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Antitrust: Opioid Treatment Producer Cannot Avoid Antitrust Class Action

In re: Suboxone Litigation, No. 19-3640 (3d Cir. July 28, 2020).

In another chapter of the expansive opioid crisis, the Third Circuit affirms class certification against a producer of a vital opioid addiction treatment who illegally prevented generic competitors from entering the market and cost purchasers millions of dollars in unnecessary high prices. (The defendant has already paid $2 billion in fines and penalties for such conduct, including in an action prosecuted by Massachusetts, whose Medicaid program was grossly overcharged).

Indivior, Inc., formerly Reckitt Benckiser Pharmaceuticals, Inc. (Reckitt), manufactured Suboxone, a tablet-form prescription drug used to treat opioid addiction. The FDA granted Reckitt a seven-year period of exclusivity in which other manufacturers could not introduce generic versions of Suboxone tablets. As the exclusivity period neared its end, Reckitt developed an under-the-tongue film version of Suboxone, which would enjoy its own exclusivity period. According to Burlington Drug Co. (Burlington) and 71 other purchasers of Suboxone (Purchasers) who were allegedly injured by Reckitt's conduct, Reckitt's transition to Suboxone film was coupled with efforts to eliminate demand for Suboxone tablets and to coerce prescribers to prefer the film version, by engaging in a widespread campaign falsely disparaging Suboxone tablets as more dangerous to children and more prone to abuse; publicly announcing that it would withdraw Suboxone tablets from the market due to safety concerns; increasing tablet prices above film prices; withdrawing Suboxone tablets from the market; and other similar actions.

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The District Court certified the class, holding that common evidence of injury and damages showed that the Purchasers paid more for brand Suboxone products than they would have for generic tablets due to Reckitt's actions to promote film, disparage tablets, and suppress generics' market entry, and that Burlington was an adequate class representative because it had the requisite knowledge of the litigation, including "the basis for the claimed injury," and its interests aligned with the class.

The Third Circuit affirmed. It agreed with the lower court that Federal Rules requirements for class actions had been satisfied: FRCP 23(b)(3) requires that common questions predominate and Rule 23(a)(4) requires that the named plaintiff(s) adequately represent the class. It also found an antitrust injury: Reckitt's behavior caused them to pay more than they otherwise would have for Suboxone products. Although Reckitt argued that it could lawfully raise prices on Suboxone tablets, the Purchasers' theory of their case was based on more than mere pricing, citing the totality of Reckitt's actions, such as raising prices, withdrawing tablets from the market, providing rebates only for film, disparaging the safety of tablets, and delaying the generics' entry. "Reckitt incorrectly asks us to examine each of these acts individually. Rather, we look at 'all the acts taken together [to determine whether they] show the willful acquisition or maintenance of a monopoly.'"

Reckitt unsuccessfully argued that Purchasers did not satisfy the FRCP's predominance requirement because their model only calculated aggregate damages. "Reckitt is incorrect. Antitrust plaintiffs may satisfy the predominance requirement by using a model that estimates the damages attributable to the antitrust injury, even if more individualized determinations are needed later to allocate damages among class members."

Reckitt finally challenged Burlington's role as a class representative, citing that it risked conflict with class counsel and lacked control over the litigation. The court disagreed. The possibility of such conflict is present in most class actions, with class representatives seeking to add defendants while counsel may want to avoid further complexity. And it is well known that "it is counsel for the class representative and not the named parties . . . who direct and manage [class] actions. Every experienced federal judge knows that any statements to the contrary [are] sheer sophistry." Here, the record showed that Burlington was aware of its role as a fiduciary, it understood the basis for the claimed injury, and had "the requisite interest in and knowledge about the case to satisfy the adequacy requirement."

LINK

Housing: Historic District has No Standing Under FHA in Absence of Causal Link Between Ordinance and Increased Blight

Tenth Street Residential Ass'n v. City of Dallas, no. 19-10826 (5th Cir. Aug. 3, 2020).

