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DISTRICT OF IDAHO

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FBA CASE SUMMARIES

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Case Summaries, Complaints and Upcoming Trials in the U.S. District Court, District of Idaho

These summaries have been prepared primarily by the work of
Natalie Lussier, a second-year law student at the University of Idaho College of Law
with oversight by Professor Katie Ball.

United States v. Rodriguez, No. 1:19-CR-00133-DCN
Motion to Suppress

- Alexis R. Klempel, United States Attorney's Office, Boise, ID for the Government
- Theodore B. Blank, Mark J. Ackley, Nicole Owens, Federal Defender Services of Idaho, Inc., Boise, ID, for Defendant

On July 9, 2020, the Court granted in part and denied in part Defendant Ismael Rodriguez's Motion to Suppress evidence gathered by law enforcement officers dispatched to a Commercial Tire after employees there reported that a person in the store was "inside rambling on, acting strange." The employees stated that Ismael Rodriguez had pulled up in a white Cadillac and they were concerned because he appeared to be under the influence. Corporal Douglas Kern was the first officer at the scene, and he learned the license plate was for a blue 2002 Chevy Cavalier, not a white Cadillac. Kern walked past the Cadillac on his way into the store and saw that the vehicle was still running and was parked outside Commercial Tire's entrance—an area not designated for parking. An employee pointed out Rodriguez to Kern and Rodriguez then attempted to exit the store. Kern directed Rodriguez to stop. As Rodriguez did so, Kern noticed Rodriguez was squinting and repeatedly clenching his jaw—physical signs consistent with drug use. Kern asked Rodriguez if he was lost. Rodriguez's slurred response was "no, just kinda tired."

Kern then viewed a large bulge in Rodriguez's front left pocket and said he could not tell if the bulge was a weapon. He asked Rodriguez if he had anything on him "that you ain't supposed to have? No guns or nothing?" Rodriguez responded in the negative as Kern patted at his pockets. Kern then asked Rodriguez to pull up his shirt so he could see Rodriguez's waistline. Rodriguez began to lift his shirt but instead quickly thrust his hands into his pockets. Kern had to request three times that Rodriguez put his hands on his head before Rodriguez complied.

Using his right hand to hold Rodriguez's hands to the back of his head, Kern ordered Rodriguez to turn around and spread his feet. Rodriguez did not immediately comply. Officer William Koho then arrived, and Kern asked him to check Rodriguez's right side as Kern patted down Rodriguez's left side. While patting down Rodriguez's right side, Koho reached directly into Rodriguez's right front and back pockets and pulled out a roll of cash from the right front pocket. After showing the cash to Kern, Koho returned it to Rodriguez's right front pocket. Kern gestured towards Rodriguez's left front pocket and stated, "anything in this pocket that you ain't supposed to have?" Rodriguez replied, "not that I know of." Kern questioned, "ok, can I get that stuff out of your pocket then?" Rodriguez responded, "go ahead and get everything out." Kern told Koho to call for a canine unit and then began to pull a large Ziploc bag out of Rodriguez's left front pocket. Seeing what appeared to be a controlled substance in the bag, Kern told Rodriguez he was going to place him in handcuffs. As Kern handcuffed him, Rodriguez volunteered that the bag contained heroin. Kern then explained to Rodriguez that he was arresting him and what was going to happen next.

Rodriguez does not dispute that Kern was justified in initiating a *Terry* search. In turn, the Government did not substantively address --- and thus appeared not to dispute --- that Koho's reach into Rodriguez's right front and back pockets went beyond the scope of a legitimate *Terry* search. The primary issue then was whether Koho's unauthorized search of Rodriguez's right pockets tainted all the evidence subsequently discovered by law enforcement.

It was undisputed that Rodriguez gave Kern consent to search his left front pocket. The Court did not decide whether that consent was voluntary but instead determined that, even if it was, the consent did not purge the taint of Koho's prior illegal expansion of a legitimate *Terry* search by reaching directly into Rodriguez's right front and back pockets. First, there was no time lapse between Koho's search of Rodriguez's right pockets and Kern's request to search his left pocket. Second, because Rodriguez's consent was almost immediately preceded by the illegal search of his right pockets, intervening circumstances --- those that would "tend to dissipate the coercive environment" --- were not present. Third, because Koho violated the well-settled limits of *Terry* when he reached directly into Rodriguez's right pockets, his conduct can be seen as purposeful and, thus, the "purpose and flagrancy" prong of the attenuation test weighed in favor of suppression.

Although the Court found that Rodriguez's consent did not purge the taint of the illegal search of his right pockets, it went on to consider that, under certain circumstances, police officers may seize contraband detected during the lawful execution of a *Terry* search. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1050 (1983). The Government suggested that even if Koho had not reached into Rodriguez's right front pocket and discovered the wad of cash, Kern would have inevitably discovered the heroin through

his pat-down of Rodriguez's left pocket. To establish inevitable discovery, the Government must present evidence that the police would inevitably have uncovered the evidence by following routine procedures. The Court considered testimony indicating that Kern did not know the heroin was contraband when he patted-down Rodriguez's left pocket. And, because the consent Rodriguez gave Kern to empty his left pocket was tainted by Koho's illegal search of Rodriguez's right pockets, the Court could not find that the heroin would have been inevitably discovered through Kern's legitimate pat-down of Rodriguez's left front pocket. In the absence of evidence establishing the heroin would have been discovered through either a legitimate *Terry* search, or through consent untainted by the illegal search of Rodriguez's right pockets, the Court suppressed the evidence located on Rodriguez's person.

However, the Court ultimately determined that, given Rodriguez's obvious intoxication, mismatched license plates, apparent gang affiliation, and that he both drove to and left a running vehicle directly outside of Commercial Tire's front door, the officers had reasonable suspicion—independent from the cash in Rodriguez's pocket—that impelled Kern's request for a canine unit and permissibly prolonged the *Terry* stop. Under these circumstances, the officers could have simply detained Rodriguez until the drug-sniffing dog arrived on the scene. *U.S. v. Ramirez*, 473 F.3d 1026, 1031 (9th Cir. 2007). Thus, the canine sniff was not a fruit of the illegal search of Rodriguez's right pockets. Additionally, even if the canine sniff was the "fruit" of the illegal expansion of *Terry*, the Court found the canine sniff admissible under the inevitable discovery doctrine.

The Court granted Rodriguez's request to suppress incriminating statements he made prior to receiving his *Miranda* warnings. When Kern pulled the large Ziploc bag from his left front pocket, Rodriguez stated, "that's heroin." The Ninth Circuit has held an illegal search is particularly likely to taint any subsequent confession because "[c]onfronting a suspect with illegally seized evidence tends to induce a confession by demonstrating the futility of remaining silent." When Rodriguez was confronted with the heroin—evidence tainted by the illegal search of his right pockets—and immediately made the statements, they were a product of the illegal search.

