Tort Liability and Mutual Aid Agreements

By Alan D. Cohn[1]

I. Introduction

Mutual aid agreements form the basis for public safety cooperation. These agreements can be between neighboring jurisdictions, among all jurisdictions in a particular region, among all jurisdictions statewide, between jurisdictions in different states, and between various levels of government (local, state, federal, tribal). Moreover, these agreements can be intended for both day-to-day and major incident response.

Tort liability is always a concern for municipal governments, and mutual aid responses can be another source of potential risk. Major incident response across state lines, involving disasters declared at the state level, typically implicates the Emergency Management Assistance Compact (EMAC), which has specific provisions addressing tort liability. However, day-to-day mutual aid response does not implicate the EMAC; liability issues are therefore governed by each state's law. Two common issues that can arise as a result of mutual aid responses are liability to responders from other jurisdictions for injuries suffered on a mutual aid response, and liability to third parties as a result of participation in a mutual aid response. These issues, and some proposed solutions, are discussed herein.[2]

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[2] There are numerous other sources of potential liability risks inherent in mutual aid responses. However, this paper focuses only on the two issues presented herein. Other excellent articles describe additional issues concerning mutual aid. *See, e.g.*, James T. O'Reilly, *Planning for the Unthinkable: Environmental Disaster Planning Issues in an Age of Terroristic Threats*, 9 WIDENER L. SYMP. J. 261, 263-268 (2003); William C. Nicholson, *Legal Issues in Emergency Response to Terrorism Incidents Involving Hazardous Materials: The Hazardous Waste Operations and Emergency Response ("HAZWOPER") Standard, Standard Operating Procedures, Mutual Aid and the Incident Management System*, 9 WIDENER L. SYMP. J. 295, 296 (2003); Howard D. Swanson, *The Delicate Art of Practicing Municipal Law Under Conditions of Hell and High Water*, 76 N.D. L. REV. 487 (2000).

II. Mutual Aid and Liability to Responders

A. Workers' Compensation, Special Employment, and the Exclusive Remedy

Under a typical state workers' compensation statute, an employee is automatically entitled to certain benefits when the employee suffers an injury or illness arising out of and in the course of employment. In exchange for this automatic entitlement, the employee and his or her dependents give up their right to bring suit against the employer under common law for negligence or other cause of action; this is known as an "exclusive remedy" provision.[3]

In some circumstances, more than one employer can become responsible for workers' compensation, such as where an employee of one employer is lent to, or borrowed by, another employer. In this situation, the lending employer is considered the "general employer" and the borrowing employer is considered a "special employer" (the employee sometimes being referred to as a "borrowed servant").[4] In several states, statutory provisions also identify categories of second employers who become "statutory employers" of employees of another employer.[5] In either case, the result is typically the same; the general employer and the special or statutory employer both become liable for workers' compensation claims filed by the employee.[6]

In the absence of provisions in the mutual aid agreement itself, there is division among the courts as to whether a firefighter responding on a mutual aid call in another jurisdiction is a "special employee" or "borrowed servant" for tort liability purposes. Some courts have found

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[3] *See* LARSON'S WORKERS' COMPENSATION LAW § 1.01 (Matthew Bender 2004).

[4] *See id.*, § 67.01[1]. Generally, a second employer becomes a "special employer" if: (1) the employee has made a "contract of hire, express or implied," with the second employer; (2) the work being performed "is essentially that of the second employer"; and (3) the second employer has the "right to control" the work of the employee. *Id.*

[5] *Id.*, § 67.04.

