Northern Illinois University Law Review

Volume 31 | Issue 1 Article 8

11-1-2010

Vol. 31, no. 1, Fall 2010: Table of Contents and Masthead

Northern Illinois University Law Review

Northern Illinois University
Law Review

Volume 31 Fall 2010 Number 1

ARTICLES

Clarifying Murky MERS: Does Mortgage Electronic Registration Systems, Inc., Have Authority to Assign the Mortgage Note in a Standard Illinois Foreclosure Action?

Kevin M. Hudspeth.....1

As the number of mortgage foreclosure actions has substantially increased over recent years, legal scrutiny of the mortgage foreclosure process has likewise increased. The question of whether a little known corporation called Mortgage Electronic Registration Systems, Incorporated (MERS) has authority to assign the promissory note secured by a mortgage has become an important question faced by courts in recent months and years.

Due to the frequency with which mortgage notes are traded on the secondary mortgage market, the plaintiff in a mortgage foreclosure action is rarely the same party who originated the loan. Under Illinois law, the party entitled to enforce the promissory note secured by a mortgage is the proper plaintiff in a mortgage foreclosure action. Many foreclosure plaintiffs in Illinois use assignments of the mortgage and note executed by MERS to demonstrate their right to foreclose the mortgage. But MERS is only named as the mortgagee of record in the mortgage itself; it has no authority to assign the note.

Nevertheless, regardless of whether MERS has authority to assign a mortgage note, a plaintiff may still foreclose by establishing its right to enforce the note under the Uniform Commercial Code (UCC), which can be done by demonstrating possession of an indorsed note or by proving the transaction through which the plaintiff acquired its rights. Ultimately, plaintiffs in mortgage foreclosure actions should focus on establishing their right to enforce the note under the UCC rather than relying on the sometimes murky legal concept of MERS.

The Law of Citations and Seriatim Opinions: Were the Ancient Romans and the Early Supreme Court on the Right Track?

Joshua M. Austin 19

This article explores the oft forgotten and somewhat misunderstood ancient Roman law methodology known as the Lex Citandi, or Law of Citations. The Law of Citations was a relatively simple theory in which authority was given to the writings of five key jurists from the classical period of Roman law, and the majority won the day. Thus, in a way, the method of separate opinions was born. It was a theory revisited by our Supreme Court in its early days through seriatim, or separate, opinions; and perhaps still seen today in the modern day

Supreme Court's concurrences and dissents. This article discusses the similarities between the Law of Citations, seriatim opinions, and modern concurrences and dissents; while taking a historical look at these concepts. Additionally, this Comment will touch briefly on English legal history as well as the importance of some recent dissenting and concurring opinions issued by the Supreme Court. Ultimately, this article argues that the Law of Citations and seriatim opinions were actually the earliest manifestations of modern dissents and concurrences, and, while perhaps not properly executed, laid the foundation for important tools still in use by the highest court in the United States.

The Need for Rational Boundaries in Civil Conspiracy Claims
Mark A. Behrens & Christopher E. Appel 37

Recently, the tort of civil conspiracy has become a favored weapon of plaintiffs' lawyers in mass tort product liability litigation involving asbestos, breast implants, tobacco, automotive tires and other products, as well as in toxic tort cases. Civil conspiracy claims are often asserted by plaintiffs to allege the liability of peripheral defendants based on their associations with the party primarily responsible for the allegedly injurious product—the manufacturer—such as through membership in a relevant industry or trade association. These claims also fit into a broader pattern of plaintiffs' attorneys seeking to extend concepts of vicarious liability, even to implicate entire industries. Examples of theories that have been raised based on the same type of philosophy include market-share, enterprise, concert of action, aiding and abetting, and public nuisance. By and large, courts have been reluctant to impose liability on one entity or individual for the acts of another. Civil conspiracy claims represent another front in the effort to expand the scope of liability for the unlawful acts of another.

Civil conspiracy claims were intended to address situations involving an agreement between two or more persons to commit an unlawful or tortious act, an act in furtherance of that agreement, and special damages caused by the act. In practice, however, courts have struggled with the application of this seemingly straightforward doctrine and the law remains unclear and unsettled. Even the basic contours and scope of a civil conspiracy claim have not been clearly or adequately defined by many courts. A few courts have subjected attenuated defendants to liability by glossing over one of the most basic elements of tort law—the existence of a duty of care—creating the potential for a super-tort.

The article, The Need for Rational Boundaries in Civil Conspiracy Claims, examines the public policy implications of expanding the reach of civil conspiracy law. The article concludes that requiring a defendant to have an independent duty to the plaintiff—a duty based upon the existence of a relationship between the plaintiff and defendant—provides a necessary, rational boundary to otherwise amorphous civil conspiracy claims. Currently, courts are narrowly divided as to whether an independent duty is required in civil conspiracy claims, although a bare majority of courts that have addressed the issue recognize this safeguard. As additional courts consider such claims, the article recommends that they follow this sound path. The article also suggests that courts clarify other key elements of civil conspiracy claims to promote predictability and litigation fairness.

