xerox State Healthcare, LLC*, No. 17-0299, State of Nevada, Department of Business and Insurance, Division of Insurance — an administrative action involving Xerox's failures in administering and operating the Xerox Exchange, (*Id.* at 0701:9-10, 0702:1-17).

Undeniably, Xerox's various deficiencies in administering and operating the Xerox Exchange were well known to Greenberg — particularly given that the two class actions referenced above culminated in a settlement agreement whereby ***Xerox was obligated to pay up to $5,000,000 in damages and $1,750,000 in class counsel's attorney's fees***. (*Id.* at 0692:23-25, 0696:22-0697:1.)[10]

E. Greenberg Evaluates and Files Litigation.

On August 25, 2017, Greenberg, on behalf of the Receiver, filed the Milliman Lawsuit against several of the CO-OP's former vendors, officers, and directors, including Nevada Health Solutions, LLC. (1P.A.5 at 0028:1-4.)

[10] Greenberg was also representing Xerox in two, unrelated matters until at least 2018. (4P.A.24 at 0717-0719, 0722-0728.)

Greenberg filed an Amended Complaint on September 24, 2018, adding Unite Here Health as a defendant. (1P.A.6.) One of the primary issues in the action is what/who caused the CO-OP's insolvency and ultimate demise. (*Id.* at 0125:7-9.) Notably, Greenberg did not include Xerox as a defendant in the action.

On June 5, 2020, Greenberg, on behalf of the Receiver, also commenced the Silver State Lawsuit to recover $510,651.27 in premium payments paid by the CO-OP's members and/or prospective members, which Silver State allegedly failed to transfer to the CO-OP between 2013 and 2015. (2P.A.14 at 0311:10-17.) These are the exact same damages that the Receiver is also seeking to recover from Unite Here Health in the Milliman Lawsuit. (7P.A.30 at 1185, at ¶ 6.)

F. <u>The Motion to Disqualify Greenberg.</u>

During discovery, it became apparent to UHH that Xerox and Silver State could be liable to the CO-OP for their negligence in administering and operating the Xerox Exchange. (*See* Section VII(B), *supra*). Accordingly, UHH served written discovery on the CO-OP concerning its relationship (and Greenberg's relationship) with Xerox and Silver State, and UHH made several public records requests to the State of Nevada. (6P.A.28 at 1122:16-1123:2; *see also* 2P.A.7 at 0247:21-25; 2P.A.8 at 0282:7-27; 2P.A.9 at 0294:23-26, 0295:11-18; 2P.A.10;

2P.A.11; 2P.A.12; 2P.A.13; 2P.A.15 at 0317:13-21, 0319:1-5; 2P.A.16 at 0323:18-0324:3; 2P.A.17 at 0329:18-0335:4; 2P.A.18 at 0341:19-0342:2, 0343:6-0344:1; 2P.A.19 at 0349:18-0374:2; 2P.A.20 at 0378:19-0380:13, 0384:5-0385:12; 2P.A.21 at 0389:23-0391:2.) UHH also received expert opinions indicating that much of the blame the Receiver is attempting to place on UHH should actually be placed on Xerox and Silver State. (6P.A.28 at 1123:5-8; *see, e.g.*, 6P.A.27 at 1047-1050, 1067-1068, 1104; 9P.A.36 at 1674, 1677 (opining that "attribut[ing] the failure of [the CO-OP] to [UHH], without regard for the CO-OP's and Xerox's evident failures, is an oversimplification of the facts, and the context in which they occurred. . . . ***[I]t is nothing more than a naked attempt to assign blame where it does not belong***") (emphasis added).)

Based on this new information, UHH believed that: (i) Xerox should have been a primary target of Greenberg's investigation of individuals and entities with potential liability to the CO-OP; and (ii) Greenberg failed to bring any claims against Xerox due to its concurrent representation of Xerox in related litigation and administrative actions. (7P.A.33 at 1324:1-7.) Because the Greenberg Group failed to disclose to the Receivership Court this significant and known conflict of interest, UHH sought disqualification of Greenberg as well as disgorgement of all

of the attorney's fees and costs paid to Greenberg from the assets of the Receivership Estate (approximately $5 million at the time of the filing of the motion). (*Id.* at 1324:15-19.)[11]

In response, the Receiver claimed that before Greenberg was retained, it was "fully advised . . . that [Greenberg] had a potential conflict with pursuing any claim against [Xerox]" and that it only retained Greenberg "for the limited purpose of pursuing specific claims on the Receiver's behalf." (9P.A.35 at 1598:14-25.) However, neither Greenberg nor the Receiver ever produced any engagement letters, conflict of interest waivers (assuming such conflicts could even be waived), billing invoices, or other correspondence in support of this self-serving assertion — not even for *in camera* review — and conflicts counsel has not filed any separate actions against Xerox on behalf of the Receiver. (9P.A.36 at 1630:11-16 & n.29.)

Ultimately, the Receivership Court denied the motion to disqualify. (9P.A.39.) As a result, UHH commenced the pending Conflicts Appeal.

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[11] On October 29, 2020, UHH provided the District Court with a copy of the Motion to Disqualify. (7P.A.33 at 1306:7-1307:18, 1323-1353.)

G. UHH Moves to Implead Xerox and Silver State and to Consolidate the Milliman and Silver State Lawsuits.

Because Greenberg's conflict of interest prevented the Receiver from suing Xerox, UHH, on October 15, 2020, filed its Motion for Leave, seeking to implead Xerox and Silver State.[12] (6P.A.28.) Several of the other defendants in the action filed joinders to the motion. (6P.A.29; 7P.A.32.) On October 19, 2020, UHH also filed its Motion to Consolidate the Milliman and Silver State Lawsuits. (7P.A.31.)

In response, the Receiver did not argue that the Motions for Leave and Consolidation should be denied due to Greenberg's conflict of interest. (10P.A.42 at 1781:1-1793:13.)[13] Rather, the Receiver — through its new "conflicts counsel" (Lewis Roca Rothgerber Christie LLP) — argued that it would be futile for UHH to assert a contribution claim against Xerox. (9P.A.40; 9P.A.41; 10P.A.42 at 1779:5-1790:25.) In their Reply, UHH pointed out that the ***only possible explanation*** for why the "neutral" Receiver would have opposed the Motion for Leave on its merits (i.e., futility) and tried to protect ***Xerox*** from a third-party

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[12] The deadline for amending pleadings and adding parties was October 16, 2020. (2P.A.22 at 0399:7.)

[13] This is likely because Greenberg and the Receiver had previously claimed that even if UHH "were allowed to implead Xerox, the Receiver's use of conflicts counsel to handle the portions of the litigation involving Xerox would avoid any potential conflict." (9P.A.35 at 1612 n.5.)

claim was because of Greenberg's conflict of interest. (10P.A.43 at 1875:12-27.) In fact, the Receiver was apparently so desperate to keep Xerox out of the Milliman Lawsuit that she argued that the multiple tort claims she had asserted against UHH (including malpractice and gross negligence) were not actually tort claims, but rather, contractual claims for which contribution is not permitted. (10P.A.42 at 1784:8-11, 1785:24-28, 1786:10-15, 1787:1-6; 10P.A.43 at 1878:13-1879:9.)

On May 26, 2021, the Court denied the Motion for Leave. (11P.A.46.) While the District Court expressly found that the Motion was "timely and not the result of dilatory conduct," it was "concerned about whether the impleader of a third party based on contribution claims would unduly complicate the pending action by injecting ***tangential issues*** such as ***potential conflicts resulting in the disqualification of plaintiff's counsel*** and impacting plaintiff's choice of counsel in the pending matter, potentially prejudicing the plaintiff." (*Id.* at 1997:17-19, 1997:25-1998:2 (emphasis added).) The District Court also rationalized that UHH could pursue a separate contribution action pursuant to NRS 17.285. (*Id.* at 1998:3-5.) Finally, the District Court also denied the Motion to Consolidate for the same reasons that it denied the Motion for Leave. (*Id.* at 1998:14-15.)

VIII. REASONS WHY A WRIT SHOULD ISSUE

A. Standard of Review.

While this Court has not specifically opined on the standard of review for a motion for leave to file a third-party complaint, other jurisdictions have opined that the trial court's decision on such a motion is reviewed for abuse of discretion. *Pettella v. Corp Bros., Inc.*, 268 A.2d 699, 706 (R.I. 1970); *see also Morris v. Allstate Ins. Co.*, 584 N.W.2d 340, 343 (Mich. Ct. App. 1998). This standard of review is in accord with the standard applied by the Court in reviewing motions for leave to file an amended pleading. *Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 105, 507 P.2d 138, 139 (1973).

This Court also reviews the denial of a motion to consolidate for an abuse of discretion. *Marcuse v. Del Webb Cmtys., Inc.*, 123 Nev. 278, 286, 163 P.3d 462, 468 (2007); *Richmond Machinery Co. v. Bennett*, 48 Nev. 286, 293, 229 P. 1098, 1099-1100 (1924).

B. The Legal Standard for Impleader.

NRCP 14(a) allows a defendant to file a third-party complaint against a nonparty "who is or may be liable to it for all or part of the claim against it." The Nevada Supreme Court has "repeatedly recognized that a third-party plaintiff has

the right" to assert an inchoate claim for contribution against a third-party defendant, meaning they may "seek contribution in an original action prior to entry of judgment." *Pack v. LaTourette*, 128 Nev. 264, 269, 277 P.3d 1246, 1249 (2012).

If more than fourteen days have elapsed from the defendant's service of its original answer, then leave must be obtained to file the third-party complaint. NRCP 14(a). "Timely motions for leave to implead non-parties should be ***freely granted*** to promote this efficiency unless to do so would prejudice the plaintiff, unduly complicate the trial, or would foster an obviously unmeritorious claim." *Shafarman v. Ryder Truck Rental, Inc.*, 100 F.R.D. 454, 459 (S.D.N.Y. 1984) (emphasis added)*; see also United States v. New Castle Cty.*, 111 F.R.D. 628, 632 (D. Del. 1986) (considering an additional factor of the possible prejudice to the third-party defendant).

C. <u>The Legal Standard for Consolidation of Two Actions.</u>

"If actions before the court involve a common question of law or fact, the court may . . . consolidate the actions . . . ." NRCP 42(a). A district court enjoys "broad" discretion in ordering consolidation. *Nalder v. Eighth Jud. Dist. Ct ex rel. Cnty. of Clark*, 136 Nev. 200, 206-07, 462 P.3d 677, 684 (2020) (internal quotation

omitted). One of the primary goals of consolidation is to promote judicial efficiency and economy. *Id.* at 207, 462 P.3d at 685.

D. It Is a Manifest Abuse of Discretion to Allow Any "Prejudice" Caused by the Greenberg Group's Self-Inflicted Conflict of Interest to Outweigh UHH's Right to Impleader and/or Consolidation.

1. As set forth in the Conflicts Appeal, only the Greenberg Group is to blame for injecting Greenberg's conflicts of interest into the Milliman Lawsuit.

The Greenberg Group never made any conflict of interest disclosures to the Receivership Court, despite their admitted knowledge of the Xerox conflict and their purported attempts to cure it. (9P.A.35 at 1598:14-25.) Rather than give the Receivership Court or the creditors of the Receivership Estate an opportunity to analyze Greenberg's conflict or file an objection, the Greenberg Group chose to proceed covertly for years, until UHH uncovered the conflicts and filed the Motion to Disqualify. (7P.A.33 at 1323-1353.)

These conflicts not only violated the Greenberg Group's disclosure obligations as fiduciaries of the Receivership Court, *see In re Envirodyne Indus., Inc.*, 150 B.R. 1008, 1020-21 (Bankr. N.D. Ill. 1993); *CFTC v. Eustace*, No. 05-2973, 2007 U.S. Dist. LEXIS 33137, at *37 (E.D. Pa. May 3, 2007), ***but they also***

continue to taint the underlying litigation to this very day. *In re S. Kitchens, Inc.*, 216 B.R. 819, 829 (D. Minn. 1998) ("Litigation like this cannot go ahead under the pall that its architects may not have analyzed, structured, and pled it with full detachment, and may be influenced by continuing loyalty to an unsued agent of the Debtor's downfall."). In short, because Greenberg is ethically prohibited from assigning any blame to Xerox for the CO-OP's demise, it has been disposed to find other parties, ***such as UHH***, to blame. (1P.A.6.) However, Greenberg is ethically incapable of being an impartial arbiter of whether the CO-OP has valid claims against UHH or the other defendants because it cannot appropriately analyze those claims in light of Xerox's substantial involvement. *See In re Bohack Corp.,* 607 F.2d 258, 263 (2d Cir. 1979) ("The conflict found by the Bankruptcy Court affects not merely a determination of the proper defendants in the action ***but whether it should have been commenced in the first place***.") (emphasis added).

There is nobody to blame for these ethical improprieties other than the Greenberg Group. They knew of Xerox's substantial involvement in negligently administering and operating the Xerox Exchange, (4P.A.24 at 0683:16-28, 0684:10-23, 0685:1-4, 0686:7, 0692:23-25, 0696:22-0697:1, 0701:9-10, 0702:1-25); yet, they chose to allow conflicted counsel to analyze and file a multi-million

dollar lawsuit against numerous other parties, including UHH. (1P.A.5.) It was (or should have been) patently foreseeable to the Greenberg Group that any parties that Greenberg chose to blame for the downfall of the CO-OP would ultimately point the finger at the true wrongdoer (*i.e.*, Xerox) and utilize NRCP 14 to protect their rights.

2. UHH should not be penalized as a result of Greenberg's conflicts of interest.

UHH is certainly not responsible for the Receiver's and the SDR's decision to retain Greenberg in the face of known conflicts, nor is UHH responsible for the continued concealment of the conflicts from the Receivership Court. Yet, in weighing the prejudice between the parties, the District Court denied the Motions for Leave and Consolidation because the requested relief would further necessitate Greenberg's disqualification and would interfere with the Receiver's right to choose her own counsel. (11P.A.46 at 1997:25-1998:2.) As explained above, the Receiver's so-called "prejudice" is entirely self-inflicted, and it is irrational to permit the Greenberg Group to benefit from undisclosed conflicts of interest for which they are entirely to blame.

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As set forth in more detail in the Conflicts Appeal, Greenberg's conflicts of interest have existed since its retention (9P.A.35 at 1598:14-25), and the addition of Xerox — (who is an obvious and significant target defendant for the recovery of assets for the Receivership Estate) — through impleader or consolidation does not "create" Greenberg's conflict. On the contrary, ***Greenberg created Greenberg's conflict***. *See El Camino Res., Ltd. v. Huntington Nat'l Bank*, 623 F. Supp. 2d 863, 886 (W.D. Mich. 2007) (holding that a thrust upon conflict "must truly be unforeseeable, and that the conflict must truly be no fault of the lawyer.") (internal quotation omitted); *Truckstop.Net, LLC v. Sprint Commc'ns Co.,* No. CV 04-561-S-BLW, 2006 U.S. Dist. LEXIS 107818, at *13-14 (D. Idaho Jan. 3, 2006) (recognizing that a "thrust upon conflict" cannot arise when the law firm was aware of and was involved in the creation of the conflict of interest).

In fact, the District Court's denial of the Motions for Leave and Consolidation is just another concrete example of why these conflicts of interest cannot be permitted in the first place. The Receiver's and the SDR's decision to utilize conflicted counsel resulted in the denial of timely and meritorious motions and imposed significant prejudice on parties who had nothing to do with the conflicts. It is a manifest abuse of discretion to penalize UHH for a conflict of

interest for which they were simply not to blame. *See State ex. rel. Leung v. Sanders*, 584 S.E.2d 203, 210 (W. Va. 2003) (finding an abuse of discretion and granting writ relief for the denial of an impleader motion because the court failed to consider certain material facts).

E. The Factors to Be Considered in Permitting a Third-Party Complaint Weigh Heavily in Favor of Granting Impleader.

1. UHH is significantly prejudiced by the District Court's denial of the impleader.

The District Court denied the Motion for Leave, in part, because UHH has the ability to file a separate action for contribution against Xerox and Silver State following any payment by UHH to the CO-OP for more than their fair share of the equitable liability. NRS 17.225(2); NRS 17.285(1); *see also* 11P.A.46. Respectfully, the District Court significantly underestimated the prejudice to UHH if forced to undertake such an approach.

First, because Xerox is not a party to the case, the factfinder is precluded from apportioning any fault to Xerox for the harm it caused to the CO-OP. NRS 41.141(2)(b)(2)*; Warmbrodt v. Blanchard*, 100 Nev. 703, 709, 692 P.2d 1282, 1286 (1984). However, if Xerox was subject to a contribution claim in the Milliman Lawsuit, the apportionment principles under NRS 41.141 would apply.

See Humphries v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark, 129 Nev. 788, 796, 312 P.3d 484, 489 (2013). In fact, this Court has previously recognized that this statutory scheme creates an "incentive" for impleader. *Id.* at 798, 312 P.3d at 491. Because the Motion for Leave was denied, UHH is now only permitted to argue that Xerox is ***entirely*** at fault for the harm that the CO-OP is trying to attribute to UHH, which is obviously a significantly more difficult burden of proof. *Banks ex rel. Banks v. Sunrise Hospital*, 120 Nev. 822, 844-45, 102 P.3d 52, 67 (2004). Considering that the CO-OP is seeking over $142 million in damages against UHH, the prejudice to UHH is particularly harsh. (7P.A.30 at 1183.)

Second, under NRS 17.225(2), "[t]he right of contribution exists only in favor of a tortfeasor who has paid more than his or her equitable share of the common liability . . . ." Accordingly, due to the District Court's denial of the Motion for Leave, UHH is required to pay any monetary judgment (or settlement) before they could even initiate a separate contribution action against Xerox and Silver State. Again, considering that the CO-OP is seeking over $142 million in damages, UHH could be driven into insolvency by the time it receives any contribution from Xerox and/or Silver State. *See* 3 Moore's Federal Practice - Civil § 14.03 (2020) ("Even when the defendant is successful in the second suit, it

will be required to pay for separate litigation, and may suffer adverse consequences because of the delay between judgments in the two suits.").[14]

Finally, "[t]he primary purpose of impleading third parties is to promote judicial efficiency by eliminating circuity of actions"; that is, "to avoid a situation that arises when a defendant has been held liable to a plaintiff and then finds it necessary to bring a separate action against a third individual who may be liable to defendant for all or part of plaintiff's original claim." *Tourangeau v. Uniroyal, Inc.*, 189 F.R.D. 42, 48 (D. Conn. 1999) (internal quotation omitted). "Third-party practice fosters efficient litigation by packaging the underlying claim for liability and any indemnity or contribution claims in a single case," which "spares the judicial system and at least some of the parties the waste and expense of multiple suits." 3 Moore's Federal Practice - Civil § 14.03 (2020). In fact, efficiency is such an important policy underlying Rule 14 that it generally outweighs the dangers of prejudice. 3 Moore's Federal Practice - Civil § 14.21 (2020). It will be significantly more efficient and less costly for all involved to resolve the entirety of this dispute in one proceeding. Forcing UHH to file a separate action will not only

[14] The Nevada Supreme Court often relies on Moore's Federal Practice. *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 654-55, 218 P.3d 853, 858-59 (2009).

subject UHH to significantly more litigation expenses, it will also unnecessarily squander judicial resources. Moreover, witnesses will be forced to testify twice, and their recollection will be significantly impaired due to the passage of time — thereby making UHH's contribution claim more difficult to prove. Thus, to achieve the underlying policies of Rule 14 and ensure the most efficacious outcome possible for everyone involved, the Motion for Leave should have been granted.

2. The motion for leave was timely.

The Motion for Leave was filed before the deadline for amending pleadings and adding parties passed. (2P.A.22 at 0399:7.) Therefore, the District Court properly determined that the Motion for Leave was timely. 11P.A.46 at 1997:17-19; *see also Wright v. Bigger*, No. 5:08CV62, 2008 U.S. Dist. LEXIS 92416, at *3 (N.D. W. Va. Nov. 13, 2008) (holding that a Rule 14 motion is timely if it complies with the scheduling order).

3. There is no prejudice to Xerox or Silver State, and impleader would not delay or unnecessarily complicate the trial.

In determining whether to allow a third-party complaint, the "prejudice to a third-party defendant must be measured by whether [it] will incur greater expense or be at a greater disadvantage in defending a third-party suit than in defending a

separate action brought against it." *Old Republic Ins. Co. v. Concast, Inc.*, 99 F.R.D. 566, 569-70 (S.D.N.Y. 1983). Here, there was no evidence adduced that Xerox or Silver State would be prejudiced by defending their conduct in the Milliman Lawsuit versus a separate action.

Moreover, at the time the Motion for Leave was denied in June 2021, there was over six months remaining for discovery and over fifteen months until the trial in the Milliman Lawsuit. (9P.A.38 at 1732:18; 11P.A.46; 11P.A.47 at 2025.) Thus, Xerox and Silver State would not have been prejudiced by the impleader. Similarly, the impleader would not have delayed or unnecessarily complicated the trial. Therefore, all of the factors to be assessed in considering impleader weigh in favor of granting the Motion for Leave.

F. The District Court Manifestly Abused Its Discretion in Denying the Motion to Consolidate.

The Receiver is seeking to recover the exact same damages from both Silver State and Unite Here Health in two separate actions. (2P.A.14 at 0311:10-17; 7P.A.30 at 1185, at ¶ 6.) "As a general principle, a plaintiff suing in tort can only recover ***once*** for a single injury, even when several defendants are responsible for that injury." *J.E. Johns & Assocs. v. Lindberg*, 136 Nev. Adv. Op. 55, 470 P.3d

204, 206 (2020) (emphasis added). Because the Receiver is seeking to recover these damages in two separate actions from two different defendants, there is substantial risk that the Receiver could obtain a windfall in the form of a double recovery. Consolidation of the Milliman and Silver State Lawsuits would have eliminated this risk. *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC*, No. 09-C-0916, 2011 U.S. Dist. LEXIS 67623, at *9 (E.D. Wisc. June 22, 2011).

"Consolidation requires only a common question of law or fact; perfect identity between all claims in any two cases is not required, so long as there is some commonality of issues." *Zimmerman v. GJS Group, Inc.*., No. 2:17-cv-00304-GMN-GWF, 2018 U.S. Dist. LEXIS 50158, at *13 (D. Nev. Mar. 27, 2018) (internal quotation omitted). Thus, in the face of identical claims in both the Silver State and Milliman Lawsuits, there was no proper basis for the District Court to deny consolidation.

The Receiver argued against consolidation, claiming it would delay the trial — as the Silver State Lawsuit was scheduled to go to trial in November 2021. (10P.A.42 at 1792:15-25). However, a short delay in trial (until May 2022) — as a result of the consolidation — hardly outweighs the risk and prejudice of an

improper, duplicative recovery of damages by the Receiver. (11P.A.47 at 2025.) Moreover, the Receiver recently stipulated to continue the trial in the Silver State Lawsuit; therefore, a speedy resolution of that action no longer appears to be a priority. (11P.A.45.)

Ultimately, the District Court denied the Motion to Consolidate because of Greenberg's conflicts of interest. (11P.A.46 at 1998:14-15.) However, as set forth in detail in Section VIII(D), *supra*, UHH should not be penalized for Greenberg's self-inflicted conflicts of interest. Because the District Court advanced no legitimate basis for its denial of the Motion to Consolidate — and UHH could suffer severe prejudice if the Receiver is permitted to seek the recovery of duplicative damages in two separate actions — the District Court abused its discretion in denying the Motion to Consolidate.

IX. CONCLUSION

For the foregoing reasons, this Court should issue an extraordinary writ of mandamus vacating the District Court's Order Denying UHH's Motions for

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Leave and Consolidation, and it should instruct the District Court to grant the Motions for Leave and Consolidation.

DATED this 30th day of June, 2021.

BAILEY❖KENNEDY

By: /s/ *Dennis L. Kennedy*
JOHN R. BAILEY
DENNIS L. KENNEDY
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Attorneys for Petitioners

VERIFICATION

STATE OF NEVADA)

COUNTY OF CLARK)

I, Dennis L. Kennedy, am a partner of the law firm of Bailey❖Kennedy, counsel of record for UHH, and the attorney primarily responsible for handling this matter for and on behalf of UHH. I make this verification pursuant to NRS 34.170, NRS 53.045, and NRAP 21(a)(5).

I hereby declare under penalty of perjury under the laws of the State of Nevada, that the facts relevant to this Petition for Extraordinary Writ Relief are within my knowledge as attorney for UHH and are based on the proceedings, documents, and papers filed in the underlying action, *State of Nevada ex rel. Nevada Health Co-Op v. Milliman, Inc.*, No. A-17-760558-B, pending in Department XVI of the Eighth Judicial District Court, Clark County, Nevada.

I know the contents of the foregoing Petition for Extraordinary Writ Relief, and the facts stated therein are true of my own knowledge except as to those matters stated on information and belief. As to any matters identified as being stated on information and belief, I believe them to be true.

True and correct copies of the orders and papers served and filed by the parties in the underlying action that may be essential to an understanding of the matters set forth in the Petition for Extraordinary Writ Relief are contained in the Appendix to the Petition.

Executed this 30th day of June, 2021.

/s/ Dennis L. Kennedy
DENNIS L. KENNEDY

NRAP 21(e) CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition for Extraordinary Writ Relief complies with the formatting requirements of NRAP 21(d), NRAP 32(a)(4) and NRAP 32(c)(2), as well as the reproduction requirements of NRAP 32(a)(1), the binding requirements of NRAP 32(a)(3), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because:

[x] This Petition for Extraordinary Writ Relief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman font 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) because it contains 6,989 words.

3. I further hereby certify that I have read this Petition for Extraordinary Writ Relief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition for Extraordinary Writ Relief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Petition regarding matters in the record to be supported by a reference to the

page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying Petition for Extraordinary Writ Relief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 30th day of June, 2021.

BAILEY❖KENNEDY

By: /s/ *Dennis L. Kennedy*
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 30th day of June, 2021, service of the foregoing **PETITION FOR EXTRAORDINARY WRIT RELIEF and APPENDIX TO PETITION FOR EXTRAORDINARY WRIT RELIEF, VOLUMES 1 through 11,** was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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ADDENDUM

CFTC v. Eustace

United States District Court for the Eastern District of Pennsylvania

May 3, 2007, Decided

CIVIL ACTION NO. 05-2973, CIVIL ACTION NO. 06-1944

Reporter
2007 U.S. Dist. LEXIS 33137 *

COMMODITY FUTURES TRADING COMMISSION v. PAUL M. EUSTACE, et al.; C. CLARK HODGSON, JR., RECEIVER, et al. v. MAN FINANCIAL INC., et al.

Subsequent History: Objection overruled by *Hodgson v. Man Fin. Inc., 2007 U.S. Dist. LEXIS 35145 (E.D. Pa., May 7, 2007)*

Costs and fees proceeding at *CFTC v. Eustace, 2007 U.S. Dist. LEXIS 44757 (E.D. Pa., June 18, 2007)*

Prior History: *Hodgson v. Man Fin., Inc., 2007 U.S. Dist. LEXIS 15739 (E.D. Pa., Mar. 2, 2007)*
CFTC v. Eustace, 2005 U.S. Dist. LEXIS 40247 (E.D. Pa., Dec. 29, 2005)

Core Terms

appointment, entities, investors, disclosure, Offshore, litem, affiliate, disqualification, disqualify, replaced, third-party, Memorandum, court-appointed

Case Summary

Procedural Posture
Plaintiff Commodity Futures Trading Commission (CFTC) brought an action against defendants based on an alleged fraudulent trading scheme, and a receiver was appointed. The receiver brought a related action against a commission merchant, and the court considered whether to ***disqualify*** the ***receiver*** based on representation by the ***receiver*** and his ***counsel*** of entities related to a fund administrator named as a third-party defendant.

Overview
Although the receiver was aware of the administrator's involvement in the subject transactions, the receiver did not disclose the representation of the related entities. The receiver contended that he had no reason to anticipate the administrator being named a party in the action and that no conflict existed because the administrator was separate from the represented entities, even though they were in the same corporate organization. The court held that disqualification of the receiver was warranted, but only with regard to the litigation against the commission merchant in which the administrator was a party. Although the receiver was highly regarded and experienced in complex litigation, there was the potential for an appearance of impropriety in the event that the receiver prevailed against the merchant but the merchant did not prevail against the administrator. Nonetheless, the additional expense and delay which would be occasioned by appointment of a new receiver warranted retention of the receiver for all matters other than the litigation involving the merchant.

Outcome
A ***receiver*** ad litem was appointed to replace the ***receiver*** only in the litigation involving the merchant.

LexisNexis® Headnotes

Legal Ethics > Client Relations > Representation > Acceptance

Legal Ethics > Client Relations > Conflicts of Interest

HN1[] Representation, Acceptance

As reflected in Pa. R. Prof. Conduct 1.7, under certain circumstances a law firm that has a client relationship with a given corporation or other organization is not barred from accepting a representation adverse to an affiliate of that corporation or organization, such as an unrelated subsidiary of a large corporation.

Legal Ethics > Client Relations > Representation > Acceptance

Legal Ethics > Client Relations > Conflicts of Interest

HN2[] Representation, Acceptance

See Pa. R. Prof. Conduct 1.7.

Legal Ethics > Client Relations > Representation > Acceptance

Legal Ethics > Client Relations > Conflicts of Interest

HN3[] Representation, Acceptance

A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as parent or subsidiary. Pa. R. Prof. Conduct 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Receiverships > Receivers > General Overview

HN4[] Standards of Review, Abuse of Discretion

A court's actions with respect to a receiver are reviewed under an abuse of discretion standard.

Civil Procedure > ... > Receiverships > Receivers > Duties of Receivers

HN5[] Receivers, Duties of Receivers

A receiver, as an officer or arm of the court, is a trustee with the highest kind of fiduciary obligations. He owes a duty of strict impartiality, of undivided loyalty, to all persons interested in the receivership estate, and must not dilute that loyalty. He is bound to act fairly and openly with respect to every aspect of the proceedings before the court. The court, as well as all the interested parties, have the right to expect that all its officers, including the receiver, will not fail to reveal any pertinent information or use their official position for their own profit or to further the interests of themselves or any associates. A receiver has the affirmative duty to endeavor to realize the largest possible amount for assets of the estate. If he has vital information which, if disclosed, might bring a better price for property which is sold pursuant to court order, he must fully disclose it prior to the sale when the prospects are greater for successful bargaining.

Civil Procedure > ... > Receiverships > Receivers > General Overview

HN6[] Receiverships, Receivers

A claim against a derelict receiver is not against an ordinary trustee but against a court's officer. Who has

the right to assert such a claim is a question affecting the integrity of the court itself. The federal courts, in holding their own officers to accountability, should not be hampered by state court decisions relating to ordinary trustees. When a federal receiver incurs obligations through misconduct, the title thereto is similarly to be determined by federal law. The doctrine, relative to receivers, of strict accountability, and of opposition to divided loyalties, is prophylactic; it aims not merely to punish actual evil in cases where it occurs but to avoid the tendency to evil in other cases.

Civil Procedure > Attorneys > Disqualification of Counsel

HN7 **Attorneys, Disqualification of Counsel**

Where a choice of counsel must be approved by a court as appropriate, such that the integrity of the judicial process is implicated, the cost and delay of replacing counsel with a conflict of interest may be outweighed.

