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In her bankruptcy schedules, Rhoads listed Fred Sommer as a creditor holding a claim for legal services. Sommer was served with Rhoads' petition, but he did not file any response in the bankruptcy proceedings. After reviewing Rhoads' petition, the bankruptcy trustee concluded there was "no property available for distribution from the estate." The trustee filed a report of no distribution, releasing to Rhoads any interest she might have in the stayed litigation. In July 1998, the bankruptcy court granted Rhoads a discharge under 11 U.S.C. § 727.

Rhoads and Sommer then exchanged several letters concerning Sommer's representation of Rhoads in the employment discrimination suit. Disagreements between Sommer and Rhoads continued. As a result, Sommer officially withdrew as Rhoads' attorney. On September 28, 1998, Sommer sent notice of his attorney's lien to Rhoads and to counsel for the Federal Deposit Insurance Corporation.

Rhoads filed notice that she was appealing the judgment of the district court in the employment discrimination case. In 2001, the appellate court remanded the case for a new trial. More than four years after Sommer withdrew as Rhoads' attorney, a federal jury found in favor of Rhoads and awarded Rhoads damages of \$120,006. As a prevailing party, Rhoads moved for an award of attorney's fees and costs. In her memorandum in support of her claim for attorney's fees, Rhoads cited Sommer's statutory lien.

The federal district court denied Rhoads' claim for fees and costs and denied Sommer's motion to intervene. The Court of Special Appeals of Maryland reversed, holding that the lien took effect upon the commencement of Sommer's services, was not lost by Sommer's failure to serve written notice under

Maryland Rule 2-652 before the bankruptcy petition, was not dependent on the viability of an *in personam* claim, and was not extinguished in the bankruptcy despite the fact that Sommer did not file proof of claim in bankruptcy. Rhoads filed a petition for writ of certiorari.

HOLDING: Affirmed.

REASONING: The court first considered when the lien was established and what notice, if any, was required to establish the lien. The court noted that the plain language of § 10-501 Maryland Business Occupations and Professions Code states that "an attorney at law *has* a lien on: (1) a cause of action or proceeding of a client of the attorney at law from the time the cause of action arises or the proceeding begins..." Before analyzing whether Sommer's lien survived Rhoads' bankruptcy discharge, the court considered whether the § 10-501 attorney's lien is an *in rem* or an *in personam* claim. The court found that an attorney's lien is an *in rem* claim.

The court held that a bankruptcy discharge releases the debtor from *personal* liability for pre-petition debts. Sommer's *in personam* claim was discharged after Rhoads' bankruptcy filing. The discharge did not affect Sommer's *in rem* claim. Because the *in rem* claim was abandoned and reverted to a status such that no bankruptcy had occurred, Sommer was not obligated to file any proof of claim in the bankruptcy estate in order to make his statutory attorney's lien claim. As a result, Sommer's lien, an *in rem* claim on any judgment or recovery in Rhoads' civil action, survived Rhoads' bankruptcy discharge of her *in personam* debts even though notice of the lien under Maryland Rule 2-652 was not provided until after the bankruptcy.

MISCELLANEOUS

PROPOSED CLASS ACTION SETTLEMENT REJECTED

Figueroa v. Sharper Image Corp., 517 F. Supp. 2d 1292 (S.D. Fla. 2007).

FACTS: Manuel Figueroa brought suit against Sharper Image as the named plaintiff in a class action. Figueroa alleged that the "Ionic Breeze" air purifier sold by Sharper Image did not perform as advertised and, in fact, exposed customers to dangerous levels of ozone. Figueroa sought relief on claims of breach of contract, breach of warranty, and unjust enrichment.

Sharper Image initially objected on the grounds that there were similar class-action suits already pending in California, and one was already pending in Florida. Sharper Image filed a motion to stay. Figueroa responded by adding the manufacturer of the units to the suit. Eventually, the manufacturer was released because of jurisdictional issues. Sharper Image's motion to stay was denied.

The day before the class was to be certified, the parties reached a settlement agreement. Due to various objections to, what was referred to as, a "coupon settlement" and a "reverse auction" by outside observers, two more versions of the settlement agreement were proposed. This proceeding was initiated by the parties to request final approval of the proposed settlement.

HOLDING: Denied.