Considerations for Professional Sports Teams Contemplating Going Public

Jorge E. Leal Garrett & Bryan A. Green 69

The recent and lingering recession has put a significant financial strain on many industries and businesses in the United States, especially professional sports teams. While professional sports teams may not be the most profitable investment to begin with, owners must still keep them as financially sound as possible. This is especially true in these tough financial times.

Going public provides the opportunity to raise capital rapidly and thus cannot be overlooked. Having sufficient capital resources is not just important from a business aspect, but is also necessary from a competitive standpoint. As a result, many teams must explore every avenue to either cut costs or raise additional capital, including going public.

Nevertheless, going public entails many challenges and implications. Additional factors, such as SEC rules and regulations, potential investors, and the element of control, must all be considered prior to the initial public offering. In the end, going public could become a valuable tool for professional sports teams to ride out the recession and become more financially stable.

Misreading *Knight*

Josh Hess 95

This article provides an explanation to an as-yet unresolved historical anomaly: The government's 1911 decision to prosecute U.S. Steel under the Sherman Antitrust Act. The government filed suit in the face of clearly hostile precedent. In 1895's United States v. E.C. Knight, *a landmark decision, the Supreme Court held that the Sherman Act could not reach large manufacturing combinations simply by virtue of their size. In the course of providing an explanation, this article examines contemporary legal scholarship and comes to the surprising conclusion that Progressive Era legal scholars believed E.C. Knight had been overruled by 1911.*

This fact has modern significance. A group of legal scholars known as "Lochner Era Revisionists" have undertaken to challenge the conventional wisdom that the pre-New Deal Supreme Court was a bastion of activist conservatism, abusing doctrine to protect big business. In the "revisionist" view, the pre-New Deal Court cared more about neutral legal principles than previously acknowledged. In particular, revisionists Barry Cushman and Charles McCrudy have argued that E.C. Knight *was not the cynical nod to business interests traditionally believed. Rather, the holding was grounded in pre-existing jurisprudence. As the article explains, the fact that contemporaries believed* Knight *was overruled—and the reasons behind that belief—lend support to the revisionist reading of* Knight.

COMMENTS

Kicking "Single-Entity" to the Sidelines: Reevaluating the Competitive Reality of Major League Soccer after *American Needle* and the 2010 Collective Bargaining Agreement

Matthew J. Jakobsze 131

The negotiation of the 2010 Collective Bargaining Agreement brought tense times for professional soccer in the United States. The Major League Soccer Players' Union sought free agency as a part of the 2010 CBA, a term that would have brought considerable relief from the restrictions imposed through Major League Soccer's centralized contracting system. In a steadfast effort to retain control, minimize labor costs, and avoid antitrust liability, Major League Soccer refused to yield to the players' demands. As a result, the parties reached impasse. Devoid of decertification as an option to expose the teams to antitrust scrutiny, the players threatened to start the 2010 season with a labor stoppage by striking. With only five days before the opening game of the 2010 season, and only tentatively optimistic views of the future of the League, both parties made concessions and another five-year labor agreement was reached. Despite the agreement, many of the League's business practices leave considerable room to question whether teams continue to function with a "unity of interest" as required under Copperweld v. Independence Tube. *Teams act independently in a slew of labor matters: hiring a Technical Director to oversee player personnel; signing designated players; signing free agents; making trades; and developing their own youth development teams. Each of these issues deserve reevaluation in light of the recent Supreme Court case,* American Needle v. National Football League*, wherein the Court determined that the NFL is not a single-entity for intellectual property purposes. Because the Court refused to confer a single-entity exemption on the NFL, the same legal principles should be applied to Major League Soccer, and leads to the conclude that teams are potential competitors that function as separate economic actors by pursuing separate economic interests—and thus should be subject to antitrust scrutiny*

Torture, Inc.: Corporate Liability under the Torture Victim Protection Act

Emily M. Martin..... 175

The Torture Victim Protection Act (TVPA) was passed by Congress to provide a modern cause of action for victims of torture around the world. The TVPA allows victims anywhere to bring suit in the Untied States for torture committed abroad by foreign nationals. Currently, there is a split in the circuits over whether the TVPA can be used to hold corporations liable for use of torture. This Comment takes the position that the TVPA can and should be applied to corporations in order to be consistent with the Act's legislative history and to fill dangerous gaps in governance over multinational corporations.