[6] Some states' mutual aid authorizing legislation, rather than the common law doctrine of special employment, may control the determination of whether the firefighter is an employee of the requesting jurisdiction. *See, e.g.*, *Lauria v. Borough of Ridgefield*, 291 A.2d 155 (Bergen County Ct. 1972), *aff'd*, 305 A.2d 78 (N.J. Super. Ct., App. Div., 1973).

that a firefighter responding to a mutual aid call was acting solely as an employee of the responding jurisdiction in the fulfillment of its duties, and not as a special employee of the requesting jurisdiction, and therefore the requesting jurisdiction is subject to suit by the firefighter.[7] By contrast, other courts have found that a firefighter responding to a mutual aid call is the "paradigmatic example of a special employee."[8]

B. The "All Responders" Model

Mutual aid-specific provisions could be inserted into state workers' compensation statutes that would resolve this issue to the advantage of both the individual responder and municipal governments. Such provisions would ensure that public safety personnel responding to mutual aid calls would receive workers' compensation coverage for injuries suffered on those calls, while shielding responding jurisdictions from tort liability as a result of injuries.

For example, most states have included "contractor under" provisions in their workers' compensation statutes. "Contractor under" provisions impose liability (typically secondary liability, but sometimes joint or even primary liability) for workers' compensation coverage on general contractors or other entities using subcontractors, for injuries suffered by employees of the subcontractors.[9] Under a typical secondary "contractor under" provision, claims are presented first to the individual's immediate employer, but if for some reason the individual

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[7] *See Enslow v. United States*, 811 F. Supp. 503 (C.D. Cal. 1992), *reversed and remanded*, No. 93-55164, 1994 WL 649979 (9th Cir. Nov. 15, 1994) (unpublished opinion, table citation at 42 F.3d 1399); *see also Nelson v. Borough of Greenville*, 124 A.2d 675 (Pa. Super. Ct. 1956) ("decedent's attendance at the West Salem fire was at the command of his own chief and was under a mutual aid arrangement between the fire companies"); *Kuntzweiller v. City of West Lafayette*, 29 N.E.2d 1007 (Ind. Ct. App. 1940) (firefighter responding to mutual aid call not special employee of requesting jurisdiction). *See also Garcia v. City of South Tucson*, 640 P.2d 1117 (Ariz. Ct. App. 1981) (police officer responding to mutual aid call not special employee of requesting jurisdiction; no joint venture where mutual aid agreement specified that each agency retained control over its employees, and "each party shall be responsible and liable for damages caused by its personnel during the course of rendering mutual law enforcement assistance . . .").

[8] *See Roma v. United States*, 344 F.3d 352, 356, 364 (3d Cir. 2003).

[9] *See* LARSON'S WORKERS' COMPENSATION LAW § 70.01 (Matthew Bender 2004); *see, e.g.*, TENN. CODE ANN. § 50-6-113; S.C. CODE ANN. §§ 42-1-400, -540.

cannot recover full compensation from the immediate employer, recovery is available from the general contractor. The purpose of these provisions is to ensure that adequate workers' compensation coverage is available to all employees on the worksite, with the general contractor having ultimate responsibility. An additional effect of these provisions is that workers' compensation becomes the exclusive remedy for workplace injuries with respect to *every* employer on the worksite, general contractors and subcontractors; an employee of a subcontractor cannot bring suit against the general contractor as a result of injuries sustained.[10]

A similar model could be developed for mutual aid responses with respect to governmental entities, and incorporated into intrastate mutual aid legislation. An "all responder" provision would provide that: (1) responding jurisdictions have primary responsibility for workers' compensation claims incurred during mutual aid responses; (2) the requesting jurisdiction has secondary or ultimate responsibility in the event that an individual responder is unable to recover the full value of his or her claim from the responding jurisdiction; and (3) workers' compensation is the exclusive remedy for injuries incurred during mutual aid responses with respect to *all* jurisdictions – requesting and responding – involved in the response. Already, the National Emergency Management Association (NEMA) has proposed Model Intrastate Mutual Aid Legislation (Model Legislation) intended to encourage states to create mutual aid arrangements between and among municipalities. An "all responder" provision could be included in state versions of the Model Legislation.[11]

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[10] *See, e.g.*, *Slaughter v. Duck River Elec. Membership Corp.*, 102 S.W.3d 612 (Tenn. Ct. App. 2002); *Boone v. Huntington & Guerry Elec. Co.*, 416 S.E.2d 212 (S.C. Ct. App. 1992).

