LEGAL UPDATE

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EMPLOYMENT, INSURANCE
WHAT YOU NEED TO KNOW ABOUT COBRA

"COBRA" stands for the Consolidated Omnibus Budget Reconciliation Act. COBRA became law in 1985 and amended the Employee Retirement Income Security Act (ERISA) to provide continuation of group health coverage that would otherwise be terminated. Employers that offer group health coverage and employ 20 or more employees on at least 50 percent of the working days in the previous calendar year are subject to COBRA (part-time employees count as a fraction of a full-time employee). An employer that does not offer any kind of health plan is not subject to COBRA.

Under COBRA an employer must allow certain individuals or "qualified beneficiaries" who would otherwise lose their group health coverage due to""qualifying events" to continue that coverage (at their own expense) for a specified period of time at group rates. A "qualified beneficiary" is an individual who was covered by the group health plan on the day before the qualifying event occurred. This includes the employee, his or her spouse and dependent children if the spouse and children were enrolled in the group health plan. A "qualifying event" is an event that, except for COBRA continuation coverage, would cause an individual to lose health coverage. For example, the death of the covered employee, divorce from the covered employee, and voluntary or

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EMPLOYMENT, DISABILITY
SUPREME COURT LIMITS DEFINITION OF DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT

The United States Supreme Court, in its recent decision in *Toyota Motor MFG., Ky., Inc. v. Williams,* restricted the definition of "disability" under the Americans with Disabilities Act ("ADA"). The Court ruled that in order to be disabled in the major life activity of performing manual tasks, an individual must be impaired in activities of "central importance to daily life" and not just the ability to perform manual tasks at work.

Ms. Williams, the plaintiff, was an employee who worked on an assembly line of an automobile manufacturing plant as part of its quality inspection team. Her employment duties included applying highlight oil to cars along the assembly line. At the time she was discharged from her job for excessive absences, Ms. Williams's job functions required her to raise her hands and arms for several hours during the day. Ms. Williams claimed that she could not perform this job function due to carpal tunnel syndrome and other related impairments. She further claimed that her excessive absences were the result of her employer's refusal to excuse her from these tasks.

Ms. Williams brought suit under the ADA claiming (1) that she was disabled because she was substantially limited in the *major life activity of performing manual tasks*, and (2) that her employer failed to excuse her from applying highlight oils to the automobiles, thereby failing to provide her a *reasonable accommodation.*

The U.S. Court of Appeals for the Sixth Circuit reversed the District Court's grant of summary judgment to the employer and ruled that Ms. Williams merely had to show that her impairments impacted a class of manual activities affecting her ability to perform tasks at work. The Court further reasoned that Ms. Williams satisfied this test because her carpal tunnel syndrome prevented her from doing tasks associated with assembly line jobs that required the repeated raising of hands and arms. The Court of Appeals rejected as irrelevant evidence showing that the plaintiff could tend to her personal and household chores, despite her physical impairments.

The Supreme Court reversed the Sixth Circuit and held that the type of evidence rejected by the Sixth Circuit was precisely the type of evidence that required examination in determining whether the plaintiff was disabled. Additionally, the Supreme Court held that the Sixth Circuit applied the wrong standard for determining the plaintiff's limitations while performing manual tasks because it reviewed a limited class of manual tasks and failed to address whether the plaintiff's impairments restricted her ability to perform everyday tasks that are central to most people's daily lives.

The Court noted that the word "substantially" in the phrase "substantially limits" is defined as "considerable" or "to a large degree" and held that impairments that only interfere in a minor way with performing manual tasks are not covered by the ADA. The Court then found that the phrase "major life activities" refers only to activities of central importance to daily life. Consequently, the Court reasoned that to be substantially limited in the major life activity of performing manual tasks, an individual must have a permanent or long-term impairment that prevents or severely restricts the individual from doing central daily activities. Noting that the ADA established a demanding standard for qualifying as disabled, the Court went on to cite walking, seeing and hearing as examples of major life activities.

The Supreme Court's opinion emphasizes that people attempting to prove disability status under the ADA must do more than merely submit evidence of a medical diagnosis of impairment. Medical conditions affect individuals differently, and an individualized assessment of the effect of an impairment is necessary. Thus, employers must be cautious in rejecting an employee's request to be accommodated on grounds that the employee is not disabled under the statute. Critical opinion regarding the magnitude of the effects of this ruling on employees' ability to sue under the ADA is premature; however, it seems likely that the case will have a significant impact on subsequent ADA cases.

