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Commercial Banking, Collections and Bankruptcy

The newsletter of the Illinois State Bar Association's Section on Commercial Banking, Collections and Bankruptcy

Newsletter Editor Comments

BY JUDGE MICHAEL CHMIEL

One month ago, in mid-February 2020, half of the judiciary of the state of Illinois had participated in Ed Con I, which was the first of two week-long educational conferences scheduled in 2020, whereat the judges of the state come together to learn, share best practices, and to arrive at 30 hours of continuing legal education, which is required of them every two years. In mid-March, a primary election was held in Illinois, whereat various new judges were essentially elected or otherwise nominated. Now, as we approach the middle of April, the world is quite a different place, including legal practice

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When an Account Receivable Isn't an Account Receivable

BY MICHAEL WEISSMAN

The decision of the Supreme Court of Illinois in Accettura v. Vacationland, 2019 IL 124285, September 19, 2019, focuses on an issue involving the validity of collateral on which lenders depend heavily—a borrower's accounts receivable.

Accettura purchased a recreational vehicle from Vacationland, Inc. on April 19, 2014 for $26,000, taking physical possession on April 25. In June of 2014 water was leaking into the vehicle. The seller performed repairs without charge.

In July 2014, there was extensive leakage into the vehicle. The vehicle was towed back to the seller on July 14. Since the damage was so extensive, the seller was not equipped to do the necessary repairs. The vehicle had to be returned to the manufacturer for the repairs. There was no indication of how long that would take. The buyers asked for a refund of the purchase price.

On August 2, 2014, before the manufacturer had picked up the vehicle, the purchaser called the seller and verbally revoked their acceptance of the purchase contract. The manufacturer picked up the vehicle on August 4 and returned it to the seller on September 23. The seller called the purchaser, advising that the vehicle had been repaired and was ready for pick up. On September 28, 2014, counsel for the

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in and outside courtrooms. In the 22nd judicial circuit, in McHenry County, Illinois, we are having weekly remote meetings for our civil division to update ourselves on the handling of cases, weekly remote meetings for our circuit to consider updates on the impact of the pandemic on our courthouse operations, daily virtual contacts through the submission of agreed and other proposed orders by email, and daily remote work as we remain on the clock albeit from our home offices. Through webinars, we are also continuing with our learning. Through a program of the National Center for State Courts on the handling of remote hearings, we heard the chief justice of the Michigan Supreme Court suggest the situation we face is "the disruption that our industry needed." A Texas state trial court judge further noted, "We can't cancel court for a month, because we don't have a spare month later." In sum, the challenge is for us to do what we can. With the technology we have available, we can do a fair amount. We just need to put our mind to it. With that thought in mind, this issue of our newsletter provides articles which challenge us a bit, broaden our focus, and perhaps cause us to think beyond the box. Should you have questions or comments on any of this, or wish to offer something to publish, please email me at mjchmiel@22ndcircuit.illinoiscourts.gov. Be well!■

When an Account Receivable Isn't an Account Receivable

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purchaser sent the seller a letter confirming that the purchaser had revoked acceptance of the contract.

The seller did not refund the purchase price, and on October 29, 2014, the purchaser sued the seller for return of the purchase price and related damages under various theories, including section 2-608(1) of the Illinois Uniform Commercial Code, which provides, in pertinent part, as follows:

> (1) The buyer may revoke his acceptance of a lot or a commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
>
> (A) on the reasonable assumption that its non-conformity would be cured and it has not been reasonably cured: or
>
> (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or the seller's assurances.

The case wound its way to the supreme court with the court saying that it was undisputed that the defects in the vehicle substantially diminished the value of the vehicle to the purchaser, and that the purchaser was unaware of the defects when he initially accepted it. This meant that the case turned on section 1(b), as noted above.

The seller argued that it should be have been afforded an opportunity to cure the defects before the purchaser could exercise its right to revoke the purchase contract. The supreme court rejected that argument, saying there was no mention of the right to cure in section 1(b).

The court found the states are divided on the interpretation of section 1(b). The court found Missouri, Texas, Minnesota, Michigan, and New Hampshire support Illinois' interpretation, with Connecticut, New Jersey, Mississippi, and Nevada saying the seller should have an opportunity to cure before revocation could become effective.