[11] An "all responder" provision would also complement the Liability and Compensation provisions of the EMAC (Articles VI and VIII), which allocate responsibility for workers' compensation to the responder's employing jurisdiction, and insulate all responding jurisdictions from liability for acts taken in good faith.

A model provision, based on existing "contractor under" provisions, might read as follows:

> WORKERS' COMPENSATION
>
> With respect to any incident involving a response under a mutual aid agreement:
>
> (a) Workers' compensation shall be the sole and exclusive remedy for any injury or illness suffered by an employee of the requesting jurisdiction, or an employee of any responding jurisdiction, while engaged in activities relating to the request for assistance.
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> (b) No cause of action shall lie against the requesting jurisdiction, or any responding jurisdiction, by an employee of the requesting jurisdiction or any responding jurisdiction, for any injury or illness suffered by an employee of the requesting jurisdiction or any responding jurisdiction while the employee was engaged in activities relating to the request for assistance.
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> (c) The requesting jurisdiction shall be responsible for workers' compensation with respect to its own employees.
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> (d) (1) Each responding jurisdiction shall be responsible for workers' compensation with respect to its own employees.
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> (2) Every claim for compensation by an employee of a responding jurisdiction under this section shall be in the first instance presented to and instituted against that responding jurisdiction. The collection of full compensation from that responding jurisdiction shall bar any claim or recovery by the employee against the requesting jurisdiction under subsection (d)(3).
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> (3) To the extent an employee of a responding jurisdiction is unable to recover compensation from that responding jurisdiction with respect to an injury or illness suffered by the employee while the employee was engaged in activities relating to the request for assistance, the requesting jurisdiction shall be liable for workers' compensation to that employee, subject to the limitation set forth in subsection (d)(4).
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> (4) An employee of a responding jurisdiction shall collect from that responding jurisdiction and the requesting jurisdiction, in total, only the amount that he or she would be entitled to recover from the responding jurisdiction.

(5) A requesting jurisdiction that pays compensation to an employee of a responding jurisdiction under this section may recover the amount paid from that responding jurisdiction.[12]

III. Mutual Aid and Liability to Third Parties

A. Governmental Immunity

Both requesting and responding jurisdictions may face liability concerns with respect to third parties as a result of mutual aid arrangements.[13] Governmental immunity will provide local governments with some degree of protection. This may be the same immunity that local governments generally possess, or specific immunity conferred by state emergency management statutes.[14]

Generally, a state may retain governmental immunity either in full or in part, or may waive governmental immunity. Where governmental immunity is retained in part, one of two different tests is typically used to determine whether the government is immune from suit: (1) the

[12] Appropriate definitions, including that of "mutual aid agreement," would need to be included if the statute to which this provision would be added did not include such definitions.

[13] Individual property owners or developers, and their insurers, generally are not considered third-party beneficiaries of mutual aid agreements. *See, e.g.*, *New Hampshire Ins. Co. v. City of Madera*, 192 Cal. Rptr. 548, 555 (Cal. Ct. App. 1983) ("a holding that the insureds in this case were third party beneficiaries of the contract between the County and the City would be contrary to public policy since it would discourage cities and counties from entering into mutual aid agreements due to the possibility of creating a civil liability that otherwise would not exist"). *See generally* MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS, § 3A.11.

[14] For example, the Alabama Emergency Management Act deems all functions performed under the statute to be governmental functions, and states that neither public agencies nor individual emergency management workers "shall be liable for the death of or injury to persons, or for damage to property, as a result of any such activity," except in cases of willful misconduct, gross negligence, or bad faith. *See* ALA. CODE §§ 31-9-16(a), (b). Arizona's emergency management statute sets forth that the state and its political subdivisions are not liable for performing, or failing to perform, any discretionary function, and immunities available within the state also apply extraterritorially. *See* ARIZ. REV. CODE §§ 26-314(A), (B). The Kansas Emergency Preparedness for Disasters Act preserves full immunity for states, political subdivisions, and individuals for all acts taken during a declared disaster emergency, except for individuals in the case of willful misconduct, gross negligence, or bad faith. *See* KAN. STAT. § 48-915(b). The Michigan Emergency Management Act preserves full immunity for states, political subdivisions, and individuals, without exception. *See* MICH. STAT. ANN. § 30.411. Note that, with respect to interstate mutual aid agreements, governmental immunity may have been retained differently in neighboring states. This situation is discussed in section III(C)(1), below, with respect to the National Capitol Region.