The Fifth Circuit finds that, while increasing blight and diminished tax revenues are injuries cognizable under the FHA, those injuries cannot be attributable to an ordinance which streamlined the process for obtaining demolition permits in the absence of evidence that the new ordinance actually increased demolitions.

Tenth Street Historic District (District) is one of a few remaining Freedmen's Towns in the nation and the only one in Dallas (City). Tenth Street Residential Association (TSRA) is Tenth Street's neighborhood association, whose members are owner-occupants of single-family homes. Tenth Street was designated as a Landmark Historic District I 1993. Despite that protection, as long-time families died off or left the area, properties have been sold off to absentee landlords or to new residents who don't recognize the unique history of the neighborhood. Inappropriate alterations, lax code enforcement, and demolitions (usually under the auspices of the City) have resulted in a once proud neighborhood on the brink of losing landmark status.

Prior to 2010, all demolitions of historic homes in the City, regardless of size, were processed under City Code 51A-4.501(h), which requires the City or property owner seeking to demolish a residential structure to submit an application to the Landmark Commission citing one or more of the following reasons:

I. To replace the structure with a new structure that is more appropriate and compatible with the historic overlay district;
II. No economically viable use of the property exists;
III. The structure poses an imminent threat to public health or safety; or
IV. The structure is noncontributing to the historic overlay district because it is newer than the period of historic significance.

In June 2010, the City Code was amended to include ordinance 4.501(i), intended to create a less burdensome procedure for demolishing historic homes under 3,000 square feet (which includes all Tenth Street homes). To that end, 4.501(i) allows the City to obtain a demolition certificate from the Landmark Commission after it receives a court order that the structure is an urban nuisance, established by proving, by a preponderance of the evidence, that the structure "is dilapidated, substandard, or unfit for human habitation and a hazard to public health, safety, and welfare."

After receiving the court order, the Landmark Commission has little to no discretion to do anything but approve the demolition. The only way to suspend demolition once the 4.501(i) process has been initiated is to intervene as an "interested person," which requires the intervenor to provide evidence that he/she has or will obtain title to the

property, has authority to rehabilitate the structure, and will complete rehabilitation of the property by a specific date, backed by a performance bond or similar legal assurance.

To incentivize historic restoration, the City uses a tax exemption program. In districts like Tenth Street, owners can receive an exemption from City property taxes of 100 percent of the property's value if the cost of rehabilitation exceeds 25 percent of the pre-rehabilitation value of the structure, excluding land value. Because the tax program is tied to property values, TSRA members who own smaller, less valuable homes necessarily receive lower exemption amounts than those in other neighborhoods who own larger homes with higher property values.

TSRA filed for injunctive relief against the City, alleging violations of the Fair Housing Act and the Equal Protection Clause, claiming that the 2010 amendment to the City code, 4.501(i), and the City's failure to provide equal services was intentional discrimination on the basis of race or, alternatively, that the policies caused a disparate impact on African American and Latino residents. The district court dismissed.

The Fifth Circuit agreed, based on a lack of standing. To invoke the jurisdiction of federal courts, a claimant must show: (1) an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not conjectural or hypothetical;" (2) a causal connection between the injury and the conduct complained of; and (3) that it is "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

The Circuit assessed TSRA's showing of each of the necessary elements:

1. **Injury-in-fact.** An organization like TSRA can establish injury in fact, under two theories: "associational standing" or "organizational standing." Associational standing requires that the individual members of the group each have standing and that "the interest the association seeks to protect be germane to its purpose." Organizational standing, on the other hand, does not depend upon the standing of the organization's members. *Id.* The organization can establish standing in its own name by meeting the same standing test that applies to individuals. TSRA asserted injuries under both theories, contending that the City's demolition and historic tax credit policies (1) make it more difficult for TSRA to fulfill its organizational role; (2) detrimentally impact the ambiance of the historic neighborhood, reduce property values, and threaten the neighborhood's designation as a historic district; and (3) pose an imminent threat to each member's home.

