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Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts ......................... Joan Steinman 813

In this Article Professor Steinman illuminates the law governing standing to appeal and the right to defend a judicial order or judgment in the federal courts, with an eye toward uncovering the issues and analyzing the weaknesses in the law. Part I puts these matters into context by identifying conceptual similarities and differences between standing to sue and standing to appeal, and between the “right” to defend in the trial court and the right to defend a judicial order or judgment that has been appealed. It brings into focus the constitutionally-grounded, prudential and practice-based constraints on standing to appeal and the right to defend judgments, and explores the relationships among those entitlements, on the one hand, and related doctrines including capacity, mootness, appealability and reviewability, on the other. Part II delves into the nature and degree of injury that warrants recognition of standing to appeal, giving special attention to the bases for appeal available to a person who has substantially prevailed in the trial court. It argues for abandonment of the collateral estoppel exception to the general rule that prevailing parties may not appeal, and for re-thinking of other exceptions to that rule. This Part also addresses the requisite relation between the injury and the order of judgment sought to be appealed, and the relevance of the appellate court’s ability to redress the claimed injury. Finally, Part II considers the doctrines that determine who may be an appellee. A sequel Article will explore the ways in which our law’s limitations on standing, in the appeal context, apply to persons other than full-fledged parties.
Adequacy of representation is the benchmark of due process in class action litigation. Representational inadequacy provides the basis for a successful collateral attack against a previous class judgment, thus disrupting the finality of the judgment and reopening litigation. Representational inadequacy can also result in unfair class settlements of the variety that have been highly publicized and widely condemned. Despite its essential nature, however, "adequacy of representation" is not well defined and the case law is inconsistent. In this Article, Professor Bassett analyzes the tripartite nature of "adequacy of representation" and argues that more attention is needed to the same interest-same injury prerequisite for class representatives; that the standard for court oversight is one of "rigorous analysis"; and that the evaluation of class counsel's adequacy of representation is, ultimately, an ethical determination in the sense of the kinds of considerations underlying the Model Rules of Professional Conduct. In particular, viewing the adequacy of class counsel as an ethical determination provides greater assurance that the adequacy prerequisite is satisfied, and thereby decreases the opportunities for subsequent collateral attack and for settlements tainted by lawyer self-interest.

REMARKS

The Emerging Law of the Internet ................. Arthur R. Miller 991

Professor Miller delivered this address as part of the John A. Sibley lecture series at the University of Georgia School of Law on November 14, 2002. His speech insightfully addresses the emerging challenges facing the social, economic, political and legal communities in light of the growing technological advances that continuously shape our society. Specifically, Professor Miller provides a trilogy of illustrative aspects of cyberspace and the law. First, he takes a quintessential "first-year" conundrum—jurisdiction over the person—and elucidates the challenges that materialize when traditional jurisdictional principles are applied in a world with no geopolitical boundaries and with the ease of instantaneous long-range communication. Second, Professor Miller brings his Copyright expertise to bear on the current debate over intellectual property rights in the
context of online music-swapping services such as Napster and Kazaa. Finally, he discusses the concepts of privacy rights in the digital age as against marketers and the federal government. He concludes by acknowledging the infancy of the state of the law in these areas and the global nature of the challenges that lie ahead.

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Water Rights, Public Resources, and Private Commodities:
Examining the Current and Future Law Governing the Allocation of Georgia Water .................. John L. Fortuna 1009

Recent trends in population growth, changing water use patterns, persistent drought, and increases in demand have led to unprecedented water shortages in Georgia. These shortages, along with a protracted interstate dispute regarding water allocation, have prompted a dramatic reevaluation of Georgia’s water management and allocation system. Given this tremendous and growing pressure on the water resources of this State, Georgia must reexamine its law governing water allocation to ensure that its water resources will be allocated fairly and efficiently in the years to come. This Note addresses three primary issues with respect to Georgia water allocation law. First, it argues that the State should abandon the absolute ownership doctrine in favor of a general rule of reasonable use for groundwater users not currently subject to the regulatory permit system. Second, this Note attempts to clarify the nature and scope of surface water rights in Georgia and argues that the General Assembly should make clear that rights in surface waters are usufructory and limited to the reasonable use thereof. Third, the Note argues that Georgia should refuse to establish a market for water withdrawal permits in the State. The establishment of such a market would raise serious constitutional questions as to the State’s ability to control the use and export of its water resources, as well as other dire social and economic consequences for citizens of the State.
The Establishment Clause's Effect on Kosher
Food Laws: Will the Jewish Meal Soon Become
Harder to Swallow in Georgia? ................. Aharon R. Junkins 1067

