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Malpractice

Ripple Jurisdictional Effects of Gunn Decision Could Be Significant, Malpractice Experts Say

CHICAGO—The U.S. Supreme Court's decision last month in *Gunn v. Minton*, 29 Law. Man. Prof. Conduct 118 (U.S. 2013), which held that federal courts rarely have jurisdiction over patent-related malpractice lawsuits, could have dramatic consequences for litigants with pending malpractice claims in federal court—some of whom might be precluded from refiling their soon-to-be-dismissed suits in state court.

That was the conclusion of panelists at the 2013 Legal Malpractice & Risk Management Conference, sponsored by Hinshaw & Culbertson and held here March 6-8.

One of the speakers expressing this view at a March 6 session was Jane Webre of Scott, Douglass & McConnico, Austin, Tex., who successfully argued the *Gunn* case.

Webre said the ruling will compel the dismissal of nearly all patent-related malpractice cases currently pending on federal dockets. "[W]hether the plaintiff can refile in state court," she added, "is going to vary state-by-state."

State laws differ as to whether a complaint dismissed for lack of jurisdiction can be refiled in a proper forum if a statute of limitations on the cause of action expired while it was pending in the "wrong" court, Webre explained. Accordingly, it's possible that the claims of some plaintiffs could be "lost" entirely, she said.

Webre argued the *Gunn* case in January and was vindicated when it was decided in her client's favor a month later. She was joined in the discussion by Peter D. Sullivan, a Hinshaw partner in Chicago; Kevin A. Rosen of Gibson, Dunn & Crutcher, Los Angeles; and John K. Villa, Williams & Connolly, Washington, D.C.

'Death Knell.' The *Gunn* decision sought to resolve a thicket of contradictory authority as to the proper jurisdiction for malpractice claims that involve "embedded federal issues."

Those conflicts, the panelists said, were caused by divergent applications of a test set forth in *Grable & Sons Metal Prods. Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), which held that state-law causes of action—such as legal malpractice—must be heard by federal tribunals if:

- resolving a federal issue is necessary to resolution of the state-law claim;
- the federal issue is disputed;
- the federal issue is "substantial"; and
- the exercise of federal jurisdiction will not "disturb [the] balance of federal and state judicial responsibilities."

Courts applying *Grable* in the context of professional negligence claims reached different conclusions. Many held that patent-related malpractice suits had to be heard in federal forums, but the panelists agreed that *Gunn* will now preclude almost any attempt to strip a state court of jurisdiction over any legal malpractice action that raises a seemingly "federal" issue. (Of course, federal courts remain open to malpractice actions where their jurisdiction is premised on another basis, such as diversity of citizenship.)

The Supreme Court's ruling, Rosen said, is "written so broadly" that it is "essentially . . . the death knell" for any attempt to have a professional negligence claim removed to federal court as involving federal law.

Webre concurred. The court "couldn't bring itself" to announce a "bright-line" rule that an embedded federal issue can never require the litigation of a malpractice claim in federal court, she acknowledged. "But they came pretty close; they said, 'rarely ever.' "

And sure enough, the exit of pending patent malpractice lawsuits from federal courts has begun. E.g., *Gerawan Farming Inc. v. Townsend Townsend & Crew LLP*, No. 1:10-CV-02011 LJO JLT, http://www.bloomberglaw.com/public/document/Gerawan_Farming_Inc_v_Townsend_Townsend_and_Crew_LLP_et_al_Docket (E.D. Cal. March 8, 2013).

Ripple Effects. The speakers, and other lawyers contacted by BNA, said the court's sweeping decision also casts doubt on the continued validity of other cases in which state courts have been stripped of jurisdiction over malpractice claims with "embedded federal issues."

One such case is *Reserve Mgmt. Co. v. Willkie Farr & Gallagher*, No. 11 Civ. 7045 (PGG), 28 Law. Man. Prof. Conduct 623 (S.D.N.Y. Sept. 25, 2012), in which the court ruled that a malpractice action premised on a law firm's allegedly deficient advice regarding federal securities laws must be heard in federal court.

"I suspect that case is not good law any more," said Rosen.

Howard M. Wasserman, a professor at Florida International University's law school, agreed. In an interview with BNA, Wasserman said that the *Reserve Management* court and other tribunals that "ruled contrary to *Gunn*" will reconsider their decisions and "almost certainly hold that the cases cannot be brought in federal court and/or can be brought in state court."

Lawrence A. Kellogg, a litigator who frequently deals with complex jurisdictional disputes, expressed a similar sentiment when contacted by BNA.

"In light of [*Gunn*], I can't see how *Reserve Management* survives," said Kellogg, a founding partner at Levine Kellogg Lehman Schneider + Grossman in Miami.

Save Me. The conference panelists said state law will dictate whether claimants with malpractice cases pending in federal courts will be permitted to refile their claims in state court after their suits are inevitably dismissed per *Gunn*.

Wassermann, an expert on civil procedure and federal courts, said in an email that "What happens now with other, similar cases depends on where those cases stand procedurally." If a case is "still pending anywhere in federal court, the court will dismiss [it] for lack of subject matter jurisdiction," he surmised.

"Many states," he added, "have 'savings statutes' which provide that if an action is filed in a court and dismissed for lack of jurisdiction, the plaintiff can refile in state court within some period of time (for example, the time remaining on the limitations period or one year, whichever is longer), so that should avoid the limitations issue, at least in those states."

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