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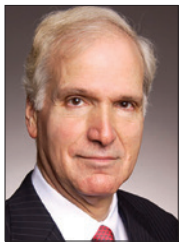
EASTERN DISTRICT ROUNDUP

Anonymous Jury, Lack of Standing, 'Give Up' Transaction



By **Harvey M. Stone**

And **Richard H. Dolan**

This column reports on several recent and significant representative decisions by the U.S. District Court for the Eastern District of New York. Judge Brian M. Cogan granted a motion, over defendant's objection, for an anonymous and partially sequestered jury. Judge Ann M. Donnelly found that plaintiff's failure to plead concrete injury deprived him of standing and the court of jurisdiction. And Judge Eric R. Komitee, on appeal from a bankruptcy court decision, held that the homestead exemption would cover certain proceeds from the sale of debtor's residence as part of a "give-up" transaction.

Anonymous and Partially Sequestered Jury

In *United States v. Luna*, 19 CR 576 (EDNY, July 2, 2022), Judge Cogan granted the government's motion for an anonymous and partially sequestered jury where defendant, a Mexican law enforcement officer, was charged with facilitating a notorious drug cartel's cocaine smuggling and violence.

In support of its motion, the government cited the need to ensure the integrity of the trial and the impartiality of the jury by preventing harassment or intimidation of jurors and mitigating their fear of such tactics. The special measures were purportedly necessary because the charges—participating in a continuing criminal enterprise involving the distribution of thousands of kilograms of cocaine—are exceptionally serious, defendant Garcia Luna has the means to interfere with the judicial process, and the case has received intense media scrutiny.

Defendant countered that (1) an anonymous and partially sequestered jury would erode the presumption of innocence and his ability to conduct an effective voir dire; (2) the government did not charge him with crimes of violence and has no evidence of any history of violence on his part; (3) the potential for publicity does not, in itself, justify the restrictions sought; and (4) less extreme remedies could be used to conceal the jurors' identities.

As Cogan noted, "during [defendant's] tenure as a high-ranking Mexican law enforcement officer, [he] allegedly facilitated the cartel's violence and drug smuggling by providing the cartel with information and protection at a very high level." According to the proffered facts, in exchange for millions of dollars defendant corruptly aided "one of the world's most notorious and violent drug trafficking organizations." Whether charged with violence or not,

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he "cannot deny knowledge of the cartel's violent activities, and it is not a major jump to infer that he may have had access to some of the individuals responsible for that violence." The cartel's pervasive violence and broad reach make it "reasonably likely that jurors may become fearful of their individual safety if not provided with anonymity." Slip op. 3-4.

In addition, with his deep ties to both the Mexican government and the Sinaloa Cartel, defendant "likely has the intent and resources to engage in witness intimidation and harassment." There is an easy leap from that to jury tampering.

The government has also shown a likelihood of considerable publicity, which could cause disclosure of jurors' names and expose them to intimidation.

Finally, "a searching voir dire and jury instructions explaining that the use of an anonymous jury is a frequent occurrence in federal court will ameliorate any potential prejudice to Mr. Garcia Luna." To that end, the court will seek the parties' input on additional questions to ask the panel at the in-person inquiry. These steps will protect the jurors' safety while allowing the defense to identify bias among jurors without knowing their names, addresses and places of employment. The court will also mitigate prejudice by telling the jury that their names will not be disclosed and their travel will be aided by the U.S. Marshalls service "out of respect and concern for their privacy." Slip op. 5-6.

No Standing or Jurisdiction Where 'Concrete Injury' Not Adequately Alleged

In *Steinmetz v. Allied Interstate*, 21 CV 5059 (EDNY, July 12, 2022), Judge Donnelly determined that, because plaintiff had failed to plead "concrete injury" required for standing, sua sponte dismissal was required on jurisdictional grounds.

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Plaintiff sought to assert class action claims under the Fair Debt Collection Practices Act, 15 U.S.C. §1692, et seq., based on a debt collector's transmission of two collection letters, one stating the amount due as $0, and the other as $575.73. Plaintiff did not pay the debt and alleged that he "'had to spend time and money investigating these [l]etters and their consequences,' and that '[b]ut for Defendant[s'] actions, [he] would have responded differently.'" Slip op. 2.