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For CARRSWOLD PARTNERSHIP, Movant: HARRY J. GIACOMETTI, SMITH, LEAD ATTORNEY, GIACOMETTI & CHIKOWSKI, PHILA, PA.

For MAN FINANCIAL, INC., Movant: DAVID M. ROSENFIELD, GRANT R. CORNEHLS, THERESE M. DOHERTY, LEAD ATTORNEYS, HERRICK FEINSTEIN LLP, NEW YORK, NY; JOSHUA HORN, LEAD ATTORNEY, FOX ROTHSCHILD O'BRIEN & FRANKEL LLP, PHILADELPHIA, PA.

For BNP PARIBAS SECURITY SERVICES, CITCO GLOBAL CUSTODY N.V., BANQUE PRIVEE EDMOND DE ROTHSCHILD EUROPE, SG PRIVATE BANK SA, Movants: RENEE F. BERGMANN, LEAD ATTORNEY, NIXON PEABODY LLC, PHILADELPHIA, PA.

For NATIONAL FUTURES ASSOCIATION, Movant: THOMAS W. SEXTON, III, LEAD ATTORNEY, NATIONAL FUTURES ASSOCIATION, CHICAGO, IL.

For NATIONAL FUTURES ASSOCIATION, THE BOARD OF TRADE OF THE CITY OF CHICAGO, INC., BOARD OF TRADE OF KANSAS CITY, CBOE FUTURES EXCHANGE, LLC, CHICAGO MERCANTILE EXCHANGE, INC, HEDGESTREET, INC., MINNEAPOLIS GRAIN EXCHANGE, BOARD OF TRADE OF THE CITY OF NEW YORK, INC, NEW YORK MERCANTILE EXCHANGE, INC., Movants: WAYNE C. STANSFIELD, LEAD ATTORNEY, REED SMITH LLP, PHILADELPHIA, PA.

For FUTURES INDUSTRY ASSOCIATION, INC., Movant: DAVID W. WIRT, LINDA T. COBERLY, MICHAEL J. PHILIPPI, LEAD ATTORNEYS, WINSTON & STRAWN LLP, CHICAGO, IL; WAYNE C. STANSFIELD, LEAD ATTORNEY, REED SMITH LLP, PHILADELPHIA, PA.

For JOINT OFFICIAL LIQUIDATORS OF PHILADEPHIA ALTERNATIVE ASSET FUND LIMITED, Movant: RENEE F. BERGMANN, LEAD ATTORNEY, NIXON PEABODY LLC, PHILADELPHIA, PA.

For C. CLARK HODGSON, JR., Plaintiff: KEITH R. DUTILL, LEE A. ROSENGARD, LEAD ATTORNEYS, LESLIE MILLER GREENSPAN, STRADLEY, RONON, STEVENS & YOUNG LLP, PHILADELPHIA, PA; JOSEPH C. CRAWFORD, PEPPER HAMILTON LLP, PHILADELPHIA, PA; PETER HEARN, PETER HEARN, P.C., PHILA, PA.

For THE EDISON III FUND LIMITED, THE FAIRFAX FUND LIMITED, THE NUCLEUS FUND LIMITED, Intervenor Plaintiffs: CONSTANTINE KARIDES, LEAD ATTORNEY, REED SMITH LLP, NEW YORK, NY; JOSEPH J. TUSO, LEAD ATTORNEY, REED SMITH LLP, PHILADELPHIA, PA.

For THOMAS GILMARTIN, Defendant: DENNIS R. SUPLEE, LEAD ATTORNEY, H. JUSTIN PARK, JENNIFER A. DIAMANTIS, THERESA E. LOSCALZO, SCHNADER HARRISON SEGAL AND LEWIS, L.L.P.,

PHILADELPHIA, PA; JOSHUA HORN, FOX ROTHSCHILD O'BRIEN & FRANKEL LLP, PHILADELPHIA, PA; THERESE M. DOHERTY, HERRICK FEINSTEIN LLP, NEW YORK, NY.

For SEP ALAVI, WILLIAM WAMBACH, TIMOTHY BRAUN, JODY MCMILLAN, JAMES ZAMORA, MAN FINANCIAL INC, Defendants: ABRAHAM C. REICH, LEAD ATTORNEY, JOSHUA HORN, FOX ROTHSCHILD O'BRIEN & FRANKEL LLP, PHILADELPHIA, PA; ANNALIESE F. FLEMING, BARACK FERRAZZANO KIRSCHBAUM PERLMAN & NAGELBERG, CHICAGO, IL; CHRISTOPHER P. GREELEY, DAVID M. ROSENFIELD, GRANT R. CORNEHLS, MATTHEW D. SOBOLEWSKI, SUSAN T. DWYER, THERESE M. DOHERTY, LEAD ATTORNEYS, HERRICK FEINSTEIN LLP, NEW YORK, NY; DAVID R. KING, LEAD ATTORNEY, HERRICK FEINSTEIN LLP, PRINCETON, NJ; MATTHEW D. PARROTT, LEAD ATTORNEY, KATTEN MUCHIN ROSENMAN LLP, NEW YORK, NY.

For MONICA RODRIGUEZ, Defendant: ABRAHAM C. REICH, LEAD ATTORNEY, JOSHUA HORN, FOX ROTHSCHILD O'BRIEN & FRANKEL LLP, PHILADELPHIA, PA; ANNALIESE F. FLEMING, BARACK FERRAZZANO KIRSCHBAUM PERLMAN & NAGELBERG, CHICAGO, IL; CHRISTOPHER P. GREELEY, DAVID M. ROSENFIELD, GRANT R. CORNEHLS, MATTHEW D. SOBOLEWSKI, SUSAN T. DWYER, THERESE M. DOHERTY, LEAD ATTORNEYS, HERRICK FEINSTEIN LLP, NEW YORK, NY; DAVID R. KING, LEAD ATTORNEY, HERRICK FEINSTEIN LLP, PRINCETON, NJ; MATTHEW D. PARROTT, LEAD ATTORNEY, KATTEN MUCHIN ROSENMAN LLP, NEW YORK, NY; CATHI A. HESSION, LEAD ATTORNEY, FLEMMING, ZULACK AND WILLIAMSON, NEW YORK, NY; JASON T. COHEN, LEAD ATTORNEY, FLEMMING, ZULACK AND WILLIAMSON ZAUDERER LLP, NEW YORK, NY.

For MCCARTER & ENGLISH, LLP, Respondent: LISA M. SALAZAR, LEAD ATTORNEY, MCCARTER AND ENGLISH, LLP, PHILADELPHIA, PA.

For DAVID SAWYIER, Movant: JOANNE R. DRISCOLL, LEAD ATTORNEY, KEVIN M. FORDE, LTD., CHICAGO, IL.

For JOHN WALLACE, EDWARD GOBORA, ThirdParty Defendants: CANDICE TOLL AARON, MICHAEL RAY ROBINSON, LEAD ATTORNEYS, SAUL EWING LLP, WILMINGTON, DE; TIMOTHY E. HOEFFNER, LEAD ATTORNEY, SHILOH DAWN THEBERGE, SAUL EWING, LLP, PHILADELPHIA, PA.

For DAVID LASHBROOK, SCOTT SOMERVILLE, ThirdParty Defendants: DAVID M. HOWARD, LEAD ATTORNEY, JOHN V. DONNELLY, III, DECHERT LLP, PHILADELPHIA, PA; MICHAEL S. DOLUISIO, LEAD ATTORNEY, DECHERT , PRICE & RHOADS, PHILA, PA; TIMOTHY E. HOEFFNER, LEAD ATTORNEY, SAUL EWING, LLP, PHILADELPHIA, PA.

For UBS FUND SERVICES (CAYMAN) LTD., ThirdParty Defendant: DAVID FLEISCHER, JONATHAN A. CHOA, KEITH W. MILLER, LAWRENCE J. CONLAN, LEAD ATTORNEYS, PAUL HASTINGS JANOFSKY & WALKER LLP, NEW YORK, NY; GAETAN ALFANO, LEAD ATTORNEY, WILLIAM L. CARR, MILLER ALFANO & RASPANTI, P.C., PHILADELPHIA, PA; TIMOTHY E. HOEFFNER, LEAD ATTORNEY, SAUL EWING, LLP, PHILADELPHIA, PA.

For MAN FINANCIAL INC, ThirdParty Plaintiff: JOSHUA HORN, LEAD ATTORNEY, FOX ROTHSCHILD O'BRIEN & FRANKEL LLP, PHILADELPHIA, PA; THERESE M. DOHERTY, HERRICK FEINSTEIN LLP, NEW YORK, NY.

For JODY MCMILLAN, JAMES ZAMORA, MONICA RODRIGUEZ, MAN FINANCIAL INC, SEP ALAVI, WILLIAM WAMBACH, TIMOTHY BRAUN, Counter Claimants: THERESE M. DOHERTY, HERRICK FEINSTEIN LLP, NEW YORK, NY; JOSHUA HORN, FOX ROTHSCHILD O'BRIEN & FRANKEL LLP, PHILADELPHIA, PA.

Judges: [*1] Michael M. Baylson, U.S.D.J.

Opinion by: Michael M. Baylson

Opinion

MEMORANDUM

Baylson, J.

These cases arise out of significant investor losses sustained in an allegedly fraudulent futures trading scheme, estimated at over $ 200 million. The issue discussed in this Memorandum is collateral to the merits of these cases and concerns whether the court-appointed Receiver, C. Clark Hodgson, Jr., Esquire ("Hodgson" or "Receiver"), and his law firm, Stradley, Ronon, Stevens and Young, LLP ("Stradley"), must be replaced because they failed to disclose prior client relationships with various UBS entities knowing that another UBS entity, UBS Fund Services (Cayman) Limited ("UBS Cayman"), participated in various aspects of the transactions underlying these cases. UBS Cayman has now been brought in as a third-party defendant in *Hodgson v. Man Financial, Inc.*, No. 06-1944.

I. *Factual Background* [1]

[*2] On June 22, 2005, the Commodity Futures Trading Commission ("CFTC") brought an action, *CFTC v. Eustace*, No. 05-2973, against Paul Eustace ("Eustace") and the Philadelphia Alternative Asset Management Co., LLC ("PAAMCO") for an alleged fraud resulting in significant investor losses. The CFTC sought, among other remedies, a Statutory Restraining Order ("SRO"), including appointment of a Receiver by the Court.

Before appointing Hodgson as the Receiver, Judge John R. Padova, to whom the case was originally assigned, advised Hodgson during a telephone conversation of the entities involved in the case, including Eustace, PAAMCO and the CFTC. There was no mention at that time of any other potential parties or the need for Hodgson to check any other conflicts. Hodgson sent Judge Padova a letter on the same day advising him no conflicts were found, and he could accept the appointment. Judge Padova accordingly issued an order on June 23, 2005 appointing Hodgson as a temporary receiver for Defendant PAAMCO and its "partners, affiliates or subsidiaries or related entities of the Defendants" with the full powers of an equity receiver.

On July 6, 2005, this case was reassigned to the undersigned, **[*3]** who made Hodgson's appointment permanent in an order dated September 21, 2005, and renewed that appointment in an order dated April 21, 2006. Since the beginning of these proceedings, the Receiver has been represented by Stradley, in which the Receiver was a partner until late December 2006 and currently holds the title of senior counsel.

A. *Early Stages*

In several hearings and orders entered in the CFTC case, the Court, particularly in the early stages, emphasized the need for the CFTC and the Receiver to work together and initially directed the CFTC, because of its initial investigation and its expertise in the subject matter, as well as because its counsel were paid by the government, to take the lead in ascertaining the factual background of the case. The Court charged both to consider whether additional actions should be brought to recover damages on behalf of the investors, but to seek Court approval before bringing any such suits. The Receiver acted promptly and appropriately in taking action, gathering together funds in different accounts, some located in Canada, pursuant to his obligations to secure assets belonging to investors. The Court was advised, at various **[*4]** hearings and in other communications, that although there were some problems in relations between the Receiver and the CFTC, progress was being made.

As part of his efforts, the Receiver sought sanctions in the CFTC action against a third party, Man Financial, Inc. ("Man"), a futures broker that had provided trading services to PAAMCO and its related entities. The Court held several hearings on the Receiver's motions to require Man to disclose information required by the SRO and ordered Man to comply with the SRO.

B. *Man Complaint*

Pursuant to the Court's above-noted requirement, the Receiver submitted a letter *in camera* briefly identifying certain civil actions that he intended to file. On April 28,

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[1] What follows is a brief summary of this case. Further details about the case are set forth in prior Memoranda of this Court, *see* 2006 U.S. Dist. LEXIS 92767, 2006 WL 3791341, 2006 U.S. Dist. LEXIS 72957, 2006 WL 2869532 and 2006 U.S. Dist. LEXIS 73063, 2006 WL 2707397. Details about the background facts on the conflict of interest issue are set forth in the Master's Report, discussed below, and filed at Doc. No. 351 in Civ. A. No. 05-2973 and Doc. No. 199 in Civ. A. No. 06-1944.

2006, the Court issued an order granting the Receiver permission to bring a separate action against Man and certain of Man's employees arising out of their alleged wrongful conduct in their relationship with PAAMCO and Eustace (Doc. No. 217).

On May 8, 2006, the Receiver initiated the action against Man and several of its employees, *Hodgson v. Man Financial, Inc.*, No. 06-1944. The Complaint alleges PAAMCO acted as manager for a number of offshore funds, including the **[*5]** major fund, entitled the Philadelphia Alternative Asset Fund Limited (the "Offshore Fund"), and Man acted as a futures commission merchant through which the Offshore Fund traded commodity futures and options. The Offshore Fund's Administrator, UBS Cayman, in turn was responsible for preparing monthly account or net asset value statements reporting the performance of the Offshore Fund to the Fund's investors.

UBS Cayman is mentioned throughout the Complaint, and its role in the overall business transaction was, according to the Complaint, a significant one. The Complaint paints UBS Cayman as one of the victims of the wrongdoing by Man. According to the Complaint, Man, among other things, allowed Eustace and PAAMCO to improperly open Offshore Fund accounts and to set up an account, known as the "50 Account," in which losses were allowed to accumulate, unknown to UBS Cayman and the investors, as well as PAAMCO's board of directors and employees. [2] In addition to asserting that Man concealed the 50 Account, the Complaint further alleges that Man made inaccurate trading results from another account, known as the 10 Account, available to UBS Cayman via an online system upon which Eustace **[*6]** knew UBS Cayman relied in preparing the monthly account or net asset value statements for the investors. (Compl. P 28.) The Complaint then continues, "Eustace caused Man Financial to convince UBS to back-date certain EFP trades . . . and to artificially report that numerous large trades occurred at market highs and lows on the last trading day of the prior month instead of the first day of the following month . . . in order to artificially boost the month-end returns of the 10 Accounts." *Id.* P 32. According to the Complaint, this backdating scheme falsely improved the performance of the Offshore Fund and again led UBS to report inaccurate net asset values to investors. *Id.* P 33.

[*7] The Receiver has candidly acknowledged that, shortly after his appointment by Judge Padova, he learned that UBS Cayman and another UBS entity, UBS Securities LLC ("UBS Securities"), had played a role in the underlying transactions and knew that Stradley attorneys, including the Receiver himself, represented other UBS entities, including several mutual funds bearing the UBS name and UBS Financial Services, Inc. (formerly UBS PaineWebber, Inc.) ("UBS Financial Services"). However, the Receiver and his counsel determined that they did not need to conduct a further conflict check because they were fully aware of Stradley's representation of the other UBS entities and determined that there was no conflict requiring disclosure to the court or withdrawal as the Receiver. According to the Receiver and his counsel, at that time, they did not have any reason to believe that any UBS entity would possibly be a party in the litigation. Even if such a possibility existed, they believed it would not present a conflict because the UBS entities represented by the Receiver and Stradley were completely separate affiliates in a larger corporate organization from UBS Cayman and UBS Securities.

At or **[*8]** about the time that the Receiver and Stradley were considering, getting permission for, and drafting the Complaint against Man, despite the many references to UBS Cayman in the Complaint and specifically the allegation that UBS backdated certain documents, albeit allegedly at the urging of Man, they continued to fail to disclose their UBS relationships to the Court or to the CFTC. On May 2, 2006, just prior to the Receiver filing the suit against Man, a meeting took place in the offices of the CFTC in Washington, DC, attended by the Receiver and his counsel, in which they discussed various entities involved in the CFTC case and the proposed lawsuit against Man. At this meeting, the role of UBS Cayman was discussed. The *in camera* letter to the Court outlining the actions the Receiver intended to file, and the meeting with the CFTC in Washington, DC on May 2, 2006, provided the opportunity for the Receiver and/or his counsel to make these disclosures in a confidential manner. The Court does not suggest that the Receiver or his counsel had any improper motives or intent, but the Court cannot ignore the fact that the disclosure was not made at that

[2] PAAMCO set up certain entities in the Cayman Islands, presumably to avoid taxes or other U.S. governmental regulations, and had arranged for UBS Cayman to administer that fund. After the Receiver was appointed in this Court, a court in the Cayman Islands established, authorized under Cayman Island law, a firm to act to act as a liquidator of the Cayman Island entities. This Court approved the protocol for coordination between the Receiver and the Cayman Islands liquidators, known as the Joint Liquidators.

time.

In November and December 2006, **[*9]** Man and other parties conducted depositions of several witnesses employed by UBS Cayman in the Cayman Islands. According to the Receiver, the first time that he or his counsel learned of any possible negligence on the part of UBS Cayman was during the November and December 2006 depositions of the UBS Cayman witnesses. On December 6, 2006, Lee Rosengard, Esquire, one of the attorneys for the Receiver at the Stradley firm, sent an email reporting on the testimony of one of those witnesses and indicating that, based on the failure of UBS Cayman to seek out independent information for verification of accounts operated by PAAMCO, "I continue to believe that the Joint Liqui[]dators in the Caymans have a malpractice claim against UBS. We need to discuss this with Clark." [3]

[*10] The Court held a hearing on the record on January 16, 2007. Initially, the Court summarized the content of the unrecorded telephone conference that had taken place the prior week on January 11, which generally concerned scheduling matters, but during which Man had advised the Court that it intended to bring UBS Cayman into the case as a third-party defendant. This had led to some discussion during the phone call about the impact the inclusion of UBS Cayman would have on both scheduling and settlement discussions. (Tr. 5-7, Jan. 16, 2007.) At the hearing, the Receiver advised the Court that he had retained an esteemed individual practitioner, Peter Hearn, to address issues relating to UBS Cayman. The Court asked Man's counsel if she knew why the Receiver had not named UBS Cayman as a defendant, and asked the same question of Receiver's counsel, at the same acknowledging that the Receiver's counsel may not want to answer that question "because of a conflict issue." The Court used the phrase "conflict issue" because counsel at the hearing implied that a conflict issue had led to the Receiver's retention of Mr. Hearn, who responded that he did not have any knowledge as to why Mr. Hodgson **[*11]** did not name UBS Cayman as one of the original defendants. *Id.* at 11. Instead, Mr. Hearn argued that it was too late to bring third-party claims against UBS Cayman.

Later in the hearing, the Court again inquired as to why, if Man believed there were grounds to bring in UBS Cayman as a party, the Receiver had not done so either in this Court or in conjunction with the Joint Liquidators. The Court prefaced this question by stating, "[n]ow, if you don't want to specifically answer that question because of your firm's conflict with UBS Cayman, I'll defer to Mr. Hearn." *Id.* at 30. Receiver's counsel stated: "I can't speak certainly to the issue of the merits of the claim against UBS or how that may compare on a relative basis with the claims that we have already asserted, . . . which is a significant piece of answering Your Honor's question but one I can't -- I can't obviously address. What I can say is this. We certainly factored that into the mix. The Receiver factored that into the mix in coming to the decision that he did in terms of the position to take on joinder and the timing of the trial." *Id.* The Court then asked, assuming UBS was sued, whether it should be in **[*12]** the same trial as Man or in a bifurcated trial that would take place after the trial against Man was completed. Receiver's counsel responded that the Receiver was intent on trying the case in spring 2007 and including both Man and the third party defendants. Mr. Hearn agreed with this statement and noted, "we sued the people who we sued because we felt they were the people who we ought to sue." *Id.* at 32. [4]

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[3] This phraseology suggests that Rosengard had reached and communicated this belief at a prior date, which the Master suggests was a few days prior. Rosengard's reference to the "Joint Liquidators" refers to the fact that, in the protocol between the Receiver and the Joint Liquidators, approved by this Court, the Joint Liquidators were given primary responsibility to institute litigation against entities in the Cayman Islands. However, nothing has been presented to this Court suggesting that the Joint Liquidators has ever started, let alone considered, litigation against UBS Cayman.

[4] Although an observer of the events that took place in the early part of this year might conclude that there were some inconsistencies in the Receiver and Stradley's positions concerning UBS Cayman, the Court does not fault them for retaining Mr. Hearn. As they told the Master, they did so out of an abundance of caution, given the fact that Man was seeking leave to name UBS Cayman as a third-party defendant, and they knew that questions would arise as to the timing of the trial, bifurcation issues, etc. At the hearing on April 18, 2007, counsel for the Receiver asserted that the Receiver and Stradley had no conflict with UBS Cayman and could sue it, but had decided on the merits of the question that it would be inadvisable to do so.

The Receiver had prepared a letter for the hearing explaining their position on this issue and offered to submit that letter to the Court *in camera*. Subsequently, the Receiver offered to share the letter with CFTC counsel as well. The Court is unwilling to have it filed of record because it obviously contains strategic attorney work product material. Man has opposed the Court receiving a letter on an *ex parte* basis. The

[*13] Several weeks later, counsel for Man sent a letter to this Court dated February 8, 2007 asserting that the Receiver and Stradley had a serious conflict of interest, drawing into question the Receiver's ability to continue to act as a receiver for PAAMCO and its related affiliates and subsidiaries. Man Financial pointed out that the Receiver and his firm had been representing several UBS clients since at least 2002, including UBS Financial Services and several UBS mutual funds, but this information was never disclosed to the Court, the CFTC or the investors in the Offshore Fund. The Receiver and his counsel responded to this letter on February 9 denying the existence of any conflict of interest. The CFTC then responded in a letter on February 13 in which it also expressed concern that a conflict of interest existed and continues to exist because of the Receiver's and his firm's representation of UBS entities. Additional letters were sent by Man and Stradley on February 13 and February 16, respectively. In response to this correspondence, the Court held a hearing on February 16, 2007 on whether the Court should appoint a Special Master under *Federal Rule of Civil Procedure 53* **[*14]** to investigate the factual underpinnings of the Receiver's and his firm's alleged conflict of interest. Later the same day, the Court issued an order appointing a retired Common Pleas Judge, Abraham J. Gafni, as a Master ("Master") to investigate these issues.

The Master then proceeded to conduct a thorough investigation into the factual circumstances underlying the Receiver's alleged conflict because of the UBS representation. The Master's Report (Doc. No. 199 in the Man action) was filed and served on March 30, 2007 and laid out in detail the facts underlying the contentions of the parties on the conflict issue, and the factual circumstances leading up to Man's letter informing the Court of Stradley's representation of several UBS-related entities. Because the Master's Report is on file, the Court need not further detail its contents in this Memorandum. The parties were given an opportunity to, and did, respond to this Report in writing and, on April 18, 2007, the Court held another hearing on the Master's Report and to hear argument as to what actions, if any, the Court should take with respect to the Receiver and his law firm. There were only a few minor corrections raised to **[*15]** the factual aspects of the Master's report in the parties' responses or at the hearing. However, the parties differ significantly on what should now happen based on those facts.

The Master did an excellent job of summarizing the parties' positions and the factual circumstances that now lead to the Court's present decision. For that reason, this Memorandum will focus on the legal issues raised by those facts.

II. *Contentions of the Parties*

The Receiver asserts that he has not done anything which requires the Court to take any action, and the case should proceed as before. The CFTC, and separately Man, assert that the Receiver's failure to disclose his own relationship and that of the Stradley firm with various UBS entities should lead to his disqualification and the appointment of a new Receiver. UBS Cayman did not take a position on this topic, and neither did any of the third party individual defendants. Various investors wrote to the Court, and although the Court does not have information as to the relative amounts of their investments or their alleged losses, most of the investors who communicated to the Court preferred that the Court allow the Receiver and his law **[*16]** firm to continue. However, one group of investors, the Edison Fund Limited, the Fairfax Fund Limited, and the Nucleus Fund Limited, represented by counsel, moved to intervene and suggested the appointment of an attorney from their counsel's law firm to take over as Receiver. They have since withdrawn that motion.

The Receiver and his law firm urge the Court to analyze this issue in connection with the Rules of Professional Conduct adopted by the Pennsylvania Supreme Court, which are applicable in this Court. *HN1*[↑] As reflected in Rule 1.7 [5] **[*18]** and Comment 34 [6], under certain

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CFTC also asserts that the contents of the letter are not relevant on the conflict issue. The Receiver advised the Court that he retained Mr. Hearn out of an abundance of caution because of the Stradley representation of other UBS entities completely separate from UBS Cayman. The record is also clear that the Receiver and his firm never sought any waiver from UBS. The Court agrees with Man and the CFTC that the absence of disclosure is the key issue in the resolution of the matter currently before the Court.

[5] Rule 1.7 of the Pennsylvania Rules of Professional Conduct provides:

> *HN2*[↑] (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or

circumstances, a law firm that has a client relationship with a given corporation or other organization is not barred from accepting a representation adverse to an affiliate of that corporation or organization, such as an unrelated subsidiary of a large corporation. The Receiver and his counsel argue that the UBS entities they represent and those entities which are involved in this litigation are separate legal entities, and there is no reason they should be treated as the same client. Moreover, according to the Receiver and his counsel, there was no expectation by UBS Financial Services that Stradley would avoid representations **[*17]** adverse to UBS Cayman.

The Receiver's legal position is supported by an expert report by Lawrence J. Fox, an attorney well known for his expertise in professional responsibility matters. If this dispute was merely an issue of whether a law firm could accept a representation adverse to a corporate affiliate of an entity **[*19]** when the firm has an ongoing client relationship with another unrelated affiliate of that entity, the Court would readily find that Mr. Fox's analysis and the Receiver's arguments were correct and that no disabling conflict existed.

The CFTC takes the position that Mr. Hodgson, as a court-appointed receiver, is subject to a higher standard of conduct with respect to handling conflicts of interest than that applied to private attorneys. The CFTC contends the Receiver is in a position similar to a bankruptcy trustee and has the duty to avoid even the appearance of possible impropriety, unfairness or partiality. As such, the Receiver and any counsel employed by him were obligated to fully disclose to the Court his and his firm's prior relationships with certain UBS entities, which the CTFC characterizes as a potential conflict of interest, and their failure to do so created an appearance of impropriety affecting the integrity of these proceedings. The CFTC concludes that the Receiver and his counsel should therefore be removed and a new Receiver appointed.

Man takes a position similar to the CFTC and relies in great part on the expert report of Professor Charles Wolfram. Professor Wolfram, **[*20]** also an esteemed and well known expert in professional responsibility matters, has authored several written opinions submitted to the Court on this matter, concluding that Mr. Hodgson and his firm should be disqualified because their prior client relationship with other UBS entities prevents them from performing independent services for the benefit of investors, and that they would be unable to act zealously on behalf of the Offshore Fund.

Both the CFTC and Man rely in part on cases decided in the bankruptcy context, and specifically, with reference to *Federal Rule of Bankruptcy Procedure 2014*, [7] **[*21]**

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(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent.

[6] Comment 34 to Rule 1.7 provides:

HN3[⬆] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[7] *Bankruptcy Rule 2014(a)* provides:

(a) Application for an order of employment

An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to *§ 327*, *§ 1103*, or *§ 1114* of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the

which requires a detailed disclosure of representations, affiliations and other potential interests for a professional who is to be employed by a trustee or committee, and *11 U.S.C. § 327(a)* [8], which governs employment of professionals by a bankruptcy trustee. The bankruptcy cases generally hold that a failure of disclosure in this regard may merit disqualification.

III. *Legal Discussion*

The situation now before the Court does not fit precisely under either Rule 1.7 or bankruptcy doctrine. The issue here is not whether the Stradley firm took on a representation adverse to an affiliate of an existing client. The Stradley firm is representing the Receiver, who was for many years a partner in the firm and is now of counsel and still does work for clients of the Stradley firm, including UBS Financial Services. Although a client, the Receiver is also an attorney with the firm. Thus, Stradley's attorney-client relationship with the Receiver presents no conflict or even a potential conflict between the Stradley firm and any other **[*22]** clients. The Court cannot look at this matter exclusively as an issue of whether the Receiver in his role as an attorney and the Stradley firm have a conflict. For this reason, Rule 1.7 can only provide a reference, but not a final answer, as to whether the Receiver and his firm met their duties of disclosure to this Court.

Furthermore, this is obviously not a bankruptcy proceeding, and *Rule 2014* and *§ 327(a)* are inapplicable for that reason. It would therefore be unfair to decide this issue by reliance on the bankruptcy code or rules alone.

Hodgson's status as a court-appointed equity receiver changes the equation. As previously noted, *see* Memorandum of April 3, 2007 (Doc. No. 352 in the CFTC action), the Receiver is a fiduciary to the Court and to the investors, appointed on motion of the CFTC. Case law concerning receivers is therefore most applicable. Some bankruptcy cases, which discuss the duty of receivers and trustees appointed in bankruptcy proceedings, are relevant on the general policy factors, independent of *§ 327(a)* and *Rule 2014*.

In reviewing the case law on the issues raised by the various parties, and having received numerous briefs on the issue, neither the **[*23]** Supreme Court nor the Third Circuit have issued any specific holdings which govern the factual situation now before the Court. The general case law concerning court supervision of court-appointed receivers notes that ***HN4***[↑] the court's actions with respect to the receiver are reviewed under an abuse of discretion standard.

Two Second Circuit cases provide helpful analysis. One deals with court-appointed receivers outside of a bankruptcy context; the second deals with a law firm's failure to sue a potentially responsible party in a bankruptcy case due to a conflict. We emphasize that the individual facts in these cases are egregious, and do not apply to the Receiver in this case, but the principles discussed cannot be ignored. The first case is *Phelan v. Middlestates Oil Corp., 154 F.2d 978 (2d Cir. 1946)*. Although the facts of this lengthy decision are largely inapposite, the court did set forth, in reliance on earlier Supreme Court cases, the general principles applicable to the appointment of a receiver:

> ***HN5***[↑] A receiver, as 'an officer or arm of the court,' is a trustee with the highest kind of fiduciary obligations. He owes a duty of strict impartiality, of 'undivided **[*24]** loyalty,' to [all] persons interested in the receivership estate, and must not 'dilute' that loyalty. He is 'bound to act fairly and openly with respect to every aspect of the proceedings before the court. . . . The court, as well as all the interested parties,' have 'the right to expect that all its officers,' including the receiver, will not 'fail to reveal any pertinent information or use their official position for their own profit or to further the interests of

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> necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

[8] *Section 327(a)* provides:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

> themselves or any associates.' A receiver has the 'affirmative duty to endeavor to realize the largest possible amount' for assets of the estate. If he has vital information which, if disclosed, might bring a better price for property which is sold pursuant to court order, he must fully disclose it 'prior to the sale when the prospects (are) greater for successful bargaining.'