The court found insufficient "organizational injury." Time spent attending meetings and one member's efforts intervening as an interested party did not constitute diversion of "significant resources," and TSRA's overall mission to "prevent speculation and gentrification" on Tenth Street was already aligned with and furthered by its efforts to thwart demolitions on Tenth Street. "TSRA has established '[a]t most, . . . 'a setback to the organization's abstract social interests,' but not an injury-in-fact."

TSRA's remaining injuries—depreciation of neighborhood aesthetics and property value and threat of demolition—were pled under the associational injury theory, meaning, those injuries must be sufficient to confer standing to the individual members to sue in their own right. The potential of future demolition was insufficient, particularly given the City's 2019 ordinance wherein it decreed that no future funds would be allocated to Tenth Street demolition.

However, the Circuit did find that the overall blight in the neighborhood and the devalued property values as a result of accelerated demolition could constitute "zone-of-interest" injuries under the FHA, based on *Bank of America v. City of Miami,* 137 S. Ct. 1296 (2017) which had found that Miami's financial injuries—lost tax revenue and extra municipal expenses—"fall within the FHA's zone of interests, as we have previously interpreted that statute."

2. **Traceability.** Traceability required that TSRA's injury be causally connected to the City's alleged misconduct. The Circuit found that it was not: "TSRA's theory of causation goes like this: the City enacted 4.501(i); the implementation of 4.501(i) caused the rate of demolitions and number of vacant lots on Tenth Street to increase; and the increased vacant lots on Tenth Street cause neighborhood deterioration, both financially and aesthetically, and threaten its status as a historic district." But TSRA's own evidence demonstrated that the rate of demolitions carried out by the City actually declined after 2010; from 3.2 per year between 1993 to 2010 to 1.4 per year thereafter, meaning there was not a "direct relation between the injury asserted and the injurious conduct alleged."

3. **Redressability.** Finally, TSRA failed to show the "likelihood that the requested relief will redress the alleged injury." On appeal, TSRA defended only its claim for injunctive relief requiring "all historic preservation demolition requests to be processed under the procedures and standards of [the prior Code provision] 4.501(h)," without explaining how this relief would redress the harms caused by the City's historic tax credit policy.

> Unfortunately for TSRA, the argument it did preserve lacks merit. TSRA posits that its requested relief—requiring all demolitions to be processed by 4.501(h)—would reduce the demolitions and cure the plight of Tenth Street. But as established above, there were more demolitions carried out per year under 4.501(h) than under 4.501(i). Under TSRA's theory that increased demolitions cause neighborhood deterioration, requiring compliance under 4.501(h) would not be the antidote for its malady.

LINK

Immunity: Michigan Governor and State/Local Officials are Subject to Tort Liability for their Flint Water Actions

Mays v. Governor, no. 157335 (Mi. July 29, 2020).

In a 4-2 opinion affirming the courts below, the Michigan Supreme Court declined to dismiss a class action for inverse condemnation and bodily harm against former Michigan Governor Rick Snyder and other state and local officials for their actions which resulted in toxic water from the Flint River being supplied to Flint residents, causing a major health crisis, damage to residential water systems and a precipitous drop in property values.

For more than 50 years, Flint, Michigan (Flint) received its water supply from Lake Huron. In 2013, then-Governor Rick Snyder (Snyder) authorized an alternative water delivery system, which resulted in the Flint River serving as an interim water source for the residents of Flint—despite his alleged knowledge of a 2011 study that cautioned against the river as a source of drinking water because millions of dollars in water treatment upgrades would be needed to ensure safety. The switch to the Flint River was made in April 2014. By June 2014, residents complained that they were becoming ill after drinking the water, later reporting hair loss, skin rashes, lead poisoning and Legionnaire's disease, from which 12 people ultimately died. In October 2014, General Motors announced that it was discontinuing the use of Flint water due to concerns about its corrosive nature. In February 2015, the EPA found that the Flint water supply was contaminated with iron at levels so high that the testing instruments could not measure it, and the state was advised that black sediment found in some of the tap water was lead.