So why is this important? Lenders, especially asset-based lenders, rely heavily on the fact that the accounts reflected on a

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borrower's reports and financial statements are bona fide. If an unhappy purchaser can revoke the contract of purchase with the seller-borrower without giving the seller an opportunity to cure any claimed defects, that will immediately invalidate the receivable. Will that come to the attention of a lender in timely fashion? The Laser Pro Business Loan Agreement used by many lenders, has an affirmative covenant that obligates a borrower to "[p]romptly inform lender in writing" of "all existing and all threatened litigation, claims, investigations administrative proceedings or similar actions affecting Borrower…which could materially affect the financial condition of Borrower…."

Do borrowers typically report controversies with customers? Isn't there a natural tendency to try to "work things out?" Does that delay in reporting afford the purchaser an opportunity to revoke the purchase contract at virtually any stage in the discussions?

Although Illinois and the states that agree with it on this issue have read the statute correctly, lenders in those states must emphasize to their borrowers the need for prompt reporting of any customer controversies and make the necessary financial adjustment in anticipation of a possible unfavorable outcome. ■

Chicken Dinner Warrants Recusal? Not So Fast!

BY DAVID W. INLANDER & RONALD D. MENNA, JR.

Invariably, judges receive invitations to attend dinners and events celebrating worthy civic, professional and public interest causes. Usually, in addition to being served the ubiquitous chicken dinner, judges are warmly greeted by practicing attorneys, community and religious leaders, and, at times, are even recognized from the dais for their presence. After all, judges should not be asked to shy away from public recognition of their esteemed status, should they? But maybe it is not that straight-forward. How careful must a judge be before accepting an invitation for a seemingly good cause?

Last month, the Seventh Circuit Court of Appeals issued an opinion which analyzed the topic of recusal in just such a setting involving an Illinois federal judge. In ***In re Gibson***[1] the seventh circuit reaffirmed that judges may attend the "rubber chicken" circuit without fear of having to recuse themselves, can have their children follow them into our profession, and their children's law firms may appear before them. While this case was analyzed under the Federal Judicial Canons, we believe the analysis and outcome would be the same under the Illinois Code of Judicial Conduct.[2]

The court was presented with the question of whether a judge's adult child's employment in a party's attorneys' law firm "creates an appearance of partiality in the eyes of an objective, well-informed, thoughtful observer."[3] It held:

It does not. The fact that a relative works at a law firm representing a party is not enough. There would need to be some aggravating circumstance, and there is none here. The Code of Conduct again provides guidance: "The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge." Cmt. to Canon 3C(1)(d)(ii).[4]

The facts are straightforward. Plaintiff, an Illinois criminal defense lawyer, was tried for the murder of his wife. After being found not guilty, he brought a § 1983 action against the City of Quincy and Adams County in the Central District of Illinois.[5]

The case was originally assigned to Judge Sue E. Myerscough. A year later, it was reassigned to Judge Colin S. Bruce. Plaintiff moved to recuse Judge Bruce as Plaintiff was representing in post-conviction proceedings a federal defendant who had been sentenced by Judge Bruce. Plaintiff's motion was granted, and the case was reassigned back to Judge Myerscough.[6]

At the next status hearing Judge Myerscough informed counsel about several circumstances which may be relevant to her impartiality: (1) her daughter had just been hired as an attorney with the University of Chicago's Exoneration Project, which is partly funded by the Plaintiff's attorneys' law firm and whose lawyers donate time, including those of Plaintiff's attorneys of record; (2) she had recently attended a dinner for the Illinois Innocence Project (affiliated with the University of Illinois Springfield), where her daughter worked prior to joining Exoneration Project, where many "exonerees", including the Plaintiff, were recognized; (3) she was aware of Plaintiff's underlying criminal case from publicity and from brief conversations with other lawyers, given that it involved a murder trial of a local criminal defense attorney; and (4) she had had cases with the City of Quincy and Adams County (defendants in the § 1983 action), with one of the defense attorneys and with the firm of another defense attorney. Plaintiff's attorneys disclosed they had worked with the judge's daughter, Lauren Myerscough-Mueller, they and the Innocence Project preemptively had screened that attorney from working on any cases before Judge Myerscough, and they were not responsible for Ms. Myerscough-