Id. at 991 (internal quotation omitted).

In *Phelan*, it appeared that the receiver had previously represented interests potentially in conflict with those of the bondholders he represented in his role as a receiver. The court considered an argument as to whether a specific New York law would excuse the high standards **[*25]** the court held federal law applies to receivers. In rejecting this argument, the court noted the special status of a receiver expresses a different consideration from that applied to an ordinary trustee:

> HN6[] A claim against a derelict receiver is not against an ordinary trustee but against a court's officer. Who has the right to assert such a claim is a question affecting the integrity of the court itself. The federal courts, in holding their own officers to accountability, should not be hampered by state court decisions relating to ordinary trustees. . . . When a federal receiver incurs obligations through misconduct, the title thereto is, we think, similarly to be determined by 'federal law.'
>
> . . .
>
> The doctrine, relative to receivers, of strict accountability, and of opposition to divided loyalties, is prophylactic; it aims not merely to punish actual evil in cases where it occurs but to avoid the 'tendency to evil in other cases.'

Id. at 1000-1001 (footnotes and citations omitted).

The second case is Bohack Corp. v. Gulf & W. Indus., Inc., 607 F.2d 258 (2d Cir. 1979). Although this case arose out of a bankruptcy proceeding, **[*26]** and the facts contain egregious circumstances of wrongdoing not present in this case, the legal focus is relevant because the court found that the law firm appointed as special counsel for the debtor in possession had failed to sue a specific defendant. The bankruptcy judge found the law firm's decision was tainted by a conflict and disqualified the special counsel, but the district court reversed this holding. The Second Circuit, in turn, reversed and upheld the disqualification decision of the bankruptcy court.

The facts showed that the law firm had failed to sue a particular defendant with which the a partner in the firm had a close personal friendship and business association, and this had prejudiced the investors. The court concluded as follows:

> We have indeed been loathe to separate a client from his chosen attorney where the alleged misconduct does not prejudice an opposing party and taint the litigation in which he is appearing. The delay and additional expense created by substitution of counsel is a factor to which we have attached considerable significance in these cases. *See*, *e.g.*, Lefrak v. Arabian American Oil Co., 527 F.2d 1136, 1138-40 (2d Cir. 1975). **[*27]**
> However the disqualification here does involve a conflict of interest which goes to the core of the pending state action and which prejudices the defendants since it was authorized by the Bankruptcy Court only if appropriate. The conflict found by the Bankruptcy Court affects not merely a determination of the proper defendants in the action but whether it should have been commenced in the first place. Moreover, counsel here was not simply the choice of the client but was confirmed by the court. As such he is answerable not only to his client but to the Bankruptcy Court as well. Under these circumstances the possible delay and additional expense caused by replacement are clearly outweighed by considerations of the integrity of the judicial process. We find therefore no abuse of discretion in Judge Parente's determination that [the law firm] be removed as special counsel in the state court action.

Id. at 264.

Two other cases, although arising in the bankruptcy context, also shed light on the obligations placed on an attorney acting in the position of a fiduciary or trustee and the consequences of failing to conform to those obligations. In *In re The Leslie Fay* **[*28]** , a federal bankruptcy judge addressed a motion to disqualify a Chapter 11 debtor's counsel because the law firm had failed to disclose potential conflicts to the court when it initially sought to be appointed. *See* In re The Leslie Fay Cos., 175 B.R. 525 (Bankr. S.D.N.Y. 1994). Several months into the proceeding, an official committee of unsecured creditors began raising questions about the law firm's disinterestedness, and the bankruptcy court

appointed an examiner to look into those allegations. The examination revealed that the law firm had several relationships with members of the debtor's Audit Committee and with one of the debtor's largest creditors that, according to the examiner, if known, would have "cast substantial doubt on whether [the law firm] could conduct a fair and impartial investigation for the Audit Committee." *Id. at 530*. The law firm had failed to disclose any of these relationships in its retention affidavit submitted to the court and claimed, when these omissions were brought to light, that it did not have a conflict of interest and had met its disclosure obligations. *Id. at 534*.

Rejecting this rationale, **[*29]** the court noted, "[i]t was for the court, and not [the law firm], to determine whether in fact a conflict existed and, if so, what the remedy should be. The 'decision should not be left to counsel, whose judgment may be clouded by the benefits of potential employment.'" *Id. at 536* (internal quotation omitted). The court in *Leslie Fay* found that the law firm had failed to meet its disclosure obligations under the bankruptcy code and noted the very real harm that resulted from that non-disclosure, including the lengthy examination that had to be conducted into the allegations of a conflict. In fashioning a remedy, the court observed that, because the debtor was at the "critical juncture" in its reorganization efforts and would probably be unable to withstand the costs and delay caused by the departure of its longstanding counsel, it would allow the law firm to remain in the case to complete what it had begun. At the same time, the court ordered that new counsel must be brought in "to handle new matters such as litigation regarding claims, any avoidance actions and suits for relief arising out of the accounting regularities." *Id. at 539*. It reached **[*30]** this decision even though the court recognized the law firm had carried out its duties properly. The court dictated the law firm must bear its own expenses in educating any new counsel on the case and, moreover, it ordered the law firm to disgorge the costs resulting from the examiner's investigation and the failure to disclose. *Id.*

The *Leslie Fay* decision has implications beyond the bankruptcy setting. As the court in *Leslie Fay* observed, ***HN7***[↑] "where the choice of counsel must be approved by a court as appropriate, such that the integrity of the judicial process is implicated, the cost and delay of replacing counsel with a conflict of interest may be outweighed." *Id. at 538*.

Similar issues were raised by a case brought in the Northern District of Illinois involving a law firm's representation of a debtor in a bankruptcy proceeding. In *In re Envirodyne Industries, Inc.*, an unofficial committee of noteholders brought a motion to disqualify the debtor's counsel in a bankruptcy proceeding, and the United States Trustee brought a separate motion to reconsider the order authorizing the law firm's employment. *See In re Envirodyne Industries, Inc., 150 B.R. 1008 (Bankr. N.D. Ill. 1993).* **[*31]** In that case, the law firm had an ongoing and longstanding client relationship with a majority shareholder of the debtor's parent company that was also a creditor of the debtor. The firm did not disclose the relationship to the court when it sought employment in the bankruptcy proceeding.

The district court found that the law firm's representation was an actual conflict under the bankruptcy code and vacated its previous order appointing the firm as the debtor's counsel. In so deciding, it rejected the law firm's argument that concurrent representation in the bankruptcy context may sometimes be appropriate, "[m]ultiple representations which may be tolerable in a commercial setting after full disclosure are not permissible in a bankruptcy setting." *Id. at 1018*. The court further rejected the law firm's contention that any litigation against the creditor is a "remote contingency" therefore not impairing its ability to represent the debtor and noted that "this statement alone is evidence of a bias and demonstrates the [law firm's] already formed belief that [the client] has no liability to the estate." *Id. at 1019*.

In evaluating the implications **[*32]** of the firm's failure to disclose this information, the court noted that failure to disclose alone "is enough to disqualify a professional and deny compensation, regardless of whether the undisclosed connections were material or de minimus." *Id. at 1021*. Notwithstanding the law firm's assertions that it has acted with neutrality and vigorously represented the debtors up until that point, "it's is the court's role and not [the firm's] to determine whether a disqualifying conflict of interest exists." The court concluded that the law firm's vigorous representation of the debtors was irrelevant to a determination of whether it complied with the bankruptcy code and rules. *Id. at 1021*.

The Court also relies on another case arising in the bankruptcy context, which the Master quoted extensively in his report, *In re BH & P, Inc., 949 F.2d 1300 (3d Cir. 1991)* which emphasized the need to develop a remedy based on fact specific inquiry in which the "judge be given an immediate opportunity to make

an intelligent appraisal of the situation and to apply his experience, common sense, and knowledge of the particular proceeding to the request. **[*33]** " *Id. at 1312*. After reviewing the facts of that case, the Third Circuit affirmed the bankruptcy court's decision and the district court's affirmance of that decision to disqualify the trustee.

IV. *Analysis*

After recognizing these general principles, based on inapposite facts, this Court must take into consideration the Receiver's arguments that no significant damage has been done to the receivership efforts in this case. In coming to a decision, the Court must balance the lack of disclosure about UBS Cayman and consider how serious it is in the context of the actual events that have unfolded, and whether any party will be prejudiced [9] or whether the integrity of the proceedings themselves will be subject to question after the case is completed. Considering this matrix of various interests, the Court believes that it should also consider the interests of the investors, the position of the CFTC as the government agency designated by Congress with regulatory authority over futures markets (a multi-billion dollar industry), and the interests of the public.

[*34] Starting with the well known proposition that disqualification is disfavored, a change in Receiver and/or his counsel would require delay in the progress and ultimate termination of the case and additional expense incurred by appointment of a new Receiver. As stated in open court several times, the Receiver is a highly regarded and highly reputable attorney with experience in complex cases. The Stradley firm has done a very satisfactory job in the performance of its professional responsibilities as counsel for the Receiver -- as evidenced by a high degree of diligence in the handling of the cases before the Court, with well prepared briefs and highly respectable motions on matters ranging from discovery to more substantive motions.

The Court also considers potential downstream impact of the current situation, in which UBS Cayman is a party in the case. [10] Fast forwarding to the end of the case, let us assume that the case has continued to trial with UBS Cayman as a third-party defendant, Man has been found liable for significant damages, but has been unsuccessful in its third-party claim against UBS Cayman. In post-trial motions and/or on appeal, assume Man argues that the Receiver **[*35]** and his counsel, because of allegiances to other UBS entities, and although playing "hardball" against Man (as the Receiver is expected to do), framed questions and arguments to the jury in such a way as to encourage the jury to impose liability only as to Man and to prejudice Man's third-party claim against UBS Cayman.

It is, of course, possible that Man is exclusively liable and that UBS Cayman has no liability whatsoever. However, in the hypothetical situation posited above, including a large jury verdict against Man and the jury's exoneration of UBS Cayman, the judgment may be subject to attack and reversal because of the underlying **[*36]** facts concerning the Receiver's ongoing relationship with other UBS entities. Man's counsel has not shied from any arguments in favor of her client, cannot be expected to give up on the conflict issue, and the Court cannot conclude that such arguments are formalistic or frivolous.

The Court has also considered various other remedies to avoid disqualification. One would be a "Chinese wall" within the Stradley firm, but the Receiver was fully knowledgeable of and involved in representation of the UBS Financial Services relationship. Another remedy would be bifurcation of issues regarding UBS Cayman, but that may require two trials and additional expense.

After considering the facts, the law and the unique situation which is presented, the Court concludes that two issues provide the tipping point requiring disqualification of Mr. Hodgson but as to the Man litigation only. The first is the hypothetical posed above and the second is the position of the CFTC. As the government agency responsible for the institution of the case in which the Receiver was appointed, it has had numerous interactions with the Receiver over the course of this litigation, and has, for reasons which the

[9] Although Man injected this conflict issue into the case, and has submitted numerous arguments noted in the Master's Report and Memorandum, the Court gives its advocacy very little weight in view of the fact that the Receiver sued Man and contends Man is liable for significant damages. Man has an obvious motive to have Mr. Hodgson discharged.

[10] Although now designated as a third-party defendant brought into the case by Man, the Court noted the possibility of realigning UBS Cayman as a co-defendant to Man rather than as a third-party defendant, in which situation Man would be able to bring a crossclaim against UBS Cayman. UBS obviously opposes such a change in its status. What position Man would take on this is unknown.

Court **[*37]** cannot find vindictive or otherwise improper, maintained that the Receiver should be replaced, knowing of the detrimental impact this would have on the investors, if only because of the delay in the outcome.

Although not of such significant weight, there is potential prejudice to Man. Nonetheless, the overriding factor is the quite possible taint of the legitimacy of the verdict, which cannot be avoided if the current Receiver remains in place.

However, the factual situation only requires the Receiver be replaced as to the Man litigation. At the hearing on April 18, both counsel for Man and the CFTC agreed Mr. Hodgson could continue as Receiver for matters other than the Man litigation. In considering these potential downstream impacts, the Court concludes that the previously undisclosed relationship between the Receiver and UBS entities other than UBS Cayman is not something that can be ignored. The continued prosecution of the case by a Receiver with a history of UBS relationships cannot be squared with the goal of concluding this case free of any doubt as to whether these relationships have tainted the proceedings or prejudiced another party.

Although the Court is aware that **[*38]** after this possibility was posed to the Receiver's counsel at the last hearing, Receiver's counsel subsequently replied by letter that the Receiver would not want to continue in that capacity as to the non-Man litigation. However, the Court sees no justification for that position and believes that the Receiver and Stradley can continue their existing role on all aspects of this case except the Man litigation. There are proceedings in Canada, in the Cayman Islands and there is one other litigation pending in this district. The additional expense of appointing a new Receiver ad litem for the Man litigation only will itself cause added expense and the Court sees no reason why further additional expense would be required to replace the present Receiver as to the non-Man matters, and therefore, the Court will assume that Mr. Hodgson will continue in those roles.

However, the Court does not reach the same conclusion as to the Stradley firm continuing as counsel with the Man litigation, but reporting to a new receiver, a Receiver ad litem [11], who will have full and exclusive authority over the Man litigation, supervising counsel, communicating with investors, staying in liaison with the **[*39]** CFTC, while remaining ultimately responsible to this Court.

[*40] The Court finds that, once Mr. Hodgson is no longer the "client" of the Stradley firm, it is not in a conflict situation, under a careful review of Rule 1.7 and Comment 34. Thus, the Stradley firm, with the qualifications noted below, may continue to represent an independent Receiver ad litem under the specific facts of this case.

This Court exercises its considerable discretion for the following major reasons:

1. Stradley has significant knowledge of the case, acquired after almost two years as counsel to the receiver;

2. Stradley's performance, as noted above, has been

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[11] The Third Circuit in *Pressman-Gutman Co., Inc. v. First Union Nat'l Bank., 459 F.3d 383 (3d Cir. 2006)* discussed the differences between a court-appointed equity receiver and a guardian ad litem, although this discussion was largely dicta because of the court's ultimate determination that it did not have jurisdiction to hear the appeal. In that case, the plaintiff, the employer-sponsor of an employee profit-sharing plan, brought an interlocutory appeal seeking review of the district court's decision to disqualify its counsel because the counsel had also represented the plan's administrators, who had been brought into the case as third party defendants. The district court had removed the administrators and disqualified their counsel, and then appointed a guardian ad litem "who will replace the [administrators] and serve as administrator of the [P]lan for the limited purpose of this lawsuit" *Id. at 390*.

The plaintiff argued, among other things, that the district court had effectively appointed a receiver, not a guardian ad litem, giving the Third Circuit jurisdiction to hear the appeal under *28 U.S.C. § 1292(a)(1)-(2)*. The Third Circuit rejected this argument, reasoning that such an interpretation "would effectively eliminate the distinction between guardians ad litem and receivers, and, for that matter, between fiduciaries and receivers." *Id. at 394*. The court emphasized the limited nature of the duties of the guardian ad litem, "we note that even though the guardian ad litem has control over the cause of action in this case, there remain myriad duties, functions and responsibilities related to managing the Plan's assets over which the guardian ad litem does not have any control. For this reason, the district court's orders do not amount to orders appointing a receiver for the Plan . . ." *Id. at 394 n.10*. Because Mr. Hodgson will retain his position as Receiver in all other proceedings except for the Man litigation, the term "Receiver ad litem" is therefore appropriate to refer to the role that will be played by Mr. Hodgson's replacement in the Man litigation. The Court reiterates that is has no views as to the merits of the Man litigation.

very satisfactory;

3. Stradley has been paid significant sums, approximately two million dollars, and to replace it completely with another firm would require an additional expenditure of a similar proportion, as well as a substantial delay in this case. [12]

The responsibilities of the Receiver ad litem will be, generally, as follows, which duties **[*41]** may be supplemented or amended as the Man litigation continues:

1. continue to employ the Stradley Firm as counsel on the Man litigation, at least for purposes of continuing to complete expert reports and discovery (which are presently ongoing), and briefing on dispositive motions;

2. consult with Mr. Hodgson as to his views on all aspects of the Man litigation;

3. independently investigate and arrive at an independent judgment as to what course of action should be taken with regard to UBS Cayman in this case, moving forward;

4. develop a settlement strategy, and communicate as appropriate with counsel for other parties and Magistrate Judge Strawbridge;

5. prepare for trial, in the event that the decisions on dispositive motions will require a trial, that will not be substantially delayed from the current schedule;

6. prepare, in conjunction with Mr. Hodgson and counsel, the litigation budgets on a quarterly basis, which may be submitted to the Court in whole in or part in camera;

7. employ counsel of his choosing to work with the Stradley firm, as long as Stradley remains counsel in the Man litigation. This new counsel will exclusively advise the Receiver ad litem as to **[*42]** UBS Cayman issues;

8. the Receiver ad litem shall determine the responsibilities of counsel for trial preparation and the trial, if the case proceeds to tria,l particularly on UBS Cayman issues. [13]

The Court believes that the above determination of this issue is feasible and fair, and that it will ensure the integrity and finality of the proceedings in this Court **[*43]** and that all parties be treated fairly. The Court will retain responsibility to ensure that the Man case is litigated these principles in mind.

The Court believes that the appointment of the Receiver ad litem, and conscientious supervision of counsel from Stradley along with counsel selected by the Receiver ad litem, will allow this case to move forward towards conclusion in an expeditious manner that is appropriate for all parties. [14]

ORDER

In accordance with the foregoing memorandum, the Court appoints Stephen J. Harmelin, Esq. [15] as Receiver ad litem for all purposes of Civil Action 06-1944 only, in place of C. Clark Hodgson, Jr., Esq., who shall continue **[*44]** as Receiver for all other purposes. The Court will schedule a pretrial conference on scheduling issues for Monday, May 14, 2007 at 10:00am.

BY THE COURT:

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[12] A similar result for similar reasons was reached in *Leslie Fay, supra.*

[13] Specifically with regard to the hypothetical posed above, concerning UBS Cayman issues, the Court urges the Receiver ad litem to ensure that counsel other than the Stradley firm handle UBS Cayman issues at the trial, such as examination of any UBS Cayman witnesses, presentation of arguments to the Court and jury concerning UBS Cayman, and, if necessary and appropriate, taking charge of any specific claims against UBS Cayman on behalf of the Receiver ad litem. This Court has approved a similar arrangement of co-counsel handling specific witnesses in a criminal case. *See United States v. Hawkins, 2004 U.S. Dist. LEXIS 17732, 2004 WL 2102017 (E.D. Pa. 2004)*.

[14] The Court takes no position at this time as to any allocation of costs incurred by the Receivership estates because of additional counsel fees resulting from this situation. The Court requests the Receiver to supply a summary of accounts, showing all income, disbursements and funds on hand, as of April 30, 2007, or as soon as available.

[15] The Court has informed counsel for the CFTC as to the conclusions reached and the identity of the Receiver ad litem and his responsibilities, including his supervision of counsel. CFTC counsel shall serve their letter of May 2, 2007 on all counsel. Mr. Harmelin has alerted the Court that his firm, but not himself, has represented a UBS entity in isolated bond financing transactions but has not represented UBS Cayman, and, the firm will not accept any further representation of any UBS entity while this case is pending.

Date: 5/3/07

/s/ Michael M. Baylson, U.S.D.J.

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Neutral
As of: June 28, 2021 5:15 PM Z

Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC

United States District Court for the Eastern District of Wisconsin

June 22, 2011, Decided; June 22, 2011, Filed

Case No. 09-C-0916; Case No. 10-C-1118

Reporter
2011 U.S. Dist. LEXIS 67623 *

KIMBERLY-CLARK WORLDWIDE, Inc., and, KIMBERLY-CLARK GLOBAL SALES, LLC, Plaintiffs, v. FIRST QUALITY BABY PRODUCTS, LLC, and FIRST QUALITY RETAIL SALES, LLC, Defendants.

Subsequent History: Sanctions disallowed by *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC, 2011 U.S. Dist. LEXIS 66745 (E.D. Wis., June 22, 2011)*

Prior History: *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC, 431 Fed. Appx. 884, 2011 U.S. App. LEXIS 11142 (Fed. Cir., 2011)*

Core Terms

consolidation, cases, patent, common questions of law, second case, infringement

Counsel: **[*1]** For Kimberly-Clark Worldwide Inc, Kimberly-Clark Global Sales LLC (1:09-cv-00916-WCG), Plaintiffs: Aimee B Kolz, Janice V Mitrius, Jason S Shull, Jonathan Pieter van Es, Joseph J Berghammer, Katherine L Fink, Katie L Becker, Marc S Cooperman, Matthew P Becker, Michael L Krashin, Thomas J Lerdal, Thomas K Pratt, Banner & Witcoff Ltd, Chicago, IL; Andrew G Klevorn, Chad J Doellinger, Eimer Stahl Klevorn & Solberg LLP, Chicago, IL; Anthony S Baish, Godfrey & Kahn SC, Milwaukee, WI 53202-3590; Daniel T Flaherty, Godfrey & Kahn SC, Appleton, WI; Vicki Margolis, Kimberly-Clark Corporation, Neenah, WI.

For First Quality Baby Products LLC, First Quality Retail Services LLC (1:09-cv-00916-WCG), Defendants: Brian A Comack, David A Boag, Ira E Silfin, Kenneth P George, Michael J Kasdan, Michael V Solomita, Amster Rothstein & Ebenstein, New York, NY; David A Caine, Kalina V Laleva, Lisa K Nguyen, Michael A Ladra, Ron E Shulman, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA; David Michael Underhill, Eric J Maurer, Michael A Brille, Boies Schiller & Flexner LLP, Washington, DC; Gregory B Conway, Thomas Wickham Schmidt, Liebmann Conway Olejniczak & Jerry SC, Green Bay, WI; Gregory J Wallace, Julie **[*2]** M Holloway, Wilson Sonsini Goodrich & Rosati, San Francisco, CA; Jose C Villarreal, Wilson Sonsini Goodrich & Rosati, Austin, TX.

For Paolo Pasqualoni (1:09-cv-00916-WCG), Movant: Thomas L Schober, Davis & Kuelthau SC, Green Bay, WI.

For First Quality Retail Services LLC (1:09-cv-00916-WCG), Counter Claimant: Brian A Comack, David A Boag, Ira E Silfin, Kenneth P George, Michael J Kasdan, Michael V Solomita, Amster Rothstein & Ebenstein, New York, NY; David Michael Underhill, Eric J Maurer, Boies Schiller & Flexner LLP, Washington, DC; Thomas Wickham Schmidt, Liebmann Conway Olejniczak & Jerry SC, Green Bay, WI.

For First Quality Baby Products LLC (1:09-cv-00916-WCG), Counter Claimant: Brian A Comack, David A Boag, Ira E Silfin, Kenneth P George, Michael J Kasdan, Michael V Solomita, Amster Rothstein & Ebenstein, New York, NY; David Michael Underhill, Eric J Maurer, Boies Schiller & Flexner LLP, Washington, DC; Kalina V Laleva, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA; Thomas Wickham Schmidt, Liebmann Conway Olejniczak & Jerry SC, Green Bay, WI.

For Kimberly-Clark Global Sales LLC, Kimberly-Clark Worldwide Inc (1:09-cv-00916-WCG), Counter Defendants: Daniel T Flaherty, Godfrey & **[*3]** Kahn SC, Appleton, WI; Marc S Cooperman, Banner & Witcoff Ltd, Chicago, IL; Vicki Margolis, Kimberly-Clark Corporation, Neenah, WI.

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For First Quality Baby Products LLC, First Quality

Consumer Products LLC, First Quality Retail Services LLC (1:10-cv-01118-WCG), Defendants: Brian A Comack, Ira E Silfin, Kenneth P George, Michael J Kasdan, Michael V Solomita, Amster Rothstein & Ebenstein, New York, NY; David Michael Underhill, Eric J Maurer, Boies Schiller & Flexner LLP, Washington, DC; Thomas Wickham Schmidt, Liebmann Conway Olejniczak & Jerry SC, Green Bay, WI.

Judges: William C. Griesbach, United States District Judge.

Opinion by: William C. Griesbach

Opinion

MEMORANDUM AND ORDER GRANTING MOTION TO CONSOLIDATE

These patent infringement cases are before the Court on a motion to consolidate. The defendant requests that they be consolidated, and the plaintiff opposes consolidation. For the reasons set forth herein **[*4]** the motion will be granted.

BACKGROUND

Within a 15-month span Plaintiffs Kimberly-Clark Worldwide, Inc., and Kimberly-Clark Global Sales, LLC (collectively "K-C") filed two separate patent lawsuits against First Quality Baby Products, LLC, and First Quality Retail Sales, LLC (collectively "First Quality"). On September 21, 2009, K-C filed Civil Action No. 09-CV-0916 alleging infringement of several product and process patents. About a year later, on September 3, 2010, K-C filed an amended complaint. Then, on December 12, 2010, K-C filed another lawsuit against First Quality, Civil Action No. 10-CV-1118, alleging that First Quality infringed a single K-C process patent.

Both cases stem from K-C's allegation that First Quality has infringed on various K-C patents related to disposable training pants and the process by which such training pants are manufactured. Fact discovery in the first case is set to close in about two months. Discovery in the second case was stayed pending resolution of a Rule 11 motion for sanctions, which motion was denied by separate order entered today.

APPLICABLE LEGAL STANDARDS

Federal Rule of Civil Procedure 42(a) (2007) states:

> (a) Consolidation. If actions before **[*5]** the court involve a common question of law or fact, the court may:
>
> (1) join for hearing or trial any or all matters at issue in the actions;
>
> (2) consolidate the actions; or
>
> (3) issue any other orders to avoid unnecessary cost or delay.

Thus, the Court may consolidate actions which are both "before the court" and "involve a common question of law or fact." *See Mutual Life v. Hillmon, 145 U.S. 285, 292, 12 S.Ct. 909, 36 L.Ed. 706 (1892)* (stating that consolidating cases "of like nature and relative to the same question" is within trial court's discretion); 8 James Wm. Moore, *MOORE'S FEDERAL PRACTICE § 42.10[1][a]* (3d ed. 2008) ("The articulated standard for consolidating two or more cases is simply that they involve 'a common question of law or fact.' "). Common questions of law or fact need not predominate, but they must exist and I must find that consolidation will prove beneficial. 8 *Moore, supra, at 42.10[1][a]*. A district court has discretion as to whether to consolidate, *King v. Gen. Elec. Co., 960 F.2d 617, 626 (7th Cir. 1992)*, but may not consolidate unless it finds at least one common issue of law or fact. *Enter. Bank v. Saettele, 21 F.3d 233, 236 (8th Cir.1994)*; 8 *Moore, supra, § 42.10[2][c]*; **[*6]** 9A Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE &PROCEDURE § 2382 (3d ed. 2008). Although neither *Rule 42* nor case law defines "common question of law or fact," the plain meaning of this phrase indicates that a common question is one that must be answered identically in each case in which it is presented.

When common questions of law or fact are present, cases should be consolidated if consolidation will streamline the litigation without causing the parties undue prejudice. *See, e.g., Fleishman v. Prudential-Bache Sec., Inc., 103 F.R.D. 623, 624-25 (E.D. Wis. 1984)*; 9A Wright & Miller, *supra,* § 2383. In determining whether to consolidate, I consider such factors as judicial economy, avoiding delay, and avoiding inconsistent or conflicting results. 8 *Moore, supra, § 42.10[4][a]* (collecting cases). I also consider factors weighing against consolidation, such as the possibility of juror confusion or administrative difficulties. *Id.* § 42.10[5].

The party moving for consolidation "has the burden of establishing that consolidation is appropriate." *Schissel*

*v. Wells, No. 06-0722, 2007 U.S. Dist. LEXIS 85470, 2007 WL 4143223, at *3 (E.D. Wis. Nov. 19, 2007)*.

DISCUSSION

In determining whether to consolidate the two **[*7]** cases, I ask first whether they share common questions of law or fact. I conclude that they do. The cases involve the same parties, are both brought under patent law, and both relate to process and product patents for training pants. Even K-C does not dispute that the cases share common questions of law and fact.

Having found common questions, I may consolidate the cases if the benefits of doing so outweigh the costs. Here, again, I conclude that they do. First Quality argues that consolidation would advance judicial economy and efficiency, would prevent K-C from obtaining windfall damages, and would prevent K-C from impermissibly splitting claims. K-C counters that First Quality's motion for consolidation would delay the first trial causing prejudice to K-C. Specifically, K-C contends that "every day that passes is one more day that K-C is being further irreparably harmed." (K-C Br., Dkt. 378 at 4.) K-C also argues that consolidation will not increase efficiency because the two cases are at different stages of litigation.

Here, the two cases are closely related but are at different stages of litigation. K-C filed its second lawsuit less than three months after filing its second amended **[*8]** complaint in the first lawsuit. K-C explains the delay in filing the second case by First Quality's delay in turning over information that precluded K-C from including allegations of infringement on the '451 patent in its second amended complaint. In the first case the Court has held a *Markman* hearing and issued its claim constructions. These steps have not yet occurred in the second case. Instead this Court stayed discovery in the second case pending resolution of First's Quality's motion for sanctions under *Rule 11*. The fact that the actions are at different stages of litigation, however, does not preclude consolidation automatically. *Miller Brewing v. Metal Co., Ltd., 177 F.R.D. 642, 644 (E.D. Wis. 1998)* (quoting 9A Charles Alan Wright & Alan R. Miller, *Federal Practice and Procedure* § 2383 (2d ed. 1995).)

Rare is the situation where consolidation will not cause some degree of delay to one of the consolidated cases. Here, while K-C's first case may be delayed by consolidation, on balance I conclude that consolidation will not unduly prejudice K-C. Having carefully considered the patent at issue in the second case in deciding First Quality's motion for sanctions, the Court is not **[*9]** convinced that significant delay is inevitable. First Quality has raised serious questions concerning the validity of the '451 Patent in that case, and it is possible that it could be resolved on an expedited basis. Even if it is not, consolidation makes sense.

The patents at issue in both cases relate to the parties' competing disposable training pants and the process by which they are manufactured. Consolidation will prevent a situation in which two separate juries decide damages and thus will remove the possibility of duplicative recovery. In addition consolidation will avoid juror confusion – a single jury will be better able to understand the full scope of the patents in suit and the nature of the products and processes at issue. A patent jury trial is no small undertaking and it follows that allowing a single jury to address the related issues in these cases is a prudent use of the Court's resources. In light of these advantages, and the lack of undue prejudice to K-C, consolidation is appropriate here. The Court need not reach First Quality's arguments related to claim splitting and *res judicata* to justify consolidation.

CONCLUSION

Accordingly, First Quality's motion to consolidate **[*10]** Case No. 09-C-0916 and Case No. 10-C-1118 (Dkt. 362 and Dkt. 29 respectively) is granted for purposes of expert discovery on damages and trial on liability and damages. If either party believes that changes in the current scheduling order are needed to address the '451 Patent, and the parties are unable to agree on a proposed modification, they should notify the Clerk and the matter will be placed on the calendar for a telephone hearing.

SO ORDERED this 22nd day of June, 2011.

