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SHOULD YOU HIRE AN APPELLATE LAWYER?

You've been to court and lost. Can you appeal the decision? You won in the trial court. Can you preserve your victory if the other side appeals? Who should handle the appeal?

WHAT ORDERS CAN BE APPEALED?

All jurisdictions allow an appeal as a matter of right from a trial court's final judgment – one that dispenses with all of the issues and all of the parties in the litigation. Federal and some state rules also allow appeals of right from some nonfinal orders, such as those granting or denying injunctions. The federal Class Action Fairness Act now makes orders certifying a class or remanding class actions to state courts appealable as of right.

Other nonfinal orders are appealable only if the appellate court grants "leave" to appeal. And all appeals to the Michigan Supreme Court and U.S. Supreme Court are by leave. The courts generally grant leave to appeal only if they are convinced that the issue is an important one, and think that the lower court has made an error.

STAY OF JUDGMENT

An appeal does not automatically stay the effect of an order or judgment. The trial or appellate court can grant a stay conditioned on posting a bond or other security covering the judgment, plus the interest that will accrue during the appeal. Bonds and judgment interest can be expensive.

THE STANDARD OF REVIEW

The chance of winning on appeal turns on the standard of review. A trial court's legal conclusions – for example its rulings granting or denying a motion to dismiss a claim on a legal ground – are reviewed under a "de novo" standard. This means that the appellate court can freely overrule the trial court's legal conclusions (though it may hesitate to do so after a long trial). On the other hand, a finding of fact (whether made by judge or jury) is subject to the "clearly

erroneous" standard. This standard can be difficult to satisfy. Generally it should not be the only ground for appeal.

Court decisions made during the course of discovery or trial (such as whether to admit evidence) are subject to the "abuse of discretion" standard. Further complicating matters, a "harmless error" will not be reversed. Taken together, the "clearly erroneous" and "abuse of discretion" standards make appeals based solely on alleged errors in the administration of trial difficult. But courts of appeal are willing to reverse such a decision if convinced there has been a miscarriage of justice.

Success on appeal may result in the need for a new trial, with all of the attendant costs and uncertainties. On the other hand, an appeal creates uncertainty for the victor at trial and presents more opportunities for settlement negotiation. Many appellate courts now require the parties to participate in a settlement conference while the appeal is pending.

WHO SHOULD HANDLE YOUR APPEAL?

Trial counsel has the advantage of familiarity with the record, a possible time-saver, but may lack experience with appellate courts, jurists, rules, and strategy – all important to success. Appellate counsel know how to choose, focus, and present arguments most effectively – and bring a "fresh set of eyes" to your legal team.

Our appellate lawyers also keep abreast of new developments and trends in substantive law and could make the winning difference. Consider teaming your trial counsel with our appellate specialists. If you would like the benefit of our perspective on your appeal, please call us.

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U.S. SUPREME COURT RUNDOWN



This year's U.S. Supreme Court term has been significant for businesses. With several important decisions outstanding, the court has already issued opinions expanding manufacturers' liability in product-liability suits, expanding employer liability in employee discrimination suits, and expanding public access to potentially sensitive company documents.

5 RECENT DECISIONS THAT COULD AFFECT YOUR BUSINESS

PRIVACY

In *FCC v AT&T*, the Court held that a corporation does not have a right of "personal" privacy such that it can object to a Freedom of Information Act (FOIA) request on the ground that the request seeks documents obtained by a government agency that are embarrassing or sensitive to the corporation. The case eliminates a protection for companies following a government investigation – sensitive internal emails, for example, now may be fair game to the public with a simple FOIA request.

REGULATORY

In *Williamson v Mazda Motor*, the Court revived an accident victim's suit against Mazda for failing to install lap-and-shoulder seatbelts – as opposed to lap belts only – in the middle seats of its minivans. Mazda's lap belts fully complied with federal safety standards, but the Court nonetheless held that those standards did not preempt state tort suits like the accident-victim plaintiff's. The case has potentially significant implications for automobile manufacturers and suppliers and for companies in other heavily regulated industries. Even full compliance with federal regulations may not protect a company from suit.