Mueller's compensation. Nevertheless, Defendants subsequently moved to disqualify Judge Myerscough pursuant to the general recusal standard in 28 U.S.C. § 455(a).[7] Judge Myerscough denied the motion. Defendants then filed a Petition for Mandamus in the 7th circuit.[8]

Initially, the 7th circuit noted that since its decision in *Fowler v. Butts*[9] it permits reviews of a denied recusal motion under any section of 28 U.S.C. § 455 only through appeal of the final judgment. It then discussed the appropriate standard of review but did not decide whether it was de novo or the deferential "clear and indisputable" standard for mandamus petitions, as the result would be same under either standard.[10] Thus, this is still an open question.

The court then turned to the grounds for recusal. To the extent the ordinary standard for a writ of mandamus applies, under 28 U.S.C. § 455(a), the petitioner must show: (1) that review after final judgment will not provide an adequate remedy for the appearance of partiality; (2) the objective appearance of partiality is "clear and indisputable"; and (3) mandamus is otherwise appropriate under the circumstances.[11] Despite Defendants' failing to address the first or third prongs, the court addressed "the central issue of apparent partiality because the standard of review is debatable and because we are reluctant to leave an unnecessary cloud hanging over the proceedings in the district court. We find that there was no reasonable question as to Judge Myerscough's impartiality on either ground offered by defendants."[12]

Defendants' first ground for recusal was Judge Myerscough's attendance at the March 30, 2019, Illinois Innocence Project fundraiser. At that time, she was not assigned this case and had no expectation she would have any further involvement. Her daughter had interviewed with the Exoneration Project but had not yet been offered a job. The judge did not attend the fundraiser in an official capacity, and "many state and local officials and judges" also attended. She was briefly acknowledged from the podium, as were other dignitaries. Plaintiff and about thirty other "exonerees" (not judges) were invited on stage to be honored. While some of the exonerees were named in the program book, Plaintiff was not.[13]

Additionally, when this case was first filed, it was inadvertently filed in the wrong division and not corrected for almost three months. As such the court found this provides evidence that no judge-shopping occurred. Further Defendants did not suggest that the reassignment to Judge Bruce occurred based on any partiality.[14] Given these facts, the 7th Circuit concluded "that no 'objective, disinterested observer' could 'entertain a significant doubt that justice would be done in the case' based on the Innocence Project fundraiser"[15], and held:

To be sure, under quite different circumstances, a judge's more extensive involvement with charitable fundraising efforts and with organizations that regularly engage in litigation can present disqualification issues. Canon 4 of the Code of Conduct for United States Judges states: "A judge may engage in extrajudicial activities that are consistent with the obligations of judicial office." Several more detailed provisions of Canon 4 are relevant here. Canon 4C allows a judge to assist in planning fundraising activities for non-profit law-related, civic, charitable, educational, religious or social organizations. A judge may even be listed as an officer, director, or trustee. But a judge may not actually solicit funds for such an organization except from members of the judge's own family and other judges over whom the judge exercises no supervisory or appellate authority. *Id*. A judge may attend fundraising events for such organizations but may not be a speaker, guest of honor, or featured on the program of such an event. Cmt. to Canon 4C.[16]

Thus, serving as a member, officer or director of a public interest entity will not automatically lead to recusal. Nor will mere attendance at a fundraiser- no matter what is served for dinner! This is true even if a close relative, who happens to be a lawyer is merely employed by an interested party, but is not an owner (equity) of such firm. [17]

The second ground for recusal was the judge's daughter's salaried employment by the Exoneration Project, a public interest entity partially funded by Plaintiff's counsel. Ms. Meyerscough-Mueller was offered the job shortly after the fundraiser. Before the judge's daughter started, the Judge Meyerscough was reassigned this case. Defendants did not question the timing of Plaintiff's motion to recuse Judge Bruce and disclaimed any notion that the Exoneration Project hired Ms. Meyerscough-Mueller in an effort by Plaintiff's attorneys to ingratiate themselves. Judge Meyerscough daughter never represented the Plaintiff and she had been screened from any involvement in any of the judge's cases, including this one. However, even if the court were to disregard the distinction between Plaintiff's attorneys' law firm and the Exoneration Project, the 7th Circuit, as quoted above, held that "without more", this is not a basis for recusal.[18]