The Court also suppressed statements Rodriguez made after he requested an attorney. When Rodriguez asked for an attorney, Koho immediately stated that he would stop questioning Rodriguez about the heroin but that he would continue to question him about the ownership of the Cadillac. Koho testified that he needed to ask questions about the car in order to determine what to do with it. However, there is a "bright-line rule that *all* questioning must cease after an accused requests counsel," and a "switch of subject" in response to an invocation of *Miranda* rights does not satisfy the requirement that interrogation must cease. In short, the interrogation never ceased after Rodriguez's unambiguous invocation, so Rodriguez could not waive his *Miranda* rights by "reinitiating" the conversation. Trial is scheduled to begin on December 7, 2020.

Hecox, et al. v. Little, et al., No. 1:20-CV-00184-DCN
Transgender Civil Rights; Due Process Clause; Equal Protection

- Gabriel Arkles, James Esseks, Chase Strangio, American Civil Liberties Union Foundation, New York, NY; Richard Eppink, American Civil Liberties Union of Idaho Foundation, Boise, ID; Catherine West, Legal Voice, Seattle, WA; Andrew Barr, Kathleen Hartnett, Elizabeth Prelogar, Cooley, LLP, Broomfield, CO, San Francisco, CA, Washington, DC for Plaintiffs
- Steven Olsen, Dayton Reed, and W. Scott Zanzig, Office of the Idaho Attorney General, Boise, ID; Matthew Wilde, Boise State University, Boise, ID for Defendants
- Roger Brooks, Parker Douglas, Christiana Holcomb, Jeffrey Shafter, Kristen Waggoner, Alliance Defending Freedom, Scottsdale, AZ, Washington, D.C.; Raul Labrador, Bruce Skaug, Skaug Law, P.C., Nampa, ID, for Intervenors

On April 15, 2020, Plaintiffs Lindsay Hecox and Jane Doe sued to contest Idaho's enactment of H.B. 500a, which categorically bars women and girls who are transgender, and many who are intersex, from participating in school sports consistent with their identified gender. It does so by requiring proof of "biological sex" based on criteria that Plaintiffs allege intentionally disqualify all women and girls who are transgender and many who are intersex. Plaintiffs also argue that this bill threatens to intrude upon the privacy and bodily autonomy of all women and girls engaged in student athletics. Idaho is the first and only state in the United States to categorically bar the participation of a subset of women in women's student athletics because they are transgender and/or intersex.

Hecox and Doe claimed they are entitled to relief under the Fourteenth Amendment's Equal Protection and Due Process Clauses, the Fourth Amendment, and Title IX. Their Complaint names several individuals and state and local entities as Defendants.

Hecox is a student at Boise State University and identifies as a transgender woman. According to the complaint, Hecox has been training in anticipation of trying out for the University women's cross-country team for the Fall 2020 season and would have been eligible to do so under existing NCAA regulations until the recent passage of H.B. 500a. Doe is a student-athlete at Boise High School and identifies as female, the sex she was assigned at birth. Doe alleges her rights will be violated if she is forced to undergo physical examinations that involve proving she was born with the reproductive anatomy, genes, and/or hormones traditionally associated with the female sex, should her sex be disputed. On April 30, 2020, Plaintiffs filed for a preliminary injunction to prohibit Defendants, as well as their officers, agents, employees, attorneys, and any person who is in active concert or participation with them, from enforcing any of the provisions of H.B. 500a.

On May 26, 2020, Madison Kenyon and Mary Marshall moved to intervene as parties in this case. Both intervenors are Idaho female athletes who seek to intervene in order to advocate for their interests and to defend the Act, arguing they "face losses to male athletes" and "stand opposed to any legally sanctioned interference with the opportunities that they have enjoyed as female competitors, and that would deprive them and other young women of viable avenues of competitive enjoyment and success within a context that acknowledges and honors them as females." The Proposed Intervenors requested intervention as a matter of right, or, alternatively, permissive intervention, under Federal Rule of Civil Procedure 24.

On June 1, 2020, Defendants filed a motion to dismiss. Defendants first argued that Plaintiffs lacked standing due to a lack of injury, in part because the proposed future injuries are allegedly hypothetical and speculative, and in part because the harm alleged is future harm. Defendants also claimed the Plaintiffs' claims are not ripe for similar reasons: H.B. 500a is not yet effective, so the alleged harm is hypothetical. Lastly, Defendants asserted that Plaintiffs' facial challenge fails because there is a set of circumstances under which H.B. 500a constitutionally excludes some athletes from participating in women's sports.

On August 17, 2020, Chief U.S. District Judge David C. Nye issued a memorandum decision granting the motion to intervene and the motion for preliminary injunction and granting in part and denying in part the motion to dismiss. To expand, Chief Judge Nye allowed intervention as of right, and, alternatively, found permissive intervention appropriate. The court also granted Plaintiffs' motion for preliminary injunction, finding that the Plaintiffs are likely to succeed in establishing the Act is unconstitutional as currently written.

Finally, regarding the motion to dismiss, the court ruled that both Plaintiffs have standing, explaining that Hecox adequately alleged an injury because she is barred from playing women's sports, and because she would be forced to turn over private medical information to the government if her sex was challenged. The court also found that Doe adequately alleged an injury because, by virtue of the Act's passage, she is subject to disparate, and less favorable, treatment based on sex. The court explained that as a female student athlete, Doe risks being subject to the "dispute process," a potentially invasive and expensive medical exam, loss of privacy, and the embarrassment of having her sex challenged, while male student athletes who play on male teams do not face such risks. By extension, the Court found Plaintiffs' claims to be ripe due to the reasonable threat that the Act will be enforced within days of the decision, imposing hardship to the Plaintiffs. Additionally, the court was not convinced a cited exception applied to Plaintiffs' facial Fourteenth Amendment challenges and dismissed those claims.

However, the Court did not dismiss Plaintiffs' as-applied Fourteenth Amendment challenges to the Act.

Copenhaver v. Baxter Int'l Inc. et al., No. 1:19-CV-00079-CWD
ERISA; ADA

- J. Grady Hepworth, Hepworth Law Offices, Boise, ID for Plaintiff
- D. John Ashby, William Smith, Hawley Troxell Ennis & Hawley LLP, Boise, ID for Defendants

Plaintiff is a participant and beneficiary of a benefit plan ("The Plan") through his employment with Defendants Baxter International and/or Baxter Healthcare Corporation ("Baxter"). The Plan is governed by the Employee Retirement Income Security Act ("ERISA"). Plaintiff alleges violations of ERISA and the Equal Opportunity for Individuals with Disabilities Act and American with Disabilities Act, 42 U.S.C. § 12111, and retaliation.

Plaintiff's position required him to drive a delivery truck and make deliveries to customers and clients. During his employment, he began to suffer chronic bilateral shoulder pain that reduced his mobility and became severe enough that he could no longer complete the essential duties of his job. Plaintiff took a leave of absence beginning approximately July 22, 2017 and filed a claim for short-term disability benefits. Plaintiff then spoke with his supervisor regarding reasonable accommodation. Baxter, acting through Liberty Life Assurance Company of Boston, ended Plaintiff's short-term disability benefits.