EMPLOYMENT

The Court held in *Staub v Proctor Hospital* that an employer can be held liable for employment discrimination based on the discriminatory motives of a supervisor who influenced, but did not make, the decision to terminate an employee. The case is significant for employers because some courts had previously held that to prove discrimination an employee generally had to show animus on the part of the supervisor who made the ultimate termination decision. The case therefore potentially expands liability for employers based on the actions of lower-level managers and supervisors.

In *Thompson v North American Stainless*, the Court held that a company could be sued for retaliating against an employee who filed a discrimination complaint by firing the employee's fiancé. Employers now need to be even more careful after employees file such complaints – any adverse action against the employee, the employee's family members working at the company, or even potentially close friends could open the door to a suit.

In *Kasten v Saint-Gobain*, the Court held that an employee who was retaliated against for making workplace-safety complaints may sue even where the employee did not make the complaints in writing. The case is significant for employers because it will likely expand the number of retaliation suits. Under *Kasten*, a disgruntled terminated employee could claim after the fact that he or she made an oral complaint to a supervisor prior to termination.

One More to Keep Your Eye On

In *Wal-Mart v Dukes*, the Court will consider whether hundreds of thousands of Wal-Mart employees may join together in a single class-action gender-discrimination suit. The implications are considerable for employers nationwide – if the Supreme Court allows the suit to proceed, employers could face similar mass discrimination suits in the future. Expect a decision in that case during the last week of the Court's term in June.



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MICHIGAN SUPREME COURT RECENT CHANGES IN THE MAKE-UP OF THE COURT

The Michigan Supreme Court has undergone dramatic changes in recent times. It is important to be aware of those changes, and to craft your appeal arguments accordingly.

Over the course of his 11 years on the Michigan Supreme Court, Justice Clifford Taylor was the intellectual leader of what came to be known as the "Taylor Court," one that many described as the finest Court in the country. When he left the Court in 2009, the philosophy of the Court shifted, but in 2011 it returned to a more conservative majority with the addition of Justices Mary Beth Kelly and Brian Zahra.

No one knows the personnel and philosophies on the Court better than Justice Taylor. Having participated in hundreds of Michigan Supreme Court weekly conferences and studied many years of Court of Appeals opinions, Justice Taylor has been insight into the thinking of the Michigan Supreme Court Justices and Court of Appeals Judges on the myriad significant issues that come before those courts. Those insights will be invaluable on any appeal.



Former Michigan Supreme Court Justice **CLIFFORD TAYLOR**, Shares Some Thoughts

[Q] WHAT ARE *AMICUS* BRIEFS AND WHY ARE THEY IMPORTANT?

[A] Even when your company is not a party to a lawsuit, an issue that is very important to you may come before a court on appeal. Oftentimes, you may correctly fear that the case won't be presented adequately to address the issues from your perspective.

In such a case, it is wise to consider the use of an *amicus curiae* – or “friend of the court” – brief which offers information to assist a court in deciding a matter. Through such briefs, you can get before the Court the arguments that you feel are important, but that the actual parties, for one reason or another, may not argue fully or well.

[Q] WHY SHOULD OUTSIDERS FILE *AMICUS* BRIEFS?

[A] In my time on the Michigan Supreme Court, I was surprised that very important issues often came to the Court in cases where casual litigants had simply happened into the circumstance that gave rise to the claim. Often they didn't fully understand the importance or complexity of the issues, or the opportunity the Court had given them by accepting the case for review.

That opportunity was to not only decide the specific case, but to more broadly impact the law as it might apply in the future and, as it might affect other interested parties. Left to the parties alone, this sometimes meant that significant issues could be poorly briefed and argued, either because of the uneven talents of the lawyers presenting the case, or perhaps because a particular litigant felt it could win on another, simpler issue and directed its counsel to de-emphasize the preparation and presentation of the harder and more complex issues or arguments that might be important to the broader community. When that happened, the Court was often left adrift as to these issues and easily might not “get it right.” An opportunity was lost.

The prospects of this happening could have been greatly reduced if those well prepared in the industry had seized the opportunity to inform the Court. The *amicus* brief is the way that can be done.