Thus, *without more*, a judge's adult child's salaried employment by a law firm which appears before that judge is not a basis for an automatic recusal. A recusal is called for when the adult child acts as an attorney in the case or has an interest that could be substantially affected by the outcome of the proceeding, such as being an equity partner.[19] Ultimately, each case will rise or fall on the specific facts assessing whether an appearance of partiality in the eyes of an objective, well-informed, thoughtful observer, is elevated to a level to warrant recusal. Here, the 7th circuit held it did not.■

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1. *In re Gibson*, ___ F.3d ___, 2019 U.S. App. LEXIS 39089, 2019 WL 8017895 (7th Circuit, No. 19-2342, published February 25, 2020).
2. Illinois Supreme Court Rules 61-67.
3. *Gibson*, *supra*, 2019 U.S. App. LEXIS 39089, *16-17, *citing In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990).
4. *Id*. at 17.
5. *Id*. at 2-3.
6. *Id*. at 3.
7. 28 U.S.C. § 455. *Disqualification of justice, judge, or magistrate judge* (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. While Illinois does not have a statute equivalent to 28 U.S.C. § 455, its concepts are found in Illinois Canon 3(C)(1), Illinois Supreme Court Rule 63, 735 ILCS 5/2-1001(a)(3) and 725 ILCS 5/114-5.
8. *Gibson*, *supra*, 2019 U.S. App. LEXIS 39089, * 3-5.
9. *Fowler v. Butts*, 829 F.3d 788, 793 (7th Cir. 2016).

10. *Gibson*, *supra*, 2019 U.S. App. LEXIS 39089, * 5-8.
11. *Id*., 2019 U.S. App. LEXIS 39089, * 8-9, *citing United States v. Sinovel Wind Group Co*., 794 F.3d 787, 793 (7th Cir. 2015).
12. *Id*., 2019 U.S. App. LEXIS 39089, * 9-10.
13. *Id*., 2019 U.S. App. LEXIS 39089, * 10-12.
14. *Id*., 2019 U.S. App. LEXIS 39089, * 10-11.
15. *Id*., 2019 U.S. App. LEXIS 39089, * 12, *citing United States v. Herrera-Valdez*, 826 F.3d 912, 917 (7th Cir. 2016).
16. *Id*., 2019 U.S. App. LEXIS 39089, * 12-13. Illinois Judicial Canon 4(C), Illinois Supreme Court Rule 64, incorporates the rules in Federal Judicial Canon 4, 4(A)(3), 4(B) and 4(C). However, compare Federal Canon 4 – "A Judge May Engage in Extrajudicial Activities That Are Consistent With the Obligations of Judicial Office" – with Illinois Canon 5, Illinois Supreme Court Rule 65 – "A Judge Should Regulate His or Her Extrajudicial Activities to Minimize the Risk of Conflict With the Judge's Judicial Duties".
17. *Id*. See also Illinois Judicial Canon 4(C), Illinois Supreme Court Rule 64 ("A judge may serve as a member, officer or director of a bar association, governmental agency, or other organization devoted to the improvement of the law, the legal system, or the administration of justice."); and Illinois Judicial Canon 5(B), Illinois Supreme Court Rule 65 ("A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of the judge's judicial duties", and "may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members ….").
18. *Gibson*, *supra*, 2019 U.S. App. LEXIS 39089 at * 13-15.
19. 28 U.S.C. § 455(b)(5)(ii) and (iii). See also *Jenkins v. Arkansas Power & Light Co*., 140 F.3d 1161, 1165 (8th Cir. 1998) (recusal not required where judge's son was "a salaried associate who would not be substantially affected by the outcome"); *Nobelpharma AB v. Implant Innovations, Inc.*, 930 F. Supp. 1241, 1267 (N.D. Ill. 1996) (recusal not required where judge's daughter was salaried partner, not equity partner, in law firm representing party before judge); *People v. Saltzman*, 342 Ill.App.3d 929, 931 (3rd Dist.), *appeal denied*, 206 Ill.2d 640 (2003), *quoting People v. Craig*, 313 Ill.App.3d 104, 105 (2nd Dist.), *appeal denied*, 191 Ill.2d 540 (2000) ("A judge should disqualify himself if he knows he has a substantial financial interest in the subject matter in controversy or is a party to the proceeding where such an interest might affect the outcome of the proceeding. 203 Ill. 2d R. 63 C(1)(d). 'The mere fact that a judge has some relationship with someone involved in a case, without more, is insufficient to establish judicial bias or warrant a judge's removal.' "). *But see, In re Hatcher*, 150 F.3d 631, 638 (7th Cir. 1998) (recusal required where judge's child worked on the linked prosecution of a co-conspirator); *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977) (recusal required where judge's brother was an equity partner in a firm litigating before the judge); and Illinois Judicial Canon 3(C)(1)(e)(iii), Illinois Supreme Court Rule 63 ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: … the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: … is known by the judge to have a more than *de minimis* interest that could be substantially affected by the proceeding ….").