"governmental function" test; and (2) the "discretionary action" test.[15] Under the governmental function test, whole classes of activities are immunized from potential tort liability where they are "considered to be traditionally or inherently governmental in nature."[16] Under the discretionary function test, a particular act of a governmental official is immunized if it "involves an element of choice, and if the choice involves applying judgment of a sort deemed worthy of protection from suit."[17]

In jurisdictions applying the government function test, elements of emergency response, such as firefighting, public safety, and law enforcement, are generally considered exempt.[18] In jurisdictions applying discretionary function analysis, however, courts are more likely to entertain tort suits complaining of the methods by which emergency response activities are conducted.[19] Commentator Ken Lerner identifies four categories of governmental emergency preparedness and response activities to which tort liability might attach; of these, Lerner speculates that neither Planning (lack of plan or flawed plan), Plan Implementation (failure to follow plan), or Executive-Level Decisionmaking (poor decision) should result in municipal liability.

However, with respect to Street-Level Operations – decisionmaking by incident commanders and other management and supervisory personnel – the area of contention arises in situations where "personnel at the operational level are acting without specific mandatory

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[15] Ken Lerner, *Governmental Negligence Liability Exposure in Disaster Management*, 23 URB. LAW. 333, 335, 338 (Summer 1991). Governmental immunity is used to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of a tort action." *Id.* (citing *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)).

[16] *Id.* at 338-339.

[17] *Id.* at 339.

[18] *Id.* at 340.

[19] *Id.* at 341.

instructions covering the action in question."[20] In this regard, Lerner points out that courts are split. Some courts have held that street-level decisions concerning emergency operations or firefighting methods are immune exercises in discretion.[21] However, as Lerner acknowledges, courts in other states have held the opposite. For example, in *Invest Cast, Inc. v. City of Blaine*,[22] the Minnesota Court of Appeals held that a suit could proceed based on various operational decisions made on the fireground. The court stated:

> [T]he fire department's decision on how many firefighter personnel and trucks to send to a fire is a policy decision protected as a discretionary function. How the firefighter personnel actually fight the fire, however, is not within the discretionary function exception. The underlying purpose of the discretionary function exception to municipal liability would not be furthered by allowing immunity for negligent firefighting methods.[23]

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[20] *Id.* at 348-349 (citing *Dahelite v. United States*, 346 U.S. 15 (1953)). This is because the "faithful execution of specific, discretionary decisions will not result in liability," *id.* at 349, while "discretionary immunity will not apply when specific instructions are not faithfully carried out."

[21] For example, in *United States v. Fidelity & Guaranty Co.*, 837 F.2d 116 (3d Cir. 1988), *cert. denied*, 437 U.S. 1235 (1988), the circuit court found that the U.S. Environmental Protection Agency On-Scene Coordinator's decision to continue remediation operations despite a contractor's recommendation that it not be performed that day because of wind conditions was discretionary, since the On-Scene Coordinator "had to weigh the comparative risks, costs and advantages of delaying the operation or using another method to deal with the hazardous chemicals." Lerner, at 349 (citing *Fidelity & Guaranty Co.*, 837 F.2d at 122). Likewise, in *City of Daytona Beach v. Palmer*, 469 So.2d 121 (Fla. 1985), the Florida Supreme Court held that "[t]he decisions of how to properly fight a particular fire, how to rescue victims in a fire, or what and how much equipment to send to a fire, are discretionary judgment decisions which are inherent in this public safety functions of fire protection." Lerner, at 349 (quoting *Palmer*, 469 So.2d at 123); *see also Ayres v. Indian Heights Volunteer Fire Department*, 493 N.E.2d 1229, 1232 (Ind. 1986) (manner in which fire is fought is discretionary function; "all fires are different and require separate and distinct judgments as to the proper manner of combating."); *Kroger v. City of Mount Vernon*, 480 N.Y.S.2d 370 (App. Div. 1984) (even if a fire chief's choice of firefighting method amounts to negligence, property owner's suit barred by immunity).