/s/ William C. Griesbach

William C. Griesbach

United States District Judge

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Neutral
As of: May 26, 2021 7:15 PM Z

Truckstop

United States District Court for the District of Idaho

January 3, 2006, Decided; January 3, 2006, Filed

Case No. CV 04-561-S-BLW

Reporter
2006 U.S. Dist. LEXIS 107818 *

TRUCKSTOP.NET, L.L.C., Plaintiff, v. SPRINT COMMUNICATIONS COMPANY L.P., Defendant.

Subsequent History: Motion denied by, Stay denied by, Motion granted by *Truckstop.Net, L.L.C. v. Sprint, Corp., 2006 U.S. Dist. LEXIS 20773 (D. Idaho, Mar. 30, 2006)*

Prior History: *Truckstop, 2005 U.S. Dist. LEXIS 58096 (D. Idaho, Feb. 4, 2005)*

Core Terms

conflicting interest, merger, thrust, withdraw, law firm, motion to withdraw, factors, concurrent, former client, confidential information, acquisition, involvement

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Judges: Larry M. Boyle, Chief United States Magistrate Judge.

Opinion by: Larry M. Boyle

Opinion

ORDER ON MOTION TO WITHDRAW

Currently pending before the Court are Jones Day's Motion to Withdraw as Counsel (Docket No. 71) and Defendant's Motion to Stay Pending Resolution of Jones Day Conflict Issue (Docket No. 81). In the interest of avoiding delay and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, the Court will address and resolve these pending motions without a hearing. The Court notes that there are several other pending motions, which will be addressed at a later date.

Further, even though Jones Day has moved to withdraw as counsel in both this and the companion case (CV 05-138-S-BLW), and although the two companion cases involve essentially the same parties **[*4]** and issues, to avoid any confusion in referring to exhibits, attachments, and docket numbers or identifications, the Court will enter a separate order for each case in response to the appropriate motion.

Therefore, having carefully reviewed the record, and otherwise being fully advised, the Court enters the following Order.

I. BACKGROUND

Plaintiff Truckstop.net ("TSN") is represented by attorneys from the law firms of Jones Day and Holland & Hart. *See Mot. Withdraw*, pp. 1-2 (Docket No. 71). Jones Day has acted as counsel for TSN before the present litigation began and has represented two of TSN's investors and their various companies and investments since the 1980's. *Id.*

Though Jones Day initially took the necessary steps to avoid conflicts of interest in representing TSN in this litigation, a conflict of interest has now arisen. *See id.* On August 12, 2005, Sprint Corporation, which is closely associated with Defendant in this action, merged with Nextel Communications, Inc., another of Jones Day's clients. *Mot. Withdraw*, p. 1 (Docket No. 71). Because of this merger, if Jones Day continues to represent TSN in this action, it will effectively be adverse to a subsidiary of its own client, **[*5]** though a client from a different action.

Sprint Nextel has refused to waive the present conflict and to allow Jones Day to continue to represent TSN in this litigation. *Id.* at p. 2. Further, TSN objects to Jones Day's request to withdraw. *Id.*

II. JONES DAY'S MOTION TO WITHDRAW AS COUNSEL

Jones Day moves to withdraw as counsel for Plaintiff TSN, claiming that its representation of TSN in this litigation is "directly adverse to Jones Day's client Sprint Nextel Corporation ('Sprint Nextel'), the parent of defendant Sprint Communications Company L.P." *Mot. Withdraw*, pp. 1-2 (Docket No. 71). In response, TSN urges the Court to deny Jones Day's motion because, it argues, the ***conflict*** was not created by Jones Day, but was ***thrust upon*** it by the merger of its client, Nextel, with Defendant Sprint Corporation. *Pl.'s Resp. to Mot. Withdraw*, p. 2 (Docket No. 77). TSN further argues that "[w]hen conflicts are ***thrust upon*** law firms by mergers, courts do not mechanically apply ***conflict***-of-interest rules; instead, they take a practical approach and carefully consider the prejudice to the firm's clients." *Id.*

Model Rule of Professional Conduct 1.7 generally prohibits a lawyer from representing a client if the

representation **[*6]** involves a concurrent conflict of interest, which exists if the representation of one client will be directly adverse to another client or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client or a former client. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2003). The commentary goes on to discuss situations akin to how TSN describes Jones Day's present situation, implying that withdrawal is not mandatory when the conflict of interest arises due to unforeseeable developments. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 5 (2003) ("Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict.").

Accordingly, an increasing number of courts permit continued representation after **[*7]** a merger has thrust a conflict of interest on the attorneys. *See, e.g.*, *Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121 (N.D. Ohio 1990)* (setting out a balancing approach to determine whether Jones Day had to be disqualified after a merger thrust conflicts of interest on it); *Installation Software Techs., Inc. v. Wise Solutions, Inc., No. 03 C 4502, 2004 U.S. Dist. LEXIS 3388, 2004 WL 524829 (N.D. Ill. Mar. 5, 2004)* (applying *Gould* balancing approach to determine whether law firm should be allowed to withdraw as counsel after ***conflict*** of interest was ***thrust upon*** it due to a client merger).

In *Gould*, Jones Day found itself having conflicts of interests after some of its clients merged. *738 F. Supp. at 1123*. Those mergers resulted in Jones Day essentially being adverse to a current client on behalf of another current client, *id.*, just as Jones Day's situation in the instant action finds Jones Day suing a current client, Sprint, on behalf of another current client, TSN. In determining whether Jones Day should have been disqualified in *Gould*, the court in that case observed

> The explosion of merger activity by corporations during the past fifteen years, and the corresponding increase in the possibility that attorney conflicts of interest may arise unexpectedly, make it appropriate for a court to adopt a perspective about the disqualification of counsel in ongoing litigation that conforms to the problem. That means **[*8]** taking a less mechanical approach to the problem, balancing the various interests. The result is that the courts are less likely to order disqualification and more likely to use other, more tailored measures to protect the interests of the public and the parties.

Id. at 1126. The court in *Gould* balanced various factors to determine whether the integrity of the judicial process would be threatened by the conflict. *Id. at 1127*. These factors included: (1) the resulting prejudice, if any, to the party withholding waiver of the conflict of interest (i.e., whether confidential information has been exchanged and whether that confidential information is related to the present action); (2) the costs of withdrawal to the moving party (financial expenses and the costs of retaining new counsel); (3) the complexity of the case; and (4) the origin of the conflict (i.e., whether it arose through an affirmative act of the party withholding waiver of the conflict of interest). *See id. at 1126-27*; *Installation Software Techs, 2004 U.S. Dist. LEXIS 3388, 2004 WL 524829, at *3*.

In applying the above factors, the court in *Gould* found that, because there had been no demonstration of prejudice, i.e., no confidential information had been passed, because disqualification would cost a great deal of time and money and would **[*9]** significantly delay the progress of the case, and because the conflict was not created by any affirmative act of Jones Day, the "harsh measure of disqualification" was not called for. *Gould, 738 F. Supp. at 1127*.

In *Installation Software Techs*., another federal district court used the *Gould* factors to address a motion to withdraw as counsel brought by Baker & McKenzie ("the attorney") after a ***conflict*** of interest was ***thrust upon*** it after one of its clients ("Client A") became the parent company to the defendant in that action, whom its other client ("Client B") was suing. *Installation Software Techs., 2004 U.S. Dist. LEXIS 3388, 2004 WL 524829*. In applying the *Gould* factors, the court first determined that though the attorney had confidential information about Client A, none of the confidential information was related to its instant litigation between Client B and the subsidiary of Client A; therefore, Client A was not prejudiced by the concurrent representation. *Id.* at *4-5. Second, though the court did not doubt that equally competent counsel could be obtained, "the hours, legal skills and strategies devoted to the early stages of th[e] case leads the Court to the conclusion that the costs of obtaining and educating new counsel, both in terms of

financial expenditures and time, would be high" **[*10]** to Client B. *Id.* at *5. Third, the court found that though the action was not extremely complex, the expenditures that Client B had already incurred for the case led to the reasonable conclusion that any new counsel would need to spend a significant amount of time and energy in litigating the case. *Id.* Fourth, the court noted that the conflict of interest was not initiated by Client A's acquisition of the defendant, not by any action of Client B or the attorney. *Id.* at *6. "Nonetheless, the Court must ensure that neither party receives an advantage because of this acquisition. . . . However, the Court must also ensure that this 'conflict by acquisition', particularly since it arose mid-litigation, does not become a means for [Client A] to strategically disadvantage [Client B]." *Id.* Balancing these factors, the court determined, in *Installation Software Techs*., that the attorney should not have to be disqualified from representing Client B due to the concurrent ***conflict*** of interest. *Id.*

If, as TSN asserts, this were a "***thrust upon***" ***conflict*** of interest case due to a client-merger, as in *Gould* and *Installation Software Techs*., a less mechanical application of the ***conflict*** rules would be called for. In **[*11]** that circumstance, the Court would apply the *Gould* factors to determine whether Jones Day may withdraw as counsel. However, application of the *Gould* factors is not necessary as this is clearly not a "***thrust upon***" ***conflict*** of interest case.

What Defendant Sprint disclosed, and which was not discussed in their initial briefing on this motion, makes the "***thrust upon***" ***conflict*** of interest analysis inapplicable. In its Reply Memorandum in Support of Jones Day's Motion to Withdraw, Defendant represents to the Court that "Jones Day was the very law firm that handled the Sprint Nextel merger announced on December 15, 2004, and completed on August 12, 2005." *Def.'s Reply Mem. Supp. Mot. Withdraw*, p. 2 (Docket No. 83).

In support of this new information, Defendant relies on the declaration of Susan Z. Haller, an attorney who works at Sprint Nextel Corporation's Legal Department in the corporation's Reston, Virginia headquarters. *Haller Decl*., ¶ 1, p. 2 (Docket No. 83, Att. 1). She avers, under penalty of perjury, that "Nextel retained Jones Day to assist it with the proposed merger with Sprint Corporation, which merger in principle was publicly announced on December 15, 2004 and ultimately closed **[*12]** on August 12, 2005." *Id.* at ¶ 2, p. 2. Haller further avers that on April 8, 2005, Nextel's Legal Department sent notices of the imminent merger to all counsel currently representing Nextel, including Jones Day, "giving them advance notice of the imminent merger and the need for them to investigate and clear conflicts." *Id.*

Defendant also submits press clippings reporting of Jones Day's involvement in the merger, including an advertisement by Jones Day in the Wall Street Journal from September 29, 2005, in which Jones Day touted its involvement in the "46.5 billion Nextel Sprint merger," and attributed its role in the merger as the reason for Jones Day being listed among The American Lawyers' 2004 dealmakers of the year. *Thomas Aff*., pp. 2, 6 (Docket No. 83, Att. 2).

In light of such evidence, it appears that Jones Day at least knew that this conflict of interest would arise, if not prior to December 15, 2004, the day the merger was publicly announced, at least since on or around April 8, 2005, due to the notice letter from Nextel's Legal Department, well over six months before filing the instant motion in this Court. Because Jones Day was heavily involved in the merger, and because **[*13]** it had early knowledge of the impending ***conflict*** of interest, this is clearly not a "***thrust upon***" ***conflict*** of interest situation.

The situation in this case is distinguishable from that presented in either *Gould* or *Installation Software Techs*.. In *Gould*, there is no evidence that Jones Day was involved in the merger that thrust the conflict of interest on the law firm. The same is true of the situation in *Installation Software Techs*.. Rather, both decisions emphasize that the conflict of interest that occurred in those cases arose through no involvement of the law firm. *See Gould, 738 F. Supp. at 1127* ("Finally, the conflict was created by Pechiney's acquisition of IGT several years after the instant case was commenced, not by *any affirmative act* of Jones, Day.") (emphasis added); *Installation Software Techs., 2004 U.S. Dist. LEXIS 3388, 2004 WL 524829 *6* ("The conflict of interest in this cause of action was initiated by Altiris' acquisition by Wise, not by *any action* of Installshield or Baker.") (emphasis added). It cannot be said that the merger causing the concurrent conflict of interest in this instant action was not the result of any action by Jones Day lawyers.

Importantly, the focus of the Court in determining whether a ***conflict*** of interest is a "***thrust upon***" ***conflict*** of interest **[*14]** is on the law firm's involvement in the creation of the ***conflict*** of interest. It

is not on whether the law firm believed the conflict of interest would be waived or when the law firm learned that the conflict of interest would not be waived. A law firm cannot take on a representation, knowing that a concurrent conflict of interest will arise due to an impending merger, in the hope and expectation that both clients will waive the ***conflict***, and then claim, when one client does not agree to the waiver, that the ***conflict*** of interest was "***thrust upon***" the law firm.

In this case, Jones Day's early notice of the impending merger—the instant action was filed November 15, 2004, *Compl*. (Docket No. 1), just one month before the Sprint-Nextel merger was publicly announced, December 15, 2004, *Haller Decl*., p. 2 (Docket No. 83, Att. 1)—and its active involvement in the merger itself means that this concurrent ***conflict*** of interest was not "***thrust upon***" Jones Day. Hence, the balancing test in *Gould* does not apply.

With that in mind, and because of the concurrent ***conflict*** of interest, Jones Day cannot continue to represent both TSN and Sprint Nextel without waivers of the conflict from both clients which, **[*15]** according to the record, it does not have. Further, TSN's only argument in opposing Jones Day's motion to withdraw is based on its allegation that the ***conflict*** was "***thrust upon***" Jones Day. In light of the new evidence disclosed by Defendant, TSN's argument is inapplicable. There being no other argument, Jones Day's motion to withdraw from its representation of TSN is granted. Therefore, TSN will become a former client of Jones Day, and the former client conflict of interest standard of Model Rule 1.9 will apply.

Model Rule of Professional Conduct 1.9 prohibits a lawyer who has formerly represented a client in a matter from thereafter representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2002).

It appears that the issues raised in this action are not substantially related to matters in which Jones Day has represented TSN before. Therefore, Rule 1.9 will not prevent Jones Day from continuing to represent Sprint in other actions after TSN becomes a former client.

III. ORDER

Based on the **[*16]** foregoing, IT IS HEREBY ORDERED that Jones Day's Motion to Withdraw as Counsel (Docket No. 71) is GRANTED. TSN kwill continue to be represented by the law firm of Holland & Hart, L.L.P. until further order of the Court.

Defendant's Motion to Stay Pending Resolution of Jones Day Conflict Issue (Docket No. 81) is DENIED.

DATED: **January 3, 2006**.

Larry M. Boyle

Chief U. S. Magistrate Judge

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Wright v. Bigger

United States District Court for the Northern District of West Virginia

November 13, 2008, Decided; November 13, 2008, Filed

Civil Action No. 5:08CV62

Reporter
2008 U.S. Dist. LEXIS 92416 *; 2008 WL 4900566

KELLEY WRIGHT and WESLEY WRIGHT, Plaintiffs, v. MARIE BIGGER, Defendant.

Core Terms

third-party, defense motion, motion for leave, summons, memorandum opinion, scheduling order, counterclaim, plaintiffs', crossclaim, deposition, passenger, deadline, injuries, implead, parties, replied, struck

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For Marie Bigger, Defendant, ThirdParty Plaintiff: April J. Wheeler, LEAD ATTORNEY, Bailey & Wyant, PLLC - Wheeling, Wheeling, WV; Thomas E. Buck, LEAD ATTORNEY, Bailey & Wyant, PLLC, Wheeling, WV.

Judges: FREDERICK P. STAMP, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: FREDERICK P. STAMP, JR.

Opinion

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT MARIE BIGGER'S MOTION FOR LEAVE TO ADD A THIRD-PARTY COMPLAINT

I. *Background*

The plaintiffs, Kelley Wright and Wesley Wright, commenced this civil action in the Circuit Court of Hancock County, West Virginia, alleging that plaintiff Ms. Wright suffered bodily injuries when the defendant ran a red light and struck the vehicle in which Ms. Wright was riding as a passenger. The defendant removed the case to federal court pursuant to 28 U.S.C. § 1332. On October 31, 2008, the defendant filed a motion with this Court to bring in a third-party defendant, Stephanie Ballato. The defendant claims that Ms. Ballato was the driver of the vehicle in which Ms. Wright was a passenger when struck and that Ms. Ballato's actions caused and/or contributed **[*2]** to the alleged injuries of Ms. Wright. The plaintiffs responded in opposition to the defendant's motion for leave to add a third-party complaint, and the defendant replied. [1] For the reasons set forth below, the defendant's motion for leave to add a third-party complaint is granted.

II. *Discussion*

Rule 14(a)(1) of the Federal Rules of Civil Procedure provides that a defendant may bring an action as a third-party plaintiff "on a nonparty who is or *may be liable* to it for all or part of the claim against it." (emphasis added). However, if the third-party plaintiff seeks to file its third-party complaint more than ten days after serving its original answer, it must first obtain the court's permission, by motion. Fed. R. Civ. P. 14(a)(1). Granting leave to bring a third-party into an action pursuant to Rule 14(a)(1) falls within the sound discretion of the trial judge and should be liberally construed. Baltimore & Ohio R.R. Co. v. Saunders, 159 F.2d 481, 483-84 (4th Cir. 1947). *See also* Schwarzer, Tashima & Wagstaffe, *Rutter Group Prac. Guide: Fed.* ***[*3]*** *Civ. Pro. Before Trial* 7:333 (The Rutter Group 2008) ("The decision whether to permit a third party claim under Rule 14 is addressed to the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion.").

While this Court expresses no opinion at this time as to whether the third-party complaint has any merit, this Court does find that the defendant's claim against the third-party meets the requirements of Rule 14(a)(1) of

[1] The plaintiffs filed both a response and an amended response in opposition to the defendant's motion for leave to add a third-party complaint.

the Federal Rules of Civil Procedure because it alleges that Ms. Ballato may be liable for the plaintiffs' claims. Furthermore, this Court notes that the motion was timely filed. Pursuant to the scheduling order entered by this Court on March 19, 2008, "[m]otions to join additional parties, motions to amend pleadings, and any crossclaim or counterclaim, as well as any similar motions, shall be filed on or before *October 31, 2008.*" (emphasis supplied). Thus, because the defendant filed the motion for leave to add a third-party complaint on October 31, 2008, the defendant filed a timely motion within the deadline set by the scheduling order entered by this Court.

This Court is not persuaded by the plaintiffs' argument that the **[*4]** defendant's motion is unduly delayed. *See* Schwarzer, Tashima & Wagstaffe, *Rutter Group Prac. Guide: Fed. Civ. Pro. Before Trial* 7:333 ("Unreasonable delay in seeking to implead a third-party may be a valid basis to deny impleader."). The plaintiffs allege that the defendant did not file this motion until more than seven months after the filing of the complaint in this case. [2] Nevertheless, in her reply, the defendant claims that the plaintiffs did not request the deposition of the defendant until less than two months before the joinder of parties deadline, and that it was only after this deposition, in which the defendant testified that she believed that she had a green light and that Ms. Ballato hit her vehicle, that the defendant had a good faith basis to file the motion currently pending before this Court. Because certain information on which the defendant bases her motion was only uncovered recently in discovery, this Court does not find that the defendant deliberately delayed filing this motion. Moreover, this Court finds no evidence that either the plaintiffs or the third-party defendant would be prejudiced by this Court granting the defendant's motion. Accordingly, the defendant's **[*5]** motion for leave to add a third-party complaint is granted.

III. *Conclusion*

For the reasons stated above, the defendant's motion for leave to add a third-party complaint is hereby GRANTED.

IT IS SO ORDERED.

The Clerk is DIRECTED to file the third-party complaint which was attached as "Exhibit A" to the Defendant Marie Bigger's Motion for Leave to Add a Third-Party Complaint, Docket No. 11. Further, the Clerk is DIRECTED to issue summons on the third-party complaint. The summons and third-party complaint shall then be served upon the third-party defendant in accordance with *Federal Rule of Civil Procedure 14*.

The party served with the summons and third-party complaint, hereinafter the third-party defendant, shall make any defenses pursuant to *Federal Rule of Civil Procedure 12* and any counterclaims or crossclaims pursuant to *Federal Rule of Civil Procedure 13*.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to counsel of record herein.

DATED: November 13, 2008

/s/ Frederick P. Stamp, Jr.

FREDERICK **[*6]** P. STAMP, JR.

UNITED STATES DISTRICT JUDGE

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[2] This Court notes that the complaint in this case was filed on January 7, 2008. The defendant filed the motion for leave to add a third-party complaint on October 31, 2008.

Neutral
As of: June 28, 2021 5:19 PM Z

Zimmerman v. GJS Grp., Inc.

United States District Court for the District of Nevada

March 26, 2018, Decided; March 27, 2018, Filed

Case Nos.: 2:17-cv-00304-GMN-GWF; 2:17-cv-00307-GMN-GWF; 2:17-cv-00312-GMN-GWF; 2:17-cv-00397-GMN-GWF; 2:17-cv-00433-GMN-GWF; 2:17-cv-00536-GMN-GWF; 2:17-cv-00554-GMN-GWF; 2:17-cv-00560-GMN-GWF; 2:17-cv-00563-GMN-GWF; 2:17-cv-00567-GMN-GWF; 2:17-cv-00569-GMN-GWF; 2:17-cv-00595-GMN-GWF; 2:17-cv-00596-GMN-GWF; 2:17-cv-00597-GMN-GWF; 2:17-cv-00602-GMN-GWF; 2:17-cv-00796-GMN-GWF; 2:17-cv-00830-GMN-GWF; 2:17-cv-00833-GMN-GWF; 2:17-cv-00834-GMN-GWF; 2:17-cv-00935-GMN-GWF; 2:17-cv-00973-GMN-GWF; 2:17-cv-00974-GMN-GWF; 2:17-cv-00976-GMN-GWF; 2:17-cv-00977-GMN-GWF; 2:17-cv-01183-GMN-GWF; 2:17-cv-01194-GMN-GWF; 2:17-cv-01198-GMN-GWF; 2:17-cv-01199-GMN-GWF; 2:17-cv-01201-GMN-GWF; 2:17-cv-01206-GMN-GWF; 2:17-cv-01209-GMN-GWF; 2:17-cv-01259-GMN-GWF; 2:17-cv-01300-GMN-GWF; 2:17-cv-01302-GMN-GWF; 2:17-cv-01308-GMN-GWF; 2:17-cv-01315-GMN-GWF; 2:17-cv-01338-GMN-GWF; 2:17-cv-01347-GMN-GWF; 2:17-cv-01358-GMN-GWF; 2:17-cv-01359-GMN-GWF

Reporter
2018 U.S. Dist. LEXIS 50158 *; 2018 WL 1512603

KEVIN ZIMMERMAN, Plaintiff, vs. GJS GROUP, INC., Defendant. vs. STATE OF NEVADA, ex rel. ADAM PAUL LAXALT, Attorney General, Defendant-Intervenor. And related cases.

Prior History: *Zimmerman v. Nev. CVS Pharm., LLC, 2017 U.S. Dist. LEXIS 131361 (D. Nev., Aug. 17, 2017)*

Core Terms

Consolidate, cases, complaints, question of law

Counsel: [*1] For Kevin Zimmerman (2:17-cv-00304-GMN-GWF, 2:17cv397), Plaintiff: Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Nevada Attorney General, State of Nevada, Office of the Attorney General, Bureau of Consumer Protection, Intervenor Defendant (2:17-cv-00304-GMN-GWF): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV.

For Nevada Attorney General, Intervenor Defendant (2:17cv397): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV USA; Mark J. Krueger, LEAD ATTORNEY, Carson City, NV USA.

For Kevin Zimmerman (2:17cv433, 2:17cv602), Plaintiff: Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV USA.

For Nevada Attorney General (2:17cv433, 2:17cv602), Defendant: Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV USA.

For Kevin Zimmerman, Plaintiff (2:17cv977): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV USA.

For Target Corporation, Defendant (2:17cv977): Sheri M. Thome, LEAD ATTORNEY, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, Las Vegas, NV USA; Chad C. Butterfield, Wilson Elser Moskowitz Edelman & Dicker LLP, Las Vegas, NV USA.

For Nevada Attorney General, Intervenor Defendant (2:17cv977): Lucas Tucker, LEAD ATTORNEY, Nevada **[*2]** Attorney General, Las Vegas, NV USA; Mark J. Krueger, LEAD ATTORNEY, Carson City, NV USA.

For Kevin Zimmerman, Plaintiff (2:17cv1206): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV USA.

For Wendy's of Las Vegas, Inc., Defendant (2:17cv1206): Richard L Tobler, Richard L. Tobler, Ltd., Las Vegas, NV USA.

For Nevada Attorney General, Intervenor Defendant (2:17cv1206): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV USA.

For Kevin Zimmerman, Plaintiff (2:17cv1300): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV USA.

For Nevada Attorney General, Intervenor Defendant (2:17cv1300): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV USA.

For Kevin Zimmerman, Plaintiff (2:17cv1302): Whitney

C Wilcher, The Wilcher Firm, Las Vegas, NV USA.

For Nevada Attorney General, Intervenor Defendant (2:17cv1302): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV USA.

For Kevin Zimmerman, Plaintiff (2:17cv1315): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV USA.

For Rose Group Holdings, Inc., doing business as 7-Eleven Food Store 29660 C, Defendant (2:17cv1315): Michael S. Orr, LEAD ATTORNEY, PRO HAC VICE, Call & Jensen, Newport Beach, CA USA; John **[*3]** P. Aldrich, Aldrich Law Firm, Ltd., Las Vegas, NV USA; Michael Scott Orr, Call & Jensen, Newport Beach, CA USA.

For Nevada Attorney General, Intervenor Defendant (2:17cv1315): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV USA.

For Kevin Zimmerman, Plaintiff (2:17cv1347): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV USA.

For Nevada Attorney General, Intervenor Defendant (2:17cv1347): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV USA; Mark J. Krueger, LEAD ATTORNEY, Carson City, NV USA.

For Kevin Zimmerman, Plaintiff (2:17-cv-00307-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Nevada CVS Pharmacy, LLC, also known as Warm Springs Road CVS, LLC, Defendant (2:17-cv-00307-GMN-GWF): Cayla Witty, Nevada Court of Appeals, Las Vegas, NV.

For Kevin Zimmerman, Plaintiff (2:17-cv-00312-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Starbucks Corporation, Defendant (2:17-cv-00312-GMN-GWF): Lynn V. Rivera, Burnham Brown, Reno, NV.

For Nevada Attorney General, Defendant (2:17-cv-00312-GMN-GWF): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV; Mark J. Krueger, LEAD ATTORNEY, Carson City, NV.

For Kevin **[*4]** Zimmerman, Plaintiff (2:17-cv-00536-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For National Retail Properties, LP, Defendant (2:17-cv-00536-GMN-GWF): Richard L Tobler, Richard L. Tobler, Ltd., Las Vegas, NV.

For Kevin Zimmerman, Plaintiff (2:17-cv-00554-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Party City Corporation, Defendant (2:17-cv-00554-GMN-GWF): David F Faustman, Teodora Hrissimiro Popova, LEAD ATTORNEYS, Fox Rothschild LLP, Las Vegas, NV.

For Kevin Zimmerman, Plaintiff (2:17-cv-00560-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Sareh Siavash, Defendant (2:17-cv-00560-GMN-GWF): Justin R. Taruc, LEAD ATTORNEY, Geoffrey W. Hawkins, Hawkins Melendrez, P.C., Las Vegas, NV.

For Kevin Zimmerman, Plaintiff (2:17-cv-00563-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Snowed Inn, LLC, Defendant (2:17-cv-00563-GMN-GWF): Kurt R. Bonds, LEAD ATTORNEY, Alverson Taylor Mortensen, et al, Las Vegas, NV.

For Nevada Attorney General, Intervenor Defendant (2:17-cv-00563-GMN-GWF): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV.

For Kevin Zimmerman (2:17-cv-00567-GMN-GWF, 2:17-cv-00569-GMN-GWF), Plaintiff: **[*5]** Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Target, Corporation, Defendant (2:17-cv-00567-GMN-GWF): Chad C. Butterfield, Sheri M. Thome, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, Las Vegas, NV.

For Nevada Attorney General, Intervenor Defendant (2:17-cv-00567-GMN-GWF): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV; Mark J. Krueger, LEAD ATTORNEY, Carson City, NV.

For Wendy's Las Vegas, Inc., Defendant (2:17-cv-00569-GMN-GWF): Richard L Tobler, Richard L. Tobler, Ltd., Las Vegas, NV.

For Kevin Zimmerman, Plaintiff (2:17-cv-00595-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Snowed Inn, Incorporated, Defendant (2:17-cv-00595-GMN-GWF): Kurt R. Bonds, Alverson Taylor Mortensen, et al, Las Vegas, NV.

For Kevin Zimmerman, Plaintiff (2:17-cv-00596-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Starbucks, Corporation, Defendant (2:17-cv-00596-GMN-GWF): Lynn V. Rivera, Burnham Brown, Reno,

NV.

For Kevin Zimmerman, Plaintiff (2:17-cv-00597-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Target, Corporation, Defendant (2:17-cv-00597-GMN-GWF): Sheri M. Thome, LEAD ATTORNEY, Chad C. Butterfield, Wilson, Elser, **[*6]** Moskowitz, Edelman & Dicker LLP, Las Vegas, NV.

For Nevada Attorney General, Intervenor Defendant (2:17-cv-00597-GMN-GWF): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV; Mark J. Krueger, LEAD ATTORNEY, Carson City, NV.

For Kevin Zimmerman, Plaintiff (2:17-cv-00796-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Einstein and Noah Corp., Defendant (2:17-cv-00796-GMN-GWF): Kelly H Dove, LEAD ATTORNEY, Michael Paretti, Snell & Wilmer L.L.P., Las Vegas, NV.

For Nevada Attorney General, Intervenor Defendant (2:17-cv-00796-GMN-GWF): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV.

For Kevin Zimmerman (2:17-cv-00830-GMN-GWF, 2:17-cv-00833-GMN-GWF), Plaintiff: Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For For Smith's Food & Drug Centers, Inc., Defendant (2:17-cv-00830-GMN-GWF): Gregory Francis Hurley, LEAD ATTORNEY, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, Costa Mesa, CA; Dalton L. Hooks, Alverson Taylor Mortensen & Sanders, Las Vegas, NV; Michael Johnson Chilleen, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, Costa Mesa, CA.

For Starbucks Corporation, Defendant (2:17-cv-00833-GMN-GWF): Lynn V. Rivera, Burnham **[*7]** Brown, Reno, NV.

For Kevin Zimmerman, Plaintiff (2:17-cv-00834-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Starbucks Corporation, Defendant (2:17-cv-00834-GMN-GWF): Lynn V. Rivera, Burnham Brown, Reno, NV.

For Kevin Zimmerman, Plaintiff (2:17-cv-00935-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Einstein and Noah Corp. doing business as Einstein Bros Bagels, Defendant (2:17-cv-00935-GMN-GWF): Kelly H Dove, LEAD ATTORNEY, Snell & Wilmer L.L.P., Las Vegas, NV; Michael Paretti, c/o Snell & Wilmer, Las Vegas, NV.

For Kevin Zimmerman, Plaintiff (2:17-cv-00973-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Smith's Food & Drug Centers, Inc., Defendant (2:17-cv-00973-GMN-GWF): Gregory Francis Hurley, Michael Johnson Chilleen, LEAD ATTORNEYS, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, Costa Mesa, CA; Mari K Schaan, LEAD ATTORNEY, Alverson Taylor, Las Vegas, ND; Dalton L. Hooks, Alverson Taylor Mortensen & Sanders, Las Vegas, NV.