Jurisdiction Stripping and the Presumption of Judicial Review: Who Gets to Make the Call in 2020

BY PATRICK KINNALLY

To many practitioners, including myself, Congress's authority to strip federal courts of jurisdiction to hear certain cases, emanates in our politic because Congress does not like what federal judges might rule, or more probably it wants to control the outcome from the beginning. This seems troubling. *Patchak v. Zinke* 137 S. Ct. 2091 (2017) (*Patchak*).

Yes, Congress has the power to enact laws, even ones which define or limit the jurisdiction of federal courts. Do Legislators have the authority to tell a court to dismiss a case based on statute they create? Or, prescribe a certain outcome in single controversy? See Peck "Congress's Power Over Courts; Jurisdiction Stripping and the Rule of *Klein,*" *Congressional Research Service* (August, 2018) (*Peck*).

On the flip side, is there truly a presumption of Judicial Review with respect to federal administrative agency actions? See, *e.g.. Abbott Labs v. Gardner* 387 U.S. 136, 139-140 (1967). If so, where does it originate? It does not appear in the Constitution. Although, announced by the courts, and endeared to by litigants, it's genesis seems murky. Bagley, "The Puzzling Presumption of Reviewability" *Harvard Law Review* 127 Harvard Law Rev. 1285 (2014).

Indeed in *Patchak* a plurality of the United States Supreme Court had a difficult time with this dialectic. The statute at issue said: Does a federal statute directing a federal court to "promptly dismiss" a pending lawsuit following actual rulings permit the lawsuit to proceed, violate the Constitution's separation of powers?" *Peck* at 12. It seems to me, the presumption of judicial review should have some force in our system of government. Perhaps, my view is mistaken.

In the guise of "changing the law" the Supreme Court said Congress could do so. The dissent, authored by Justice Roberts opined the new statute clearly ordained the outcome in a single case, thereby, intruding unconstitutionally in an area left to solely to the judicial branch of government. See also *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329-38 (2016) (*Peck*, at 21).

But, is it clearly a role for Congress, even if a limited one? Congress should not be able to declare whether Pat Kinnally gets to win over Tom Prindable in his lawsuit. But *Patchak* can be read to say that. *Peck* at 22. Especially, where the Constitution not Congress, declared what cases and controversies the Judiciary was authorized to resolve (Article 3, Sec 2).

This tension seems more awkward in the immigration context. Stripping federal judges of the ability to decide cases or controversies involving federal immigration statutes, policies or regulations? Yes, they can do that. See 8 U.S.C. 1252 (a)(2)(D) *Immigration and Naturalization Service v. St. Cyr,* 533 U.S. 289 (2001). Again, we should be asking ourselves, why? Should we permit administrative law judges and adjudicators, empowered by Congress, to supplant Article III Judges who have the authority to interpret all cases in Law and Equity arising under

the Constitution and the laws of the United States? It is a knotty dilemma; the terrain, challenging.

