HOOSIER LITIGATION BLOG

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June 10 **2016**

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A Flooded Bridge Too Far: The 7th Circuit & Section 1927 Sanctions

After several weeks of discussing Indiana law, we turn back to the Seventh Circuit for this week's discussion. We have previously discussed the issue of sanctions on a handful of occasions. Most recently, we discussed a case in which the Seventh Circuit affirmed sanctions for discovery abuses. Before that, we discussed sanctions for a frivolous appeal in Indiana state courts. Today's topic is a bit different. Here, we get insight into sanctionable behavior in the class action realm. Today's case for discussion is *Boyer v. BNSF Railway Co.* Begins from an understandable attempt to take a second bite at the apple when the first attempted class action fell apart but left the door open for a second shot, but spun out of control with what one might call highly questionable decision making. Because the court, in a unanimous opinion by Judge Ilana Rovner, held that the actions were sanctionable, I think we can take the extra step and just call it poor decision making.

This is not the first time we have taken a look at poor decision making in a putative class case before the seventh circuit. In our prior discussion, Judge Posner ripped into plaintiffs and their counsel, finding their claims to be frivolous (or "frivolous squared") and concluded: "We are surprised that UBS hasn't asked for the imposition of sanctions on the plaintiffs and class counsel." *Boyer* is a case where the sanctions were requested and ordered. So let us look how *Boyer* went from understandable to sanctionable.

It all started with a July 2007 flood in a small town in Wisconsin. The court described:

> Bagley is a small town situated in a valley along the eastern bank of the Mississippi River. Bluffs flank the river valley, and those bluffs are transected by ravines that drain the upper watershed into the river. A 500-year rain that occurred on July 17 and 18, 2007, sent torrents of water down those ravines, among them the Glass Hollow Drain. A Burlington Northern and Santa Fe Railway Company ("BNSF") bridge crosses over the Glass Hollow Drain near Bagley. Large amounts of debris swept along by the rainwater clogged the trestle undergirding the railway bridge, causing the water runoff to back up and inundate Bagley. Most of the town's 300 to 400 homes were flooded.

The flood led to a case, *Irish v. BNSF Railway Co.*, which blamed BNSF for causing the flood. The problem with *Irish* was well summarized in the opening line of the decision: "This is a lawsuit in search of a viable theory of recovery." For the first time on appeal, the plaintiffs tried an argument they had not previously tried. Instead of deciding the merits of the argument, the court concluded it was untimely raised and could not be considered.

Sixteen months later, one of the attorneys from *Irish* filed a case in Arkansas state court–*Boyer*–bringing claims against BNSF for the flood. BNSF removed the case to Arkansas federal court then succeeded in having the case transferred to Wisconsin. Despite the new arguments, the Wisconsin court dismissed the case. BNSF asked for sanctions under Rule 11 and 28 U.S.C. § 1927. The trial court denied the request for sanctions. The parties each appealed.

The court of appeals, because *Irish* had not resolved the untimely argument that was at the core of *Boyer*, held that the case was not frivolous. Rule 11 requires that the conduct be frivolous, so the court affirmed the denial of sanctions under Rule 11. On § 1927, however, the court found sanctions should have been imposed. Senction 1927 states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Notably, "a court is not required to find that a party's claims are frivolous in order to find its attorney's conduct sanctionable" under § 1927.

So what was the tipping point for sanctions? It appears to have been filing in Arkansas. Had the case been filed in Wisconsin, there may not have been sanctions, but there still might have been. Under § 1927, "a finding of subjective bad faith on the part of the offending attorney will support the imposition of sanctions [ ], but such a finding is not necessary; 'objective bad faith' will also support a sanctions award."

> If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious. To put this a little differently, a lawyer engages in bad faith by acting recklessly or with indifference to the law, as well as by acting in the teeth of what he knows to be the law.

The court concluded that there was nothing sanctionable about the decision to file the case. Instead, it was the actions of counsel that merited sanction.

> What our decision in *Irish* should have brought a stop to is the habit of the plaintiffs' attorneys from perpetually altering their line of argument as the moment suits them. We cited this pattern with disapproval in the *Irish* decision itself and have repeated those observations here. Yet, the pattern has persisted. The argument presented below was that a failure of maintenance that results in a one-time flood is not covered by section 88.87. That is also the argument that the parties have briefed. Imagine our surprise then, when counsel was asked about that argument at oral argument and replied that we did not need to address it, as the real issue in the case was BNSF's failure to keep the area upstream of the trestle free of debris, as opposed to the failure to maintain the trestle itself. This is yet another change of position to an argument that was not raised below. And it is unacceptable. It is one thing to flesh out, winnow, or sharpen one's case as the record develops and counsel responds to the evidence and arguments of his opponent. It is another to repeatedly throw item after item at the wall to see what might stick.