Plaintiffs alleged that during this time, state officials failed to take any significant remedial measures to address the growing threat and instead continued to downplay the risks, advising Flint water users that it was safe to drink the tap water--while arranging for state employees in Flint to drink water from water coolers installed in state buildings. Additionally, plaintiffs alleged that the state advised the EPA that Flint was using a corrosion-control additive with knowledge that the statement was false. In October 2015, Snyder acknowledged that the Flint water supply was contaminated with dangerous levels of lead and ordered Flint to reconnect to its prior water source.

In January 2016, plaintiffs initiated a four-count class action in the Court of Claims against Snyder, the state of Michigan, the Michigan Department of Environmental Quality (MDEQ), and the Michigan Department of Health and Human Services (collectively, the state defendants) and against former Flint emergency managers Darnell Earley and Jerry Ambrose (the city defendants). They alleged, in part, claims for bodily injury and inverse condemnation and sought damages.

After surviving defendants' motions for summary disposition at the Court of Claims and Court of Appeals, plaintiffs' case reached the Michigan Supreme Court. It affirmed the

Court of Appeals inverse condemnation judgment, finding that the pleadings established that defendants' actions were a substantial cause of the decline in plaintiffs' property value, that defendants took affirmative actions directed at plaintiffs' property, and that plaintiffs suffered a unique or special injury different in kind, not simply in degree, from the harm suffered by all persons similarly situated. While state and municipal agencies performing governmental functions are generally immune from tort liability, the government may voluntarily subject itself to liability.

Following United States Supreme Court precedent in comparing plaintiffs to a generalized group of similar individuals—other municipal water users who generally experience harms such as service disruptions and externalities associated with construction—the Flint plaintiffs alleged injuries that were different in kind, not just degree, from other municipal water users when they alleged that water contaminated with Legionella bacteria and toxic levels of iron and lead flowed through their pipes, service lines, and water heaters, which damaged the infrastructure and diminished their property's value. Accordingly, plaintiffs' allegations were sufficient to conclude that plaintiffs had alleged a claim of inverse condemnation to survive a motion for summary disposition.

Defendants continued to argue that plaintiffs failed to satisfy statutory notice requirements: MCL 600.6431 provides that in actions for property damage or personal injuries, the claimant must file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within six months following the happening of the event giving rise to the cause of action--the date on which the defendant's breach harmed the plaintiff. While defendants asserted that the April 2014 switch to Flint River water was the operative breach, predating plaintiffs' complaint by nearly two years, the Michigan Supreme Court found that questions of fact remained as to when plaintiffs sustained their injuries, meaning summary disposition at this stage of the litigation was premature. And while the Michigan legislature has never expressly created an exception to immunity for a constitutional tort, one case (*Smith v Dep't of Pub Health*, 428 Mich 540 (1987), *aff'd sub nom Will v Mich Dep't of State Police*, 491 US 58 (1989), held that when a plaintiff brings a constitutional-tort claim against the state, in certain instances, the government is not immune from liability for violations of its Constitution. Recognizing that discovery had not yet occurred and accepting plaintiffs' allegations as true, the majority found that dismissal of monetary damages claims at this stage of the litigation would be premature.

A concurrence dealt more explicitly with the Court of Claims' Act six-month notice rule, citing the "harsh-and-unreasonable-consequences" exception to the notice requirement which the Court of Appeals had relied on, and further affirming the Court of Appeals' ruling that the fraudulent-concealment exception of a related provision would apply to the notice requirement: "The omission of a fraudulent-concealment exception to MCL 600.6431 is not reconcilable with the Legislature's intent to provide claimants with two years from the date of discovery to bring suit for harm that was fraudulently concealed."

Two justices dissented. One issue of contention was the majority's view that defendants' actions shocked the conscience: there were various studies about the safety of Flint River water, Snyder testified that he was repeatedly assured by the MDEQ that the water was safe, and there was no broad consensus that using the Flint River as a water source would cause a serious public health crisis. More specifically, the dissents focused on the notice issue: "Plaintiffs filed their complaint on January 21, 2016, and thus the event giving rise to the cause of action must have happened on or after July 21, 2015, for plaintiffs' action to have been filed in a timely manner," they wrote. "Because plaintiffs alleged in their complaint and in their amended complaint that the event giving rise to the cause of action was the switching of the water supply on April 25, 2014 ... plaintiffs' action was untimely."