For Kevin Zimmerman, Plaintiff (2:17cv974): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV USA.

For Smith's Food & Drug Centers, Inc., Defendant (2:17cv974): Gregory Francis Hurley, LEAD ATTORNEY, PRO **[*8]** HAC VICE, Sheppard Mullin Richter & Hampton LLP, Costa Mesa, CA USA; Mari K Schaan, LEAD ATTORNEY, Alverson Taylor, Las Vegas, ND USA; Michael Johnson Chilleen, LEAD ATTORNEY, PRO HAC VICE, Sheppard Mullin Richter & Hampton LLP, Costa Mesa, CA USA; Dalton L. Hooks, Alverson Taylor Mortensen & Sanders, Las Vegas, NV USA.

For Nevada Attorney General, Intervenor Defendant (2:17cv974): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV USA.

For Kevin Zimmerman, Plaintiff (2:17-cv-00976-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Starbucks Corporation, Defendant (2:17-cv-00976-GMN-GWF): Lynn V. Rivera, Burnham Brown, Reno, NV.

For Nevada Attorney General, Intervenor Defendant (2:17-cv-00976-GMN-GWF): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV.

For Kevin Zimmerman, Plaintiff (2:17-cv-01183-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Nevada Attorney General, Intervenor Defendant (2:17-cv-01183-GMN-GWF): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV.

For Kevin Zimmerman, Plaintiff (2:17cv1194): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV USA.

For Smith's Food & Drug Centers, Inc., doing **[*9]** business as Smith's Food & Drug #346, Defendant (2:17cv1194): Mari K Schaan, LEAD ATTORNEY,

Alverson Taylor, Las Vegas, ND USA; Michael Johnson Chilleen, LEAD ATTORNEY, PRO HAC VICE, Gregory Francis Hurley, Sheppard Mullin Richter & Hampton LLP, Costa Mesa, CA USA; Dalton L. Hooks, Alverson Taylor Mortensen & Sanders, Las Vegas, NV USA.

For Nevada Attorney General, Intervenor Defendant (2:17cv1194): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV USA.

For Kevin Zimmerman, Plaintiff (2:17-cv-01198-GMN-GWF): Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Snowed Inn, LLC, doing business as McDonald's #24975, Defendant (2:17-cv-01198-GMN-GWF): Kurt R. Bonds, LEAD ATTORNEY, Alverson Taylor Mortensen, et al, Las Vegas, NV.

For Nevada Attorney General, Intervenor Defendant (2:17-cv-01198-GMN-GWF): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV; Mark J. Krueger, LEAD ATTORNEY, Carson City, NV.

For Kevin Zimmerman (2:17-cv-01199-GMN-GWF, 2:17-cv-01201-GMN-GWF), Plaintiff: Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Speedee Mart, Inc., doing business as Speedee Mart #111, Defendant (2:17-cv-01199-GMN-GWF): Dylan T. Ciciliano, LEAD ATTORNEY, **[*10]** Garman Turner Gordon LLP, Las Vegas, NV; Gregory E Garman, LEAD ATTORNEY, Garman Turner Gordon, Las Vegas, NV.

For Starbucks Corporation, doing business as Starbucks Coffee Company, Defendant (2:17-cv-01201-GMN-GWF): Lynn V. Rivera, Burnham Brown, Reno, NV.

For Kevin Zimmerman (2:17-cv-01209-GMN-GWF, 2:17-cv-01259-GMN-GWF), Plaintiff: Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Nevada Attorney General, Intervenor Defendant (2:17-cv-01209-GMN-GWF): Lucas Tucker, LEAD ATTORNEY, Nevada Attorney General, Las Vegas, NV; Mark J. Krueger, LEAD ATTORNEY, Carson City, NV.

For 7-Eleven, Inc., Defendant (2:17-cv-01259-GMN-GWF): John P. Aldrich, Aldrich Law Firm, Ltd., Las Vegas, NV.

For Kevin Zimmerman (2:17-cv-01308-GMN-GWF, 2:17-cv-01338-GMN-GWF), Plaintiff: Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For Party City Corporation, doing business as Party City of Mission Center #538, Defendant (2:17-cv-01308-GMN-GWF): David F Faustman, LEAD ATTORNEY, Teodora Hrissimiro Popova, Fox Rothschild LLP, Las Vegas, NV.

For Kevin Zimmerman (2:17-cv-01358-GMN-GWF, 2:17-cv-01359-GMN-GWF), Plaintiff: Whitney C Wilcher, The Wilcher Firm, Las Vegas, NV.

For WBF McDonald's Management, LLC, doing **[*11]** business as, McDonald's (2:17-cv-01358-GMN-GWF, 2:17-cv-01359-GMN-GWF), Defendant: Kurt R. Bonds, LEAD ATTORNEY, Alverson Taylor Mortensen, et al, Las Vegas, NV.

Judges: Gloria M. Navarro, Chief United States District Judge.

Opinion by: Gloria M. Navarro

Opinion

ORDER

Pending before the Court is Intervenor State of Nevada's ("Intervenor's") Motion to Consolidate, (ECF No. 37).[1] Plaintiff Kevin Zimmerman ("Plaintiff") filed a Response, (ECF No. 39), and Intervenor filed a Reply, (ECF No. 41). For the reasons discussed herein, Intervenor's Motion is **GRANTED in part** and **DENIED in part**.

I. BACKGROUND

These cases arise out of alleged violations of Title III of the Americans with Disabilities Act ("ADA"), *42 U.S.C. § 12101, et seq.*, and a series of lawsuits filed by Plaintiff against various defendant-entities in the Las Vegas, Nevada area. On February 28, 2017, the Court issued an omnibus order transferring more than seventy of Plaintiff's cases to the undersigned and the Honorable Magistrate Judge George Foley. *See Zimmerman v. Nevada CVS Pharmacy, LLC*, No. 2:17-cv-00307-GMN-GWF (D. Nev. 2017) (Omnibus Transfer Order, ECF No. 5). The Court reasoned that the "allegations in each of these cases are nearly identical," and **[*12]** that "judicial

[1] Intervenor filed its initial Motion in *Zimmerman v. GJS Grp., Inc.*, No. 2:17-cv-00304-GMN-GWF (D. Nev. 2017). Unless otherwise indicated, the Court will cite to the parties' respective briefs in that case, which are identical to those filed in the other cases that Intervenor seeks to consolidate.

economy will be served" by transferring all of the cases to a single District Court Judge and Magistrate Judge. (*Id.* 1:26-2:3).

On August 8, 2017, Intervenor filed a motion to intervene as a limited-purpose defendant, (ECF No. 28), which Judge Foley subsequently granted on October 11, 2017. (ECF No. 35). On October 17, 2017, Intervenor filed the instant Motion to Consolidate, (ECF No. 37). According to Intervenor's Motion, Plaintiff filed approximately 275 complaints in the District of Nevada between the dates of January 31, 2017, and October 17, 2017. (Mot. to Consolidate 2:25). Intervenor further asserts that, as of October 2017, approximately eighty-nine cases were active. (*Id.* 2:25-3:2); (*see* App. A to Mot. to Consolidate, ECF No. 37-1).[2]

Pursuant to this, Intervenor seeks consolidation of all of Plaintiff's cases for the limited purpose of determining "whether the complaints filed by this Plaintiff should be dismissed on the basis of common issues of law and fact," and "whether the Court should issue any sanctions or other remedial orders." (*Id.* 1:26-2:2).

II. LEGAL STANDARD

Rule 42(a) of the Federal Rules of Civil Procedure governs motions to consolidate. It provides:

> If actions before the court involve a common **[*13]** question of law or fact, the court may join for hearing or trial any or all matters at issue in the actions, consolidate the actions, or issue any other orders to avoid unnecessary cost or delay.

Fed. R. Civ. P. 42(a).

When deciding whether to consolidate cases, the threshold question for the court to answer is whether the actions involve common questions of law or fact. *See id.* District courts are given wide latitude in exercising their discretion to grant or deny consolidation. *See In re Adams Apple, 829 F.2d 1484, 1487 (9th Cir. 1987)*. "Consolidation requires only a common question of law or fact; perfect identity between all claims in any two cases is not required, so long as there is some commonality of issues." *Firefighters, Local 1908 v. Cnty. of Clark, No. 2:12-cv-00615-MMD-VCF, 2012 U.S. Dist. LEXIS 76175, 2012 WL 1986590, at *2 (D. Nev. June 1, 2012)*. If the court determines that common questions are present, it must then balance the savings of time and effort that consolidation will produce against any inconvenience, delay, confusion, or prejudice that may result. *Huene v. United States, 743 F.2d 703, 704 (9th Cir. 1984)*. Finally, whether actions should be consolidated under *Rule 42(a)* is a matter committed to the trial court's discretion. *Inv'rs Research Co. v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 877 F.2d 777 (9th Cir. 1989)*.

III. DISCUSSION

Intervenor moves for consolidation on the basis that all the complaints in these actions are "substantially similar" and "contain common questions **[*14]** of law and fact." (Mot. to Consolidate 11:9-15). Specifically, Intervenor seeks consolidation for the limited purpose of determining whether all cases should be dismissed "on the basis of threshold questions of law and fact common to all consolidated cases, including, but not limited to, Plaintiff's lack of standing, and Plaintiff's failure to state a cause of action." (*Id.* 2:4-8).[3] Moreover, in its Reply, Intervenor states that it intends to assert a facial challenge to Plaintiff's standing based on common allegations and omissions in all of Plaintiff's complaints. (Reply 6:4-7, ECF No. 41).

Plaintiff responds that "key facts in each of Plaintiff's cases are unique and specific to each location, which destroys the commonality of fact" alleged by Intervenor. (Resp. 3:23-25, ECF No. 39). Plaintiff asserts that his claims "arise from specific and distinct facts related to where he suffered discrimination, how he suffered, the way each unique defendant subjected him to unequal access, the identity of the responsible defendants, and the separate and specific date when the events occurred." (*Id.* 8:22-9:1). Moreover, Plaintiff contends that the complaints allege "no less than 37 specific **[*15]** and unique types of discrimination." (*Id.* 4:7-8). Plaintiff continues that consolidation would prejudice him in light of the distinct procedural postures

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[2] "[A] court may take judicial notice of its own records in other cases . . . ." *See United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980)*. Since that time, approximately half of those cases have been closed.

[3] In its Motion to Consolidate, Intervenor also seeks sanctions or other remedial orders concerning Plaintiff's representations in his various applications to proceed in forma pauperis and the issue of whether Plaintiff conducted a reasonable inquiry prior to filing the instant actions. (Mot. to Consolidate 11:16-13:3). The Court, however, directs Intervenor to discuss this request in a separate motion. *See D. Nev. LR IC 2-2(b)*.

of each case. (*Id.* 9:6-9).

The Court finds that common questions of law render the instant cases appropriate for consolidation. All of the complaints in these actions allege that Defendants' violations of the ADA and corresponding Accessibility Guidelines have prevented Plaintiff from the full use and enjoyment of Defendants' places of public accommodation ("PPA"). The complaints in these actions are virtually identical.[4] Because Intervenor and various Defendants to these cases have asserted challenges to Plaintiff's standing, the Court finds that judicial economy will be served by resolving the threshold question of jurisdiction in a single order.

Accordingly, the Court will consolidate the above-captioned cases for the limited purpose of determining subject matter jurisdiction. The Court will set a briefing schedule to allow the parties to address whether Plaintiff has established an injury-in-fact sufficient to confer Article III standing. Specifically, the Court will permit Intervenor to assert a facial challenge to Plaintiff's **[*16]** standing based on common allegations or omissions in the instant complaints.[5] The Court denies, without prejudice, the pending motions to dismiss in these cases with leave to join in Intervenor's consolidated motion to dismiss. In doing so, the Court notes that the question of subject matter jurisdiction must be answered prior to allowing these cases to proceed on their merits. *See* Hawaii v. Trump, 878 F.3d 662, 680 (9th Cir. 2017) ("Without jurisdiction the court cannot proceed at all in any cause.") (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)).

The Court cautions, however, that numerous arguments have been made by Defendants to the instant cases that are inconsistent with prevailing Ninth Circuit law. Specifically, Plaintiff's status as an ADA "tester" does not factor into the standing analysis. In the Ninth Circuit, "motivation is irrelevant to the question of standing under Title III of the ADA." *See* Civil Rights Educ. & Enf't Ctr. v. Hosp. Props. Tr., 867 F.3d 1093, 1102 (9th Cir. 2017) (holding that "Plaintiffs' status as ADA testers . . . does not deprive them of standing."). Moreover, in the Ninth Circuit, a Plaintiff need not have concrete plans to return to a defendant's PPA. *See* Chapman v. Pier 1 Imps., Inc., 631 F.3d 939, 950 (9th Cir. 2011); *see also* Civil Rights Educ. & Enf't Ctr., 867 F.3d at 1100-01 (holding that an ADA Plaintiff need not intent to visit the PPA in question until *after* the alleged barriers are remediated). Accordingly, the parties are **[*17]** advised to consider these cases in addressing the question of subject matter jurisdiction.

IV. CONCLUSION

IT IS HEREBY ORDERED that Intervenor's Motions to Consolidate, (ECF No. 37, *et al.*), are **GRANTED in part** and **DENIED in part**. Specifically, the Court grants Intervenor's Motions for the limited purpose of addressing subject matter jurisdiction, consistent with the foregoing.

IT IS FURTHER ORDERED that all consolidated briefings shall be filed in Case No. 2:17-cv-00304-GMN-GWF.

IT IS FURTHER ORDERED that all pending motions to dismiss are denied without prejudice with leave to join in the consolidated briefing to be submitted by Intervenor or, alternatively, to refile upon resolution of Intervenor's motion to dismiss, in accordance with Appendix A to this Order.

IT IS FURTHER ORDERED that Intervenor shall have until **April 18, 2018** to file its consolidated motion to dismiss.

DATED this 26 day of March, 2018.

/s/ Gloria M. Navarro

Gloria M. Navarro, Chief Judge

United States District Judge

Appendix A

Go to table1

[4] For this reason, the Court previously issued the omnibus transfer order discussed *supra*.

[5] In this regard, because Intervenor seeks to assert a facial challenge, the Court finds that the existence of distinct alleged ADA violations at different locations will not prejudice Plaintiff.

Table1 (*Return to related document text*)

Case Number	Motions to Consolidate	Motions to Dismiss
2:17-cv-00304-GMN-GWF	ECF No. 37	N/A
2:17-cv-00307-GMN-GWF	ECF No. 33	N/A
2:17-cv-00312-GMN-GWF	ECF No. 30	N/A
2:17-cv-00397-GMN-GWF	ECF No. 21	N/A
2:17-cv-00433-GMN-GWF **[*18]**	ECF No. 19	N/A
2:17-cv-00536-GMN-GWF	ECF No. 23	N/A
2:17-cv-00554-GMN-GWF	ECF No. 26	N/A
2:17-cv-00560-GMN-GWF	ECF No. 30	ECF No. 21
2:17-cv-00563-GMN-GWF	ECF No. 22	ECF No. 18
2:17-cv-00567-GMN-GWF	ECF No. 25	N/A
2:17-cv-00569-GMN-GWF	ECF No. 24	N/A
2:17-cv-00595-GMN-GWF	ECF No. 34	ECF No. 21
2:17-cv-00596-GMN-GWF	ECF No. 28	N/A
2:17-cv-00597-GMN-GWF	ECF No. 26	N/A
2:17-cv-00602-GMN-GWF	ECF No. 21	N/A
2:17-cv-00796-GMN-GWF	ECF No. 25	N/A
2:17-cv-00830-GMN-GWF	ECF No. 26	N/A
2:17-cv-00833-GMN-GWF	ECF No. 25	N/A
2:17-cv-00834-GMN-GWF	ECF No. 21	N/A
2:17-cv-00935-GMN-GWF	ECF No. 24	N/A
2:17-cv-00973-GMN-GWF	ECF No. 24	N/A
2:17-cv-00974-GMN-GWF	ECF No. 25	N/A
2:17-cv-00976-GMN-GWF	ECF No. 21	N/A
2:17-cv-00977-GMN-GWF	ECF No. 15	N/A
2:17-cv-01183-GMN-GWF	ECF No. 12	N/A
2:17-cv-01194-GMN-GWF	ECF No. 23	N/A
2:17-cv-01198-GMN-GWF	ECF No. 15	ECF No. 11
2:17-cv-01199-GMN-GWF	ECF No. 17	N/A
2:17-cv-01201-GMN-GWF	ECF No. 18	N/A
2:17-cv-01206-GMN-GWF	ECF No. 17	N/A
2:17-cv-01209-GMN-GWF	ECF No. 11	N/A
2:17-cv-01259-GMN-GWF	ECF No. 23	N/A
2:17-cv-01300-GMN-GWF	ECF No. 12	N/A
2:17-cv-01302-GMN-GWF	ECF No. 12	N/A
2:17-cv-01308-GMN-GWF	ECF No. 18	N/A
2:17-cv-01315-GMN-GWF	ECF No. 21	ECF No. 10
2:17-cv-01338-GMN-GWF	ECF No. 20	N/A
2:17-cv-01347-GMN-GWF	ECF No. 10	N/A
2:17-cv-01358-GMN-GWF	ECF No. 18 **[*19]**	ECF No. 10
2:17-cv-01359-GMN-GWF	ECF No. 17	ECF No. 8

Table1 (*Return to related document text*)

End of Document

West's Nevada Revised Statutes Annotated
Title 2. Civil Practice (Chapters 10-22)
Chapter 17. Judgments (Refs & Annos)
Contribution Among Tortfeasors (Refs & Annos)

N.R.S. 17.225

17.225. Right to contribution

Currentness

1. Except as otherwise provided in this section and NRS 17.235 to 17.305, inclusive, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

2. The right of contribution exists only in favor of a tortfeasor who has paid more than his or her equitable share of the common liability, and the tortfeasor's total recovery is limited to the amount paid by the tortfeasor in excess of his or her equitable share. No tortfeasor is compelled to make contribution beyond his or her own equitable share of the entire liability.

3. A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

Credits

Added by Laws 1973, p. 1303. Amended by Laws 1979, p. 1355.

Notes of Decisions (22)

N. R. S. 17.225, NV ST 17.225
Current through legislation of the 81st Regular Session (2021) effective as of May 26, 2021. Some sections effective July 1, 2021 are also available; see effective date in individual sections. Text subject to revision and classification by the Legislative Counsel Bureau.

West's Nevada Revised Statutes Annotated
Title 2. Civil Practice (Chapters 10-22)
Chapter 17. Judgments (Refs & Annos)
Contribution Among Tortfeasors (Refs & Annos)

N.R.S. 17.285

17.285. Enforcement of right of contribution

Currentness

1. Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

2. Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

3. If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by the tortfeasor to enforce contribution must be commenced within 1 year after the judgment has become final by lapse of time for appeal or after appellate review.

4. If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, the tortfeasor's right of contribution is barred unless the tortfeasor has:

(a) Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him or her and has commenced an action for contribution within 1 year after payment; or

(b) Agreed while action is pending against him or her to discharge the common liability and has within 1 year after the agreement paid the liability and commenced an action for contribution.

5. The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

Credits

Added by Laws 1973, p. 1304.

Notes of Decisions (4)

N. R. S. 17.285, NV ST 17.285
Current through legislation of the 81st Regular Session (2021) effective as of May 26, 2021. Some sections effective July 1, 2021 are also available; see effective date in individual sections. Text subject to revision and classification by the Legislative Counsel Bureau.

End of Document

West's Nevada Revised Statutes Annotated
Title 3. Remedies; Special Actions and Proceedings (Chapters 28-43)
Chapter 34. Writs; Petition to Establish Factual Innocence (Refs & Annos)
Mandamus (Refs & Annos)

N.R.S. 34.160

34.160. Writ may be issued by appellate and district courts; when writ may issue

Effective: January 1, 2015

Currentness

The writ may be issued by the Supreme Court, the Court of Appeals, a district court or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or person. When issued by a district court or a judge of the district court it shall be made returnable before the district court.

Credits

Added by CPA (1911), § 753. NRS amended by Laws 2013, c. 343, § 77, eff. Jan. 1, 2015.

Notes of Decisions (445)

N. R. S. 34.160, NV ST 34.160
Current through the end of both the 31st and 32nd Special Sessions (2020)

End of Document

West's Nevada Revised Statutes Annotated
Title 3. Remedies; Special Actions and Proceedings (Chapters 28-43)
Chapter 34. Writs; Petition to Establish Factual Innocence (Refs & Annos)
Mandamus (Refs & Annos)

N.R.S. 34.170

34.170. Writ to issue when no plain, speedy and adequate remedy in law

Currentness

This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested.

Credits

Added by CPA (1911), § 754.

Notes of Decisions (178)

N. R. S. 34.170, NV ST 34.170
Current through the end of both the 31st and 32nd Special Sessions (2020)

End of Document

West's Nevada Revised Statutes Annotated
Title 3. Remedies; Special Actions and Proceedings (Chapters 28-43)
Chapter 41. Actions and Proceedings in Particular Cases Concerning Persons (Refs & Annos)
Comparative Negligence

N.R.S. 41.141

41.141. When comparative negligence not bar to recovery; jury instructions; liability of multiple defendants

Currentness

1. In any action to recover damages for death or injury to persons or for injury to property in which comparative negligence is asserted as a defense, the comparative negligence of the plaintiff or the plaintiff's decedent does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought.

2. In those cases, the judge shall instruct the jury that:

(a) The plaintiff may not recover if the plaintiff's comparative negligence or that of the plaintiff's decedent is greater than the negligence of the defendant or the combined negligence of multiple defendants.

(b) If the jury determines the plaintiff is entitled to recover, it shall return:

(1) By general verdict the total amount of damages the plaintiff would be entitled to recover without regard to the plaintiff's comparative negligence; and

(2) A special verdict indicating the percentage of negligence attributable to each party remaining in the action.

3. If a defendant in such an action settles with the plaintiff before the entry of judgment, the comparative negligence of that defendant and the amount of the settlement must not thereafter be admitted into evidence nor considered by the jury. The judge shall deduct the amount of the settlement from the net sum otherwise

recoverable by the plaintiff pursuant to the general and special verdicts.

4. Where recovery is allowed against more than one defendant in such an action, except as otherwise provided in subsection 5, each defendant is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to that defendant.

5. This section does not affect the joint and several liability, if any, of the defendants in an action based upon:

(a) Strict liability;

(b) An intentional tort;

(c) The emission, disposal or spillage of a toxic or hazardous substance;

(d) The concerted acts of the defendants; or

(e) An injury to any person or property resulting from a product which is manufactured, distributed, sold or used in this State.

6. As used in this section:

(a) "Concerted acts of the defendants" does not include negligent acts committed by providers of health care while working together to provide treatment to a patient.

(b) "Provider of health care" has the meaning ascribed to it in NRS 629.031.

Credits

Added by Laws 1973, p. 1722. Amended by Laws 1979, p. 1356; Laws 1987, p. 1697; Laws 1989, p. 72.

Notes of Decisions (72)

N. R. S. 41.141, NV ST 41.141
Current through legislation of the 81st Regular Session (2021) effective as of May 26, 2021. Some sections effective July 1, 2021 are also available; see effective date in individual sections. Text subject to revision and classification by the Legislative Counsel Bureau.

End of Document

West's Nevada Revised Statutes Annotated
Title 57. Insurance (Chapters 679a-697)
Chapter 695I. Silver State Health Insurance Exchange
Organization; Powers and Duties

N.R.S. 695I.200

695I.200. Creation; purpose

Effective: July 1, 2011

Currentness

The Silver State Health Insurance Exchange is hereby established to:

1. Facilitate the purchase and sale of qualified health plans in the individual market in Nevada;

2. Assist qualified small employers in Nevada in facilitating the enrollment and purchase of coverage and the application for subsidies for small business enrollees;

3. Reduce the number of uninsured persons in Nevada;

4. Provide a transparent marketplace for health insurance and consumer education on matters relating to health insurance; and

5. Assist residents of Nevada with access to programs, premium assistance tax credits and cost-sharing reductions.

Credits

Added by Laws 2011, c. 439, § 13, eff. July 1, 2011.

Notes of Decisions (1)

695I.200. Creation; purpose, NV ST 695I.200

N. R. S. 695I.200, NV ST 695I.200
Current through legislation of the 81st Regular Session (2021) effective as of May 26, 2021. Some sections effective July 1, 2021 are also available; see effective date in individual sections. Text subject to revision and classification by the Legislative Counsel Bureau

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 157. Quality Affordable Health Care for All Americans
Subchapter I. Immediate Actions to Preserve and Expand Coverage

42 U.S.C.A. § 18001

§ 18001. Immediate access to insurance for uninsured individuals with a preexisting condition

Effective: March 23, 2010

Currentness

<For Executive Order No. 14009, "Strengthening Medicaid and the Affordable Care Act", see Executive Order No. 14009, January 28, 2021, 86 F.R. 7793.>

(a) In general

Not later than 90 days after March 23, 2010, the Secretary shall establish a temporary high risk health insurance pool program to provide health insurance coverage for eligible individuals during the period beginning on the date on which such program is established and ending on January 1, 2014.

(b) Administration

(1) In general

The Secretary may carry out the program under this section directly or through contracts to eligible entities.

(2) Eligible entities

To be eligible for a contract under paragraph (1), an entity shall--

(A) be a State or nonprofit private entity;

(B) submit to the Secretary an application at such time, in such manner, and containing such information as the Secretary may require; and

(C) agree to utilize contract funding to establish and administer a qualified high risk pool for eligible individuals.

(3) Maintenance of effort

To be eligible to enter into a contract with the Secretary under this subsection, a State shall agree not to reduce the annual amount the State expended for the operation of one or more State high risk pools during the year preceding the year in which such contract is entered into.

(c) Qualified high risk pool

(1) In general

Amounts made available under this section shall be used to establish a qualified high risk pool that meets the requirements of paragraph (2).

(2) Requirements

A qualified high risk pool meets the requirements of this paragraph if such pool--

(A) provides to all eligible individuals health insurance coverage that does not impose any preexisting condition exclusion with respect to such coverage;

(B) provides health insurance coverage--

(i) in which the issuer's share of the total allowed costs of benefits provided under such coverage is not less than 65 percent of such costs; and

(ii) that has an out of pocket limit not greater than the applicable amount described in section 223(c)(2) of Title 26 for the year involved, except that the Secretary may modify such limit if necessary to ensure the pool meets the actuarial value limit under clause (i);

(C) ensures that with respect to the premium rate charged for health insurance coverage offered to eligible individuals through the high risk pool, such rate shall--

(i) except as provided in clause (ii), vary only as provided for under section 300gg of this title (as amended by this Act and notwithstanding the date on which such amendments take effect);

(ii) vary on the basis of age by a factor of not greater than 4 to 1; and

(iii) be established at a standard rate for a standard population; and

(D) meets any other requirements determined appropriate by the Secretary.

(d) Eligible individual

An individual shall be deemed to be an eligible individual for purposes of this section if such individual--

(1) is a citizen or national of the United States or is lawfully present in the United States (as determined in accordance with section 18081 of this title);

(2) has not been covered under creditable coverage (as defined in section 300gg(c)(1) of this title as in effect on March 23, 2010) during the 6-month period prior to the date on which such individual is applying for coverage through the high risk pool; and

(3) has a pre-existing condition, as determined in a manner consistent with guidance issued by the Secretary.

(e) Protection against dumping risk by insurers

(1) In general

The Secretary shall establish criteria for determining whether health insurance issuers and employment-based health plans have discouraged an individual from remaining enrolled in prior coverage based on that individual's health status.

(2) Sanctions

An issuer or employment-based health plan shall be responsible for reimbursing the program under this section for the medical expenses incurred by the program for an individual who, based on criteria established by the Secretary, the Secretary finds was encouraged by the issuer to disenroll from health benefits coverage prior to enrolling in coverage through the program. The criteria shall include at least the following circumstances:

(A) In the case of prior coverage obtained through an employer, the provision by the employer, group health plan, or the issuer of money or other financial consideration for disenrolling from the coverage.

(B) In the case of prior coverage obtained directly from an issuer or under an employment-based health plan--

(i) the provision by the issuer or plan of money or other financial consideration for disenrolling from the coverage; or

(ii) in the case of an individual whose premium for the prior coverage exceeded the premium required by the program (adjusted based on the age factors applied to the prior coverage)--

(I) the prior coverage is a policy that is no longer being actively marketed (as defined by the Secretary) by the issuer; or

(II) the prior coverage is a policy for which duration of coverage form[1] issue or health status are factors that can be considered in determining premiums at renewal.

(3) Construction

Nothing in this subsection shall be construed as constituting exclusive remedies for violations of criteria established under paragraph (1) or as preventing States from applying or enforcing such paragraph or other provisions under law with respect to health insurance issuers.

(f) Oversight

The Secretary shall establish--

(1) an appeals process to enable individuals to appeal a determination under this section; and

(2) procedures to protect against waste, fraud, and abuse.

(g) Funding; termination of authority

(1) In general

There is appropriated to the Secretary, out of any moneys in the Treasury not otherwise appropriated, $5,000,000,000 to pay claims against (and the administrative costs of) the high risk pool under this section that are in excess of the amount of premiums collected from eligible individuals enrolled in the high risk pool. Such funds shall be available without fiscal year limitation.

(2) Insufficient funds

If the Secretary estimates for any fiscal year that the aggregate amounts available for the payment of the expenses of the high risk pool will be less than the actual amount of such expenses, the Secretary shall make such adjustments as are necessary to eliminate such deficit.

(3) Termination of authority

(A) In general

Except as provided in subparagraph (B), coverage of eligible individuals under a high risk pool in a State shall terminate on January 1, 2014.

(B) Transition to Exchange

The Secretary shall develop procedures to provide for the transition of eligible individuals enrolled in health insurance coverage offered through a high risk pool established under this section into qualified health plans offered through an Exchange. Such procedures shall ensure that there is no lapse in coverage with respect to the individual and may extend coverage after the termination of the risk pool involved, if the Secretary determines necessary to avoid such a lapse.

(4) Limitations

The Secretary has the authority to stop taking applications for participation in the program under this section to comply with the funding limitation provided for in paragraph (1).

(5) Relation to State laws

The standards established under this section shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to qualified high risk pools which are established in accordance with this section.

CREDIT(S)

(Pub.L. 111-148, Title I, § 1101, Mar. 23, 2010, 124 Stat. 141.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 13765

<January 20, 2017, 82 F.R. 8351>

Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. It is the policy of my Administration to seek the prompt repeal of the Patient Protection and Affordable Care Act (Public Law 111-148), as amended (the "Act"). In the meantime, pending such repeal, it is imperative for the executive branch to ensure that the law is being efficiently implemented, take all actions consistent with law to minimize the unwarranted economic and regulatory burdens of the Act, and prepare to afford the States more flexibility and control to create a more free and open healthcare market.

Sec. 2. To the maximum extent permitted by law, the Secretary of Health and Human Services (Secretary) and the heads of all other executive departments and agencies (agencies) with authorities and responsibilities under the Act shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications.

Sec. 3. To the maximum extent permitted by law, the Secretary and the heads of all other executive departments and agencies with authorities and responsibilities under the Act, shall exercise all authority and discretion available to them to provide greater flexibility to States and cooperate with them in implementing healthcare programs.