In immigration law there is a form of procedural relief called a motion to reopen. This legal option provides a person in a removal proceeding to petition an administrative tribunal, the Board of Immigration Appeals (BIA) or an administrative law judge (IJ) and request either to revisit a decision previously made. The request must ask the BIA or the IJ to make a new decision based on newly discovered evidence or a change in circumstances or law from the time of the previous removal hearing, See *Kucana v. Holder*, 558 U.S. 233 (2010) (*Kucana*).

For the most part, federal appellate courts do not have jurisdiction to review final orders of removal where certain criminal offenses occur. But see *Ghahremani v. Gonzalez*, 498 F. 3d. 993 (9th Cir. 2007) (*Ghahremani*). However, those courts do retain jurisdiction to review constitutional claims and questions of law regardless of the predicate for the removal charge. And *Ghahremani* held that such review included not only questions of law but mixed questions of law and fact.

As to motions to reopen there are two variants. First, there is a regulatory strain to reopen 8 CFR 1003.23(b) or 8 CFR 1003.2(a), which is an administrative or executive branch fiat. It imposes a 90-day limit on reopening from a final removal order. Also, the person can invoke his/her statutory right to reopen removal proceedings under 8 U.S.C. 1229 a(c)(7) (the statute). Its temporal confine is disputed.

A motion to reopen must include the new facts that will be proven at a hearing to be held if the motion is granted. It needs to be supported by affidavits, the application for the relief sought, and other evidence. Generally, the motion should show that such proof is material, was not available at the time of the original hearing, and could not have been discovered or presented at the time of the original hearing. 8 CFR 1003.2(c)(1). Subject to certain exceptions, a motion to reopen must be filed within 90 days of the entry of a final administrative order of removal.

The government's view is that if a person in removal proceedings departs from the United States while the motion is pending that such departure constitutes a withdrawal of the motion. Most circuit courts have rejected this view. See *Kurzban Sourcebook*, 16th Ed. (1758-60). To circumvent the 90-day limitation a person filing a motion to reopen claims that his or her failure to file should be equitably tolled. Equitable tolling is a time-honored maxim which affords a court the ability to waive the requirement of non-jurisdictional statutes of limitations where a litigant was diligent but unable to comply with a filing deadline. *Kucana*

The regulatory version; however, unlike the statutory prong imposes a restraint. It declares as to any person in a removal hearing whom has departed the United States from filing any motion. This is called the "departure bar" See *Resendez v. Lynch*, 831 F. 3d 337 (2016) (*Resendez*). The BIA, not an Article III judge has opined that its administrative regulations have stripped it, categorically, of any jurisdiction to entertain any motion to reopen filed by departed persons in removal proceedings. *Matter of Armendarez* 24 I&N Dec. 646 (2008). The *Resendez* court saw it differently.

In 1973 Resendez was admitted as a lawful permanent resident alien. Almost 30 years later he pleaded guilty to possessing one gram of a controlled substance, a felony. The federal government sought to deport or remove him based on that conviction. He was ordered removed in 2003.

Eleven years later, Resendez filed a motion to reopen under the statute. The government said his motion was untimely because it was not filed within 90 days of his removal order. He had departed the United States since he was deported. Resendez replied that he was entitled to equitable tolling of the 90 day deadline, since the law had changed since he was ordered removed (*Lopez v. Gonzalez* 549 U.S. 47 (2006); and, the Supreme Court had opined that a statutory motion to reopen should not wear the trappings of what the Executive Branch chose to say what it thought it was. See *Mata v. Lynch* 135 S. Ct. 2150 (2015).

Echoing *Kucana*, the *Mata* court, again held the court of appeals had misapplied the clear meaning of the statute in the context of a motion to reopen.

Noel Mata entered the United States unlawfully and remained here for over a decade. In 2010 he was convicted of assault. A year later he was ordered removed by an immigration judge. His lawyer appealed, but the appeal was dismissed because no brief was filed. Over 100 days later, Mata hired a new lawyer who filed a motion to reopen, claiming Mata's prior lawyer had rendered ineffective assistance of counsel. The BIA, although recognizing it had authority to equitably toll the 90-day filing restraint, in some cases, declined to do so. Mata filed a petition with the Circuit Court of Appeals to review the BIA decision. But the 5th Circuit Court of Appeals refused. It said it had no jurisdiction to review whether the BIA's refusal to exercise its authority to reopen cases *sua sponte*, and therein equitably toll the 90 day limitation period.