[Q] WHAT EXCITES YOU ABOUT BEING IN PRIVATE PRACTICE?

[A] One of the parts of our appellate practice at Miller Canfield that I particularly enjoy is that we can, with the remarkable resources of this firm, work up these sometimes complicated *amicus* issues and effectively place the interests of our clients fully before the Court so that they are not subject to the vicissitudes of the particular interests of the actual parties to the suit.



MILLER CANFIELD WELCOMES CLIFFORD TAYLOR

Former Chief Justice of the Michigan Supreme Court, Clifford W. Taylor, has joined our firm as Of Counsel, bringing with him a wealth of experience, insight, and leadership skills gained while presiding over the state's highest court.

Justice Taylor will focus on appeals involving federal and state constitutional, statutory, and public policy matters, helping to form appeal strategy and oral arguments on appeal. He will also serve as an arbitrator and mediator.

The addition of Chief Justice Taylor to our appellate practice profoundly enhances our ability to serve clients, as he brings a unique perspective to appellate matters.

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APPELLATE SUCCESS FOR OUR CLIENTS

A REVIEW OF A FEW RECENT CASES

TACKLING CONSTITUTIONAL LAW CLAIMS

Representing Eastern Michigan University in the United States Sixth Circuit Court of Appeals in a currently pending appeal of the dismissal of constitutional law claims brought by a former college student who had been dismissed from a graduate counseling program after declining to counsel a homosexual client in a clinical course on religious grounds. The federal district court granted summary judgment in the university's favor, and the student appealed. The case, which is being followed nationally and in which 11 *amici curiae* have filed briefs on appeal, presents complex issues relating to the interplay between constitutional freedoms of speech and religion, the right of a public university to determine its own curriculum, and to enforce and apply the governing professional codes of ethics. The case is fully briefed and is awaiting oral argument. *Ward v Wilbanks, et al.*



ABLY REPRESENTING MUNICIPALITIES

Successfully represented the City of Benton Harbor in the Michigan Court of Appeals (and in then securing the denial of a request for leave to further appeal to the Michigan Supreme Court) on a claim by two city residents seeking to halt the construction of three holes of a Jack Nicklaus Signature Golf Course in a City park that abuts Lake Michigan, as well as other redevelopment efforts in the park. The circuit court judge had granted the City's motion for summary disposition and ruled in favor of the City on all claims. The Court of Appeals affirmed that ruling, and the Supreme Court declined to hear the case. *Drake et al. v City of Benton Harbor, et al.*

PROTECTING SCHOOLS

Successfully represented the Detroit Public Schools in the Michigan Supreme Court on a tax refund case involving in excess of \$150 million. The Supreme Court reversed the Court of Appeals and reinstated the decision of the Michigan Tax Tribunal dismissing the claim. *Briggs Tax Service, LLC v Detroit Public Schools, et al.*

SCORING VICTORIES IN ANTITRUST CASES

Successfully represented the National Collegiate Athletic Association in the United States Sixth Circuit Court of Appeals in a claim brought by a manufacturer of lacrosse sticks and other lacrosse equipment, who sued the NCAA claiming that its adoption of certain lacrosse stick head specifications violated federal antitrust laws. The federal district court dismissed the claims. The Sixth Circuit affirmed that decision. *Warrior Lacrosse, Inc. v NCAA.*

Successfully represented several cemetery companies in the United States Sixth Circuit Court of Appeals in an antitrust class action brought by a trade association of independent monument builders. In dismissing the claims, the federal district court found that the plaintiffs had failed to plead a viable relevant market or to adequately plead an economically-plausible conspiracy. The Sixth Circuit affirmed that decision. *Michigan Division-Monument Builders of North America v Michigan Cemetery Association.*

If you have questions or would like more information, contact Mark T. Boonstra 734.668.7735 or Clifford Taylor 517.483.4989, Co-Chairs of Miller Canfield's Commercial Appellate Section.

Results were dependent upon the facts in these specific cases. No guarantee or prediction is implied regarding the outcome of other legal matters.

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