

# THE DAILY RECORD

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## Western District case notes

### ERISA

In *Madden v. Bewley, et al.*, No. 16-CV-571(EAW) (Jan. 18, 2017), plaintiff sued decedent's former employer, retirement system, and former spouse to establish the estate's rights to the entirety of decedent's retirement benefits. Although decedent and her former spouse had executed a separation agreement in which both parties agreed to waive any interest in the other's retirement benefits, decedent's retirement system still determined that the retirement benefit should be split with 50% going to the former spouse as the designated primary beneficiary.

Prior to commencing the lawsuit, plaintiff requested unsuccessfully that the former spouse voluntarily renounce his interest in the retirement benefits, but received no response. When the former spouse also failed to answer the complaint, plaintiff moved for a default judgment, which the Court granted on plaintiff's claim that the former spouse had breached the separation agreement. The Court found that the allegations in the complaint, when accepted as true and combined with the attached separation agreement, established that the former spouse had waived his interest, thus making plaintiff entitled to the entire retirement benefit.

### Products Liability

In *Miccio v. Conagra Foods, Inc., et al.*, No. 16-CV-6140(EAW) (Dec. 20, 2016), plaintiff sued the manufacturer and distributors of a cooking spray can after sustaining injuries when the can, unused at the time, exploded in her workplace. She brought her lawsuit under theories of strict liability (including designed defect, manufacturing defect, and failure to warn), breach of express and implied warranty, and negligence. After defendant moved to dismiss the complaint and plaintiff moved to amend the complaint, defendant argued



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that the proposed amended complaint still failed to adequately plead manufacturing defect, breach of express warranty, and negligence claims. The Court denied the motion, finding that plaintiff had sufficiently pleaded a strict liability manufacturing defect by alleging that the product a) was defective due to an error in the manufacturing process through inadequate or a lack of testing, and b) deviated from all other like units due to that defect.

Although plaintiff failed to make any specific allegation about the product's manufacturing process, it was sufficient that she had alleged the canister exploded and nothing she did caused the explosion. On the other hand, the Court held that plaintiff had not sufficiently pleaded a breach of express warranty claim. Plaintiff failed to allege that defendants had made any specific statement concerning the safety or efficacy of the cooking spray can, and generalized and vague allegations that defendants supposedly made express warranties were not enough. In addition, plaintiff also failed to allege that the warranty had induced her employer to purchase the product or that she had relied on the warranty to her detriment.

### Tribal Sovereignty and State Tax

### Laws

In *Seneca Nation of Indians v. Paterson*, No. 10-CV-00687(MAT) (Jan. 23, 2017), plaintiff sought declaratory and injunctive relief concerning the alleged unconstitutionality of certain New York state tax law amendments imposing a tax on cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe. The Court initially granted a temporary restraining order but later denied plaintiff's motion for a preliminary injunction. After that decision was affirmed by the Second Circuit, defendants moved for summary judgment seeking dismissal of plaintiff's complaint on the merits.

In response, plaintiff cross-moved pursuant to Fed. R. Civ. P. 41(a)(2) for conditional dismissal of its complaint, without prejudice to a future action concerning implementation or enforcement of the tax law amendments. In granting defendants' motion and denying plaintiff's cross-motion, the Court first reaffirmed its prior finding that the tax law amendments do not unconstitutionally burden plaintiff's right of tribal sovereignty. Next, because plaintiff's complaint alleged only pre-enforcement claims, the Court found that its holding could not include "future" or "hypothetical" claims, because such claims are speculative and unripe. As a result, plaintiff's claims were dismissed with prejudice.

### Insurance Coverage

In *Cybercreek Ent., LLC v. U.S. Underwriters Ins. Co.*, No. 16-CV-00424(EAW) (Dec. 20, 2016), plaintiff claimed that defendant breached the parties' insurance contract when it canceled the policy because plaintiff failed to make certain improvements to the underlying property. Defendant moved to dismiss the com-

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plaint, arguing that plaintiff failed to sufficiently allege a breach since the policy could be cancelled with or without cause, and merely required 30 days' notice of the cancellation.

The Court granted the motion and dismissed the complaint, finding that defendant's reason for cancelling the contract was "wholly immaterial" to its analysis because New York law required the Court to infer the contract was terminable without cause in the absence of a provision specifically requiring cause. Therefore, because defendant had an unqualified right to terminate the policy after providing 30 days' notice, there had been no breach.

### **Discovery Sanctions**

In *Scott-Iverson v. Ind. Health Assoc, Inc.*, No. 13-CV-451V(F) (Jan. 4, 2017), an action alleging race and gender discrimination, defendant moved to compel plaintiff's presence at the continuation of her deposition for an additional three hours and sixteen minutes as a result of late starting times, breaks and disruptive conduct by plaintiff and her attorney. Defendant also sought an order compelling plaintiff to answer 11 questions asked at her prior deposition, which plaintiff refused to answer. Finally, defendant requested an award of sanctions, including

civil contempt, against plaintiff and her attorney based upon their conduct during plaintiff's six prior deposition sessions.

As to the first request, the Court found that plaintiff failed to provide any evidence contradicting defendant's calculation of the short-fall in her actual deposition time as computed in accordance with Fed. R. Civ. P. 30(d)(1). As a result, defendant was entitled to a continuation of the deposition for the requested time. Regarding the second prong of defendant's motion, the Court found that plaintiff's repeated refusal to answer the questions at issue was unjustified, noting that, when a deponent believes a deposition is being conducted in bad faith, the deponent should apply "immediately" for judicial intervention under Fed. R. Civ. P. 30(d)(3) (A). Accordingly, plaintiff was directed to answer the outstanding questions.

Finally, the Court found that the record amply demonstrated that plaintiff's attorney engaged in 56 unwarranted interruptions and objections during plaintiff's six prior deposition sessions, which could only be interpreted as "a continuous series of ill-motivated attempts to disrupt and interfere" with the deposition. The Court also found that plaintiff's attorney's verbal assault on defendant's attorney, including accusing him of being a racist, would not be tolerated, and fined plaintiff's attorney \$50 for each of the 56 unwarranted inter-

ruptions, and \$500 for each of the four aspersions upon defendant's attorney's character as a "racist."

### **Negligence**

In *Wilde et al. v. CSX Transportation, Inc.*, No. 14-CV-50S (Dec. 27, 2016), a minor was injured following a fall from a concrete support to defendant's railroad bridge, and the minor's parents brought a tort action for compensatory damages in New York state court. The bridge, located a half mile outside of town, had four "no-trespassing" signs located at each corner and a railing on either side, but no fence to restrict access.

Following removal, the Court granted defendant's motion for summary judgment, holding first that, as a matter of law, defendant was not on notice of trespassers at the site. There was no factual dispute that defendant had ever received prior notice of trespassers at the bridge, and neither the presence of trespassers one half mile away nor the placement of the "no trespassing" signs made it foreseeable there would be trespassers at this location. Without notice of trespassers, the Court determined there did not exist a duty to install a fence. The Court also found that the concrete support was an open and obvious danger in any event, for which defendant did not owe a duty to warn.