The Supreme Court stated the circuit court of appeals conflated the issue of jurisdiction with the statutory right to file a motion to reopen and seek review of that decision. Said differently, whether the BIA rejects the alien's motion to reopen because it is filed after 90 days from the final administrative order, or is inadequate in some other way, does not equate with law that the court of appeals is without power to review that decision. On the merits, perhaps, the BIA's decision is erroneous. But to get there the Circuit Court has to take jurisdiction over the case, explain why this is or not so, and make a ruling.

On December 9, 2019 the U.S. Supreme Court heard arguments on *Guerrero-Lasprilla v. Barr* (S. Ct. No. 18-776) (*Guerrero*) and *Ovalles v. Barr* (*Ovalles*) S.Ct. No. 18-1015 (2019). The issue presented, is if a noncitizen files an untimely motion to reopen a removal case, explains the reason for the delay, and loses before the BIA, can the Circuit Court of Appeals review that decision? In other words, can Congress strip the Circuit Court of Appeals of jurisdiction to entertain such a motion to reopen? Who gets to make that call? Congress through its cadre of appointed administrative judges, or our judiciary?

In *Guerrero* and *Ovalles*, both were lawful

permanent residents and were deported for criminal convictions. Congress stripped federal courts of jurisdiction to hear appeals from removal orders for the crimes they committed. *Guerrero* and *Ovalles* filed motions to reopen over a decade after their removal from the United States. Citing *Resendez* they claimed the right to reopen and they were diligent in filing their motions once *Resendez* was authored. Furthermore, they argued the Supreme Court could take a look at the mixed question of law and fact in determining whether Congress effectively stripped the federal courts of jurisdiction in those types of cases.

Pedro Guerrero-Lasparilla (*Guerrero*) was a lawful permanent resident for 12 years when he was removed for felony drug convictions in 1998. 18 years later in 2016 he filed a motion to reopen claiming a BIA decision (*Matter of Abdelghany* 26 I&N Dec. 254 (BIA 2014), afforded him a basis for relief from the removal order (*i.e.*, a change in law). The IJ and the BIA denied his motion. Since *Abdelghany* had been filed in 2014 both administrative tribunals found Guerrero, in the ensuing two years, had not been diligent in pursuing the motion. In their view, equitable tolling did not apply. In response, Guerrero said he could not have filed his motion until the court of appeals authored its decision in *Resendez* in 2016.

Again as, in *Mata*, the fifth circuit opined it lacked jurisdiction to review the BIA's decision. It did so, by concluding that whether Guerrero pursued his motion in earnest was a factual question, not a legal one. Because Congress had stripped the courts of jurisdiction to entertain the matter based on the facts of Guerrero's motion, (and the underlying criminal convictions) namely, the circumstances he undertook to perfect his motion, it had no power to consider it. According to the government it was a factual dispute which Congress had foreclosed our Judiciary from considering.

As we segue into 2020 with the issues of Congressional authority and eviscerating judicial authority to decide cases and controversies perhaps, as judges and advocates we might pause and return to examine exactly what Article III actually says what it means. Our judiciary gets to interpret the law, not make it. In *Guerrero*, we may see the true extent of Congressional authority to strip federal judges to hear certain types of immigration cases. Article III of the Constitution states the Supreme Court shall have appellate jurisdiction with such exceptions and under such regulations as the Congress shall make (Art III, Sec. 2). But the presumption of judicial review in the face of a statute that seems unclear, may prove telling. I guess we will see how that goes. The court's opinion will be much anticipated by many of us.■

[Editor's Note, inspired by Author: In its Opinion, the Supreme Court rejected the jurisdiction stripping argument and again overturned the Fifth Circuit. In a 7-2 decision, The Supreme Court held, "Because the Provision's phrase "questions of law" includes the application of a legal standard to disputed or established facts, the Fifth Circuit erred in holding that it had no jurisdiction to consider petitioners' claims of due diligence for equitable tolling purposes."]