ALAN BOWDEN

CIVIL PROCEDURE
D.C. COURT OF APPEALS ADDRESSES *FORUM NON CONVENIENS*

Latin for "inconvenient court." (Barron's Law Dictionary). Of course, to be honest, when you are a defendant, aren't all courts *inconvenient*? And how is an injured person supposed to know what court is *convenient* to ensure their case will be heard and decided fairly? Well, as everyone *should* know, you go ask an attorney. All courts, from the Supreme Court down to state trial courts, have expounded on this subject at one point in time or another, but understanding the basics is not very difficult. In our last *Legal Update* Alan Bowden focused on a Superior Court judge's handling of a *forum non conveniens* matter; here we will review a contemporaneous appellate court decision.

There are two main factors a court looks at to decided when to grant a defendant's motion (usually a motion to dismiss) on grounds of *forum non conveniens*—the private interests of the litigants and the public interests of the forum. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The *private interests* of the litigants include the following: "1) the relative ease of access to sources of proof; 2) the availability of compulsory process for attendance of witnesses; 3) the cost of obtaining attendance of willing witnesses; 4) the possibility of viewing premises, if the view would be appropriate to the action; 5) all other practical problems concerning the ease, expedition and expense of the trial; 6) the enforceability of a judgment once obtained; 7) evidence that the plaintiff attempted to vex, harass or oppress the defendant by his choice of forum; and 8) the relative advantages and obstacles to fair trial." *Coulibally v. Malaquias*, 728 A.2d 595, 600 (D.C. 1999). No one factor is more important than any other. The court will look at all of the factors and weigh the outcomes to determine whether the private interests of the litigants can be settled in the current court.

In *Medlantic Long Term Care Corp. v. Smith*, 791 A.2d 25 (D.C. 2002), the D.C. Court of Appeals used these factors in a case where an individual who was domiciled in the District of Columbia died after care at a Medlantic Long Term Care Corporation ("MLTC") facility in Silver Spring, Maryland. The estate sued MLTC and its parent corporation in the District of Columbia. This scenario is not unusual, since the plaintiff-friendly D.C. Superior Court is the forum of choice for personal injury and, particularly, medical malpractice litigants. Regardless, MLTC moved to dismiss for *forum non conveniens*, arguing that the case was better suited to Maryland than the District. The trial court denied the motion, and MLTC appealed. The D.C. Court of Appeals looked at the fact that all the parties and events were located within a few miles of the District, that MLTC's parent corporation had its principal place of business in D.C. and that both the defendants had similar business activities in the District. The court determined that, since the alleged negligence occurred in suburban Silver Spring, any witnesses were within the *subpeona* power of the Court, and, since all occurrences and the parties themselves were in the metropolitan area, the *private factors* were not significant.

The *public interests* of the forum include "1) administrative difficulties caused by local court dockets congested with foreign litigation, 2) the local interest in having localized controversies decided at home, 3) the unfairness of imposing the burden of jury duty on the citizens of a forum having no relation to the litigation, and 4) the avoidance of unnecessary problems in conflict of laws and in the interpretation of the laws of another jurisdiction." *Coulibally*, 728 A.2d at 601. Again, as with the private interests, the court does not look at any one factor as most important, but views all the factors as a whole.

In *Medlantic* the court found the case was not truly *foreign* litigation since the decedent was domiciled in the District, both defendants conducted significant business in the District and MLTC's parent corporation had its principal place of business in the District. Second, the court felt that it was not unusual for District residents to get health services in Maryland and Virginia and that the District has a significant interest in how resident corporations conduct business in other jurisdictions when they provide similar medical services in the District. Finally, the Court explained, "courts are not unfamiliar with applying the laws of other jurisdictions, especially Maryland upon whose common law [the District's] common law is based." *Jimmerson v. Kaiser Found. Health Plan*, 663 A.2d 540, 544 (D.C. 1995).

The Court of Appeals in *Medlantic* affirmed the trial court's denial of the *forum non conveniens* motion. The burden is on the defendant to demonstrate why the forum is inconvenient, and the plaintiff need not justify bringing suit in the jurisdiction until the defendant has proven inconvenience. "Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Coulibaly*, 728 A.2d at 601.

BRENDA HANKINS

EMPLOYMENT
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involuntary termination (except for gross misconduct) are examples of qualifying events. The type of qualifying event will determine who is entitled to continuation coverage and the required amount of time that the plan must offer the health coverage. The maximum length of coverage is 36 months.

COBRA regulations are complex, and employers administering COBRA in-house must be careful to provide proper notice to their employees within the required time limits. Generally, employers are required to send COBRA notices to employees under the following circumstances: (1) when a group health plan first becomes subject to COBRA; (2) when a new employee is hired; (3) when employees add spouses; and (4) when a "qualifying event" occurs. The COBRA notices under 1, 2 and 3 above are important because they inform employees and spouses as to what they are to do in the event of a qualifying event (*i.e.*, divorce, legal separation, death or cessation of dependency status). For example, the initial notice explains that a employer must be notified within 60 days of a divorce.