Baxter later terminated Plaintiff by letter dated March 21, 2018. Plaintiff then filed a complaint with the Idaho Human Rights Commission and the EEOC for ADA discrimination for failure to accommodate and retaliation. The Idaho Human Rights Commission and the EEOC then provided him a Notice of Right to Sue and he subsequently brought this action.

Plaintiff's first count alleges violation of ERISA, section 502. Plaintiff asserts that Defendants abused their discretion under the Plan by denying him benefits under the Disability Policy and that he was improperly denied Short-Term and Long-Term Disability benefits under The Plan, as well as other employment benefits.

Plaintiff's second count alleges violation of the Equal Opportunity for Individuals with Disabilities Act and American with Disabilities Act, 42 U.S.C. § 12111, and Retaliation. Plaintiff asserts that Defendants discriminated against him in violation of 42 U.S.C. § 12112 by failing to engage in any form of interactive process and failing to make reasonable accommodations for his known physical limitations. Plaintiff also asserts that

Defendant interfered and retaliated against him in violation of 42 U.S.C. § 12203(a), (b) by terminating him and that the decision to terminate Plaintiff was because of his request for accommodation and expressed desire to engage in a thorough interactive process. Plaintiff alleges that because of Defendants' discrimination, failure to accommodate, interference, and retaliation, he suffered lost wages, future lost wages, lost employee benefits including insurance and retirement benefits, and other damages to be proven at trial. Plaintiff alleges he has also suffered general damages such as mental anguish, inconvenience, financial stress, and loss of enjoyment of life.

Plaintiff seeks recovery of all benefits owing and due under The Plan, both past and future; recovery of all past and future lost wages; recovery and/or reinstatement of all retirement benefits, health insurance, life insurance, and other benefits; declaratory and/or injunctive relief ordering payment of future benefits under The Plan, an award of pre-judgment and post-judgment interest; and an award of court costs, attorney fees, and expert witness fees.

On January 21, 2020, Defendants filed a motion for summary judgment, asserting that with the facts available, Defendants' decision to discontinue Plaintiff's short-term disability benefits was not an abuse of discretion and was fully supported by the administrative record.

On January 31, 2020, Plaintiff filed a motion for partial summary judgment under ERISA, asserting that Baxter violated Plaintiff's rights by denying his rightful claim for disability benefits. It was undisputed that Plaintiff's disabilities prevented him from performing his job. The court considered that Defendants breached their fiduciary duties by denying Plaintiff's claim for benefits and issued a decision granting Plaintiff's partial motion for summary judgment and denying Defendant's motion for summary judgment. In short, the court concluded that Baxter's decision was not supported by substantial evidence and that it abused its discretion in discontinuing Plaintiff's benefits.

On August 21, 2020, Baxter filed another motion for summary judgment, asserting that they are entitled to summary judgment on Plaintiff's ADA claim. Baxter argues that Plaintiff is not a "qualified individual" under the ADA, meaning there is no obligation under the ADA to provide an accommodation that would involve elimination or reallocation of essential job functions. Plaintiff's response is due on September 11, 2020. A status conference is set for September 10, 2020.

Sawtooth Mtn. Ranch LLC, et al. v. U.S. Forest Service, No. 1:19-CV-00118-CWD
NEPA; TRO; Preliminary Injunction

- Erika Malmen, Robert Maynard, Kaycee Royer, Perkins Coie LLP, Boise, ID for Plaintiffs

- Steven Andersen, Haley Krug, Andersen Schwartzman PLLC, Boise, ID; Christine England, United States Attorney's Office, Boise, ID for Defendants
- Marie Kellner, Idaho Conservation League, Boise, ID for Amicus

Plaintiffs brought this action against the U.S. Forest Service, seeking declaratory and injunctive relief requiring it to comply with what Plaintiffs allege is controlling law for managing the Recreation Area and Sawtooth National Forest. This action arose under the Sawtooth National Recreation Area Act, 16 U.S.C. § 460aa et seq. ("SNRA Act"); the National Forest Management Act, 16 U.S.C. § 1600 et seq. ("NFMA"); the National Environmental Policy Act, 42 U.S.C. § 4331, et seq. ("NEPA"); the Administrative Procedure Act, 5 U.S.C. § 551, et seq. (the "APA"); the Declaratory Judgment Act, 28 U.S.C. § 2201, and any regulations or other authorities implementing these statutes.

In Count One, Plaintiffs alleged that the Forest Service's approval of a trail project violated the SNRA Act, because a trail --- as proposed --- is a "greenbelt," and therefore contrary to the Act's strictures. In Count Two, Plaintiffs alleged the Forest Service violated NEPA when it relied upon a "categorical exclusion" to approve the trail project, thereby circumventing NEPA's review process. Count Three alleges that the trail project traverses multiple riparian conservation areas (RCAs) in violation of NFMA. In Count Four, Plaintiffs contended the Conservation Easement provided limited authorization to the Forest Service to construct a right-of-way for the public to use as a trail, and that the project as proposed exceeds the scope of the grant and falls outside the boundary of the easement. In Count Five, Plaintiffs asserted that Defendants' failures to comply with the SNRA Act, NEPA, NFMA, and the Conservation Easement restrictions were "arbitrary, capricious, or otherwise not in accordance with the law," in violation of the APA. Plaintiffs sought declaratory relief.

Plaintiffs filed a motion for preliminary injunction on May 10, 2019, claiming they can demonstrate a likelihood of success on the merits on three of their claims – Counts Two, Three, and Four. The Court denied Plaintiffs' motion for preliminary injunction, determining that Plaintiffs did not demonstrate that they are likely to succeed on the merits of any of their three claims.

On August 8, 2019, Plaintiffs amended their Complaint. This First Amended Complaint includes three claims brought under the Quiet Title Act (QTA) and asserted against the United States, the Federal Highway Administration (FHA), and Dean A. Umathum. The first claim concerned the boundaries of the easement, while the other two Quiet Title Act claims concerned different aspects of the scope of the easement.

Defendants filed a motion to dismiss on October 7, 2019, claiming that Plaintiffs' new complaint failed to allege Quiet Title Action claims within the bounds of the Quiet Title Act and asked the Court to dismiss Claim One and dismiss the FHA and Dean Umathum

as new Defendants. The Court granted Defendants' motion, concluding that there was a lack of subject matter jurisdiction over claim One and that Defendants Federal Highway Administration and Dean A. Umathum should be dismissed as Defendants regarding Claims Two and Three asserted under the Quiet Title Act.

On March 19, 2020, Plaintiffs filed a Second Amended Complaint, clarifying existing claims brought pursuant to the Quiet Title Act, National Forest Management Act, National Environmental Policy Act, and Sawtooth National Recreation Area Act. Plaintiffs also added claims under the Endangered Species Act and Clean Water Act. Defendants filed a motion to strike this Amended Complaint, which the Court denied.