[22] 471 N.W.2d 368 (Minn. Ct. App. 1991).

[23] *Id.* at 371. Lerner cites to cases in which firefighters arguably engaged in some dereliction of duty, but the principle remains the same. *See Gordon v. City of Henderson*, 766 S.W.2d 784, 785 (Tenn. 1989) (firefighters were "absent from their regular duty station, and had to be located by the Henderson Police Department," resulting in longer response times, and some of the firefighters "has the smell of liquor on their breath."); *Williams v. Tuscumbia*, 426 So.2d 824, 826 (Ala. 1983) (driver of fire truck was sick and not replaced; the court stated that "the fire department acted unskillfully by not having a back-up driver who could have immediately taken the place of the sick driver . . . In other words, the fire department lacked proficiency.").

Similarly, in *Commerce & Industry Ins. Co. v. Grinnell Corp.*,[24] the court rejected a local government's claims of discretionary function immunity, finding that firefighters had failed to follow specific regulations and fire department procedures.

B. The National Capitol Region Problem

An additional problem that has arisen with regional mutual aid arrangements are conflicts between governmental immunity standards in neighboring states. For example, conflicting governmental immunity standards have posed a problem for responders in the National Capitol Region, where the three different jurisdictions – Virginia, Maryland, and the District of Columbia – have three very different governmental immunity standards.[25] Virginia has preserved complete sovereign immunity.[26] The District of Columbia has waived sovereign immunity for all tort claims except those involving discretionary functions.[27] Maryland maintains a hybrid system, under which Maryland retains immunity for governmental functions;[28] recoveries are limited for accidents involving emergency vehicles responding to calls or pursuing suspects;[29] and local governments are required by statute to indemnify and defend their employees for allegations of misconduct that occur within the scope of their employment.[30]

The conflict between these governmental immunity standards came to light in a case involving police pursuit. In *Biscoe v. Arlington County*,[31] a police officer from the Arlington

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[24] 280 F.3d 566 (5th Cir. 2002).

[25] *See* Alice Lipowicz, "National Capitol Region Struggles to Strike Mutual Aid Agreements," *CQ Homeland Security* (Aug. 23, 2004).

[26] *See Mann v. Arlington County*, 98 S.E.2d 515 (Va. 1957) (Virginia counties cannot be sued unless they consent to suit by statute); *Fry v. County of Albemarle*, 9 S.E. 1004 (1890).

[27] *See Wade v. District of Columbia*, 310 A.2d 857 (D.C. 1973).

[28] *See Housing Auth. of Baltimore City v. Bennett*, 754 A.2d 367 (Md. 2000); *Tadjer v. Montgomery County*, 479 A.2d 1321 (Md. 1984).

[29] MD. CTS. & JUD. PROC. CODE § 5-639; MD. TRANS. CODE § 19-103.

[30] MD. CTS. & JUD. PROC. CODE §§ 5-301 *et seq.*

[31] 738 F.2d 1352 (D.C. Cir. 1984).

County, Virginia Police Department (ACPD) spotted a bank robbery suspect driving on a state road towards the District of Columbia, and followed the car into the District, where he put on his overhead lights and siren and effected a vehicle stop. However, while the officer was otherwise engaged, the driver ran back into the vehicle and drove off. The ACPD officer gave chase, and in the ensuing pursuit, the suspected bank robber ran a red light and hit another vehicle, which in turn struck a pedestrian, severely injuring him.[32]

In the subsequent tort suit against the ACPD, the county asserted governmental immunity under Virginia law.[33] The circuit court rejected this defense, relying on the Supreme Court's holding in *Nevada v. Hall*[34] that the issue of a non-forum state's immunity is controlled solely by the forum state's law, and that the forum state may, but is not required to, extend immunity to the non-forum state's actions.[35] The court noted that the District of Columbia retained sovereign immunity only for discretionary functions, and that because the ACPD officer's actions were nondiscretionary acts, "[f]orced application of Virginia's law would . . . frustrate the policies that underlie the District's immunity rules."[36] The court also noted that while the District could extend immunity to neighboring states such as Virginia, it had expressly chosen not to in a previous case.[37] Therefore, the circuit court affirmed the trial court's ruling against Arlington County on the question of immunity.