REASONING: The court stated that "the issues presented that bear upon whether to grant final approval here are: (a) whether the settlement was procured by collusion among the parties or was the result of arms-length and informed bargaining; and (b) whether the proposed final settlement is fair, adequate and reasonable, applying the six *Bennett* factors. In addition, the Court is to evaluate the fairness of the parties' proposed settlement under the standards contained in the CAFA ["Class Action Fairness Act"]."

The court found no evidence of collusion. It did find that plaintiff's lawyers had drastically lowered their demands by more than 1000% very late in the settlement process. Plaintiffs had initially asked for an 80% coupon, which would have been about \$280. One day before the settlement they dropped their demand to \$19. The court reasoned that plaintiff's lawyers were negotiating from a position of weakness due to Sharper Image's threat to stay the settlement pending other class action claims against them.

Next the court considered the *Bennett* factors which are: "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved." *Bennett v.*

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The court found that the settlement agreement was substantively unfair, due to the large difference between the hundreds of dollars consumers had paid for the Ionic Breeze and the \$19 dollar coupon that was proposed.

settlement agreement was substantively unfair, due to the large difference between the hundreds of dollars consumers had paid for the Ionic Breeze and the \$19 dollar coupon that was proposed. This, coupled with the two million dollar award to plaintiffs' attorneys, made the settlement unfair under both steps two and three of the *Bennett* test and the CAFA. The court next found that because of the extensive pre-trial discovery that had already been done, the expense of litigation as opposed to the unfair settlement would be minimal. The continued objections of third parties were noted, and the stage of the proceedings was found to be close enough to trial to not favor the settlement.

For these reasons, the court rejected the proposed settlement agreement under both the CAFA and the *Bennett* test.

UNDER CAFA, DEFENDANT MUST ESTABLISH GROUNDS FOR REMOVAL

Frederico v. Home Depot, 507 F.3d 188 (3d Cir. 2007).

FACTS: Frederico ("plaintiff") brought a state court class action suit against lessor Home Depot, alleging breach of contract, fraud, and violation of New Jersey consumer fraud statute. Home Depot removed the case to federal district court on diversity grounds. Frederico did not attempt to have the case remanded to state court.

Plaintiff's claim was based on an incident involving a truck rental from Home Depot. She was told to return the truck at a specific time in the evening. When she returned the truck, she was told the rental department had closed, and to return it the next morning. She was charged late fees for this, which was the basis of her suit. The trial court found that she was not specific enough in her charges because she did not state a specific time that she had attempted to return the truck and she could not identify the employee she spoke to at that time. For these reasons, the trial court dismissed her case for failure to state a claim on which relief could be granted. Plaintiff appealed.

HOLDING: Affirmed.

REASONING: The United States Court of Appeals for the Third Circuit noted that the district court determined that jurisdiction was proper pursuant to the Class Action Fairness Act ("CAFA") and that Frederico had never challenged that decision. Nonetheless, this court raised the matter of subject matter jurisdiction *sua sponte*.

In order to find jurisdiction, the court analyzed three

Behring Corp., 737 F.2d 982 (11th Cir. 1984).

The court found that there was a substantial chance of success at trial based on the merits of the case. It cited a consumer report magazine that had been sued unsuccessfully by Sharper Image for printing a report that criticized the flaws in the Ionic Breeze. Next, the court found that the

questions: "(1) which party has the burden of establishing federal jurisdiction in the removal process; (2) the extent of that party's burden of proof; and (3) whether diversity jurisdiction is established by the record before us." As to the first question, the court found that it had already been decided "that the party asserting federal jurisdiction in a removal case bears the burden of showing, at all stages of the litigation, that the case is properly before the federal court." This meant that Home Depot had the burden of establishing federal jurisdiction.

Using Home Depot's calculations, the court found that it was possible that Frederico's claim satisfied the requirements of 28 U.S.C. § 1332(d)(2), for federal jurisdiction over a class action claim. Noting that Home Depot's calculations were based on Frederico's own pleadings, the court found the record sufficient to support federal jurisdiction. Having determined the jurisdiction issue, the court turned to the facts. It agreed with the district court that Frederico's factual submissions were insufficient, and affirmed the dismissal.

CONTINGENCY FEE REDUCES MALPRACTICE AWARD

Horn v. Wooster, 165 P.3d 69 (Wyo. 2007).