The seeing what sticks approach alone is worthy of rebuke, but standing alone it might not have been enough to trigger sanctions.

> What ultimately has persuaded us that section 1927 sanctions are in order, however, is counsel's decision to file the *Boyer* litigation in Arkansas. We cannot think of a better example of multiplying the proceedings needlessly, unreasonably, and vexatiously. The plaintiffs'

> claims have no tie whatsoever to Arkansas: none of the plaintiffs lived or live there; the flood did not occur there; no evidence related to the flood is to be found there; and BNSF is neither headquartered in Arkansas nor maintains its principal place of business there. Moreover, each of the plaintiffs' claims invoked Wisconsin law, so the plaintiffs were asking the Arkansas court to apply another court's substantive law. The one and only connection to Arkansas is that BNSF owns and maintains roughly 190 miles of track within Arkansas. Although that circumstance might well support the exercise of personal jurisdiction over BNSF in Arkansas, it has no connection with the events at issue in this suit.
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> Filing the case in Arkansas was, in short, an objectively unreasonable decision. It was not only foreseeable but inevitable that BNSF would, upon removing the *Boyer* suit to federal court, seek transfer of the case to the Western District of Wisconsin and that the district judge in Arkansas would grant that motion. Correcting the plaintiffs' improper choice of venue imposed entirely unnecessary costs on BNSF (which was required to both appear in Arkansas and file the motion to transfer), not to mention the Arkansas district court (which was required to rule on the motion). Our decision in *Kapco* cited forum-shopping (there, the filing of a second complaint before a different judge in the same district) as one reason among several sustaining the imposition of section 1927 sanctions. In this case, we believe the unreasonable selection of Arkansas by itself warrants the imposition of sanctions. There was not even an arguable basis for filing the case in Arkansas, and the memorandum that counsel filed in opposition to BNSF's transfer motion essentially admitted that the choice of forum was dictated by a desire for a different judge.

Having found that § 1927 sanctions were merited, the court awarded the costs BNSF incurred in litigating the transfer ($38.5k).

An interesting note is the appellate standard for § 1927 review. The decision whether to grant or deny sanctions is entrusted to the sound discretion of the district court and is entitled to high deference on appeal. However, here, the district court's one-paragraph order found that the claims were not frivolous and denied sanctions. The order did not, however, specifically reference § 1927. This left the door open for the appellate court. Reasoning that "legal issues unaddressed by district court may be resolved on appeal where [the] record is developed and

relevant facts are undisputed," the court found:

> But where, as here, a court appears not to have considered sanctions pursuant to section 1927, and the record is otherwise fully developed and the pertinent facts are not in dispute, we may consider the propriety of section 1927 sanctions *de novo*.

If one thing is abundantly clear from *Boyer* it is just how far one must go to invoke the wrath of the court and imposition of section 1927 sanctions. The litany of complaints by the court extends beyond what we have covered here, and, in the end, had plaintiffs just not filed in Arkansas, they might have gotten away without sanctions.

Join us again next time for further discussion of developments in the law.

Sources

- *Boyer v. BNSF Ry. Co.*, ---F.3d---, Nos. 14-3131 & 14-3182, 2016 U.S. App. LEXIS 10021 (7th Cir. June 1, 2016) (Rovner, J.).
- *Irish v. BNSF Ry. Co.*, 674 F.3d 710, 711 (7th Cir. 2012) (Rovner, J.).
- Federal Rule of Civil Procedure 11.
- 28 U.S.C. § 1927.
- Colin E. Flora, *Seventh Circuit Examines Sanctions for Abusive Conduct in Discovery*, HOOSIER LITIG. BLOG (May 2, 2016).
- Colin E. Flora, *When Appeals Go Bad: Attorney's Fees for Frivolous Appeals in Indiana*, HOOSIER LITIG. BLOG (April 18, 2015).
- Colin E. Flora, *Lessons from Thomas v. UBS AG (7th Cir. 2013): Multistate Class Actions and Applicable Law in Federal Diversity*, HOOSIER LITIG. BLOG (Feb. 8, 2013).