LINK

Qualified Immunity: No Immunity for Officer Who Fired at Vehicle Driven Towards Him as it Passed Within Inches

Reavis v. Frost, no. 19-7042 (10th Cir. July 28, 2020).

Affirming the lower court, the Tenth Circuit denies qualified immunity where a driver attempted to flee a stop by driving his truck directly at an officer, who shot from the side and rear of the passing vehicle; a dissent did not find the law to be clearly established.

Two deputies from Oklahoma's Okfuskee County Sheriff's Department responded to the report of a stabbing incident in November 2016. They went to the Creek Nation Emergency Room in Okemah, Oklahoma, where the stabbing victim identified his assailant as Josh Williams, who had fled the scene in a black 1990s Chevrolet truck.

The officers split up and soon encountered the vehicle; Deputy Blake Frost (Frost) stopped his squad car in the path of the truck, which came to a stop several car lengths away. Unbeknownst to Frost, the driver was not Josh Williams but James Coale (Coale). Frost exited his vehicle, identified himself and commanded Mr. Coale to show his hands. When Coale did not comply, Frost pointed his gun at Coale, who then accelerated his truck toward Frost, who retreated behind his squad car. As the truck passed within inches, Frost fired five to seven times, hitting the side and rear windows of the vehicle, killing Coale.

In the action by Coale's estate for violation of Coale's Fourth Amendment rights, Frost moved for summary judgment based on qualified immunity. The district court concluded that a reasonable jury could find Frost's use of deadly force was objectively

unreasonable under the circumstances and that this was clearly established under Tenth Circuit precedent.

The Tenth Circuit affirmed. Applying *Graham's* objective reasonableness standards required an examination of the entire scenario faced by Frost. "In evaluating whether the suspect poses an immediate threat when deadly force is employed, the court must consider the totality of the circumstances. That is, the question of whether there is no threat, an immediate deadly threat, or that the threat has passed, at the time deadly force is employed must be evaluated based on what a reasonable officer would have perceived under the totality of the circumstances." The Circuit reviewed various precedents which illustrate the legitimacy of responding to an ongoing deadly threat—such as when a vehicle is headed directly towards an officer, who fires through the windshield to stop the driver—and contrast with Frost's firings, which occurred after he was out of the path of Coale's truck and partially after the vehicle had passed him.

One such case "clearly places officers on notice that the use of deadly force is unreasonable when a reasonable officer would have perceived that the threat had passed." It also demonstrates that considering the precise moment the officer used force is important because "circumstances may change within seconds[,] eliminating the justification for deadly force." Furthermore, unlike *Plumhoff* or other scenarios where the speeding vehicle might conceivably injure other pedestrians, this stop had occurred on a dirt road, far removed from any meaningful population density.

While the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality," the Circuit added that "Nevertheless, our analysis is not a scavenger hunt for prior cases with precisely the same facts, and a prior case need not be exactly parallel to the conduct here for the officials to have been on notice of clearly established law."

To answer the question of whether an officer can shoot at a vehicle after the deadly threat has passed, the Circuit turned to *Tennessee v. Garner*, 471 U.S. 1 (1985), which addressed a Tennessee statute permitting an officer to "use all the necessary means to effect the arrest" of a fleeing suspect. As *Garner* clearly established, "when a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."

Construing the facts, as the district court found them, in the light most favorable to the Estate, the Circuit concluded that a reasonable officer in Frost's position would have known when he raised his weapon and fired that there was no immediate threat of harm to himself or others. And given Tenth Circuit precedent, "it would also be clear to every reasonable officer—who would have perceived any threat posed by Mr. Coale's truck had abated—that the use of deadly force to stop Mr. Coale's truck was unreasonable."