Sec. 4. To the maximum extent permitted by law, the head of each department or agency with responsibilities relating to healthcare or health insurance shall encourage the development of a free and open market in interstate commerce for the offering of healthcare services and health insurance, with the goal of achieving and preserving maximum options for patients and consumers.

Sec. 5. To the extent that carrying out the directives in this order would require revision of regulations issued through notice-and-comment rulemaking, the heads of agencies shall comply with the Administrative Procedure Act and other applicable statutes in considering or promulgating such regulatory revisions.

Sec. 6. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of

appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

EXECUTIVE ORDER NO. 13813

<October 12, 2017, 82 F.R. 46385>

Promoting Healthcare Choice and Competition Across the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. (a) It shall be the policy of the executive branch, to the extent consistent with law, to facilitate the purchase of insurance across State lines and the development and operation of a healthcare system that provides high-quality care at affordable prices for the American people. The Patient Protection and Affordable Care Act (PPACA), however, has severely limited the choice of healthcare options available to many Americans and has produced large premium increases in many State individual markets for health insurance. The average exchange premium in the 39 States that are using www.healthcare.gov in 2017 is more than double the average overall individual market premium recorded in 2013. The PPACA has also largely failed to provide meaningful choice or competition between insurers, resulting in one-third of America's counties having only one insurer offering coverage on their applicable government-run exchange in 2017.

(b) Among the myriad areas where current regulations limit choice and competition, my Administration will prioritize three areas for improvement in the near term: association health plans (AHPs), short-term, limited-duration insurance (STLDI), and health reimbursement arrangements (HRAs).

(i) Large employers often are able to obtain better terms on health insurance for their employees than small employers because of their larger pools of insurable individuals across which they can spread risk and administrative costs. Expanding access to AHPs can help small businesses overcome this competitive disadvantage by allowing them to group together to self-insure or purchase large group health insurance. Expanding access to AHPs will also allow more small businesses to avoid many of the PPACA's costly requirements. Expanding access to AHPs would provide more affordable health insurance options to many Americans, including hourly wage earners, farmers, and the employees of small businesses and entrepreneurs that fuel economic growth.

(ii) STLDI is exempt from the onerous and expensive insurance mandates and regulations included in title I of the PPACA. This can make it an appealing and affordable alternative to government-run exchanges for many people without coverage available to them through their workplaces. The previous administration took steps to restrict access to this market by reducing the allowable coverage period from less than 12 months to less than 3 months and by preventing any extensions selected by the policyholder beyond 3 months of total coverage.

(iii) HRAs are tax-advantaged, account-based arrangements that employers can establish for employees to give employees more flexibility and choices regarding their healthcare. Expanding the flexibility and use of HRAs would provide many Americans, including employees who work at small businesses, with more options for financing their healthcare.

(c) My Administration will also continue to focus on promoting competition in healthcare markets and limiting excessive consolidation throughout the healthcare system. To the extent consistent with law, government rules and guidelines affecting the United States healthcare system should:

(i) expand the availability of and access to alternatives to expensive, mandate-laden PPACA insurance, including AHPs, STLDI, and HRAs;

(ii) re-inject competition into healthcare markets by lowering barriers to entry, limiting excessive consolidation, and preventing abuses of market power; and

(iii) improve access to and the quality of information that Americans need to make informed healthcare decisions, including data about healthcare prices and outcomes, while minimizing reporting burdens on affected plans, providers, or payers.

Sec. 2. Expanded Access to Association Health Plans. Within 60 days of the date of this order, the Secretary of Labor shall consider proposing regulations or revising guidance, consistent with law, to expand access to health coverage by allowing more employers to form AHPs. To the extent permitted by law and supported by sound policy, the Secretary should consider expanding the conditions that satisfy the commonality-of-interest requirements under current Department of Labor advisory opinions interpreting the definition of an "employer" under section 3(5) of the Employee Retirement Income Security Act of 1974. The Secretary of Labor should also consider ways to promote AHP formation on the basis of common geography or industry.

Sec. 3. Expanded Availability of Short-Term, Limited-Duration Insurance. Within 60 days of the date of this order, the Secretaries of the Treasury, Labor, and Health and Human Services shall consider proposing regulations or revising guidance, consistent with law, to expand the availability of STLDI. To the extent permitted by law and supported by sound policy, the Secretaries should consider allowing such insurance to cover longer periods and be renewed by the consumer.

Sec. 4. Expanded Availability and Permitted Use of Health Reimbursement Arrangements. Within 120 days of the date of this order, the Secretaries of the Treasury, Labor, and Health and Human Services shall consider proposing regulations or revising guidance, to the extent permitted by law and supported by sound

policy, to increase the usability of HRAs, to expand employers" ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with nongroup coverage.

Sec. 5. Public Comment. The Secretaries shall consider and evaluate public comments on any regulations proposed under sections 2 through 4 of this order.

Sec. 6. Reports. Within 180 days of the date of this order, and every 2 years thereafter, the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor and the Federal Trade Commission, shall provide a report to the President that:

(a) details the extent to which existing State and Federal laws, regulations, guidance, requirements, and policies fail to conform to the policies set forth in section 1 of this order; and

(b) identifies actions that States or the Federal Government could take in furtherance of the policies set forth in section 1 of this order.

Sec. 7. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

EXECUTIVE ORDER NO. 13877

<June 24, 2019, 84 F.R. 30849>

Improving Price and Quality Transparency in American Healthcare To Put Patients First

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Purpose. My Administration seeks to enhance the ability of patients to choose the healthcare that is best for them. To make fully informed decisions about their healthcare, patients must know the price and quality of a good or service in advance. With the predominant role that third-party payers and Government programs play in the American healthcare system, however, patients often lack both access to useful price and quality information and the incentives to find low-cost, high-quality care. Opaque pricing structures may benefit powerful special interest groups, such as large hospital systems and insurance companies, but they generally leave patients and taxpayers worse off than would a more transparent system.

Pursuant to Executive Order 13813 of October 12, 2017 (Promoting Healthcare Choice and Competition Across the United States), my Administration issued a report entitled "Reforming America's Healthcare System Through Choice and Competition." The report recommends developing price and quality transparency initiatives to ensure that healthcare patients can make well-informed decisions about their care. In particular, the report describes the characteristics of the most effective price transparency efforts: they distinguish between the charges that providers bill and the rates negotiated between payers and providers; they give patients proper incentives to seek information about the price of healthcare services; and they provide useful price comparisons for "shoppable" services (common services offered by multiple providers through the market, which patients can research and compare before making informed choices based on price and quality).

Shoppable services make up a significant share of the healthcare market, which means that increasing transparency among these services will have a broad effect on increasing competition in the healthcare system as a whole. One study, cited by the Council of Economic Advisers in its 2019 Annual Report, examined a sample of the highest-spending categories of medical cases requiring inpatient and outpatient care. Of the categories of medical cases requiring inpatient care, 73 percent of the 100 highest-spending categories were shoppable. Among the categories of medical cases requiring outpatient care, 90 percent of the 300 highest-spending categories were shoppable. Another study demonstrated that the ability of patients to price-shop imaging services, a particularly fungible and shoppable set of healthcare services, was associated with a per-service savings of up to approximately 19 percent.

Improving transparency in healthcare will also further protect patients from harmful practices such as surprise billing, which occurs when patients receive unexpected bills at highly inflated prices from out-of-network providers they had no opportunity to select in advance. On May 9, 2019, I announced principles to guide efforts to address surprise billing. The principles outline how patients scheduling appointments to receive facility-based care should have access to pricing information related to the providers and services they may need, and the out-of-pocket costs they may incur. Having access to this type of information in advance of care can help patients avoid excessive charges.

Making meaningful price and quality information more broadly available to more Americans will protect patients and increase competition, innovation, and value in the healthcare system.

Sec. 2. Policy. It is the policy of the Federal Government to ensure that patients are engaged with their healthcare decisions and have the information requisite for choosing the healthcare they want and need. The Federal Government aims to eliminate unnecessary barriers to price and quality transparency; to increase the availability of meaningful price and quality information for patients; to enhance patients' control over their own healthcare resources, including through tax-preferred medical accounts; and to protect patients from surprise medical bills.

Sec. 3. Informing Patients About Actual Prices. (a) Within 60 days of the date of this order, the Secretary of Health and Human Services shall propose a regulation, consistent with applicable law, to require hospitals to publicly post standard charge information, including charges and information based on negotiated rates and for common or shoppable items and services, in an easy-to-understand, consumer-friendly, and machine-readable format using consensus-based data standards that will meaningfully inform patients' decision making and allow patients to compare prices across hospitals. The regulation should require the posting of standard charge information for services, supplies, or fees billed by the hospital or provided by employees of the hospital. The regulation should also require hospitals to regularly update the posted information and establish a monitoring mechanism for the Secretary to ensure compliance with the posting requirement, as needed.

(b) Within 90 days of the date of this order, the Secretaries of Health and Human Services, the Treasury, and Labor shall issue an advance notice of proposed rulemaking, consistent with applicable law, soliciting comment on a proposal to require healthcare providers, health insurance issuers, and self-insured group health plans to provide or facilitate access to information about expected out-of-pocket costs for items or services to patients before they receive care.

(c) Within 180 days of the date of this order, the Secretary of Health and Human Services, in consultation with the Attorney General and the Federal Trade Commission, shall issue a report describing the manners in which the Federal Government or the private sector are impeding healthcare price and quality transparency for patients, and providing recommendations for eliminating these impediments in a way that promotes competition. The report should describe why, under current conditions, lower-cost providers generally avoid healthcare advertising.

Sec. 4. Establishing a Health Quality Roadmap. Within 180 days of the date of this order, the Secretaries of Health and Human Services, Defense, and Veterans Affairs shall develop a Health Quality Roadmap (Roadmap) that aims to align and improve reporting on data and quality measures across Medicare, Medicaid, the Children's Health Insurance Program, the Health Insurance Marketplace, the Military Health System, and the Veterans Affairs Health System. The Roadmap shall include a strategy for establishing, adopting, and publishing common quality measurements; aligning inpatient and outpatient measures; and eliminating low-value or counterproductive measures.

Sec. 5. Increasing Access to Data to Make Healthcare Information More Transparent and Useful to Patients. Within 180 days of the date of this order, the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury, Defense, Labor, and Veterans Affairs, and the Director of the Office of Personnel Management, shall increase access to de-identified claims data from taxpayer-funded healthcare programs and group health plans for researchers, innovators, providers, and entrepreneurs, in a manner that is consistent with applicable law and that ensures patient privacy and security. Providing access to this data will facilitate the development of tools that empower patients to be better informed as they make decisions related to healthcare goods and services. Access to this data will also enable researchers and entrepreneurs to locate

inefficiencies and opportunities for improvement, such as patterns of performance of medical procedures that are outside the recommended standards of care. Such data may be derived from the Transformed Medicaid Statistical Information System (T-MSIS) and other sources. As part of this process, the Secretary of Health and Human Services shall make a list of priority datasets that, if de-identified, could advance the policies set forth by this order, and shall report to the President on proposed plans for future release of these priority datasets and on any barriers to their release.

Sec. 6. Empowering Patients by Enhancing Control Over Their Healthcare Resources. (a) Within 120 days of the date of this order, the Secretary of the Treasury, to the extent consistent with law, shall issue guidance to expand the ability of patients to select high-deductible health plans that can be used alongside a health savings account, and that cover low-cost preventive care, before the deductible, for medical care that helps maintain health status for individuals with chronic conditions.

(b) Within 180 days of the date of this order, the Secretary of the Treasury, to the extent consistent with law, shall propose regulations to treat expenses related to certain types of arrangements, potentially including direct primary care arrangements and healthcare sharing ministries, as eligible medical expenses under section 213(d) of title 26, United States Code.

(c) Within 180 days of the date of this order, the Secretary of the Treasury, to the extent consistent with law, shall issue guidance to increase the amount of funds that can carry over without penalty at the end of the year for flexible spending arrangements.

Sec. 7. Addressing Surprise Medical Billing. Within 180 days of the date of this order, the Secretary of Health and Human Services shall submit a report to the President on additional steps my Administration may take to implement the principles on surprise medical billing announced on May 9, 2019.

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

Footnotes

[1] So in original. Probably should be “from”.

42 U.S.C.A. § 18001, 42 USCA § 18001
Current through PL 117-15 with the exception of PL 116-283, Div. A, Title XVIII.

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 157. Quality Affordable Health Care for All Americans
Subchapter III. Available Coverage Choices for All Americans
Part B. Consumer Choices and Insurance Competition Through Health Benefit Exchanges

42 U.S.C.A. § 18031

§ 18031. Affordable choices of health benefit plans

Effective: December 20, 2019

Currentness

(a) Assistance to States to establish American Health Benefit Exchanges

(1) Planning and establishment grants

There shall be appropriated to the Secretary, out of any moneys in the Treasury not otherwise appropriated, an amount necessary to enable the Secretary to make awards, not later than 1 year after March 23, 2010, to States in the amount specified in paragraph (2) for the uses described in paragraph (3).

(2) Amount specified

For each fiscal year, the Secretary shall determine the total amount that the Secretary will make available to each State for grants under this subsection.

(3) Use of funds

A State shall use amounts awarded under this subsection for activities (including planning activities) related to establishing an American Health Benefit Exchange, as described in subsection (b).

(4) Renewability of grant

(A) In general

Subject to subsection (d)(4), the Secretary may renew a grant awarded under paragraph (1) if the State recipient of such grant--

(i) is making progress, as determined by the Secretary, toward--

(I) establishing an Exchange; and

(II) implementing the reforms described in subtitles A and C (and the amendments made by such subtitles); and

(ii) is meeting such other benchmarks as the Secretary may establish.

(B) Limitation

No grant shall be awarded under this subsection after January 1, 2015.

(5) Technical assistance to facilitate participation in SHOP Exchanges

The Secretary shall provide technical assistance to States to facilitate the participation of qualified small businesses in such States in SHOP Exchanges.

(b) American Health Benefit Exchanges

(1) In general

Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an "Exchange") for the State that--

(A) facilitates the purchase of qualified health plans;

(B) provides for the establishment of a Small Business Health Options Program (in this title referred to as a "SHOP Exchange") that is designed to assist qualified employers in the State who are small employers in facilitating the enrollment of their employees in qualified health plans offered in the small group market in the State; and

(C) meets the requirements of subsection (d).

(2) Merger of individual and SHOP Exchanges

A State may elect to provide only one Exchange in the State for providing both Exchange and SHOP Exchange services to both qualified individuals and qualified small employers, but only if the Exchange has adequate resources to assist such individuals and employers.

(c) Responsibilities of the Secretary

(1) In general

The Secretary shall, by regulation, establish criteria for the certification of health plans as qualified health plans. Such criteria shall require that, to be certified, a plan shall, at a minimum--

(A) meet marketing requirements, and not employ marketing practices or benefit designs that have the effect of discouraging the enrollment in such plan by individuals with significant health needs;

(B) ensure a sufficient choice of providers (in a manner consistent with applicable network adequacy provisions under section 2702(c) of the Public Health Service Act), and provide information to enrollees and prospective enrollees on the availability of in-network and out-of-network providers;

(C) include within health insurance plan networks those essential community providers, where available, that serve predominately low-income, medically-underserved individuals, such as health care providers

defined in section 340B(a)(4) of the Public Health Service Act and providers described in section 1927(c)(1)(D)(i)(IV) of the Social Security Act as set forth by section 221 of Public Law 111-8, except that nothing in this subparagraph shall be construed to require any health plan to provide coverage for any specific medical procedure;

(D)(i) be accredited with respect to local performance on clinical quality measures such as the Healthcare Effectiveness Data and Information Set, patient experience ratings on a standardized Consumer Assessment of Healthcare Providers and Systems survey, as well as consumer access, utilization management, quality assurance, provider credentialing, complaints and appeals, network adequacy and access, and patient information programs by any entity recognized by the Secretary for the accreditation of health insurance issuers or plans (so long as any such entity has transparent and rigorous methodological and scoring criteria); or

(ii) receive such accreditation within a period established by an Exchange for such accreditation that is applicable to all qualified health plans;

(E) implement a quality improvement strategy described in subsection (g)(1);

(F) utilize a uniform enrollment form that qualified individuals and qualified employers may use (either electronically or on paper) in enrolling in qualified health plans offered through such Exchange, and that takes into account criteria that the National Association of Insurance Commissioners develops and submits to the Secretary;

(G) utilize the standard format established for presenting health benefits plan options;

(H) provide information to enrollees and prospective enrollees, and to each Exchange in which the plan is offered, on any quality measures for health plan performance endorsed under section 399JJ of the Public Health Service Act, as applicable; and

(I) report to the Secretary at least annually and in such manner as the Secretary shall require, pediatric quality reporting measures consistent with the pediatric quality reporting measures established under section 1139A of the Social Security Act.

(2) Rule of construction

Nothing in paragraph (1)(C) shall be construed to require a qualified health plan to contract with a provider described in such paragraph if such provider refuses to accept the generally applicable payment rates of such plan.

(3) Rating system

The Secretary shall develop a rating system that would rate qualified health plans offered through an Exchange in each benefits level on the basis of the relative quality and price. The Exchange shall include the quality rating in the information provided to individuals and employers through the Internet portal established under paragraph (4).

(4) Enrollee satisfaction system

The Secretary shall develop an enrollee satisfaction survey system that would evaluate the level of enrollee satisfaction with qualified health plans offered through an Exchange, for each such qualified health plan that had more than 500 enrollees in the previous year. The Exchange shall include enrollee satisfaction information in the information provided to individuals and employers through the Internet portal established under paragraph (5) in a manner that allows individuals to easily compare enrollee satisfaction levels between comparable plans.

(5) Internet portals

The Secretary shall--

(A) continue to operate, maintain, and update the Internet portal developed under section 18003(a) of this title and to assist States in developing and maintaining their own such portal; and

(B) make available for use by Exchanges a model template for an Internet portal that may be used to direct qualified individuals and qualified employers to qualified health plans, to assist such individuals and employers in determining whether they are eligible to participate in an Exchange or eligible for a premium tax credit or cost-sharing reduction, and to present standardized information (including quality ratings) regarding qualified health plans offered through an Exchange to assist consumers in making easy health insurance choices.

Such template shall include, with respect to each qualified health plan offered through the Exchange in each rating area, access to the uniform outline of coverage the plan is required to provide under section

2716 of the Public Health Service Act and to a copy of the plan's written policy.

(6) Enrollment periods

The Secretary shall require an Exchange to provide for--

(A) an initial open enrollment, as determined by the Secretary (such determination to be made not later than July 1, 2012);

(B) annual open enrollment periods, as determined by the Secretary for calendar years after the initial enrollment period;

(C) special enrollment periods specified in section 9801 of Title 26 and other special enrollment periods under circumstances similar to such periods under part D of title XVIII of the Social Security Act; and

(D) special monthly enrollment periods for Indians (as defined in section 1603 of Title 25).

(7) Reenrollment of certain individuals in qualified health plans in certain exchanges

(A) In general

In the case of an Exchange that the Secretary operates pursuant to section 18041(c)(1) of this title, the Secretary shall establish a process under which an individual described in subparagraph (B) is reenrolled for plan year 2021 in a qualified health plan offered through such Exchange. Such qualified health plan under which such individual is so reenrolled shall be--

(i) if available for plan year 2021, the qualified health plan under which such individual is enrolled during the annual open enrollment period for such plan year; and

(ii) if such qualified health plan is not available for plan year 2021, a qualified health plan offered through such Exchange determined appropriate by the Secretary.

(B) Individual described

An individual described in this subsection is an individual who, with respect to plan year 2020--

(i) resides in a State with an Exchange described in subparagraph (A);

(ii) is enrolled in a qualified health plan during such plan year and does not enroll in a qualified health plan for plan year 2021 during the annual open enrollment period for such plan year 2021; and

(iii) does not elect to disenroll under a qualified health plan for plan year 2021 during such annual open enrollment period.

(d) Requirements

(1) In general

An Exchange shall be a governmental agency or nonprofit entity that is established by a State.

(2) Offering of coverage

(A) In general

An Exchange shall make available qualified health plans to qualified individuals and qualified employers.

(B) Limitation

(i) In general

An Exchange may not make available any health plan that is not a qualified health plan.

(ii) Offering of stand-alone dental benefits

Each Exchange within a State shall allow an issuer of a plan that only provides limited scope dental benefits meeting the requirements of section 9832(c)(2)(A) of Title 26 to offer the plan through the Exchange (either separately or in conjunction with a qualified health plan) if the plan provides pediatric dental benefits meeting the requirements of section 18022(b)(1)(J) of this title).

(3) Rules relating to additional required benefits

(A) In general

Except as provided in subparagraph (B), an Exchange may make available a qualified health plan notwithstanding any provision of law that may require benefits other than the essential health benefits specified under section 18022(b) of this title.

(B) States may require additional benefits

(i) In general

Subject to the requirements of clause (ii), a State may require that a qualified health plan offered in such State offer benefits in addition to the essential health benefits specified under section 18022(b) of this title.

(ii) State must assume cost

A State shall make payments--

(I) to an individual enrolled in a qualified health plan offered in such State; or

(II) on behalf of an individual described in subclause (I) directly to the qualified health plan in which

such individual is enrolled;

to defray the cost of any additional benefits described in clause (i).

(4) Functions

An Exchange shall, at a minimum--

(A) implement procedures for the certification, recertification, and decertification, consistent with guidelines developed by the Secretary under subsection (c), of health plans as qualified health plans;

(B) provide for the operation of a toll-free telephone hotline to respond to requests for assistance;

(C) maintain an Internet website through which enrollees and prospective enrollees of qualified health plans may obtain standardized comparative information on such plans;

(D) assign a rating to each qualified health plan offered through such Exchange in accordance with the criteria developed by the Secretary under subsection (c)(3);

(E) utilize a standardized format for presenting health benefits plan options in the Exchange, including the use of the uniform outline of coverage established under section 2715 of the Public Health Service Act;

(F) in accordance with section 18083 of this title, inform individuals of eligibility requirements for the medicaid program under title XIX of the Social Security Act, the CHIP program under title XXI of such Act, or any applicable State or local public program and if through screening of the application by the Exchange, the Exchange determines that such individuals are eligible for any such program, enroll such individuals in such program;

(G) establish and make available by electronic means a calculator to determine the actual cost of coverage after the application of any premium tax credit under section 36B of Title 26 and any cost-sharing reduction under section 18071 of this title;

(H) subject to section 18081 of this title, grant a certification attesting that, for purposes of the individual responsibility penalty under section 5000A of Title 26, an individual is exempt from the individual requirement or from the penalty imposed by such section because--

(i) there is no affordable qualified health plan available through the Exchange, or the individual's employer, covering the individual; or

(ii) the individual meets the requirements for any other such exemption from the individual responsibility requirement or penalty;

(I) transfer to the Secretary of the Treasury--

(i) a list of the individuals who are issued a certification under subparagraph (H), including the name and taxpayer identification number of each individual;

(ii) the name and taxpayer identification number of each individual who was an employee of an employer but who was determined to be eligible for the premium tax credit under section 36B of Title 26 because--

(I) the employer did not provide minimum essential coverage; or

(II) the employer provided such minimum essential coverage but it was determined under section 36B(c)(2)(C) of such title to either be unaffordable to the employee or not provide the required minimum actuarial value; and

(iii) the name and taxpayer identification number of each individual who notifies the Exchange under section 18081(b)(4) of this title that they have changed employers and of each individual who ceases coverage under a qualified health plan during a plan year (and the effective date of such cessation);

(J) provide to each employer the name of each employee of the employer described in subparagraph (I)(ii) who ceases coverage under a qualified health plan during a plan year (and the effective date of such cessation); and

(K) establish the Navigator program described in subsection (i).

(5) Funding limitations

(A) No Federal funds for continued operations

In establishing an Exchange under this section, the State shall ensure that such Exchange is self-sustaining beginning on January 1, 2015, including allowing the Exchange to charge assessments or user fees to participating health insurance issuers, or to otherwise generate funding, to support its operations.

(B) Prohibiting wasteful use of funds

In carrying out activities under this subsection, an Exchange shall not utilize any funds intended for the administrative and operational expenses of the Exchange for staff retreats, promotional giveaways, excessive executive compensation, or promotion of Federal or State legislative and regulatory modifications.

(6) Consultation

An Exchange shall consult with stakeholders relevant to carrying out the activities under this section, including--

(A) educated health care consumers who are enrollees in qualified health plans;

(B) individuals and entities with experience in facilitating enrollment in qualified health plans;

(C) representatives of small businesses and self-employed individuals;

(D) State Medicaid offices; and

(E) advocates for enrolling hard to reach populations.

(7) Publication of costs

An Exchange shall publish the average costs of licensing, regulatory fees, and any other payments required by the Exchange, and the administrative costs of such Exchange, on an Internet website to educate consumers on such costs. Such information shall also include monies lost to waste, fraud, and abuse.

(e) Certification

(1) In general

An Exchange may certify a health plan as a qualified health plan if--

(A) such health plan meets the requirements for certification as promulgated by the Secretary under subsection (c)(1); and

(B) the Exchange determines that making available such health plan through such Exchange is in the interests of qualified individuals and qualified employers in the State or States in which such Exchange operates, except that the Exchange may not exclude a health plan--

(i) on the basis that such plan is a fee-for-service plan;

(ii) through the imposition of premium price controls; or

(iii) on the basis that the plan provides treatments necessary to prevent patients' deaths in circumstances the Exchange determines are inappropriate or too costly.

(2) Premium considerations

The Exchange shall require health plans seeking certification as qualified health plans to submit a justification for any premium increase prior to implementation of the increase. Such plans shall prominently

post such information on their websites. The Exchange shall take this information, and the information and the recommendations provided to the Exchange by the State under section 2794(b)(1) of the Public Health Service Act (relating to patterns or practices of excessive or unjustified premium increases), into consideration when determining whether to make such health plan available through the Exchange. The Exchange shall take into account any excess of premium growth outside the Exchange as compared to the rate of such growth inside the Exchange, including information reported by the States.

(3) Transparency in coverage

(A) In general

The Exchange shall require health plans seeking certification as qualified health plans to submit to the Exchange, the Secretary, the State insurance commissioner, and make available to the public, accurate and timely disclosure of the following information:

(i) Claims payment policies and practices.

(ii) Periodic financial disclosures.

(iii) Data on enrollment.

(iv) Data on disenrollment.

(v) Data on the number of claims that are denied.

(vi) Data on rating practices.

(vii) Information on cost-sharing and payments with respect to any out-of-network coverage.

(viii) Information on enrollee and participant rights under this title.

(ix) Other information as determined appropriate by the Secretary.

(B) Use of plain language

The information required to be submitted under subparagraph (A) shall be provided in plain language. The term "plain language" means language that the intended audience, including individuals with limited English proficiency, can readily understand and use because that language is concise, well-organized, and follows other best practices of plain language writing. The Secretary and the Secretary of Labor shall jointly develop and issue guidance on best practices of plain language writing.

(C) Cost sharing transparency

The Exchange shall require health plans seeking certification as qualified health plans to permit individuals to learn the amount of cost-sharing (including deductibles, copayments, and coinsurance) under the individual's plan or coverage that the individual would be responsible for paying with respect to the furnishing of a specific item or service by a participating provider in a timely manner upon the request of the individual. At a minimum, such information shall be made available to such individual through an Internet website and such other means for individuals without access to the Internet.

(D) Group health plans

The Secretary of Labor shall update and harmonize the Secretary's rules concerning the accurate and timely disclosure to participants by group health plans of plan disclosure, plan terms and conditions, and periodic financial disclosure with the standards established by the Secretary under subparagraph (A).

(f) Flexibility

(1) Regional or other interstate Exchanges

An Exchange may operate in more than one State if--

(A) each State in which such Exchange operates permits such operation; and

(B) the Secretary approves such regional or interstate Exchange.

(2) Subsidiary Exchanges

A State may establish one or more subsidiary Exchanges if--

(A) each such Exchange serves a geographically distinct area; and

(B) the area served by each such Exchange is at least as large as a rating area described in section 2701(a) of the Public Health Service Act.

(3) Authority to contract

(A) In general

A State may elect to authorize an Exchange established by the State under this section to enter into an agreement with an eligible entity to carry out 1 or more responsibilities of the Exchange.

(B) Eligible entity

In this paragraph, the term "eligible entity" means--

(i) a person--

(I) incorporated under, and subject to the laws of, 1 or more States;

(II) that has demonstrated experience on a State or regional basis in the individual and small group health insurance markets and in benefits coverage; and

(III) that is not a health insurance issuer or that is treated under subsection (a) or (b) of section 52 of Title 26 as a member of the same controlled group of corporations (or under common control with) as a health insurance issuer; or

(ii) the State medicaid agency under title XIX of the Social Security Act.

(g) Rewarding quality through market-based incentives

(1) Strategy described

A strategy described in this paragraph is a payment structure that provides increased reimbursement or other incentives for--

(A) improving health outcomes through the implementation of activities that shall include quality reporting, effective case management, care coordination, chronic disease management, medication and care compliance initiatives, including through the use of the medical home model, for treatment or services under the plan or coverage;

(B) the implementation of activities to prevent hospital readmissions through a comprehensive program for hospital discharge that includes patient-centered education and counseling, comprehensive discharge planning, and post discharge reinforcement by an appropriate health care professional;

(C) the implementation of activities to improve patient safety and reduce medical errors through the appropriate use of best clinical practices, evidence based medicine, and health information technology under the plan or coverage;

(D) the implementation of wellness and health promotion activities; and

(E) the implementation of activities to reduce health and health care disparities, including through the use of language services, community outreach, and cultural competency trainings.

(2) Guidelines

The Secretary, in consultation with experts in health care quality and stakeholders, shall develop guidelines concerning the matters described in paragraph (1).

(3) Requirements

The guidelines developed under paragraph (2) shall require the periodic reporting to the applicable Exchange of the activities that a qualified health plan has conducted to implement a strategy described in paragraph (1).

(h) Quality improvement

(1) Enhancing patient safety

Beginning on January 1, 2015, a qualified health plan may contract with--

(A) a hospital with greater than 50 beds only if such hospital--

(i) utilizes a patient safety evaluation system as described in part C of title IX of the Public Health Service Act; and

(ii) implements a mechanism to ensure that each patient receives a comprehensive program for hospital discharge that includes patient-centered education and counseling, comprehensive discharge planning, and post discharge reinforcement by an appropriate health care professional; or

(B) a health care provider only if such provider implements such mechanisms to improve health care quality as the Secretary may by regulation require.

(2) Exceptions

The Secretary may establish reasonable exceptions to the requirements described in paragraph (1).

(3) Adjustment

The Secretary may by regulation adjust the number of beds described in paragraph (1)(A).

(i) Navigators

(1) In general

An Exchange shall establish a program under which it awards grants to entities described in paragraph (2) to carry out the duties described in paragraph (3).

(2) Eligibility

(A) In general

To be eligible to receive a grant under paragraph (1), an entity shall demonstrate to the Exchange involved that the entity has existing relationships, or could readily establish relationships, with employers and employees, consumers (including uninsured and underinsured consumers), or self-employed individuals likely to be qualified to enroll in a qualified health plan.