When a qualifying event occurs the employee, spouse and dependents (if all of these individuals were covered by the group health plan on the day before the qualifying event) must be notified by the employer of their right to elect continuation coverage. Each qualified beneficiary has an independent right to elect COBRA. Employers that also serve as plan administrators have a duty to notify all qualified beneficiaries of their right to elect COBRA within 44 days of a qualifying event (time frames are different if employers and plan administrators are separate). It is sufficient if an employer sends a letter or other notice by first class regular mail (it is not sufficient to simply post the notice on the premises). Qualified beneficiaries have 60 days within which to elect COBRA coverage. The 60-day period generally runs from the date the employee is sent a COBRA notice by the employer or plan administrator. However, if coverage under the group health plan ends after the date the employer's notice is sent, then the employee has 60 days from the date coverage ends.

COBRA continuation coverage ends when the maximum period of coverage has been reached, the employee fails to pay premiums, the employer goes out of business or stops offering a group health plan or the beneficiary gets coverage under another plan. Employers that violate COBRA requirements could face state and federal penalties including daily fines.

DANA THERIOT

ESTATE PLANNING
WHO IS MINDING YOUR PORTFOLIO?

The title of *Business Week*'s May 13, 2002 cover story was "How Corrupt Is Wall Street?" The answer the editors gave to their own rhetorical question was "enough to hurt you." The predicament with investment banking as a business, according to the editors, is the inherent conflict in two of the most important aspects of it. On the one hand, investment bankers need to raise capital for client companies through the underwriting process. On the other, they have investor clients whom they advise on placing investor savings for maximum yield with minimum risk. Obviously, investment bankers have a strong incentive to try to sell their investor clients the securities of client companies, regardless of the intrinsic financial merit of the client company or its suitability to the investor's overall financial needs.

This conflict is not new, and the Federal securities laws enacted beginning in 1933 plus the numerous regulations of the Securities and Exchange Commission try to prevent abuses which might hurt investors. The problem with after-the-fact remedies, however, is that they are expensive, time-consuming, emotionally draining, and, sometimes, not totally effective. Thus, although the securities rules were supposed to do away with the "let the buyer beware" maxim, it is still one of the best protections that the individual investor has. Although volumes could be written on this subject we would like to discuss just three self-protection methods.

Trust But Verify. Your stockbroker or investment advisor is probably honest and competent. Nevertheless, you need to check out his or her recommendations. Read the prospectuses of recommended investments. If you have the skills, analyze the financial statements yourself. If not, use one of the many fine services freely available in your local public library. Do not rely on tips. Using insider information is not only unlawful but most insider information is usually wrong anyway. Moreover, even if the information is correct, it is usually incomplete, so it is very hard to make an informed investment on a tip. Too much vital information is missing and unavailable except to true insiders.

Diversify. Let the Enron-WorldCom disaster be your guide. Diversification means holding not only a variety of stocks, but also a variety of *kinds* of investments: bonds, real estate investment trusts, and money market instruments. There are many excellent index funds, as well as many excellent managed funds with low expense ratios. Be careful about paying loads or sales charges. There is no reason to pay them because there are just too many good no-load funds available. Business owners need to have some eggs in a basket other than the principal business.

Invest in Context. Investing should be done in the context of an overall financial and estate plan which involves considerations such as estate taxes, income taxes, life insurance, beneficiary designations for retirement plans, and choice of beneficiaries for wills and trusts. Even after verifying the appropriateness of an investment recommended by your broker and its suitability as a means of diversification, you still need to ask yourself whether the money could be better spent on life insurance or added to a retirement plan or account, rather than held directly as an investment.

The unfolding Wall Street-Enron-WorldCom-Arthur Andersen drama is a wake up call to take charge of your portfolio. The law can protect you only so far and provides remedies after the fact, but inoculation against financial missteps is relatively painless and can be done quickly with some professional assistance. Please call Roy Morris or the author if you would like to review your present overall financial picture.

NÉSTOR CRUZ

NEGLIGENCE
D.C. INNKEEPER STATUTE PUT TO THE TEST

The Four Seasons Hotel in Georgetown provides safe deposit boxes for the security of guests' valuables. The hotel also provides convenience safes in guest rooms—with posted warnings on closet doors and on the room safes themselves that the hotel's liability is limited for those opting to use the room safe. The hotel's efforts to limit its liability are being severely tested in one pending case arising from the theft of over $1.2 million worth of jewelry.