FACTS: On September 18, 2001, a bus driver lost control and collided with Albert Wooster causing him injuries. Mr. Wooster, a resident of Maine, had been traveling through Wyoming, where the injury occurred and the action was brought. Mr. Wooster hired Mr. Duddy, an attorney practicing in Maine who was not licensed to practice in Wyoming. Together they hired Mr. Horn to prosecute the case in Wyoming. Their arrangement was based on a contingency fee in which Horn would receive fifty percent of damages recovered from the personal injury action. Duddy would receive 1/3 of Horn's contingency fee as compensation for services. After Horn filed the case in Wyoming, he failed to file a notice of the claim within the time constraints specified under Wyoming law. Summary judgment was awarded to the defense.

Mr. Wooster and Mr. Duddy later brought suit against Mr. Horn for malpractice and attempted to recover the damages he would have had rights to had he won the case. Mr. Duddy also sought action for his 1/3 of the expected damages. The district court certified two questions to the Wyoming Supreme Court.

HOLDING: Question one answered affirmatively and question two answered negatively.

REASONING: The first question pertained to whether a client's malpractice award should be reduced by the amount of the contingency fee that would have been payable to the attorney absent his malpractice. The Wyoming Supreme Court permitted the contingency fee offset. The court reasoned that the purpose and function of a malpractice award was to place the client in as good a position as they would have been without breach. The court emphasized that malpractice damages were not punitive, but rather compensation for the client's loss. The court relied heavily on *Moores v. Greenberg*, 834 F.2d 1105 (1st Cir. 1987) which held that the plaintiff was only entitled to damages foreseeable as a consequence of the attorney's negligence. Accordingly, the court ruled that to calculate net client proceeds from the underlying personal injury action the attorney's contingency fees must be deducted.

Additionally, the court upheld the American rule which

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generally holds that each party is responsible for their own costs and fees. The exceptions for reimbursement of attorney's fees were not available in the present case because the court did not find an express statutory or contractual authorization to do so. Finally, the court rejected the *quantum meruit* theory because it would be impractical to apply on a case by case basis and it ignored the original fee arrangement between client and attorney.

The second question the court asked was whether co-counsel could recover the agreed portion of the contingency fee expected under a contingency fee arrangement, either as an offset against the contingent fee or as a separate claim against the principal attorney. The court held that the associated counsel could not recover damages expected under a contingency fee arrangement. The court was uncomfortable with the idea of attorneys suing their co-counsel. The court suggested that the implications of creating independent attorney duties to their clients would conflict with the joint fiduciary duty owed to clients. The court was simply unwilling to sacrifice client's best interests in favor of feuding attorneys. The case was resolved such that the court answered the first question in the affirmative and the second in the negative.

GOLF COURSE MAY BE SUED FOR DAMAGE FROM ERRANT SHOT

MEC Leasing, LLC v. Jarrett, 164 P.3d 344 (Or. Ct. App. 2007).

FACTS: Plaintiff filed suit against defendant golf course operator for negligence. The negligence complaint resulted from damage to four cars on plaintiff's property by four golf balls from defendant's adjacent golf course.

Plaintiff alleged that defendant was aware of the dangers of players hitting golf balls from the 15th tee and fairway onto adjacent property. Plaintiff further argued that the defendant failed to supervise and control players using said 15th tee and fairway so as to preclude such players from hitting errant golf balls, to warn persons on the adjacent property of the inherent danger of errant golf balls being driven by players on the 15th tee and fairway, to erect or install any protective fencing or other devices to preclude divergent golf balls from leaving the limits of the golf course, and permitted players on the 15th tee and fairway to hit golf balls outside the limits of the golf course. Defendant argued that he was not a proper defendant and that the facts did not support plaintiff's claim against him. Defendant moved for summary judgment.

The trial judge found that defendant was a proper party, but granted his motion for summary judgment, stating: "[t]he allegations here really seek redress for damage caused either by accident, depending on the particular nature of the conduct involved by the individual golfer, or by negligence of an individual golfer but is not attributable to the golf course operator here." Plaintiff appealed.

HOLDING: Reversed and remanded.