(B) Types

Entities described in subparagraph (A) may include trade, industry, and professional associations, commercial fishing industry organizations, ranching and farming organizations, community and consumer-focused nonprofit groups, chambers of commerce, unions, resource partners of the Small Business Administration, other licensed insurance agents and brokers, and other entities that--

(i) are capable of carrying out the duties described in paragraph (3);

(ii) meet the standards described in paragraph (4); and

(iii) provide information consistent with the standards developed under paragraph (5).

(3) Duties

An entity that serves as a navigator under a grant under this subsection shall--

(A) conduct public education activities to raise awareness of the availability of qualified health plans;

(B) distribute fair and impartial information concerning enrollment in qualified health plans, and the availability of premium tax credits under section 36B of Title 26 and cost-sharing reductions under section 18071 of this title;

(C) facilitate enrollment in qualified health plans;

(D) provide referrals to any applicable office of health insurance consumer assistance or health insurance ombudsman established under section 2793 of the Public Health Service Act, or any other appropriate State agency or agencies, for any enrollee with a grievance, complaint, or question regarding their health plan, coverage, or a determination under such plan or coverage; and

(E) provide information in a manner that is culturally and linguistically appropriate to the needs of the population being served by the Exchange or Exchanges.

(4) Standards

(A) In general

The Secretary shall establish standards for navigators under this subsection, including provisions to ensure that any private or public entity that is selected as a navigator is qualified, and licensed if appropriate, to engage in the navigator activities described in this subsection and to avoid conflicts of interest. Under such standards, a navigator shall not--

(i) be a health insurance issuer; or

(ii) receive any consideration directly or indirectly from any health insurance issuer in connection with the enrollment of any qualified individuals or employees of a qualified employer in a qualified health plan.

(5) Fair and impartial information and services

The Secretary, in collaboration with States, shall develop standards to ensure that information made available by navigators is fair, accurate, and impartial.

(6) Funding

Grants under this subsection shall be made from the operational funds of the Exchange and not Federal funds received by the State to establish the Exchange.

(j) Applicability of mental health parity

Section 2726 of the Public Health Service Act shall apply to qualified health plans in the same manner and to the same extent as such section applies to health insurance issuers and group health plans.

(k) Conflict

An Exchange may not establish rules that conflict with or prevent the application of regulations promulgated by the Secretary under this subchapter.

CREDIT(S)

(Pub.L. 111-148, Title I, § 1311, Title X, §§ 10104(e) to (h), 10203(a), Mar. 23, 2010, 124 Stat. 173, 900, 927; Pub.L. 116-94, Div. N, Title I, § 608, Dec. 20, 2019, 133 Stat. 3130.)

Notes of Decisions (21)

§ 18031. Affordable choices of health benefit plans, 42 USCA § 18031

42 U.S.C.A. § 18031, 42 USCA § 18031
Current through PL 117-15 with the exception of PL 116-283, Div. A, Title XVIII.

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 14

Rule 14. Third-Party Practice

Currentness

(a) When a Defending Party May Bring in a Third Party.

(1) ***Timing of the Summons and Complaint.*** A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.

(2) ***Third-Party Defendant's Claims and Defenses.*** The person served with the summons and third-party complaint--the "third-party defendant":

(A) must assert any defense against the third-party plaintiff's claim under Rule 12;

(B) must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);

(C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

(3) ***Plaintiff's Claims Against a Third-Party Defendant.*** The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

(4) ***Motion to Strike, Sever, or Try Separately.*** Any party may move to strike the third-party claim, to sever it, or to try it separately.

(5) ***Third-Party Defendant's Claim Against a Nonparty.*** A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(6) ***Third-Party Complaint In Rem.*** If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(i) in the property arrested.

(b) When a Plaintiff May Bring in a Third Party. When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

(c) Admiralty or Maritime Claim.

(1) ***Scope of Impleader.*** If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(a)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable--either to the plaintiff or to the third-party plaintiff--for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.

(2) ***Defending Against a Demand for Judgment for the Plaintiff.*** The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 17, 2000, effective December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Third-party impleader is in some aspects a modern innovation in law and equity although well known in admiralty. Because of its many advantages a liberal procedure with respect to it has developed in England, in the federal admiralty courts, and in some American state jurisdictions. See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16A, r.r. 1-13; United States Supreme Court Admiralty Rules (1920), Rule 56 (Right to Bring in Party Jointly Liable); 12 P.S.Pa. § 141; Wis.Stat. (1935) §§ 260.19, 260.20; N.Y.C.P.A. (1937) §§ 193(2), 211(a). Compare La.Code Pract. (Dart, 1932) §§ 378-388. For the practice in Texas as developed by judicial decision, see *Lottman v. Cuilla*, Tex.1926, 288 S.W. 123, 126. For a treatment of this subject see Gregory, *Legislative Loss Distribution in Negligence Actions* (1936); *Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure (1936)*, 45 Yale L.J. 393, 417 et seq.

Third-party impleader under the conformity act has been applied in actions at law in the Federal courts. *Lowry and Co., Inc. v. National City Bank of New York,* N.Y.1928, 28 F.2d 895; *Yellow Cab Co. of Philadelphia v. Rodgers,* C.C.A.3, 1932, 61 F.2d 729.

1946 Amendment

Note. The provisions in Rule 14(a) which relate to the impleading of a third party who is or may be liable to the plaintiff have been deleted by the proposed amendment. It has been held that under Rule 14(a) the plaintiff need not amend his complaint to state a claim against such third party if he does not wish to do so. *Satink v. Holland Township,* D.N.J.1940, 31 F.Supp. 229, noted, 1940, 88 U.Pa.L.Rev. 751; *Connelly v. Bender,* E.D.Mich.1941, 36 F.Supp. 368; *Whitmire v. Partin (Milton),* E.D.Tenn.1941, 2 F.R.D. 83, 5 Fed.Rules Serv. 14a.513, Case 2; *Crim v. Lumbermen's Mutual Casualty Co.,* D.D.C.1939, 26 F.Supp. 715; *Carbola Chemical Co., Inc. v. Trundle,* S.D.N.Y.1943, 3 F.R.D. 502, 7 Fed.Rules Serv. 14a.224, Case 1; *Roadway Express, Inc. v. Automobile Ins. Co. of Hartford, Conn., (Providence Washington Ins. Co.)* N.D.Ohio 1945, 8 Fed.Rules Serv. 14a.513, Case 3. In *Delano v. Ives,* E.D.Pa.1941, 40 F.Supp. 672, the court said: ". . . the weight of authority is to the effect that a defendant cannot compel the plaintiff, who has sued him, to sue also a third party whom he does not wish to sue, by tendering in a third party complaint the third party as an additional defendant directly liable to the plaintiff." Thus impleader here amounts to no more than a mere offer of a party to the plaintiff, and if he rejects it, the attempt is a time-consuming futility. See *Satink v. Holland Township, supra; Malkin v. Arundel Corp.,* D.Md.1941, 36 F.Supp. 948; also Koenigsberger, *Suggestions for Changes in the Federal Rules of Civil Procedure,* 1941, 4 Fed.Rules Serv. 1010. But cf. *Atlantic Coast Line R. Co. v. United States Fidelity & Guaranty Co.,* Ga.1943, 52 F.Supp. 177. Moreover, in any case where the plaintiff could not have joined the third party originally because of jurisdictional limitations such as lack of diversity of citizenship, the majority view is that any attempt by the plaintiff to amend his complaint and assert a claim against the impleaded third party would be unavailing. *Hoskie v. Prudential Ins. Co. of America, (Lorrac Real Estate Corp.),* E.D.N.Y.1941, 39 F.Supp. 305; *Johnson v. G. J. Sherrard Co., (New England Telephone & Telegraph Co.),* D.Mass.1941, 5 Fed.Rules Serv. 14a.511, Case 1, 2 F.R.D. 164; *Thompson v. Cranston,* W.D.N.Y.1942, 6

Fed.Rules Serv. 14a.511, Case 1, 2 F.R.D. 270, affirmed CCA2d, 1942, 132 F.2d 631, certiorari denied 1945, 63 S.Ct. 1028, 319 U.S. 741, 87 L.Ed. 1698; *Friend v. Middle Atlantic Transportation Co.,* C.C.A.2, 1946, 153 F.2d 778, certiorari denied 1946, 66 S.Ct. 1370, 328 U.S. 865, 90 L.Ed. 1635; *Herrington v. Jones,* E.D.La.1941, 5 Fed.Rules Serv. 14a.511, Case 2, 2 F.R.D. 108; *Banks v. Employers' Liability Assurance Corp., (Central Surety & Ins. Corp.)* W.D.Mo.1943, 7 Fed.Rules Serv. 14a.11, Case 2; *Saunders v. Baltimore & Ohio R. Co.,* S.D.W.Va.1945, 9 Fed.Rules Serv. 14a.62, Case 2; *Hull v. United States Rubber Co. (Johnson Larsen and Co.),* E.D.Mich.1945, 9 Fed.Rules Serv. 14a.62, Case 3. See also concurring opinion of Circuit Judge Minton in *People of State of Illinois for Use of Trust Co. of Chicago v. Maryland Casualty Co.,* C.C.A.7, 1942, 132 F.2d 850, 853. Contra: *Sklar v. Hayes (Singer),* E.D.Pa.1941, 4 Fed.Rules Serv. 14a.511, Case 2, 1 F.R.D. 594. Discussion of the problem will be found in Commentary, *Amendment of Plaintiff's Pleading to Assert Claim Against Third-Party Defendant,* 1942, 5 Fed.Rules Serv. 811; Commentary, *Federal Jurisdiction in Third-Party Practice,* 1943, 6 Fed.Rules Serv. 766; Holtzoff, *Some Problems Under Federal Third-Party Practice,* 1941, 3 La.L.Rev. 408, 419-420; 1 Moore's *Federal Practice,* 1938, Cum.Supplement § 14.08. For these reasons therefore, the words "or to the plaintiff" in the first sentence of subdivision (a) have been removed by the amendment; and in conformance therewith the words "the plaintiff" in the second sentence of the subdivision, and the words "or to the third-party plaintiff" in the concluding sentence thereof have likewise been eliminated.

The third sentence of rule 14(a) has been expanded to clarify the right of the third-party defendant to assert any defenses which the third-party plaintiff may have to the plaintiff's claim. This protects the impleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action. A new sentence has also been inserted giving the third-party defendant the right to assert directly against the original plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. This permits all claims arising out of the same transaction or occurrence to be heard and determined in the same action. See *Atlantic Coast Line R. Co. v. United States Fidelity & Guaranty Co.,* Ga.1943, 52 F.Supp. 177. Accordingly, the next to the last sentence of subdivision (a) has also been revised to make clear that the plaintiff may, if he desires, assert directly against the third-party defendant either by amendment or by a new pleading any claim he may have against him arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. In such a case, the third-party defendant then is entitled to assert the defenses, counter-claims and cross-claims provided in Rules 12 and 13.

The sentence reading "The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff, or to the third-party plaintiff" has been stricken from Rule 14(a), not to change the law, but because the sentence states a rule of substantive law which is not within the scope of a procedural rule. It is not the purpose of the rules to state the effect of a judgment.

The elimination of the words "the third-party plaintiff, or any other party" from the second sentence of rule 14(a), together with the insertion of the new phrases therein, are not changes of substance but are merely for the purpose of clarification.

1963 Amendment

Under the amendment of the initial sentences of the subdivision, a defendant as a third-party plaintiff may freely and without leave of court bring in a third-party defendant if he files the third-party complaint not later than 10 days after he serves his original answer. When the impleader comes so early in the case, there is little value in

requiring a preliminary ruling by the court on the propriety of the impleader.

After the third-party defendant is brought in, the court has discretion to strike the third-party claim if it is obviously unmeritorious and can only delay or prejudice the disposition of the plaintiff's claim, or to sever the third-party claim or accord it separate trial if confusion or prejudice would otherwise result. This discretion, applicable not merely to the cases covered by the amendment where the third-party defendant is brought in without leave, but to all impleaders under the rule, is emphasized in the next-to-last sentence of the subdivision, added by amendment.

In dispensing with leave of court for an impleader filed not later than 10 days after serving the answer, but retaining the leave requirement for impleaders sought to be effected thereafter, the amended subdivision takes a moderate position on the lines urged by some commentators, see Note, 43 Minn.L.Rev. 115 (1958); cf. Pa.R.Civ.P. 2252-53 (60 days after service on the defendant; Minn.R.Civ.P. 14.01 (45 days). Other commentators would dispense with the requirement of leave regardless of the time when impleader is effected, and would rely on subsequent action by the court to dismiss the impleader if it would unduly delay or complicate the litigation or would be otherwise objectionable. See 1A Barron & Holtzoff, *Federal Practice & Procedure* 649-50 (Wright ed. 1960); Comment, 58 Colum.L.Rev. 532, 546 (1958); cf. N.Y.Civ.Prac.Act § 193-a; Me.R.Civ.P. 14. The amended subdivision preserves the value of a preliminary screening, through the leave procedure, of impleaders attempted after the 10-day period.

The amendment applies also when an impleader is initiated by a third-party defendant against a person who may be liable to him, as provided in the last sentence of the subdivision.

1966 Amendment

Rule 14 was modeled on Admiralty Rule 56. An important feature of Admiralty Rule 56 was that it allowed impleader not only of a person who might be liable to the defendant by way of remedy over, but also of any person who might be liable to the plaintiff. The importance of this provision was that the defendant was entitled to insist that the plaintiff proceed to judgment against the third-party defendant. In certain cases this was a valuable implementation of a substantive right. For example, in a case of ship collision where a finding of mutual fault is possible, one shipowner, if sued alone, faces the prospect of an absolute judgment for the full amount of the damage suffered by an innocent third party; but if he can implead the owner of the other vessel, and if mutual fault is found, the judgment against the original defendant will be in the first instance only for a moiety of the damages; liability for the remainder will be conditioned on the plaintiff's inability to collect from the third-party defendant.

This feature was originally incorporated in Rule 14, but was eliminated by the amendment of 1946, so that under the amended rule a third party could not be impleaded on the basis that he might be liable to the plaintiff. One of the reasons for the amendment was that the Civil Rule, unlike the Admiralty Rule, did not require the plaintiff to go to judgment against the third-party defendant. Another reason was that where jurisdiction depended on diversity of citizenship the impleader of an adversary having the same citizenship as the plaintiff was not considered possible.

Retention of the admiralty practice in those cases that will be counterparts of a suit in admiralty is clearly

desirable.

1987 Amendment

The amendments are technical. No substantive change is intended.

2000 Amendment

Subdivisions (a) and (c) are amended to reflect revisions in Supplemental Rule C(6).

GAP Report

Rule B(1)(a) was modified by moving "in an in personam action" out of paragraph (a) and into the first line of subdivision (1). This change makes it clear that all paragraphs of subdivision (1) apply when attachment is sought in an in personam action. Rule B(1)(d) was modified by changing the requirement that the clerk deliver the summons and process to the person or organization authorized to serve it. The new form requires only that the summons and process be delivered, not that the clerk effect the delivery. This change conforms to present practice in some districts and will facilitate rapid service. It matches the spirit of Civil Rule 4(b), which directs the clerk to issue the summons "to the plaintiff for service on the defendant." A parallel change is made in Rule C(3)(b).

2006 Amendment

Rule 14 is amended to conform to changes in designating the paragraphs of Supplemental Rule C(6).

2007 Amendment

The language of Rule 14 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 14 twice refers to counterclaims under Rule 13. In each case, the operation of Rule 13(a) depends on the state of the action at the time the pleading is filed. If plaintiff and third-party defendant have become opposing parties because one has made a claim for relief against the other, Rule 13(a) requires assertion of any counterclaim that grows out of the transaction or occurrence that is the subject matter of that claim. Rules 14(a)(2)(B) and (a)(3) reflect the distinction between compulsory and permissive counterclaims.

A plaintiff should be on equal footing with the defendant in making third-party claims, whether the claim against the plaintiff is asserted as a counterclaim or as another form of claim. The limit imposed by the former

reference to "counterclaim" is deleted.

2009 Amendment

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Notes of Decisions (927)

Fed. Rules Civ. Proc. Rule 14, 28 U.S.C.A., FRCP Rule 14
Including Amendments Received Through 6-1-21

End of Document

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Appellate Procedure (Refs & Annos)
II. Appeals from Judgments and Orders of District Courts

Nevada Rules of Appellate Procedure, Rule 17

Rule 17. Division of Cases between the Supreme Court and the Court of Appeals

Effective: January 1, 2019

Currentness

(a) Cases Retained by the Supreme Court. The Supreme Court shall hear and decide the following:

(1) All death penalty cases;

(2) Cases involving ballot or election questions;

(3) Cases involving judicial discipline;

(4) Cases involving attorney admission, suspension, discipline, disability, reinstatement, and resignation;

(5) Cases involving the approval of prepaid legal service plans;

(6) Questions of law certified by a federal court;

(7) Disputes between branches of government or local governments;

(8) Administrative agency cases involving tax, water, or public utilities commission determinations;

(9) Cases originating in business court;

(10) Cases involving the termination of parental rights or NRS Chapter 432B;

(11) Matters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law; and

(12) Matters raising as a principal issue a question of statewide public importance, or an issue upon which there is an inconsistency in the published decisions of the Court of Appeals or of the Supreme Court or a conflict between published decisions of the two courts.

(b) Cases Assigned to Court of Appeals. The Court of Appeals shall hear and decide only those matters assigned to it by the Supreme Court and those matters within its original jurisdiction. Except as provided in Rule 17(a), the Supreme Court may assign to the Court of Appeals any case filed in the Supreme Court. The following case categories are presumptively assigned to the Court of Appeals:

(1) Appeals from a judgment of conviction based on a plea of guilty, guilty but mentally ill, or nolo contendere (Alford);

(2) Appeals from a judgment of conviction based on a jury verdict that

(A) do not involve a conviction for any offenses that are category A or B felonies; or

(B) challenge only the sentence imposed and/or the sufficiency of the evidence;

(3) Postconviction appeals that involve a challenge to a judgment of conviction or sentence for offenses that are not category A felonies;

(4) Postconviction appeals that involve a challenge to the computation of time served under a judgment of

conviction, a motion to correct an illegal sentence, or a motion to modify a sentence;

(5) Appeals from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case;

(6) Cases involving a contract dispute where the amount in controversy is less than $75,000;

(7) Appeals from postjudgment orders in civil cases;

(8) Cases involving statutory lien matters under NRS Chapter 108;

(9) Administrative agency cases except those involving tax, water, or public utilities commission determinations;

(10) Cases involving family law matters other than termination of parental rights or NRS Chapter 432B proceedings;

(11) Appeals challenging venue;

(12) Cases challenging the grant or denial of injunctive relief;

(13) Pretrial writ proceedings challenging discovery orders or orders resolving motions in limine;

(14) Cases involving trust and estate matters in which the corpus has a value of less than $5,430,000; and

(15) Cases arising from the foreclosure mediation program.

(c) Consideration of Workload. In assigning cases to the Court of Appeals, due regard will be given to the workload of each court.

(d) Routing Statements; Finality. A party who believes that a matter presumptively assigned to the Court of Appeals should be retained by the Supreme Court may state the reasons as enumerated in (a) of this Rule in the routing statement of the briefs as provided in Rules 3C, 3E, and 28 or a writ petition as provided in Rule 21. A party may not file a motion or other pleading seeking reassignment of a case that the Supreme Court has assigned to the Court of Appeals.

(e) Transfer and Notice. Upon the transfer of a case to the Court of Appeals, the clerk shall issue a notice to the parties. With the exception of a petition for Supreme Court review under Rule 40B, any pleadings in a case after it has been transferred to the Court of Appeals shall be entitled "In the Court of Appeals of the State of Nevada."

Credits

Adopted effective January 20, 2015. Amended effective January 1, 2017; October 21, 2018.

Editors' Notes

COMMENTS

Nothing in Rule 17(b)(8) should be interpreted to deviate from current jurisprudence regarding challenges to discovery orders and orders resolving motions in limine.

Rules App. Proc., Rule 17, NV ST RAP Rule 17
Current with amendments received through November 15, 2020.

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Appellate Procedure (Refs & Annos)
III. Extraordinary Writs

Nevada Rules of Appellate Procedure, Rule 21

Rule 21. Writs of Mandamus and Prohibition and Other Extraordinary Writs

Effective: June 7, 2020

Currentness

(a) Mandamus or Prohibition: Petition for Writ; Service and Filing.

(1) *Filing and Service.* A party petitioning for a writ of mandamus or prohibition must file a petition with the clerk of the Supreme Court with proof of service on the respondent judge, corporation, commission, board or officer and on each real party in interest. A petition directed to a court shall also be accompanied by a notice of the filing of the petition, which shall be served on all parties to the proceeding in that court.

(2) *Caption.* The petition shall include in the caption: the name of each petitioner; the name of the appropriate judicial officer, public tribunal, corporation, commission, board or person to whom the writ is directed as the respondent; and the name of each real party in interest, if any.

(3) *Contents of Petition.* The petition must state:

(A) whether the matter falls in one of the categories of cases retained by the Supreme Court pursuant to NRAP 17(a) or presumptively assigned to the Court of Appeals pursuant to NRAP 17(b);

(B) the relief sought;

(C) the issues presented;

(D) the facts necessary to understand the issues presented by the petition; and

(E) the reasons why the writ should issue, including points and legal authorities.

(4) *Appendix.* The petitioner shall submit with the petition an appendix that complies with Rule 30. Rule 30(i), which prohibits pro se parties from filing an appendix, shall not apply to a petition for relief filed under this Rule and thus pro se writ petitions shall be accompanied by an appendix as required by this Rule. The appendix shall include a copy of any order or opinion, parts of the record before the respondent judge, corporation, commission, board or officer, or any other original document that may be essential to understand the matters set forth in the petition.

(5) *Verification.* A petition for an extraordinary writ shall be verified by the affidavit of the petitioner or, if the petitioner is unable to verify the petition or the facts stated therein are within the knowledge of the petitioner's attorney, by the affidavit of the attorney. The affidavit shall be filed with the petition.

(6) *Emergency Petitions.* A petition that requests the court to grant relief in less than 14 days shall also comply with the requirements of Rule 27(e).

(b) Denial; Order Directing Answer.

(1) The court may deny the petition without an answer. Otherwise, it may order the respondent or real party in interest to answer within a fixed time.

(2) Two or more respondents or real parties in interest may answer jointly.

(3) The court may invite an amicus curiae to address the petition.

(4) In extraordinary circumstances, the court may invite the trial court judge to address the petition.

(c) Other Extraordinary Writs. An application for an extraordinary writ other than one provided for in Rule 21(a) shall be made by filing a petition with the clerk of the Supreme Court with proof of service on the parties named as respondents and any real party in interest. Proceedings on the application shall conform, so far as is

practicable, to the procedure prescribed in Rule 21(a) and (b).

(d) Form of Papers; Length; Number of Copies. All papers must conform to Rule 32(c)(2). An original and 2 copies shall be filed unless the court requires the filing of a different number by order in a particular case. A petition shall not exceed 15 pages unless it contains no more than 7,000 words (or 650 lines of text in a monospaced typeface) or the court grants leave to file a longer petition. Unless the court directs otherwise, the same page and type-volume limits apply to any answer, reply, or amicus brief allowed by the court. A motion to exceed the page or type-volume limit in this rule must comply with Rule 32(a)(7)(D).

(e) Certificate of Compliance. A petition filed under this Rule and any answer, reply, or amicus brief allowed by the court must include a certificate of compliance that comports with NRAP 32(a)(9).

(f) Disclosure Statement. A petition and any answer thereto shall be accompanied by the disclosure statement required by NRAP 26.1.

(g) Payment of Fees. The court shall not consider any application for an extraordinary writ until the petition has been filed; and the clerk shall receive no petition for filing until the $250 fee has been paid, unless the applicant is exempt from payment of fees, or the court or a justice or judge thereof orders waiver of the fee for good cause shown.

Credits

Amended effective July 1, 2009; January 20, 2015; October 1, 2015; January 1, 2017; June 7, 2020.

Editors' Notes

ADVISORY COMMITTEE NOTES

The federal rule is revised to substitute "Supreme Court" for "court of appeals" and "filing fee" for "docket fee."

Subdivision (b) is modified to substitute "may" for "shall" in the first sentence; and amending the second sentence to require the appellate court to enter an order fixing the time within which an answer, directed solely to the issue of arguable cause against issuance of an alternative or peremptory writ may be filed. The third sentence is modified to relieve the clerk of responsibility for service of the order, to broaden the scope of "respondent" to include tribunals and boards other than "judges," and to require service on all persons, other than parties, directly affected. The fifth sentence of the federal rule is deleted as unnecessary under Nevada practice. The sixth sentence is amended to require the court, rather than the clerk, by order, to advise the parties of the date on which briefs are to be filed, if briefs are required, and the date of oral argument. The final sentence of the federal rule, giving applications for writs preferences over ordinary civil cases is deleted, as an

undue intrusion on the court's discretion.

Subdivision (d) is revised to require filing of the original and six copies of all papers with the court, to conform with existing rules.

Subdivision (e) is added to require filing of applications for writs and payment of filing fees before the court considers the application, unless the applicant is exempt or the court waives fees.

Notes of Decisions (37)

Rules App. Proc., Rule 21, NV ST RAP Rule 21
Current with amendments received through November 15, 2020.

End of Document

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Civil Procedure (Refs & Annos)
III. Pleadings and Motions (Refs & Annos)

Rules of Civil Procedure, Rule 14

Rule 14. Third-Party Practice

Currentness

(a) When a Defending Party May Bring in a Third Party.

(1) *Timing of the Summons and Complaint.* A defending party may, as third-party plaintiff, file a third-party complaint against a nonparty, the third-party defendant, who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave to file the third-party complaint if it files the third-party complaint more than 14 days after serving its original answer. A summons, the complaint, and the third-party complaint must be served on the third-party defendant, or service must be waived.

(2) *Third-Party Defendant's Claims and Defenses.* After being served or waiving service, the third-party defendant:

(A) must assert any defense against the third-party plaintiff's claim under Rule 12;

(B) must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against a defendant or another third-party defendant under Rule 13(g);

(C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiffs claim against the third-party plaintiff.

(3) *Plaintiff's Claims Against a Third-Party Defendant.* The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

(4) *Defendant's Claims Against a Third-Party Defendant.* A defendant may assert against the third-party defendant any crossclaim under Rule 13(g).

(5) *Motion to Strike, Sever, or Try Separately.* Any party may move to strike the third-party claim, to sever it, or to try it separately.

(6) *Third-Party Defendant's Claim Against a Nonparty.* A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(b) When a Plaintiff May Bring in a Third Party. When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

Credits

Amended effective January 1, 2005; March 1, 2019.

Editors' Notes

ADVISORY COMMITTEE NOTES

2019 Amendment

The amendments generally conform Rule 14 to FRCP 14. The modifications to Rules 14(a)(2)(B) and 14(a)(4) permit defendants and third-party defendants to bring crossclaims against each other as "coparties" under Rule 13(g).

Notes of Decisions (6)

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Civil Procedure (Refs & Annos)
VI. Trials

Rules of Civil Procedure, Rule 42

Rule 42. Consolidation; Separate Trials

Currentness

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any right to a jury trial.

Credits

Amended effective September 27, 1971; January 1, 2005; March 1, 2019.

Notes of Decisions (21)

Civ. Proc. Rules, Rule 42, NV ST RCP Rule 42
Current with amendments received through June 15, 2021.

A letter to all Nevadans

Xerox is committed to making Nevada Health Link better.

As the contracted vendor for Nevada's health insurance exchange, we recognize and truly regret any challenges you may have encountered when dealing with the system.

Given the importance of getting this right, we're dedicating significant and widespread resources from throughout our company to address the issues most important to you—the customers.

Long wait times for the call center, website errors and other processing delays are unacceptable. As a result, we have brought in hundreds of additional staff over the last few weeks to help solve these issues.

Like you, we want a Nevada Health Link that is easy to access and simple to use. Though every issue won't be solved overnight, we have made steady progress, and we are confident that you will see these improvements continue over the coming days and weeks.

Nevada Health Link has to be a service of which both Xerox and all Nevadans can be proud. We are sincerely dedicated to reaching that goal.

Ursula M. Burns
Chairman and CEO, Xerox Corporation

For more information about our work with Nevada Health Link, go to:
xerox.com/NevadaHealthLink

§ 14.03 Impleader Permits Defending Party to Join Absentee Who Is or May Be Liable for All or Part of Underlying Claim Against Defending Party

[1] Impleader Promotes Efficiency and Consistency by Allowing Defending Party to Override Plaintiff's Structure of Litigation by Joining Third Party Who Is Derivatively Liable

The third-party practice, or impleader, rule permits a defending party (usually a defendant) to bring a new party into a pending case, but only if that absentee "is or may be liable to [the defending party] for all or part of the claim against it."[1] The joinder provisions of the Federal Rules repose in the plaintiff great discretion to select the party structure of litigation. The impleader rule shows that this discretion is not absolute, but may be overridden in narrow circumstances. Other joinder rules reflect similarly narrow intrusions into plaintiff autonomy. For instance, the compulsory joinder rule permits the court or the defendant to force the joinder of a nonparty, but only to avoid specific harm that may occur if the nonparty is not joined.[2] Similarly, intervention of right permits an absentee to join pending litigation to avoid potential harm that could be inflicted by nonjoinder.[3]

Impleader basically permits a defending party to join an absentee for the purpose of deflecting to that absentee all or part of its potential liability to the plaintiff on the underlying claim.[3.1] Almost always, this deflection will be based on an assertion that the absentee owes the defending party a duty of indemnity or contribution. Third-party practice fosters efficient litigation by packaging the underlying claim for liability and any indemnity or contribution claims in a single case.[4] This inclusive packaging spares the judicial system and at least some of

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[1] *Fed. R. Civ. P. 14(a)(1)*.

[2] *Fed. R. Civ. P. 19*; *see* Ch. 19, *Required Joinder of Parties.*

[3] *Fed. R. Civ. P. 24(a)(2)*; *see* ***Ch. 24, Intervention.***

[3.1] **Deflecting liability.** *Ortiz v. Cybex Int'l, Inc., 345 F. Supp. 3d 107, 117 (D.P.R. 2018)* (quoting **Moore's**, impleader under *Fed. R. Civ. P. 14* permits "defending party to join an absentee for the purpose of deflecting to that absentee all or part of its potential liability to the plaintiff on the underlying claim. … based on an assertion that the absentee owes the defending party a duty of contribution or indemnity").

[4] **Efficiency.**

1st Circuit *Lehman v. Revolution Portfolio L.L.C., 166 F.3d 389, 394–395 (1st Cir. 1999)* (core purpose of *Fed. R. Civ. P. 14(a)* is to avoid unnecessary duplication and circuity of action); *Ortiz v. Cybex Int'l, Inc., 345 F. Supp. 3d 107, 117 (D.P.R. 2018)* (citing **Moore's**, impleader "fosters efficient litigation" by permitting underlying liability claims to be resolved simultaneously with indemnity and contribution claims).

2d Circuit *Hicks v. Long Island R.R., 165 F.R.D. 377, 379 (E.D.N.Y. 1996)* (purpose of impleader is to avoid circuity of actions).