In September 1997, Thelma and Christina Paraskevaides were guests at the Four Seasons. They brought with them approximately $1.2 million worth of jewelry, which was then stolen from a convenience safe in their suite. When they sued the hotel for negligence and breach of warranty, the hotel raised defenses based on statutory limitations and contributory negligence. The trial judge granted the hotel's motion for summary judgment, reasoning that D.C.'s Innkeeper Statue protected the hotel and that Plaintiffs were contributorily negligent'"as a matter of law" for foolishly leaving expensive jewelry in a room safe. In *Paraskeviades v. Four Seasons Washington*, U.S.App.D.C. No. 01-7121 (June 14, 2002), the U.S. Circuit Court for the District of Columbia reviewed the liability issues presented and reached a strikingly different conclusion.

The common law doctrine of *infra hospitium* holds an innkeeper strictly liable for loss of a guest's property unless the loss is due to an act of God or the guest's fault. Many jurisdictions have softened that doctrine by adopting liability limitations. The D.C. Innkeeper Statute, §30-101 of the D.C. Code, essentially limits a hotel's liability if the hotel provides a *suitable depository* for valuables and properly notifies guests of the available depository. The Court of Appeals's analysis in this case differed from the trial court in finding the hotel's notice to guests inadequate. While the Four Seasons did post an acceptable summary of the law on the closet door and on the room safe itself, the law also requires posting in the *public rooms* of the hotel. Absent the required *public rooms* posting—and strictly construing the statute because it is an exception to the common law—the Court of Appeals concluded that the Four Seasons had not complied and therefore could not use the Innkeeper Statute as a liability shield. The court also rejected as irrelevant the hotel's argument that Plaintiffs had *actual notice* of the liability limitation.

The Court of Appeals also rejected the trial court's finding on contributory negligence. Whether Plaintiffs' claims should be barred because of their own negligence, the court reasoned, should be left to the jury.

The case having been remanded to the District Court for trial, the dynamics for trial—and possible settlement—have changed drastically. Without the Innkeeper Statute, the hotel faces the prospect of being found strictly liable under the *infra hospitium* doctrine. And persuading the jury that locking expensive jewelry in a room safe was itself negligent will also be difficult. Regardless, one thing is certain—there are now postings of the Innkeeper Statute notice in all *public rooms* of the Four Seasons.

LAWRENCE CARR

CARR, MORRIS & GRAEFF, P.C.

Carr, Morris & Graeff, P.C., was established in 1982 by the named principals–Lawrence Carr, Roy Morris and Stephen Graeff. It is a diversified firm structured primarily to meet the legal needs of businesses and their principals.

The firm strives to provide full service representation to its corporate and individual clients. It is designed to provide such service by organization and presentation of an array of attorneys with diverse backgrounds in specialized areas of the law as well as a generalized background which enables them to look beyond a narrow specialty or need. The academic and cultural backgrounds of the attorneys of the firm are as diverse as their experience and specializations.

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The firm maintains its office in the Metro Center region of downtown Washington. It has attorneys admitted to all of the local judicial jurisdictions–the District of Columbia, Maryland and Virginia.

STAFF NOTES

Vacation time is fast upon us. It's hot in Washington. It no longer rains here. We're buried in tourist traffic. So, how do the CMG vacations grade out this year?

- Roy Morris. Always the leader in off-beat sites, Roy and Marie Morris spent a week bicycling the Finger Lakes region of New York, a tour called "Bon Ton Roulez." Roy also hosts his sister Glenda—home from England—and continues his monthly track runs at the Summit Point Raceway. (Mostly, though, Roy awaits delivery of his Mini Cooper.) *Grade: A-*
- Steve Graeff. Regional inn-hopping has replaced the annual Maine trek. *Grade: B-*
- Larry Carr. The beach and a weekend in New Hampshire. *Grade: B*
- Adam Wilk. Myrtle Beach with "the fam." *Grade: B*
- Nestor Cruz. "Summer vacation" and "Boca" are synonymous. *Grade: B*
- Phil Schwartz. Wintergreen, to smell mountain air and hit 300 yd. drives deep into the woods. *Grade: B*
- Brenda Hankins. Just bought a house, pleading poverty. *Grade: Incomplete*
- Dana Theriot. Quickies to California (for a graduation) and to Lake Michigan (to confirm it's a great lake), then later this Summer a trek to Louisiana to meet the extended family. *Grade: B+*
- Tim Feely. To the Outer Banks with the full family, then the Bahamas without the kids. *Grade: A-*
- Alan Bowden. Alan's wife is expecting...hoping to vacation more after childbirth (*right, about 20 years after childbirth...*). *Grade: Incomplete*

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