DISSENT: Judge Briscoe dissented:

> I assume without deciding that Frost's actions (under the version of the facts a reasonable jury could find when read in the light most favorable to Coale) violated the Fourth Amendment. **After careful review of applicable precedent, however, I cannot agree that every reasonable officer in Frost's position would have known that the law governing those actions was clearly established.** This is especially true given recent Supreme Court rulings which have emphasized that "clearly established law" requires prior precedent which "squarely addresses" the specific circumstances confronting officers when they deploy force. Here, taking into account ambiguities in our case law, not every reasonable officer standing in Frost's shoes would have known it was illegal to fire as Coale's truck pulled close to him and passed.

He found the majority's reliance on *Garner* as misplaced, because, as the Supreme Court had later cautioned, decisions like *Garner* "lay out excessive-force principles at only a general level." *White v. Pauly*, 137 S. Ct. 548, 552 (2017). Briscoe cited various Supreme Court decisions casting doubt on the conclusion that an officer would clearly know not to shoot at a vehicle being driven in a threatening manner: the law was not clearly established "when an officer shot and killed a speeding, evasive, and potentially intoxicated driver who was moments away from encountering another officer," *Mullenix*; when "officers fired 15 shots into a suspect's vehicle, including 12 shots when the suspect was attempting to get away, after a high-speed chase endangering those on the road and contact with patrol vehicles which prompted the suspect to 'thr[o]w the car into reverse in an attempt to escape,'" *Plumhoff*; and "when an officer shot in the back a suspect who refused commands to exit a vehicle, struggled with the officer, and started to drive off." *Brosseau.*

While Frost might have been wrong in concluding Coale's truck still posed a threat as it pulled even with him and then drove past, "[a]n officer may be found to have acted reasonably even if he has a mistaken belief as to the facts establishing the existence of exigent circumstances." Judge Briscoe was particularly critical of the majority's "precise moment" analysis: "We have said that analyzing the precise moment of lethal force (and whether an officer recklessly created the need to use such force) is at most "a specific application of"—not a substitute for—"the 'totality of the circumstances' approach inherent in the Fourth Amendment's reasonableness standard."

Briscoe faulted the majority's for focusing on a single presumed fact, despite their endorwement of the "totality of the circumstances" approach—"Over and over, the majority touts the possibility that a jury could conclude there was no threat of harm to Frost at the moment he fired, as shown by (inter alia) the deadly bullet coming from the back. Under binding Supreme Court precedent, that analysis is far too cramped."

LINK

Trials: Plaintiff Can Litigate Using Pseudonym Where Disclosure Would Bring Shame to Family and Risk Harassment

Doe v. Neverson, no. 20-10265 (11th Cir. July 30, 2020).

Although mere "personal embarrassment" is not sufficient grounds to file a complaint anonymously, a lower court improperly refused to allow a pseudonym where revelations of sexual assault would subject the plaintiff and her family to great shame and could instigate a violent response.

The plaintiff (Doe) alleges that she was assaulted by Tremaine Aldon Neverson (Neverson), an internationally acclaimed singer-songwriter known as Trey Songz, while the two were partying at a nightclub in Miami on New Year's morning in 2018, after attending an earlier gathering at Snoop Dog's residence.

Two years later, Doe sued Neverson in federal court for sexual assault, battery, and negligent and intentional infliction of emotional distress. She filed her complaint using the pseudonym "Jane Doe." Before Neverson was served with a summons, the district court *sua sponte* ordered Doe to show cause as to why the complaint should not be dismissed because it was impermissibly filed under a fictitious name.

Doe responded to the order to show cause and moved for leave to proceed pseudonymously. In the motion, she argued that she should be permitted to proceed under a pseudonym because she will be required to disclose matters of the "utmost intimacy," including Neverson's sexual assault. She further asserted that she comes from a devout Muslim family from Trinidad, and the nature of the allegations would bring shame to her and her family because of their cultural and religious traditions. In addition, Doe argued that if her identity were publicized, she and her family would be subject to online bullying, harassment, and threats. She further asserted that using a pseudonym would not prejudice Neverson because she would provide him with her real name under a protective order so that he could conduct discovery and build a defense.