NORTHERN ILLINOIS UNIVERSITY
LAW REVIEW

Volume 31 Fall 2010 Number 1

Member, *National Conference of Law Reviews*

Northern Illinois University
College of Law

General Administration

John G. Peters, Ph.D., President
Raymond W. Alden III, Ph.D., Executive Vice President and Provost
Eddie R. Williams, Ph.D., Vice President, Business and Finance, and Chief of Operations

College of Law Administration

Jennifer Rosato, Dean, Professor
David Gaebler, Associate Dean, Associate Professor
Leonard B. Mandell, Associate Dean for Student Services
John R. Austin, Director of Law Library, Associate Professor
Melody Mitchell, Director of Alumni Events and Public Relations
Jacob Imm, Assistant Director of Alumni Events and Public Relations/Web Communications Administrator
Greg Anderson, Director of Career Opportunities and Development
Christina Raguse, Director of the Office of Budget and Records

College of Law Faculty

James J. Alfini	Professor Emeritus
Elvia Arriola	Professor
John R. Austin	Director of Law Library & Associate Professor
Paul J. Cain	Supervising Attorney
Kathleen L. Coles	Associate Professor
Mark W. Cordes	Professor
Marc D. Falkoff	Associate Professor
David B. Gaebler	Associate Dean & Associate Professor
Leona S. Green	Associate Professor
Christopher T. Hines	Assistant Professor
Jeanna L. Hunter	Instructor
Robert Jones	Associate Professor
Yolanda M. King	Assistant Professor
Guadalupe T. Luna	Professor
Elsa M. Miller	Instructor
Malcolm L. Morris	Professor
Jay R. Naftzger	Practitioner-in-Residence
Jeffrey A. Parness	Professor Emeritus
Daniel S. Reynolds	Associate Professor
Laurel Rigertas	Assistant Professor
Jennifer L. Rosato	Dean & Professor
Lawrence Schlam	Professor

Lorraine A. Schmall	Professor
Daniel M. Schneider	Professor
Gordon B. Shneider	Professor Emeritus
Meredith Stange	Instructor
E. Blythe Stason, Jr.	Professor Emeritus
David H. Taylor	Director of Skills Training & Presidential Teaching Professor
Wendy Vaughn	Staff Attorney
John A. Walton	Associate Professor

College of Law Library Faculty

John R. Austin, B.A., M.L.S., J.D.
Director of Law Library, Associate Professor

Gary L. Vander Meer, B.A., M.L.S., M.A.P.A.
Associate Director of Law Library, Technical Services Librarian, Associate Professor

Therese A. Clarke Arado, B.B.A., J.D., M.L.S.
Instructional Services/Reference Librarian, Associate Professor

Frank Lima, B.A., M.L.S., J.D.
Computing & Electronic Services Librarian, Assistant Professor

Sharon L. Nelson, B.A., M.S.
Assistant Technical Services and Systems Librarian, Assistant Professor

Benjamin E. Carlson, B.A., M.L.I.S., J.D.
Research & Instructional Services Librarian, Assistant Professor

The NORTHERN ILLINOIS UNIVERSITY LAW REVIEW (ISSN 0734-1490) is published tri-annually by the students of the Northern Illinois University College of Law, DeKalb, Illinois 60115-2854.

Manuscripts offered for publication in the Northern Illinois University Law Review must be typed and double-spaced with footnotes. All citations must conform to A Uniform System of Citation (19th ed. 2000), a Harvard Law Review publication. Manuscripts should be sent to the attention of the Editor-in-Chief, Northern Illinois University Law Review, DeKalb, Illinois 60115-2854. Manuscripts will not be returned unless specifically requested.

Comments and suggestions regarding the content of this publication are invited.

Cite as N. ILL. U. L. REV. (2010)

Subscriptions are considered to be continuous and, absent receipt of notice to the contrary, will be renewed automatically each year. Law Review subscription price: $24.00 per volume; $8.00 per Issues; $10.00 per Symposium Issue. Correspondence related to subscriptions should be addressed to:

Managing Editor
Northern Illinois University Law Review
DeKalb, Illinois 60115-2854

Correspondence related to back issues should be addressed to:

William S. Hein & Co., Inc.
1285 Main Street
Buffalo, New York 14209

The ideas expressed in the Law Review are those of the various authors and do not necessarily represent the viewpoint of the Law Review, the faculty, or the administration of Northern Illinois University College of Law.

COPYRIGHT POLICY

Except as otherwise provided, the author of each article in this issue has granted permission for copies of the article to be made available for classroom use provided that: (1) copies of the article are distributed at or below cost, (2) the author and the Northern Illinois University Law Review are identified clearly on the copies, (3) proper notice of copyrights are affixed to each copy, and (4) the Northern Illinois University Law Review is notified of its use.