Plaintiffs filed a memorandum in support of motion for preliminary injunction against the Forest Service and FHA to prevent them from Constructing the Stanley to Redfish Trail without first complying with mandates under the ESA and CWA. Further, Plaintiffs asserted that they can demonstrate they are likely to succeed on the merits of their claims and that if an injunction does not issue that they and the public will be irreparably harmed. Plaintiffs also filed a temporary restraining order to enjoin the Defendants from continuing construction activities on the Trail. The Court denied both motions.

On June 24, 2020, Defendants filed a motion for a temporary restraining order and preliminary injunction to prevent Plaintiffs and their associates from interfering with construction of the Trail. Defendants allege Plaintiff's brother buffeted the Government's contractor with helicopter rotor wash, sediment and other debris during several low-level passes on Saturday morning, as it was constructing the Trail. Defendants also filed a motion for leave to file an amended answer to Plaintiffs' Second Amended Complaint. The Court denied the motion for TRO and expedited the briefing on the motion for preliminary injunction and motion for leave to file an amended answer. Defendants eventually withdrew their motion to amend, as well as their motion for preliminary injunction in light of a promise by Plaintiffs that there will be no further threat to the work crew's safety.

Pursuant to the court's scheduling order, the parties must complete discovery by mid-October and dispositive motions are due at the beginning of May 2021. A bench trial is set for October 2021.

WildEarth Guardians, et al. v. U.S. Forest Service, et al., No. 1:19-CV-00203-CWD
NEPA; ESA

- Matthew Bishop, Western Environmental Law Center, Helena, MT; Peter Frost, Western Environmental Law Center, Eugene, OR; Dana Johnson, Law Office of Dana M. Johnson, Moscow, ID for Plaintiffs

- Jeremy Clare, Safari Club International, Washington, D.C.; Cherese McLain and Paul Turcke, MSBT Law, Chtd., Boise, ID; D. David DeWald, Erik Petersen, Wyoming Attorney General's Office, Cheyenne, WY; Owen Moroney, Idaho Attorney General's Office, Boise, ID; and Robert Williams, U.S. Department of Justice, Washington, D.C., for Defendants

Plaintiffs challenged a policy enacted by the U.S. Forest Service ("USFS"), claiming that the United States Fish and Wildlife Service ("FWS") and the USFS failed to reinitiate consultation under the Endangered Species Act ("ESA") and that the USFS failed to supplement its prior National Environmental Policy Act ("NEPA") analysis.

The case concerns the effect on grizzly bears from using bait to hunt black bears in national forests in Idaho and Wyoming. In 1994, the USFS proposed a national policy to allow states to decide whether bait can be used in national forests. In 1995, the USFS adopted a policy that stated "[w]here State law and regulation permit baiting[,] the practice is permitted on National Forest System lands unless the authorized officer determines on a site specific basis that the practice conflicts with Federal laws or regulations, or forest plan direction, or would adversely affect other forest uses or users."

After publication, several environmental groups challenged the policy, claiming that USFS violated the ESA and violated the NEPA. The district court granted summary judgment to the USFS, rejecting both claims. Plaintiffs appealed the decision and the United States Court of Appeals for the D.C. Circuit affirmed the district court's judgment.

In this action, Plaintiffs consist of several environmental groups that filed a complaint against USFS and FWS, alleging that numerous grizzly bears have been taken due to hunting black bear using bait in national forests in Idaho and Wyoming, exceeding the level of permissible incidental take and triggering the duty to reinitiate consultation. Plaintiffs also allege that the Environmental Assessment is outdated, and significant new information exists requiring its supplementation. The Complaint seeks to compel supplemental processes under the ESA and NEPA regarding the 1995 USFS policy.

In its two-count Complaint, Plaintiffs contended that both the USFS and FWS have failed to reinitiate consultation under the ESA and that the USFS failed to supplement its prior NEPA analysis.

Defendants filed a partial motion to dismiss, contending that Count I failed to state a prima facie claim for relief against FWS, because FWS did not have the authority to reinitiate consultation under the ESA. Defendants also asserted that Count II must be dismissed pursuant to *Fund for Animals v. Thomas*, which determined the USFS policy was not a major federal action triggering a duty under NEPA. Thus, the USFS contended

that there was no major federal action remaining to occur, and it had no duty to supplement the EA under NEPA.

On May 7, 2020, Judge Candy Wagahoff Dale issued a memorandum decision and order granting in part and denying in part Defendants' partial motion to dismiss.

In addressing the first count, the court denied Defendants' motion. The court found that Defendant USFS's argument that it is not the proper defendant was without merit and that Defendants did not cite any case holding contrary to Ninth Circuit precedent nor attempt to persuasively distinguish the district court cases that favor Plaintiffs' arguments.

In addressing the second count, the Court granted Defendants' motion to dismiss. The Court reasoned that USFS's final federal rule of deferring states on game-baiting black bears was already challenged, and on appeal the D.C. Circuit held that the USFS complied with NEPA, finding the consultation process the USFS undertook under the ESA was adequate. So, because the rule was approved, there is no ongoing or proposed federal action that requires supplementation.

On July 17, 2020, Defendants filed another motion to dismiss, but only for Count I of the Plaintiffs' complaint. Defendants assert that Plaintiffs' "failure to reinitiate" a claim is moot and should be dismissed for lack of jurisdiction and Article III standing. The Court has yet to rule on this motion, but a hearing is scheduled for October 28, 2020 by video.

F.V. v. Jeppesen, No. 1:17-CV-00170-CWD
Transgender Civil Rights; Motion to Clarify

- Colleen Smith, D. Jean Veta, Henry Liu, Isaac Belfer, Michael Lanosa, William Isasi, Covington & Burlington LLP, Washington, D.C., Los Angeles, CA; Kara Ingelhart, Nora Huppert, Peter Renn, Lambda Legal Defense and Education Fund, Inc., Chicago, IL, Los Angeles, CA; Monica Cockerille, Cockerille Law Offices, LLC, Boise, ID for Plaintiffs
- Steven Olsen, W. Scott Zanzig, Dayton Reed, Office of the Attorney General, Boise, ID for Defendants

Judge Candy Wagahoff Dale issued two decisions to clarify a permanent injunction regarding transgender individuals' ability to amend the sex indicator listed on their birth certificate to match their gender identity.

This case began in 2017 when Plaintiffs, two transgender women born in Idaho, brought action under 42 U.S.C. § 1983, on behalf of themselves and others similarly situated, challenging whether Idaho Department of Health and Welfare's ("IDHW") categorical rejection of applications to amend birth certificates violated the Equal Protection and Due Process clauses of the Fourteenth Amendment and impermissibly compelled speech in violation of the First Amendment.

On summary judgment, the court determined that the categorical and automatic denial of applications submitted by transgender people to change the sex listed on their birth certificates was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. A March 5, 2018 Order permanently enjoined "the IDHW Defendants and their officers, employees, and agents from practicing or enforcing the policy of automatically rejecting applications from transgender people to change the sex listed on their birth certificates."