The circuit court gave little weight to Virginia's concerns over the economic well-being of its counties, as embodied in its immunity doctrine, and the possible deterrent effect of its

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[32] *Id.* at 1354-1355.

[33] *Id.* at 1356.

[34] 440 U.S. 410 (1979).

[35] *Biscoe*, 738 F.2d at 1356-1357.

[36] *Id.* at 1357.

[37] *Id.* at 1359 (citing *Qasim v. Washington Metropolitan Area Transit Auth.*, 455 A.2d 904, 906 (D.C.), *cert. denied*, 461 U.S. 929 (1983)).

ruling on future cross-jurisdictional law enforcement operations.[38] However, the impact of the circuit court's ruling in *Biscoe* on mutual aid relationships and emergency management cooperation in the National Capital Region can be clearly seen. Indeed, the 9/11 Commission, in its final report, noted that "a serious obstacle to multi-jurisdictional response has been the lack of indemnification for mutual-aid responders in areas such as the National Capitol Region."[39]

C. Federal Legislation and the *Nevada v. Hall* Solution

As noted above, the U.S. Supreme Court, in *Nevada v. Hall*, held that it is the forum state's decision whether or not to recognize the non-forum state's immunity doctrine in a suit brought in the forum state's court.[40] The forum state may, but is not required to, extend immunity to the non-forum state's actions.[41]

Officials in the Washington, D.C. area are attempting to address the issue with respect to their region through federal legislation.[42] In fact, provisions addressing this issue were included in legislation introduced by Sen. John McCain (R-Ariz.) that would implement the recommendations of the 9/11 Commission.[43] The legislation states that in the event of a lawsuit resulting from a out-of-state mutual aid response, responders from Washington, D.C., Maryland and Virginia would be subject to the governmental immunity standards of their own states, rather than the state in which the events underlying the lawsuit occurred.[44] Because of the peculiar nature of the District of Columbia as a federal enclave for which Congress has a degree of

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[38] *Id.* at 1361.

[39] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: The Final Report of the National Commission on Terrorist Attacks Upon the United States* (W.W. Norton & Co. 2004), at 397.

[40] *Hall*, 440 U.S. at 423-424, 425-426.

[41] *Id.* at 425.

[42] *See* Alice Lipowicz, "National Capitol Region Struggles to Strike Mutual Aid Agreements," *CQ Homeland Security* (Aug. 23, 2004).

[43] *See* S. 2774 (108th Cong.), § 803.

[44] *See id.*

oversight, federal legislation may be necessary in order to accomplish this goal. This legislation, if it is successfully enacted, could serve as a model for legislation covering other multi-state regions.

In the meantime, legislation can be enacted at the state level to accomplish this result. As noted above, NEMA has proposed the Model Legislation in an effort to encourage states to create mutual aid arrangements between and among municipalities. In state versions of the Model Legislation, a provision could be included that would address this issue of conflicting governmental immunity doctrines, along the lines suggested by *Nevada v. Hall*. Such a provision might read as follows:

> Any jurisdiction or its employees responding pursuant to a request for assistance under a mutual aid agreement shall be liable for any act or omission of its employees only to the extent that the responding jurisdiction has waived its sovereign immunity, in full or in part, either by statute or common law.

Have you litigated a case involving a mutual aid agreement or response that resulted in a decision, published or unpublished? Would you be willing to share that decision? Please send it to Alan Cohn, Akin Gump Strauss Hauer & Feld LLP, 1333 New Hampshire Avenue, NW, Washington, DC 20036, (202) 887-4597, acohn@akingump.com. Please include your contact information and any supplemental materials you think appropriate. Thanks!