After defendants moved to dismiss under FRCP 12(b)(6), Donnelly directed the parties to file supplemental briefing addressing whether, in light of *TransUnion v. Ramirez*, 141 S. Ct. 2190 (2021), and *Maddox v. Bank of New York Mellon Trust Company, N.A.*, 19 F.4th 58 (2d Cir. 2021), plaintiff had alleged injury-in-fact so as to establish Article III standing and, thus, federal jurisdiction. Although the parties agreed that the court had jurisdiction, "federal courts have an independent obligation to resolve any issue about their subject matter jurisdiction sua sponte," slip op. 4 (citation omitted), and Donnelly found jurisdiction lacking.

TransUnion held that "'[o]nly those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court.'" Slip op. 4, quoting 41 S. Ct. at 2205. "[W]hether a harm qualifies as 'concrete' hinges on 'whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts.'" *Maddox,* 19 F.4th at 63, quoting *TransUnion*, 141 S. Ct. at 2204.

Plaintiff failed to meet this standard. The mere receipt of a confusing or misleading debt collection letter does not establish a harm closely related to fraudulent or negligent misrepresentation, and spending time or money for legal advice in response to a confusing debt collection letter is not sufficient to establish injury-in-fact. Slip op. 5-8 (collecting cases). Plaintiff's argument that

his pleading supported an inference that he did not pay as a result of his confusion over the amounts owed in the two different letters was not supported by the complaint, which alleged only that "[b]ut for [d]efendant[s'] actions, [p]laintiff would have responded differently" and was "devoid of the type of specific factual allegations that would allow the Court to assume that [p]laintiff actually relied on [defendants'] representation to his own detriment."

Having dismissed on jurisdictional grounds, Donnelly did not address defendants' motion to dismiss for failure to state a claim.

Bankruptcy Appeal—'Give-Up' Transactions

In *Stark v. Pryor (In re Stark)*, 20 CV 4766 (EDNY, June 28, 2022), Judge Komitee, reversing a bankruptcy court decision, held that equity proceeds from a "give-up" (or "carve-out") transaction involving the debtor's residence was, within specified limits, subject to the homestead exemption.

Appellant/debtor Sheryl Stark commenced a Chapter 7 bankruptcy proceeding five days before a scheduled foreclosure sale on her residence. Debtor had no equity in the property.

Trustees in bankruptcy are not empowered to sell estate property when the sale would not benefit the unsecured creditors. The trustee may abandon the property, and the mortgage holder must proceed to a state foreclosure proceeding, which is more costly than a sale in bankruptcy. A "give-up" transaction is a workaround by which "the Trustee agrees to sell the house inside the bankruptcy process in return for the mortgage-holder's agreement to 'give up' some of the proceeds of that sale to the estate." Slip op. 3. This device provides a benefit to the unsecured creditors.

Debtor, claiming a homestead exemption under New York law in the amount of $170,825, objected to the carve-out sale, arguing that such deals are proscribed under the Bankruptcy Code and, if the carve-out sale went forward, she was entitled to her homestead exemption. The bankruptcy court held that (1) carve-out deals are permissible, and (2) the homestead exemption did not apply because the "carved-out funds flow from the trustee's negotiation rights and not the debtor's equity in the property." Slip op. 7, quoting *In re Stark*, No. 8-20-70948, 2020 WL 5778400 (Bankr. EDNY Sept. 25, 2020), at *6.

On appeal, Komitee agreed with the bankruptcy court that carve-out deals are permissible, but found the bankruptcy court erred in determining that debtor was not entitled to her homestead exemption in a carve-out deal. New York law provides for exemption of a New York debtor's home—"'a lot of land with a dwelling thereon' that is 'owned and occupied as a principal residence' up to $170,825 'in value above liens and encumbrances.' NY CPLR §5206(a); N. Y. Debt. & Cred. Law §282." Slip op. 12.

As Komitee observed, the "value" of a carve-out to the secured lender was that the trustee was enabling the sale of the property outside a foreclosure proceeding by trading away the debtor's right to remain on the property without making mortgage payments during the course of any foreclosure proceeding. Accordingly, "the value resides in the homeowner's 'property' rights in the house and is thus protected by the homestead exemption." Slip op. 14. If during the course of the bankruptcy case, "the property value increases past the amount of the lien, equity can be created and may become subject to any applicable exemptions." "[C]arve-out arrangements do the same thing; the secured creditor's agreement to accept less money upon a sale creates equity in the home where none existed before." Slip op. 17-18.