On March 18, 2020, the Idaho Legislature passed, and on March 30, 2020, the Idaho Governor signed into law, House Bill 509 (HB 509), which provides that the sex listed on a birth certificate can be amended in only one of two ways: 1) by filing a notarized affidavit within one year of the filing of the certificate, signed by the requisite persons, declaring the information contained on the certificate "incorrectly represents a material fact at the time of birth," and 2) after one year, a party may challenge the qualitative statistics and material facts on the certificate "in court only on the basis of fraud, duress, or material mistake of fact."

On April 16, 2020, Plaintiffs filed a motion before the Court, asking the Court to clarify that enforcement of HB 509 violates the permanent injunction forbidding a categorical ban on transgender individuals' applications to change the gender marker on their birth certificates to match their gender identity and mandating IDHW to accept such applications.

On June 1, 2020, Judge Candy Wagahoff Dale granted in part and denied in part Plaintiffs' motion to clarify. The court clarified that the plain language and objective of the Order and Judgment entered in this case permanently enjoined IDHW from infringing on the constitutional rights of transgender individuals by automatically rejecting applications to change the sex listed on their birth certificates to match their gender identity. The court added that the injunction requires IDHW to institute a meaningful and constitutionally-sound process for accepting, reviewing, and considering applications from transgender individuals to amend the gender listed on their birth certificates. However, the court did not determine whether HB 509 or the IDHW's interpretation and implementation of HB 509 violates the Constitution or the injunction.

On August 7, 2020, Judge Candy W. Dale granted Plaintiffs' second motion to clarify. The Court further clarified that IDHW's revised application form and instructions, which required applicants seeking to change their sex on their birth certificate to submit a certified copy of a court order, violated the injunction. The court also stated that the statute is directly at odds with the intent and mandate of the injunction.

JE Dunn Construction Company v. Owell Precast LLC, No. 4:20-CV-00158-BLW
Motion to Compel Arbitration

- Thomas A. Larkin, Jan D. Sokol, Stewart Sokol & Larkin LLC, Portland, OR for Plaintiff
- Joseph Goddaeus Ballstaedt, Skoubye Nielson & Johansen, Salt Lake City, UT; Kevin J. Simon, Strachan & Simon, St. George, UT for Defendant
- Keely E. Duke, Duke Evett PLLC, Boise, ID for Third-Party Defendant

Plaintiff, a foreign business corporation, filed suit in the District of Idaho on March 30, 2020 seeking an order compelling arbitration, pursuant to 9 U.S.C. § 4, arising from alleged deficiencies in Defendant's work on a government construction project (the Project).

Plaintiff is the general contractor for the Project, located in Pocatello, Idaho. Plaintiff and Defendant entered into a contract to furnish materials and services for precast concrete portions of the Project. The contract between Plaintiff and Defendant contained an arbitration provision regarding any disputes arising from the Project.

Defendant then entered into a separate agreement with Eriksson Technologies for design work related to the Project. The agreement between Eriksson and Defendant did not contain an arbitration clause and the separate contract between Defendant and Plaintiff was not incorporated.

In May 2020, Defendant also filed a cross-petition to compel arbitration, demanding that if the Court orders arbitration between Plaintiff and Defendant, that it also compel arbitration of all claims in their cross-petition and require Eriksson to participate in the same arbitration in accordance with the Federal Arbitration Act. Defendant alleged that it contracted its design obligations to Eriksson and that, if Defendant is found liable, Eriksson should indemnify Defendant for and against all claims and liability made against Defendant by Plaintiff. Defendant's basis for these allegations is that Eriksson "was aware of and relied upon" the contract between Defendant and Plaintiff and that Eriksson "relied on and substantially benefited from" the contract.

Eriksson then filed a motion to dismiss on the grounds that there is no basis to compel them to participate in an arbitration process to which they did not consent. Defendant and Eriksson's contract lacked an arbitration provision and Eriksson was not a party to the agreement between Plaintiff and Defendant, which did include an arbitration provision. Eriksson stated that it appropriately performed its work under the contract with Defendant and the problems that are at issue in the arbitration were not caused by anything Eriksson did or did not do.

Plaintiff filed a partial joinder motion in support of Eriksson's motion to dismiss, stating that it had no arbitration agreement with Eriksson and did not consent to its joinder in any arbitration with Defendant.

On August 3, 2020, the Court granted Plaintiff's petition to compel arbitration and motion to strike Defendant's counterclaims. It also required supplemental briefing on Defendant's petition to compel arbitration and denied the remaining motions. On August 27, 2020, Defendant filed its supplemental briefing on its request to compel Eriksson to participate in arbitration. Response briefing by Eriksson and Plaintiff is due by September 17, 2020.

KT Contracting Co., et al. v. Farb et al., No. 2:20-CV-00157-BLW
Securities; Fraud; Conversion

- Michael Christian, Peter J. Smith, IV, Smith + Malek, PLLC, Boise, ID for Plaintiff
- Bradley C. Crockett, Wolff Hislop & Crockett, Spokane Valley, WA for Defendant

Plaintiffs include KT Contracting Co., Inc. (KT), an Oregon corporation authorized to do business in the State of Idaho; Highway Specialties, LLC, a Washington limited liability company authorized to do business in the state of Idaho; and Karl Thatcher (Thatcher), an individual.

Defendants include David Farb (Farb), an individual residing in Spokane, Washington; and Farb Guidance Systems, Inc. (Farb Guidance), a Delaware Corporation.

In 2016, Farb proposed to Thatcher, directly and through his agents, that Thatcher invest several hundred thousand dollars in a for-profit business venture Farb proposed to create involving the deployment of autonomous tractors for farm field cultivation. The business venture was to be conducted through Precision Farming Group, Inc. (PFG), an Idaho corporation created by Farb and his agents. Relying upon Farb's representations, Thatcher invested several hundred thousand dollars for the benefit of PFG. In total, Thatcher's investments and loans to PFG totaled over $1,000,000. In exchange for his investments, Thatcher was to receive 20% of the stock of PFG and an annual

reimbursement of his loans in the form of additional stock and cash. Throughout 2017 and 2018, Thatcher continued to make investments in and loans to PFG in reliance to Farb's representations that PFG was pursuing a for-profit business and was using Thatcher's investments and loans for such a business purpose.

One such investment that Thatcher contributed was four autonomous tractors for PFG's use, totaling $375,000. The leases for the four autonomous tractors provide that upon failure by PFG to make the required lease payments, Highway Specialties may terminate the leases and recover possession of the autonomous tractors. On or about April 1, 2019, Highway Specialties sent PFG and Farb a letter declaring the leases for all four tractors terminated pursuant to PFG's failure to make the monthly lease payments and requesting the location of the tractors for Highway Specialties to recover possession of them. Farb removed the four autonomous tractors from PFG's possession and has refused to turn them over to Thatcher or Highway Specialties. Upon information and belief, Farb caused one of the tractors to be moved to Hawaii and caused two others to be moved to Wisconsin.