REASONING: The Oregon Court of Appeals agreed with the plaintiff that there were sufficient issues of material fact to survive summary judgment. It also rejected the trial court's analysis, stating that "[c]ontrary to defendant's argument, plaintiff does not seek to hold defendant liable for any specified negligence of individual golfers; rather, plaintiff asserts that defendant is liable in negligence for the activities that it conducts on the golf

course property, activities that according to plaintiff's allegations have injurious effects beyond the boundaries of the golf course property."

The court found that this issue was well settled in common law. "[A] party in the exercise of a right upon his own land which involves danger to the property of his neighbor [is] bound to provide against such danger by all reasonable prudence and care." They also found that "[i]t is axiomatic that an actor may be liable for his own negligence even though the injury caused was the result of the combined effects of the actor's negligence and the subsequent conduct of another person."

In summation, the court found that the "defendant knowingly permitted others to partake in activities on the property that defendant operated that caused damage to plaintiff's property, and defendant was on notice that golf balls frequently were hit onto the properties adjacent to the golf course, thereby causing injury and damage." Because of this, the court found foreseeability and lack of preventative actions by defendant to be issues of material fact for a jury to determine.

STATUTE IMMUNIZING RENTAL CAR BUSINESSES IS STRUCK DOWN

Vanguard Car Rental USA, Inc. v. Huchon, ____ F. Supp. 2d ____ (S.D. Fla. 2007).

FACTS: Vanguard Car Rental ("Vanguard") leased a Chevrolet Classic vehicle to Michael Jankowski. Shortly thereafter Jankowski was involved in a motor vehicle accident with the defendant, Jean Francois Huchon. Huchon filed a personal injury claim in state court. Huchon's claim in state court was removed to federal court and consolidated with the declaratory injunction action filed by Vanguard. Vanguard sought a declaratory judgment that they were not liable to Huchon for damages from the accident. They based their claim of immunity from liability on 49 U.S.C. § 30106. This section provides that an owner of a vehicle who rents or leases the vehicle shall not be liable for the harm to persons or property that results from the use or operation during the period of the rental or lease, as long as the owner is engaged in the trade or business of renting and leasing motor vehicles, and there was no negligence or criminal wrongdoing on the part of the owner. Vanguard moved for summary judgment on these grounds. Huchon moved to dismiss on various grounds.

HOLDING: Plaintiff's and defendant's motions denied.

REASONING: The court began by determining whether the statute was constitutional or an overreaching power of Congress. The "Commerce Clause, Article I, section 8 of the United States Constitution, provides that Congress shall have the power to . . . regulate commerce . . . among the several states." The court identified the three-part test in *United States v. Lopez*, 514 U.S. 549, 552 (1995). "Congress has the authority to regulate, first the use of channels of interstate commerce, second the instrumentalities of interstate commerce, and third activities substantially related to interstate commerce."

The court first examined if the statute in question regulated a channel in commerce. The court reasoned that the statute regulated the assignment of benefits and burdens between parties to a commercial transaction rather than the actual use of roads and highways and therefore did not directly regulate either

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channels of interstate commerce or the use of those channels. Second, the court determined whether the statute regulated an instrumentality of interstate commerce. While the court reasoned that cars were by their nature instrumentalities of interstate commerce, all of the statutes upheld in prior cases related directly to automobiles and were not a regulation of tort liability as in the present case.

The court evaluated the final prong as to whether the statute regulated activities substantially related to interstate commerce. The Supreme Court of the United States established a four factor test for this area in *United States v. Morrison*, 529 U.S. 598, 610-12 (2000). The four factors are: (1) whether Congress made findings about the activity's impact on interstate commerce; (2) whether the federal statute contains an "express jurisdictional element" limiting the statute's reach; (3) whether the activity is commercial or economic by nature; (4) whether the connection between the activity and its effect on interstate commerce is attenuated. The court found "no official Congressional findings were made," nor was there "any element expressly limiting" the

statute's reach. In examining the third element the court held that "vicarious tort liability does have an economic impact" and created a potential expense that the car rental company might pass through to its customers. In considering the fourth element, the court found that the effect on interstate commerce is attenuated. The court determined that there was no "rational basis to support a conclusion that vicarious tort liability affects interstate commerce." Using the rationale set forth for finding this statute constitutional would have made the court "hard pressed to think of any type of state legislation which could not be preempted by congress, including state taxes."

The court determined that there was no "rational basis to support a conclusion that vicarious tort liability affects interstate commerce."