3d Circuit *Erkins v. Case Power & Equip. Co., 164 F.R.D. 31, 32 (D.N.J. 1995)* (impleader avoids circuity of actions); *Saunders v. Jim Emes Petroleum Co., 101 F.R.D. 405, 407 (W.D. Pa. 1983)* (avoids "circuity of actions").

5th Circuit *Harrison v. Glendel Drilling Co., 679 F. Supp. 1413, 1422 (W.D. La. 1988)* (joining third-party defendant promotes efficiency).

the parties the waste and expense of multiple suits.[4.1] Concomitantly, it avoids the possibility of inconsistent judgments. Joinder of all persons interested in the ultimate resolution of the dispute binds them to a single judgment. Without such joinder, the defendant who loses on the underlying dispute must bring a separate action for indemnity or contribution. Because the alleged indemnitor or contributor is not bound by the judgment in the first case (because it was not a party) the defendant might be unsuccessful, and thereby incur a liability it should have been able to pass on to another.[5] Even when the defendant is successful in the second suit, it will be required to pay for separate litigation, and may suffer adverse consequences because of the delay between judgments in the two suits. Effecting joinder of the indemnitor or contributor in a single case thus promotes judicial economy and fosters a consistent outcome that allows the defendant to avoid these potential harms.

It bears repeating that impleader is available only for the assertion of derivative claims or "claims over" against the third party. It does not permit joinder of a new party for the assertion of any other claims, even transactionally related claims (*see* *§ 14.04*).

[2] Only Defending Parties May Implead

The rule provides that any "defending party" may assert an impleader claim. Obviously, this reference includes a defendant. But it also includes any other party against whom an affirmative claim for relief is pending. For example, the rule expressly allows a third-party defendant to "proceed under this rule" to implead an absentee who may be liable to indemnify or contribute to a judgment.[6] This provision seems unnecessary in view of the general language that impleader is available to any "defending party." Because a third-party defendant is a litigant against whom an affirmative claim for relief is pending, the third-party defendant is a "defending party"

6th Circuit *American Zurich Ins. Co. v. Cooper Tire & Rubber Co., 512 F.3d 800, 805 (6th Cir. 2008)* (underlying *Fed. R. Civ. P. 14* is desire to promote economy by avoiding situation in which defendant has been adjudicated liable and then must bring totally new action against third party for indemnity or contribution); *Hood v. Security Bank of Huntington, 562 F. Supp. 749, 751 (S.D. Ohio 1983)* (avoids "circuity of actions" and multiple suits; eliminates unnecessary expense; saves time).

7th Circuit *Leaseway Warehouses, Inc. v. Carlton, 568 F. Supp. 1041, 1043 (N.D. Ill. 1983)* (avoids "circuity of actions" and multiple suits; eliminates unnecessary expense; saves time).

10th Circuit *First Nat'l Bank of Strasburg v. Platte Valley State Bank, 107 F.R.D. 120, 123 (D. Colo. 1985)* (disposes of related claims in single suit; simplifies and expedites litigation).

[4.1] **Avoids multiple suits.** *Ortiz v. Cybex Int'l, Inc., 345 F. Supp. 3d 107, 117 (D.P.R. 2018)* (citing **Moore's**, simultaneous resolution of main claims and indemnity and contribution claims through impleader spares parties and courts "the waste and expense of multiple lawsuits").

[5] **Nonparty not bound by judgment.** *Richards v. Jefferson County, Ala., 517 U.S. 793, 798, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996)* (Due Process permits judgment to bind only parties to litigation and those represented by parties to litigation; nonparties may not be bound, even if they share essentially identical interests with those who were joined as parties); *Martin v. Wilks, 490 U.S. 755, 761–762, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989)* (only parties actually joined and nonparties represented by them may be bound by judgment). *See generally* Robert Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, *67 N.Y.U. L. Rev. 193 (1992)* (discussing due process restriction).

[6] *Fed. R. Civ. P. 14(a)(5)*.

and clearly is entitled to assert impleader. Such assertions by a third-party defendant are often called "fourth-party claims."[7] In what may be the record, parties in one case impleaded five successive absentees.[8]

There is a similarly unnecessary provision regarding plaintiffs. The plaintiff impleader rule provides: "When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so."[9] The subdivision is unnecessary because it is obvious that a plaintiff against whom a claim has been asserted is a "defending party," who is able to implead under the general language of the impleader rule.[10]

Prior to the 2007 amendments, the plaintiff impleader provision was limited to when a counterclaim was brought against a plaintiff (*see* *§ 14App.06[1]* (setting out text of rule as of 1987)), creating some confusion as to exactly which sort of claims asserted against a plaintiff would entitle that plaintiff to proceed with impleader. The current version of the rule simply refers to a "claim" asserted against a plaintiff.[11] This substantive amendment to the Rule makes it clear that the plaintiff is on equal footing with the defendant (or any "defending party") in terms of the ability to implead.[11.1]

A litigant may lose its status as a "defending party." For instance, a defendant who defaults is no longer a defending party, because there is no affirmative claim pending against it; such a defendant may not implead a third-party.[12] A nonparty, of course, is not a "party" at all and likewise cannot be a "defending party" under Rule

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[7] **Fourth party claims.**

2d Circuit *See, e.g.*, *International Paving Sys. v. Van Tulco, Inc., 866 F. Supp. 682, 693 (E.D.N.Y. 1994)* (referring to fourth-party claim).

8th Circuit *See, e.g.*, *Interstate Power Co. v. Kansas City Power & Light Co., 992 F.2d 804, 806 (8th Cir. 1993)* (referring to impleader by third-party defendant as fourth-party claim).

10th Circuit *See, e.g.*, *TBG, Inc. v. Bendis, 841 F. Supp. 1538, 1554 (D. Kan. 1993)* (referring to fourth-party claim).

[8] **Five successive absentees.** *Bevemet Metais, Ltda. v. Gallie Corp., 3 F.R.D. 352, 352 (S.D.N.Y. 1942)* (five successive impleader claims; court ordered separate trials).

[9] *Fed. R. Civ. P. 14(b)*.

[10] *Fed. R. Civ. P. 14(a)(1)*.

[11] *Fed. R. Civ. P. 14(b)*.

[11.1] *Fed. R. Civ. P. 14(b)*, advisory committee note of 2007 (*reproduced verbatim at § 14App.09[3]*).

[12] **Must be affirmative claim pending against defending party.**

2d Circuit *MetLife Investors USA Ins. Co. v. Zeidman, 734 F. Supp. 2d 304, 310 (E.D.N.Y. Aug. 31, 2010)*, *aff'd*, *442 Fed. Appx. 589 (2d Cir. 2011)* (claimant to interpleader fund faces no potential for liability, so it is not "defending party" and cannot file third party complaint).

6th Circuit *Newhouse v. Probert, 608 F. Supp. 978, 985 (W.D. Mich. 1985)* (defendant who defaulted could not assert impleader, because he was no longer "defending party;" although relief from default granted, court struck third party complaint).

11th Circuit *Faser v. Sears, Roebuck & Co., 674 F.2d 856, 860 (11th Cir. 1982)* (summary judgment for defendant moots impleader claims).

14, even if its interests are implicated by an existing party to the action.[12.1] Instead, the nonparty must either intervene under Rule 24, or be brought in by one of the existing parties.

[3] Impleader Is Permissive, Not Compulsory

The impleader rule provides that a defending party *may* implead, not that it *shall* or *must.* [13] Because of this language, impleader claims are permissive and not compulsory.[14] Accordingly, a defending party who asserts impleader in state court waives its right to remove the case to federal court.[15] Also, if a defending party fails to use impleader, or if the court refuses to let it use impleader, that defending party remains free to sue the third-party separately to assert a right of indemnity or contribution. In that case, the third-party would not be bound by any findings from the original case, because it was not a party to that action.[16] On the other hand, the third-party may be able to assert collateral estoppel against the party who sues it in the second case (*see* *Ch. 132, Collateral Estoppel and Issue Preclusion*).

[4] Use of Impleader May Be Limited by Restrictions on Jurisdiction and Venue

The impleader rule is merely a procedural provision; it cannot affect the independent requirements of jurisdiction and venue. The court must have personal jurisdiction over the third-party defendant and, unless the third party submits to that jurisdiction, must serve process to effect joinder (*see* *§ 14.22*). In addition, the impleader claim, as every claim asserted in federal court, must be supported by federal subject matter jurisdiction. Because subject matter jurisdiction is not a waivable requirement, it can pose a serious obstacle to joinder of the third party. If a claim is not supported by an independent basis of subject matter jurisdiction such as federal question jurisdiction[17] or diversity of citizenship jurisdiction[18] the court and counsel will assess whether the claim can nonetheless invoke supplemental jurisdiction.[19] In contrast to the often difficult hurdle of

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[12.1] **Nonparty cannot seek impleader**

1st Circuit *Kodar, LLC v. United States FAA, 879 F. Supp. 2d 218, 229 (D.R.I. 2012)* (insurer of defendant was not party to action, and could not file third-party complaint).

9th Circuit *Retcal, Inc. v. Insular Lumber Co. (Phil.), Inc., 379 F. Supp. 62, 64 (C.D. Cal. 1973)* (in admiralty action, persons who were neither defendants, defending parties, nor claimants were not authorized to file third party complaints).

[13] *Fed. R. Civ. P. 14(a)(1)*.

[14] **Impleader permissive, not compulsory.** *Knudsen v. Samuels, 715 F. Supp. 1505, 1506 (D. Kan. 1989)* ("third-party complaint is a permissive pleading"); *Southeast Guar. Trust Co. v. Rodman & Renshaw, Inc., 358 F. Supp. 1001, 1010 (N.D. Ill. 1973)* ("third-party claim is not compulsory").

[15] **Waives removal.** *See* *Knudsen v. Samuels, 715 F. Supp. 1505, 1506 (D. Kan. 1989)* (impleader is permissive, and assertion of impleader claim in state court manifests its desire to litigate in state court); *California Republican Party v. Mercier, 652 F. Supp. 928, 931 (C.D. Cal. 1986)* (citing **Moore's**, filing impleader claim in state court waives right to remove because impleader is permissive claim).

[16] **Nonparty not bound by judgment.** *Richards v. Jefferson County, Alabama, 517 U.S. 793, 797–801 (1996)* (Due Process permits judgment to bind only parties to litigation and those represented by parties to litigation; nonparties cannot be bound, even if they share essentially identical interests with those who were joined as parties); *Martin v. Wilks, 490 U.S. 755, 761–762, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989)* (only parties actually joined and nonparties represented by them can be bound by judgment).

[17] *28 U.S.C. § 1331*.

[18] *28 U.S.C. § 1332(a)(1)*

subject matter jurisdiction, venue rarely poses a serious problem for joinder of the third-party defendant. In most instances, courts will simply treat the impleader claim as ancillary to the main action for venue purposes (*see* *§ 14.42*).

Even if all requirements for jurisdiction and venue of an impleader claim are met, if the claim is subject to a mandatory forum selection clause or arbitration clause, the court may decline to decide the claim and instead transfer it to the designated forum, or dismiss it in lieu of the alternative forum.[20] This issue rarely arises, however, because such a clause typically applies to all claims asserted in the action, or to none.

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[19] *28 U.S.C. § 1367*; *see* *§ 14.41*.

[20] **Forum selection clause or arbitration clause.** *See, e.g.*, *CNH Indus. Am. LLC v. Jones Lang Lasalle Ams., Inc., 882 F.3d 692, 700 n.2 (7th Cir. 2018)* (noting that defendant's impleader claim against product manufacturer had been dismissed in lieu of arbitration, and that arbitration proceeding had been stayed pending outcome of main claims).

§ 14.21 More Than 14 Days After Serving Answer, Third-Party Plaintiff Must Seek Leave to Implead Third-Party Defendant

[1] Form of Third Party Motion

Until December 2015, counsel could find guidance by using Form 41 of the Appendix of Forms to the Federal Rules. Use of that form was not mandatory but it was sufficient per Rule 84. Model forms have become available from many alternate sources which has negated the illustrative purpose contemplated in originally providing forms; therefore, effective December 1, 2015, Rule 84 was abrogated along with its accompanying forms.[1] [2] Whichever form one uses, the better practice will be to attach a third-party summons and a third-party complaint to the motion.[3] This practice gives the court and other parties notice of the type of claim proposed against the proposed third-party defendant, and allows a more meaningful assessment of the propriety of the impleader motion. Although the impleader rule does not set a time for bringing the motion for leave to implead, one's delay in seeking leave may augur toward denial of the motion (*see* [3], *below*).

[2] Motion Must Be Filed With Court and Served on All Existing Parties to Action; Simultaneous E-Filing and Service

When the Rule requires a party to seek leave of court, "by motion," to implead a third person,[4] Rule 7 requires that motion to be in writing.[5] In turn, Rule 5(a) requires the party to serve its written motion seeking leave all other parties to the action.[5.1] The reference to parties includes only those who are already joined. Such parties are entitled to present objections to the impleader at the hearing on the motion. Because the third-party defendant is not yet a party to the action, however, it is not entitled to notice of the motion for leave to implead, and not entitled to object at the hearing on the motion. Instead, if impleader is granted, the third-party defendant may move to vacate the order permitting it (*see* § 14.24).

The motion for leave to assert an impleader claim must also be filed with the court.[5.1.1] If the movant is represented, e-filing is required, unless exempted for good cause or by local rule.[5.1.2] If the movant is

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[1] *See* § 84App.07 (setting out text and Advisory Committee Note of 2015 amendment to Rule 84).

[2] [Reserved]

[3] **Better practice.** *See* Liberty Folder v. Curtiss Anthony Corp., 90 F.R.D. 80, 84 (S.D. Ohio 1981) (citing **Moore's**, attaching summons and third-party complaint is "better practice").

[4] *See* ***Fed. R. Civ. P. 14(a)(1)*** ("the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.").

[5] *See* ***Fed. R. Civ. P. 7(b)(1)(A)*** ("A request for a court must be made by motion. The motion must … be in writing unless made during a hearing or trial."); *see also* ***Ch. 7, Pleadings Allowed; Form of Motions and Other Papers*** .

[5.1] *See* ***Fed. R. Civ. P. 5(a)(1)(D)*** ("the following papers must be serve on every party: … a written motion"); *see also* ***Ch. 5, Serving and Filing Pleadings and Other Papers***.

unrepresented, whether e-filing is available or required is governed by local rules and orders.[5.1.3] When e-filing is used, the motion is deemed to be simultaneously served on all other registered users of the court's system,[5.1.4] so no separate service is required. These provisions therefore simplify the process of serving and filing a Rule 14 motion for leave, because e-filing itself constitutes service. If, however, one of the other existing parties is both unrepresented and not a registered user of the court's e-filing system, separate service on that party is required under one of the other service methods of Rule 5(b).

Although every pleading or motion should be properly labeled, substance governs over form, at least for a pro se pleading; when a pro se filing effectively seeks to bring in a third-party defendant, it should be considered to be a motion under Rule 14 even if it is improperly designated by the party.[5.2]

[3] District Court Considers All Relevant Factors, Including Delay, in Ruling on Motion

The district court has great discretion in addressing a motion for leave to implead. Although the impleader rule does not set a time in which a motion for leave must be brought, undue delay is one factor on which the court may rely to deny a motion. On the other hand, there is usually nothing talismanic about delay alone. Instead, the court should look at all relevant factors of each individual case, including whether the delay in seeking leave was excusable and whether the delay would prejudice a party.[6] Of course, delay may be excused if the party

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[5.1.1] ***Fed. R. Civ. P. 5(d)(1)(A)*** ("Any paper after the complaint that is required to be served must be filed no later than a reasonable time after service.").

[5.1.2] ***Fed. R. Civ. P. 5(d)(3)(A)***.

[5.1.3] ***Fed. R. Civ. P. 5(d)(3)(B)***.

[5.1.4] ***Fed. R. Civ. P. 5(b)(2)(E)*** (paper is served by "sending it to a registered user by filing it with the court's electronic-filing system").

[5.2] **Improper designation disregarded.** *See, e.g.*, *United States v. Cabelka, 2017 U.S. Dist. LEXIS 214321, at *3 (N.D. Tex. Dec. 13, 2017)* (when only one defendant was present, designation of claims in answer as "crossclaims" was erroneous, but given defendant's pro se status, court would deem pleading to be motion for impleader under ***Fed. R. Civ. P. 14(a)***).

[6] **Whether delay excusable or would cause prejudice.**

2d Circuit *See, e.g.*, *Embassy Elec., Ltd. v. Lumbermens Mut. Cas. Co., 108 F.R.D. 418, 420 (S.D.N.Y. 1985)* (prejudice to plaintiff or third-party defendant); *Shafarman v. Ryder Truck Rental, Inc., 100 F.R.D. 454, 458–459 (S.D.N.Y. 1984)* (timely motions should be freely granted unless would prejudice plaintiff, unduly complicate trial, or foster unmeritorious claim); *Johnson Controls, Inc. v. Rowland Tompkins Corp., 585 F. Supp. 969, 974 (S.D.N.Y. 1984)* (impleader would cause no prejudice); *State Mut. Life Assurance Co. v. Arthur Andersen & Co., 65 F.R.D. 518, 521 (S.D.N.Y. 1975)* (citing **Moore's**, in multiparty fraud action leave to implead some three years after answer was filed was permitted when benefits from settling all issues in one suit outweighed possible prejudice and brought the motion within interest-of-justice exception in local rule that required that motions to implead be made within six months of service of answer).

3d Circuit *See, e.g.*, *Hornsby v. Johns-Manville Corp., 96 F.R.D. 367, 368 (E.D. Pa. 1982)* (impleader allowed despite substantial delay, court notes defendants' tardiness was excusable, lack of prejudice to third-party defendants and that trial would not be unduly delayed or complicated); *Afif v. RMI Co., 93 F.R.D. 429, 430 (E.D. Pa. 1982)* (17-month delay, no prejudice); *Jagielski v. Package Mach. Co., 93 F.R.D. 431, 432 (E.D. Pa. 1981)* (prejudice to other parties or to court will defeat late motion for impleader); *Zielinski v. Zappala, 470 F. Supp. 351 (E.D. Pa. 1979)* (16 months after defendant's answer, when delay was due to defendant's obtaining two medical opinions in a malpractice case, and when no evidence that prejudice would result).

7th Circuit *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 650 (7th Cir. 2002)* (district court incorrectly denied third party complaint that was filed four months after suit was filed, when third-party action fell within general contours of ***Fed. R. Civ. P. 14(a)***, did not contravene customary jurisdictional and venue requirements, and would not work unfair prejudice).

9th Circuit *UL LLC v. Space Chariot, Inc., 250 F. Supp. 3d 596, 606 (C.D. Cal. 2017)* (denying impleader because of delay and potential prejudice to existing parties, and noting that impleader claim for indemnification could be pursued in separate action);

seeking impleader did not know of the existence of, or a basis for joining, a third-party defendant, or if assertion of a claim would have violated ethical restrictions.[7] The party must not be dilatory in proceeding, however, after a basis for impleader becomes clear.

Another relevant factor is whether granting impleader will delay trial.[8] Courts may also consider whether the proposed third-party complaint states a claim on which relief may be granted.[8.1]

The court will weigh the elimination of delay and circuity against the danger of prejudice to the plaintiff. This is not a neutral balancing, however, and generally the interests of efficiency will outweigh the dangers of prejudice.[9]

Clear-View Techs., Inc. v. Rasnick, 2015 U.S. Dist. LEXIS 37293, at *4 (N.D. Cal. Mar. 23, 2015) (denying impleader when, after 15-month delay, allowing impleader would complicate issues, cause undue delay, and the convenience that would be obtained by permitting impleader of new parties did not outweigh substantial prejudice if leave were granted); Banks v. City of Emeryville, 109 F.R.D. 535, 538 (N.D. Cal. 1985) (permitting impleader despite 17-month delay, because joinder of third-party defendant would not prejudice any party or unduly complicate case).

[7] **Did not know of basis for impleader.**

3d Circuit United States v. New Castle County, 111 F.R.D. 628, 634 (D. Del. 1986) (delay excusable in part because of ***Fed. R. Civ. P. 11*** sanction against baseless claims; decided before ***Fed. R. Civ. P. 11*** amendment of 1993); Dysart v. Marriott Corp., 103 F.R.D. 15, 17–18 (E.D. Pa. 1984) (delay acceptable given late notice of possible liability of third parties); Jagielski v. Package Mach. Co., 93 F.R.D. 431, 432 (E.D. Pa. 1981) (impleader allowed despite 18-month delay, court noting recent discovery of basis for impleader; defendant not dilatory or derelict in pursuing matter after discovery; joinder would not prejudice any party and would not delay or complicate trial).

4th Circuit Charlotte Motor Speedway, Inc. v. International Ins. Co., 125 F.R.D. 127, 131–132 (M.D.N.C. 1989) (19-month delay; impleader allowed, noting newly emerging evidence, discovery not yet complete, no substantial delay would be caused).

[8] **Delay trial.**

3d Circuit Con-Tech Sales Defined Ben. Trust v. Cockerham, 715 F. Supp. 701, 703 (E.D. Pa. 1989) (nine-month delay; impleader allowed, noting it would not prejudice plaintiff, delay or complicate the trial).

4th Circuit Crocket v. Virginia Folding Box Co., 1973 U.S. Dist. LEXIS 12373, at *5 (E.D. Va. Aug. 8, 1973) (citing **Moore's**; impleader denied because granting it would lead to additional motions and discovery which would delay trial).

6th Circuit Diar v. Genesco, Inc., 102 F.R.D. 288, 290 (N.D. Ohio 1984) (two-year delay; motion made on eve of discovery cut-off, six weeks before trial date; no showing of basis for impleader on merits); Liberty Folder v. Curtiss Anthony Corp., 90 F.R.D. 80, 84 (S.D. Ohio 1981) (citing **Moore's**, impleader allowed in part because trial date postponed for other reasons, and joinder thus would not cause delay).

8th Circuit Handlos v. Litton Indus., Inc., 51 F.R.D. 300 (E.D. Wis. 1970) (leave to implead denied although assented to by plaintiff when case, which as it stood would not be ready for trial until two and one-half years after its commencement, would be further delayed by such impleader).

9th Circuit Clear-View Techs., Inc. v. Rasnick, 2015 U.S. Dist. LEXIS 37293, at *4 (N.D. Cal. Mar. 23, 2015) (15-month delay; impleader denied when granting it would create need for additional time after close of fact discovery and less than three months before trial was scheduled to start and allowing impleader would complicate trial); Ahern v. Gaussoin, 104 F.R.D. 37, 41–42 (D. Or. 1984) (impleader denied for failure to justify 10-month delay and because impleader would complicate trial).

[8.1] **Third-party complaint failed to state claim.** *See* M.O.C.H.A. Soc'y, Inc. v. City of Buffalo, 272 F. Supp. 2d 217 (W.D.N.Y. 2003) (court identified four factors: (1) whether defendant deliberately delayed or was derelict in filing motion; (2) whether impleading new party would delay or unduly complicate trial; (3) whether impleader would prejudice third-party defendant; and (4) whether proposed third-party complaint states claim on which relief may be granted).

[9] ***Balancing.*** Hicks v. Long Island R.R., 165 F.R.D. 377, 379 (E.D.N.Y. 1996) (third-party action would cause undue delay that would substantially prejudice plaintiff and defendant did not show meritorious excuse for its delay; impleader denied).

The court should also assess whether impleader would unduly complicate the pending case by injecting tangential issues,[10] although such prejudice might be avoidable by ordering separate trials (*see* § 14.27).

It bears repeating that resolution of the question of whether to permit impleader will vary with the individual facts of the case. The inquiry is ad hoc and is vested in the sound discretion of the trial court.[11] In its exercise of discretion, a court may permit third party actions impleader where they fall within the "the general contours" outlined by Rule 14.[11.1] An appellate court will not reverse the district court's decision unless it finds an ***abuse of discretion***.[12]

[4] Existence of Local Rule on Timing of *Impleader* Motion May Affect Allocation of Burden

An increasing number of district courts have promulgated local rules prescribing the appropriate time for seeking leave to implead. A common, but certainly not universal, provision is that impleader must be sought within six months of serving the original answer. In some courts, motions for leave to implead brought beyond

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[10] **Complicate case.**

2d Circuit *In re "Agent Orange" Prod. Liab. Litig., 544 F. Supp. 808, 810–811 (E.D.N.Y. 1982)* (motion denied because impleader would complicate unduly already complex case in which parties already actively involved in discovery).

3d Circuit *Fuel Transp. Co. v. Fireman's Fund Ins. Co., 108 F.R.D. 156, 158 (E.D. Pa. 1985)* (denial of impleader when it would expand action beyond extant basic issues into complex factual inquiry).

7th Circuit *Towne Mortg. Co. v. Sunshine, — F. Supp. 2d —, 2015 U.S. Dist. LEXIS 84312 (S.D. Ind. 2015)* (motion denied where motion for leave was "patently untimely" when filed nearly eleven months after judgment was entered and a fourteen months after Defendants had filed their answer, no explanation for delay, and impleading a third party after final judgment not only would tremendously and unnecessarily complicate the proceedings it would disrupt the resolution of the case that the parties and the court had already reached).

9th Circuit *Southwest Adm'rs, Inc. v. Rozay's Transfer, 791 F.2d 769, 777 (9th Cir. 1986)* (upholding denial of motion to implead because impleader would have injected new question of rescission of collective bargaining agreement into case); *Ahern v. Gaussoin, 104 F.R.D. 37 (D. Or. 1984)* (impleader would delay and confuse already complex case, lead to further pleadings and prejudice plaintiff).

[11] **Discretion.**

1st Circuit *Lehman v. Revolution Portfolio L.L.C., 166 F.3d 389, 393 (1st Cir. 1999)* ("the determination is left to the informed discretion of the district court, which should allow impleader on any colorable claim of derivative liability that will not unduly delay or otherwise prejudice the ongoing proceedings").

6th Circuit *Aetna Cas. & Sur. Co. v. Dow Chem. Co., 933 F. Supp. 675, 686 (E.D. Mich. 1996)* (motion committed to court's discretion).

9th Circuit *Southwest Adm'rs, Inc. v. Rozay's Transfer, 791 F.2d 769, 777 (9th Cir. 1986)* (upholding denial of motion to implead because impleader would have injected new question of rescission of collective bargaining agreement into case).

[11.1] **Impleader under "general contours" standard.** *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 650 (7th Cir. 2002)* (district court incorrectly denied impleader complaint filed four months after suit was filed, because third party claim fell within general contours of ***Fed. R. Civ. P. 14(a)***, did not contravene customary jurisdictional and venue requirements, and would not work unfair prejudice); *Ashley v. Schneider Nat'l Carriers, Inc., 2015 U.S. Dist. LEXIS 95919, at *13–*14 (N.D. Ill. July 23, 2015)* (third-party complaint denied when punitive damages had not been contemplated in direct action and thus impleader claim did not fall within general contours of ***Fed. R. Civ. P. 14***).

[12] **Abuse of discretion.** *See Minnesota v. Pickands Mather & Co., 636 F.2d 251, 254 (8th Cir. 1980)* ("We note the probable value of appellate review … is slight because it is unlikely that we would find an abuse of discretion by the district court in its attempts to keep a lawsuit manageable and progressing towards trial").

that period are not automatically denied, because the time frame is only a guide to the court's discretion.[13] One court has reached the common sense conclusion that amendment of the complaint does not re-commence the period allowed for impleader under local rule, at least when the amended complaint contained no new theories of liability.[14]

The failure to seek impleader within the time period prescribed by local rule can carry one important consequence, however: it places an affirmative burden on the party seeking impleader to justify the delay, frequently requiring a showing of "special circumstances" for not acting sooner. In this manner, then, the local rules reverse the usual burden; in the ordinary case, the party opposing impleader objects to a motion for leave to implead by demonstrating prejudice or some other factor.[15] Obviously, it is important that parties and counsel consult the local rules of the district in which litigation is pending.

Even if the particular district court does not have a local rule as to the timing of impleader claims, a scheduling order entered in the case will typically set a deadline for joining new parties or claims to the action.[16] If a party seeks leave to assert an impleader claim after such a deadline, the good cause standard of Rule 16[17] must be met before the court will permit the claim.[18]

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[13] **Not automatically denied.**

3d Circuit *See, e.g.*, *Con-Tech Sales Defined Ben. Trust v. Cockerham, 715 F. Supp. 701, 703 (E.D. Pa. 1989)* (local rule providing for motion not later than 90 days after serving answer did not bar impleader nine months after serving answer if delay would not cause prejudice); *B&B Inv. Club v. Kleinert's, Inc., 391 F. Supp. 720, 725 (E.D. Pa. 1975)* (quoting **Moore's**, local rule only a guide to court's discretion).

11th Circuit *See, e.g.*, *Insurance Co. of N. Am. v. Morrison, 148 F.R.D. 295, 296 (M.D. Fla. 1993)* (six-month provision).

[14] **Amendment does not recommence period.** *Oberholtzer v. Scranton, 59 F.R.D. 572, 574 (E.D. Pa. 1973)* (plaintiff's amendment of complaint does not restart period in which local rules provide for bringing motion for leave to amend, so long as original complaint contained basis for impleader).

[15] **Burden.**

2d Circuit *Embassy Elect., Ltd. v. Lumbermens Mut. Cas. Co., 108 F.R.D. 418, 421 (S.D.N.Y. 1985)* (motion more than six months after answer; denied because no showing of special circumstances justifying delay); *Hogan v. Janos Indus. Insulation Corp., 102 F.R.D. 205, 206–207 (S.D.N.Y. 1984)* (same; no showing of special circumstances, because exercise of reasonable diligence would have disclosed existence of third-party defendants within six-month period); *E.F. Hutton & Co. v. Jupiter Dev. Corp., 91 F.R.D. 110, 113 (S.D.N.Y. 1981)* (no special circumstances shown).

3d Circuit *Lovallo v. Pittsburgh Corning Corp., 99 F.R.D. 627, 628 (E.D. Pa. 1983)* (motion more than 90 days after answer denied because no showing of reason for delay).

11th Circuit *Insurance Co. of N. Am. v. Morrison, 148 F.R.D. 295, 296 (M.D. Fla. 1993)* (defendant who failed to satisfy local rule has burden to explain delay).

[16] *See* ***Fed. R. Civ. P. 16(b)(3)(A)*** (scheduling order must limit "time to join other parties" or "file motions."); *see generally* ***Ch. 16, Pretrial Conferences; Scheduling; Management***.

[17] *See* ***Fed. R. Civ. P. 16(b)(4)*** (scheduling order "may be modified only for good cause and with the judge's consent").

[18] **Movant must show good cause to implead after scheduling order deadline.**

3d Circuit *BRG Harrison Lofts Urban Renewal LLC v. GE Co., 2020 U.S. Dist. LEXIS 152796, at *9–*11 (D.N.J. Aug. 21, 2020)* (settlement negotiations and mediation that stayed case for more than one year, coupled with necessity of reviewing copious discovery materials showed good cause for belated impleader claim and modification of scheduling order).

5th Circuit *Cruz v. Weber-Stephen Prods., LLC, 2018 U.S. Dist. LEXIS 1243, at *4–*6 (N.D. Tex. Jan. 4, 2018)* (when basis for impleader claim was not revealed until discovery, third-party plaintiff met good cause standard of ***Fed. R. Civ. P. 16(b)(4)*** to permit assertion of impleader claim after expiration of scheduling order deadline).

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