In September 2018, Thatcher was able to obtain access to PFG's QuickBooks accounting records. Through review of the QuickBooks records, Thatcher discovered that Farb was using PFG's funds and services largely for the benefit of Farb Farms, which was controlled by Farb.

Thatcher discovered that between late 2016 and late 2018, Farb caused PFG to pay directly to Farb Farms or to third parties for its benefit approximately $1,000,000 in total. Expenses Farb caused PFG to pay to or for the benefit of Farb Farms included: equipment lease payments, fertilizer, employee payroll, land rental payments, custom farming work done by PFG for Farb Farms, and other Farb Farms expenses.

An example of an alleged discrepancy that Thatcher cites is that in total, in 2017 and 2018, Farb caused PFG and PFG Trucking to make payments to him personally or for his personal benefit totaling a net amount of at least $171,648.80. Additionally, in May 2018, Farb caused Farb Farms to sell a substantial amount of land and equipment. Shortly after the sales, Farb paid himself approximately $200,000 from Farb Farms' checking account.

Plaintiffs allege twelve counts: (1) Fraud; (2) Conversion; (3) Claim and Delivery pursuant to Idaho Code § 8-302; (4) Securities Fraud pursuant to Idaho Code § 30-14-501; (5) Securities Fraud pursuant to the Securities Exchange Act of 1934 § 10(b) and Sec Rule 10(b)(5); (6) Control Person Liability Pursuant to Idaho Code § 30-14-509(g)(2); (7) Control Person Liability Pursuant to the Securities Exchange Act of 1934 § 20(a); (8) Failure to Register as Broker pursuant to Idaho Code § 30-14-509(d); (9) Failure to Register as a Broker pursuant to the Securities Exchange Act of 1934 § 15(a);

(10) Failure to Register Securities pursuant to Idaho Code § 30-14-301; (11) Failure to Register Securities pursuant to the Securities Act of 1933 § 12; and Inspection of Corporate Records pursuant to Idaho Code §§ 30-29-1602 & 30-29-1605.

Discovery is ongoing and dispositive motions are due in February of 2021. Plaintiffs recently filed an Amended Complaint and corresponding motion to amend. Defendants have not yet responded.

Fraga-Jimenez v. Saul, No. 1:18-CV-00430-CWD
Social Security Act

- Taylor Lynn Mossman-Fletcher, Mossman Law Office LLP, Boise, ID for Petitioner
- Joanne P. Rodriguez, United States Attorney's Office, Boise, ID; Jeffrey Eric Staples, Social Security Administration, Office of General Counsel, Seattle, WA for Respondent

In 2018 Petitioner Yolanda Fraga-Jimenez petitioned for review of the Respondent's denial of social security benefits, alleging the Administrative Law Judge (ALJ) David Willis, erred at steps three, four, and five in the five-step process used to determine whether a claimant is disabled. On March 16, 2020, Judge Candy Wagahoff Dale issued a memorandum decision and order, remanding Commissioner's decision with an order to calculate and award benefits.

In 2013 Petitioner protectively filed an application for Title II benefits for a period of disability based upon physical impairments including systemic lupus erythematosus (lupus) and chronic migraines. After a hearing in January of 2016, ALJ Willis issued a decision finding Petitioner not disabled. Petitioner then requested review by the Appeals Council, which granted her request for review and remanded the claim with specific instructions to update the record, consider obtaining evidence from a medical expert, further evaluate the opinion evidence, and reconsider the residual functional capacity (RFC) determination.

ALJ Willis held a hearing on remand and issued another decision finding that Petitioner was not disabled. The Appeals Council denied Petitioner's request for review of that decision. She then appealed this final decision to the United States District Court for the District of Idaho.

Petitioner contended that the ALJ erred at steps three, four and five in the five-step process used to determine whether a claimant is disabled. Petitioner alleged the following errors: (1) failing to properly evaluate whether Petitioner's headaches meet,

or are equivalent to, Listing 11.02; (2) failing to give clear and convincing reasons in support of discounting Petitioner's credibility; (3) giving improper weight to the medical opinion evidence; (4) failing to give reasons germane to each lay witness in support of discounting lay witness testimony; and (5) assigning a RFC that was not supported by the record.

The court ultimately granted Petitioner's request for review and remanded for an award of benefits. The court found that the ALJ erred at steps four and five, and that any one of these errors would support remand for an award of benefits. Central to the court's decision was the ALJ's failure to consider the uncontroverted evidence in the record regarding Petitioner's excessive absenteeism, which would be work preclusive based upon the testimony of the vocational expert. As a result, the court declined to address whether the ALJ properly evaluated Listing 11.02, because it was not necessary to the court's decision.

Brookville Equip. Corp. v. Motivepower, Inc., No. 1:19-CV-00387-CWD
Motion to Dismiss, Choice of Law Issue

- Debora Grasham, Kersti Kennedy, Givens Pursley, LLP, Boise, ID for Plaintiff
- Dane Bolinger, Hawley Troxell Ennis & Hawley, LLP, Boise, ID for Defendant

Plaintiff, a Pennsylvania corporation, filed suit in the District of Idaho on October 4, 2019, alleging defamation per se; defamation; invasion of privacy by false light; interference with contract; and interference with prospective economic advantage. Defendant then filed a motion to dismiss that hinged upon which state's substantive law applies to these five causes of action. On April 22, 2020, Judge Candy Wagahoff Dale issued a memorandum decision and order granting in part and denying in part Defendant's motion to dismiss.

Plaintiff is a manufacturer of rail equipment vehicles, with more than 20 years of experience providing small fleets (e.g., less than 20) of passenger locomotive and streetcar vehicles to transit agencies in the U.S. Defendant, a direct competitor of Plaintiff, designs, manufactures, and remanufactures locomotives and provides specific services on locomotives for customers throughout the U.S.

Plaintiff asserts that Defendant, a Delaware corporation, was responsible for publishing a defamatory letter to one or more of Plaintiff's customers, damaging Plaintiff's reputation. The letter referenced was sent from Defendant to a mutual customer of the two parties, stating that Plaintiff's fuel tanks were non-compliant with federal regulations and needed repair.

Plaintiff requested that the Federal Railroad Administration conduct an audit, which found compliance with regulations and that the equipment contained no defects. Plaintiff notified Defendant of this and requested a retraction of Defendant's statement that the fuel tanks were non-compliant. Defendant refused to retract the statement and denied that the letter was defamatory.

Defendant filed a motion to dismiss, arguing that New York substantive law applies to counts one and two because the defamatory statements were published in New York via the letter. Defendant also argues New York substantive law should apply to count three because New York is the location where the invasion of privacy occurred. Additionally, Defendant argued that Pennsylvania law applies to counts four and five because the injury in the form of lost revenue was felt by Plaintiff in Pennsylvania.

Plaintiff responded that Idaho's two-year statute of limitations applies and all claims in the Complaint would be allowed to proceed.