To substantiate these claims, Ms. Doe attached her own declaration including The Shade Room's post about the lawsuit—titled "Trey Songz Reportedly Hit With $10 Million Lawsuit In Damages For Alleged Sexual Battery"—and examples of comments by readers of that post, such as:

- "THESE H0's GOTTA STOP WITH THIS BS";
- "Just another female tryna get some money from a celebrity";
- "I know someone can pull up Diddys 2017 New Year's Eve photos let's find out who this chick is roomies";

The district court denied the motion and dismissed the complaint without prejudice, giving Doe one week to file an amended complaint under her own name. The court rejected her argument that the nature of the allegations would bring harm and shame to

her family due to their cultural/religious traditions because "'personal embarrassment' alone is not enough for leave to proceed anonymously." The court also concluded that the contention that Doe would suffer online bullying, harassment, and threats "lack[ed] evidentiary support," because she did not "identify anyone who might harm her." Finally, although acknowledging that proceeding pseudonymously would "not pose that great of a risk of unfairness to [Mr. Neverson]," the court concluded that Doe should be required to proceed under her real name because she might have to testify publicly at trial eventually, so "the protective order . . . would only serve to postpone the inevitable."

The Eleventh Circuit reversed, reviewing the lower court's order for abuse of discretion: A district court abuses its discretion if its ruling is based on an error of law or "if it fails to actually consider the circumstances of the case and to weigh the relevant factors and instead follows a blanket rule in making its final decision."

While FRCP 10(a) requires that "every pleading" in federal court "must name all the parties," creating a "strong presumption in favor of parties proceeding in their own names . . . the rule is not absolute." A party may proceed anonymously by establishing "a substantial privacy right which outweighs the 'customary and constitutionally-embedded presumption of openness in judicial proceedings.'"

According to the Circuit, the "first step" in evaluating a request for anonymity "(1) is challenging government activity; (2) would be compelled, absent anonymity, to disclose information of the utmost intimacy; or (3) would be compelled, absent anonymity, to admit an intent to engage in illegal conduct and thus risk criminal prosecution." Along with these factors, courts "should carefully review *all* the circumstances of a given case and then decide whether the customary practice of disclosing the plaintiff's identity should yield to the plaintiff's privacy concerns."

The Circuit held that the lower court abused its discretion for two reasons. First, it erroneously concluded that Doe would be required to disclose her identity at trial, "contrary to cases showing that is not necessarily so." The analysis of whether a plaintiff may proceed anonymously may change at different stages of the litigation. But it was incorrect to assume that Doe could not proceed at trial under a pseudonym: the Circuit cited one precedent where women who were videotaped engaging in sexual conduct when they were minors were entitled to proceed anonymously at trial. "The district court therefore erred in concluding that proceeding under a pseudonym is only 'postpon[ing] the inevitable.'"

Second, the district court incorrectly rejected Doe's argument regarding the shame the allegations would bring to her and her family due to their religious beliefs, relying on cases that hold that "personal embarrassment" is not enough to warrant proceeding anonymously in sexual assault cases. While "personal embarrassment" alone does not justify proceeding under a pseudonym, the Eleventh Circuit has held that "social stigma" is sufficient to warrant proceeding anonymously, and "[c]ourts have permitted plaintiffs to proceed anonymously in cases involving mental illness, homosexuality, and

transsexuality" because "the social stigma attached to the plaintiff's disclosure was found to be enough to overcome the presumption of openness in court proceedings."

Here Doe was not just alleging that the assault allegations might result in "personal embarrassment," she was asserting that because she is from a "devout Muslim family," the "very nature of her allegations would be sufficient to bring harm to [herself] and shame to her family under the cultural/religious traditions that her family practices."

The Circuit also commented that the district court may have too easily discounted evidence that Doe would be subject to threats and harassment. It cited *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981), a Mississippi case where a mother and her children were objecting to a public school's morning prayer practice. The allowing the plaintiffs to proceed anonymously, the court in *Stegall* had cited local newspaper reports of public reaction to the lawsuit voiced at a school board meeting, which included threats such as "Christians must beat the evil out of these people." The Circuit noted that "In today's digital age, Ms. Doe's evidence seems similar to the news report we relied on in *Stegall*."

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