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The Unlimited Potential of Limited Scope Engagements

BY JOE SOULIGNE

In a time where many are pondering issues of access to our legal system, there is a tool that often remains overlooked and under-used, that of the limited scope engagement. With a relatively small amount of preparation, these sorts of short-term consultations and/or representations can be advantageous to both the lawyer and the client.

What Are Limited Scope Engagements?

Limited scope engagements are exactly what the name implies – representations of a client that are limited to a short, pre-determined purpose, after which the representation will automatically end. This purpose can include one or more components: providing legal advice about legal rights, drafting and/or reviewing documents, conducting negotiations, or even court appearances on the client's behalf.

Ethical Concerns in Limited Scope Engagements

The Illinois Rules of Professional Conduct allows such limited representations under Rule 1.2(c), which states that "A lawyer may limit the scope of the representation if the limitation is reasonable under the

circumstances and the client gives informed consent."[1]

Additionally, Supreme Court Rule 13(c)(6) allows an attorney to make a limited scope appearance in a civil proceeding, so long as the attorney and the party to be represented have entered into a written agreement to do so.[2] In such cases, the attorney must file a notice of limited scope appearance form as found in the Article I Forms Appendix to the Supreme Court Rules.[3]

Supreme Court Rule 13(c)(7) further explains that after the completion of the representation under Rule 13(c)(6), the attorney must withdraw by oral motion or written notice.[4] If the representation is completed during a court appearance, such motion may be made orally and the court must grant the motion, so long as the client does not object on the grounds that the representation has not been completed as agreed. Otherwise, the attorney should file a notice of withdrawal of limited scope appearance form, also found in the Forms Appendix to the Supreme Court Rules, including serving the form on the client and other parties or counsels of record. If no objection is filed within 21 days, the representation automatically terminates.

Finally, Supreme Court Rule 137(e) allows an attorney to assist a self-represented person in drafting or reviewing pleadings, motions or other documents without making an official appearance.[5] In the course of such a review, the attorney "may rely on the self-represented person's representation of facts without further investigation by the attorney, unless the attorney knows that such representations are false."[6]

Factors to Consider in Undertaking a Limited Scope Engagement

The first and most important consideration in undertaking a limited scope engagement with a client is to consider carefully both the client and the situation, as any limitations must be "reasonable *under the circumstances*" and the client must give "informed consent" under Rule 1.2(c) of the Illinois Rules of Professional Conduct.

In order to evaluate the reasonableness of such an engagement under the circumstances, it is important to consider whether the tasks involved are capable of being performed independently of other aspects of the case, such that the task to be completed can be easily defined and performed without deeper involvement in the case. Additionally, the terms of the representation, including what the attorney will and, perhaps more importantly, will not do, are disclosed and agreed to in advance.

One easy way to ensure that both the attorney and the client are clear on the scope and limitations of any arrangement is to use a simple engagement agreement. This agreement, signed by both the attorney and the client in advance of any work being completed, should establish in detail the client's goals for the duration of the representation, as well as the specific work that the lawyer plans to perform to reach those goals.

It is also prudent to include a detailed explanation of the fee structure for the representation. In many cases, the nature of the representation and the client's situation will lend itself to either a flat fee or a cap on the charges incurred—for example, a limited scope consultation may be limited to an hour at a set billing rate, while allowing the client to extend their time beyond that initial hour should they choose to do so.

Finally, consideration should also be given to potential conflicts of interest, as well as the subject matter of any advice or work done. Practitioners must be careful to vet potential limited scope clients carefully enough to ensure that they do not conflict with any past or present clients just as if they were a traditional client. Additionally, in consultations where clients may have a myriad of legal questions related to their particular issue, an attorney should take particular caution not to offer advice without adequate knowledge of the particular area of law, even if that requires additional research either before or after the client meeting.

For additional information on limited scope engagements, including sample representation agreements and best practices, see the ISBA's PracticeHQ at https://www.isba.org/practicehq/limitedscoperepresentation.■