On April 22, 2020, Judge Dale issued a memorandum decision granting in part and denying in part Defendant's motion to dismiss. In addressing the first three counts, the court determined that New York substantive law applied to thee claims and granted the Defendant's motion to dismiss regarding those claims. In addressing count four and five, the court declined to conclude that Pennsylvania law applied and denied the Defendant's motion to dismiss regarding those claims.

On July 31, 2020, the court extended the deadline to serve initial disclosures to October 2, 2020 to allow the parties to engage in further settlement discussions.

Ferguson v. State of Idaho Dep't of Transp., No. 4:18-CV-00469-CWD
Motion for Summary Judgment; Motion for Fees

- Karl Decker, Holden Kidwell Hahn & Crapo, PLLC, Idaho Falls, ID; Nicole Deforge, Scott Lilja, Fabian VanCott, Salt Lake City, UT for Plaintiffs
- Sam Angell, Blake Hall, Hall Angell & Associates, LLP, Idaho Falls, ID for Defendant

Plaintiffs Bear Crest Limited, LLC, Yellowstone Bear World, Inc., and Velvet Ranch, LLC (Bear World) own property near the intersection of U.S. Highway 20 and 4300 West in Madison County, Idaho where they operate a tourist and entertainment attraction known as Yellowstone Bear World. Until 2016, visitors to Yellowstone Bear World accessed the property from U.S. Highway 20 via a connection (the Intersection) at Madison County Road 4300 West (Bear World Road).

The Intersection was constructed upon land formerly owned by the Gideons, who deeded the land to the State of Idaho in 1973 by warranty deed. The Gideon Deed reserved access to the Intersection to the grantors, and Bear World, as the successor in interest to the Gideons, now owns the property and all access rights and related easements.

Bear World entered into an Easement Agreement with Madison County in 2016, whereby Bear World granted an easement to Madison County for the purpose of "constructing, operating and maintaining a south bound vehicular slip ramp between the west side of U.S. Highway 20 and 4300 West." The express terms of the Easement Deed provided that, if the slip ramp was not completed and open to the public before May 12, 2017, Madison County would restore the property to the same condition in which it existed on the date the easement was granted, and the easement would terminate.

In 2016, the Idaho Transportation Department (ITD) closed the Intersection and terminated access to Yellowstone Bear World at the Intersection. Upon learning of ITD's decision, Madison County constructed a frontage road directly to Bear World's property to ensure Bear World would still have access to its property. According to both Commissioner Weber and Wade Allen, the District Engineer for ITD, Madison County neither made the decision nor had the authority to make the decision to designate U.S. Highway 20 as a controlled-access road.

Plaintiff Ferguson stated that since the closure of the Intersection, "many visitors have called in confusion at the closed intersection and have not known how to access" Yellowstone Bear World. Bear World contends, therefore, that the frontage road does not constitute reasonable alternative access.

On October 24, 2018, Bear World filed a complaint arising out of its desire for continued access to its property via the Intersection. The complaint alleged inverse condemnation; violation of Plaintiffs' substantive due process rights; violation of Plaintiffs' procedural due process rights; and breach of contract.

Both the State Defendants and Madison County filed motions to dismiss. The court granted the State of Idaho and ITD's motion to dismiss without prejudice, finding that the Eleventh Amendment barred Plaintiffs' claims against them in Federal Court. However, the court denied Madison County's motion to dismiss, finding the allegations in the complaint satisfied the *Iqbal/Twombly* standard.

Defendant Madison County subsequently filed a motion for summary judgment, arguing that the first, second, and third claims for relief asserted against Madison County fails as a matter of law, because the County lacks the legal authority to regulate state highways, and therefore could not effect a taking; the actions taken by Madison County fails to reach the level of a taking, because the alternative access was reasonable; and Madison

County was not a signatory to the Gideon deed, and therefore the breach of contract claim fails as a matter of law.

The court granted summary judgment for Madison County's first argument, reasoning that only ITD could effect a taking because only ITD had the authority to designate Highway 20 as a controlled-access road, so Madison County's cooperation in the discovery process will not change the court's conclusion that Madison County cannot be held reasonable for what was ultimately ITD's decision to make. As a result of this finding, the court declined to address the second argument that the designation of U.S. Highway 20 does not reach the level of a taking because the newly constructed frontage road constitutes reasonable alternative access.

The court also granted summary judgment for Madison County's third argument, reasoning that because Madison County was not a party to the Gideon Deed, Madison County is entitled to summary judgment.

Defendants then filed a motion for attorney fees. On April 29, 2020, Judge Dale issued a memorandum decision and order denying this motion because it could not find that this is the exceptional case that requires an award of attorney fees for the prevailing defendant. Applying 42 U.S.C. 1988(b), the court found Plaintiff's takings claim and the related due process claims were not "frivolous" or "unreasonable." Although Bear World ultimately lost, this does not mean the claims asserted were frivolous.

Eastop v. Bennion, No. 1:18-CV-00342-BLW

Motion in Limine; Fourth Amendment; Reasonableness of Search

- James Marshall Piotrowski, Marty Durand, Piotrowski Durand, PLLC, Paul J. Stark, Idaho Education Association, Boise, ID for Plaintiff
- David Paul Gardner, Jetta Hatch Mathews, Hawley Troxell Ennis & Hawley LLP, Pocatello, ID for Defendants

Plaintiff sought damages for wrongful termination due to what he alleged was an unreasonable search in violation of the Fourth Amendment. The parties filed motions in limine to exclude certain evidence, and Plaintiff filed two motions in limine. Defendants also filed a motion in limine to exclude evidence of liability insurance, as well as evidence that they were required to make reasonable accommodations for Plaintiff. On February 26, 2020, Judge Candy Wagahoff Dale issued a memorandum decision and order granting in part and denying in part these motions.

Plaintiff was an elementary school teacher until November 2017. Beginning in Fall 2016 and continuing through Spring 2017 school district officials received reports of Plaintiff's inappropriate behavior and struggle with alcohol. Of note, Plaintiff led an assembly in April 2017 where his behavior was alleged to have been particularly erratic. In May 2017 the Board of Trustees (Board) voted to terminate Plaintiff, but later decided instead to place Plaintiff on probation. Terms of the probation included requiring Plaintiff to submit to drug and/or alcohol testing. Plaintiff refused to abide by this provision and was put on administrative leave pending a due process hearing. The Board held a due process hearing in October 2017 and voted to terminate Plaintiff. Plaintiff was officially terminated in November 2017.

Plaintiff filed his first motion in limine to exclude the evidence of his behavior or actions prior to the 2016-17 school year; his behavior or actions that were not put before the Board at its August 2017 meeting, including allegations of sexual harassment; and his behavior or actions occurring after the Board meeting. Plaintiff argued that this evidence is not relevant as to whether the Board's decision to require him to submit to drug and alcohol testing was reasonable, and that his conduct prior to the 2016-17 school year was stale.

Plaintiff also filed a second motion in limine to exclude six potential witnesses from testifying. Plaintiff argued that Defendants did not disclose these witnesses until they produced their first pretrial witness list. Plaintiff also argued that the testimony of the witnesses would not be relevant.

In addressing the first motion in limine to exclude evidence or his prior behavior, the court stated that, while less clear, it appears from all of the "special needs" cases that courts only consider the factors leading up to implementation of the search policy and do not consider information that came to light after the policy was implemented. This comported with the court's statement that a search, or in this case the policy prescribing a search, must be justified at its inception. Although Plaintiff's refusal to be subject to a drug or alcohol test were pursuant to his probation which was implemented on August 15, 2017, evidence of Plaintiff's prior conduct was also relevant. But only if it was known and considered at or before the Board's August 15 meeting.

It was unclear to the court and the parties what evidence was considered at that meeting. Consequently, the court decided to allow evidence relevant to the reasonableness of the testing condition generated prior to the Board's meeting, but only upon a showing that the Board was aware of and considered those facts in making their decision.

In addressing the second motion in limine to exclude six potential witnesses from testifying, the court pointed out facts that indicated Plaintiff knew that at least three of them would be potential witnesses. The testimony of those witnesses was permitted, but

only within the relevant scope of the evidence they provided. Defendants conceded the exclusion of the other three witnesses, and therefore the court stated that Defendants had not met their burden of showing that the non-disclosure of the witnesses was harmless, and their testimony was not permitted.

Accordingly, Plaintiff's motions in limine were granted in part and denied in part.

Defendants also filed motions in limine to exclude evidence of liability insurance under Rule 411, as well as evidence that they were required to make reasonable accommodations for Plaintiff. Plaintiff did not object to the first motion. During the pre-trial, Plaintiff's Counsel indicated that they would not be raising the issue of reasonable accommodations. The court thus granted the Defendant's motion in limine.

The parties entered a stipulation of dismissal with prejudice on May 12, 2020 and the case was dismissed.

Engineered Structures, Inc. v. Travelers Property Casualty Co., No. 1-16-CV-00516-CWD
Insurance; Breach of Contract; Bad Faith

- John Gragg, Tara Johnson, Seifer, Yeats, Zwierzynski & Gragg, Portland, OR for Plaintiff
- Ronald Clark, Bullivant Houser Bailey, Portland, OR for Defendant

This case centers on a dispute about the scope of insurance coverage from a builders' risk policy ("the Policy") between Defendant Travelers Property Casualty Company of America ("Travelers") and Plaintiff Engineered Structures, Inc. ("ESI"). The Policy covered risks of loss while ESI built a fueling station for Fred Meyer Stores, Inc., in Portland, Oregon.

Damages occurred when an underground fuel storage tank "floated" in a "wet" excavation hole before the tank's complete installation. Travelers Insurance investigated and determined that the damages resulted from ESI or its subcontractor, 3 Kings Environmental, Inc. not placing enough ballast water into the tank to prevent floatation during a period of rainy weather. Travelers Insurance thus denied coverage for ESI's damages, citing an exclusion in the Policy barring coverage for "faulty, inadequate or defective . . . workmanship [or] construction" ("the Exclusion"). ESI then sued Travelers Insurance for breach of contract, negligence, breach of the implied covenant of good faith and fair dealing (bad faith), and declaratory judgment.

The district court found the Exclusion to be ambiguous based on faulty "workmanship" being susceptible to two reasonable interpretations: (1) excluding only losses caused by a flawed product; or (2) excluding losses caused by a flawed process. The court construed the Exclusion in favor of coverage, meaning the "product" interpretation governed and the Exclusion did not apply because ESI's damages did not occur from a flaw in the underground storage tank. Because the Exclusion did not apply, the district court granted summary judgment to ESI on its breach of contract claim.

The court next addressed ESI's claim of negligence by explaining that --- while ESI sought to recover tort damages against Travelers for alleged statutory violations of the minimum standards of care under Idaho's Unfair Claims Settlement Practices Act("UCSPA") --- neither Idaho nor Oregon recognizes a private right of action under the UCSPA.

Finally, the court considered ESI's claim for the tort of bad faith. The court explained that Idaho recognizes the tort of bad faith exists independent of a claim for breach of contract against an insurer, but Oregon does not recognize an actionable tort for an insurer's bad faith refusal to pay policy benefits. Thus, a conflict exists between the two states for this type of claim. The court decided that, although the tort of bad faith is not equivalent to a breach of contract claim under Idaho law, to find that Travelers committed bad faith in handling (and denying) ESI's claim, there must also have been a duty under the contract that was breached. Accordingly, both the breach of contract claim, and the bad faith claim, depend upon the Policy's provisions.

Turning to the merits, the court found the central issue to be whether ESI's claim for benefits was reasonably in dispute and thereby fairly debatable. Here, there was evidence to support Travelers' argument that ESI's claim was reasonably in dispute. Travelers discharged its contractual obligations to ESI by promptly acknowledging and investigating the claim. ESI, by contesting the adequacy of the investigation, asserted Travelers acted unreasonably in denying the claim. However, the court noted that, at the time of the investigation, the loss had been remediated, thereby hampering Travelers's investigation. The court could not conclude that Traveler's investigation was unreasonable and, accordingly. denied ESI's bad faith claim.

On July 20, 2020, the court granted ESI's motion for attorneys' fees in the amount of $91,457.50. That same day, the parties cross-appealed to the Ninth Circuit Court of Appeals (case numbers 18-35588 & 18-35589). Travelers appealed the district court's grant of summary judgment on the breach of contract claim, and ESI appealed the district court's grant of summary judgment on its bad faith claim.

On August 17, 2020, the Ninth Circuit issued a Memorandum Decision remanding the case to the district court. The Circuit upheld the district court's bad faith decision. The

panel explained that Travelers had submitted evidence to support a reasonable dispute about insurance coverage and, while ESI presented evidence showing that Travelers knew there might be some question as to whether 3 Kings properly ballasted the tank, its evidence was not enough to show more than the existence of "a legitimate question or difference of opinion over the eligibility, amount or value of the claim." In other words, ESI needed to present some evidence of a clear entitlement to coverage, which it did not do. The Ninth Circuit explained that, even if the district court found that coverage exists for ESI's losses, that does not mean Travelers acted in bad faith by denying ESI's claim and litigating the Policy's scope in these circumstances.

The Circuit reversed the district court's grant of summary judgment on ESI's breach of contract claim. The court explained that the district court focused on "workmanship" to find the Exclusion ambiguous and inapplicable, but that focus disregarded the Exclusion's unambiguous, process-oriented use of "construction." The Ninth Circuit found that "construction" carries an unambiguous, process-oriented meaning in the Exclusion, and it rejected both parties' positions on the "resulting loss or damage" provision as untenable. The Circuit remanded the case to the district court for further proceedings on whether an "excluded cause of loss" did, in fact, "result[] in a Covered Cause of Loss"; and, if so, the scope of the "resulting loss or damage" provision in light of the Circuit's decision.

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