The Second and Fourth Circuits, as well as the New Jersey Supreme Court, have held kosher fraud laws alluding to Orthodox Hebrew religious doctrine to be offensive to the Establishment Clause of the United States Constitution. Relying on the Lemon test, these courts concluded that the kosher fraud laws advanced and inhibited religion, and excessively entangled government and religion. These decisions raise Establishment Clause problems concerning Georgia's kosher fraud laws, which likewise refer to Orthodox Hebrew religious doctrine as the statute's source for koshering standards. Ultimately, Georgia's kosher fraud laws will collapse when the Lemon test is applied because the laws advance the Orthodox branch of Judaism and inhibit the other branches, and because the laws are excessively entangled with religion. Even if a court opted to use a minority approach to Establishment Clause issues, such as the Larson test, Justice O'Connor's endorsement test, or Justice Kennedy's coercion test, Georgia's kosher fraud laws would still be found to violate the Establishment Clause. This Note argues that Georgia should replace its current kosher fraud laws with laws that require a disclosure statement to reveal what measures were taken to ensure the kosher preparation of food labeled as such.

Idiopathic Short Stature or Just Plain Short:
Why the Federal Government Should
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On July 25, 2003 the FDA approved the use of the human growth hormone (HGH) Humatrope for use in healthy children predicted to reach below average adult height: four feet, eleven inches for females and five feet, three inches for males. The FDA decision to approve Humatrope treatment for extremely short, healthy children, however, does not prevent or regulate off-label prescription of Humatrope or other brands of HGH to healthy children outside the FDA-approved height indication. This Note discusses the results of clinical studies treating short, healthy children with HGH, and analyzes the costs and benefits of HGH treatment for children of differing heights. It suggests that the physical and emotional costs of treatment for children taller
than the FDA height indication outweigh HGH treatment benefits. Furthermore, this Note concludes that the external pressures and lack of regulatory, legal, and possibly economic constraints on physician and parent decisionmakers interfere with their ability to correctly analyze whether HGH treatment is in a healthy child’s best interest. Finally, this Note recommends Congress grant the FDA authority to guard against inappropriate use of HGH products in healthy children.
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Municipal Regulation of Pesticides: A Primer on U.S. and Canadian Law
by Lora Freeman, Alyssa Bradley, and Donald Lidstone

In the last several years, concerns have been raised over the negative health effects of exposure to pesticides from park and play surfaces, lawns, and other places. Local governments are often involved in regulating pesticide applications in their communities, and municipal regulation will likely increase in Canada and the United States in the future. As outlined in this article, however, the issue raises many questions about the overlap of government powers and the extent of municipal authority.

New EPA Standard for Investigating Contaminated Sites: Protection for Those Conducting “All Appropriate Inquiries”
by Clifford P. Case

The U.S. Environmental Protection Agency is about to propose a regulation that will define “all appropriate inquiries” under the 2002 Small Business Liability Relief and Brownfields Redevelopment Act, and significantly affect how municipalities acquire real property. Clifford Case, who represented IMLA on the rulemaking committee set up by the EPA to develop the definition, explains what municipalities need to know about this new standard.

Alcohol, Sex and the City: Local Regulation of Alcohol-Serving Establishments Challenges Municipalities
by Steven Meyers and Stephanie Stuart

Municipal authority to regulate alcohol-serving establishments depends on whether and how much of the state's Twenty-First Amendment authority has been delegated to the local government. A further issue is the fact that ordinances which regulate alcohol on the premises of adult entertainment establishments do not fit neatly into the category of either a zoning ordinance or a public decency statute. Steven Meyers and Stephanie Stuart review the preemption issues and First Amendment concerns that arise when drafting such an ordinance.

Siting New Airport Runways: Who Should Decide?
by Jack Corbett

Each level of government has a role in the development of airports, but who should have the final say as to whether a new runway will be constructed at a major airport? Expert Jack Corbett offers this review of the various roles of the federal government, states, and local governments in light of the FAA Reauthorization Act and other considerations.

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RELATION BACK OF AMENDED COMPLAINTS: THE CALIFORNIA COURTS SHOULD ADOPT A MORE PRAGMATIC APPROACH

The doctrine of relation back permits an amended complaint to relate back to the date of the filing of the original complaint, for purposes of avoiding the bar of the statute of limitations. California’s relation-back doctrine provides, in general terms, that an amended complaint relates back if it rests on the “same general set of facts” as alleged in the original complaint. This modern rule was intended both to avoid the danger of narrow construction that older tests involved and to further the policy that cases should be decided on their merits. However, subsequent California court decisions have placed additional restrictions on the “same general set of facts” standard. These decisions typically state the current relation-back doctrine as requiring that the amended complaint must (1) rest on the “same general set of facts,” (2) involve the “same accident and same injuries,” and (3) refer to the “same offending instrumentality” as the original complaint.

This article proposes that the current restrictions on the core “same general set of facts” standard should not be prerequisites to relation back of amended complaints that do not name new defendants. More importantly, the “same general set of facts” standard should be applied in a pragmatic manner, as opposed to the formalistic approach evident in many recent appellate court rulings. This pragmatic approach would focus on whether the defendant will be unfairly surprised and therefore unduly prejudiced by the allegations in the proposed amendment. The key inquiry is whether, during the course of pretrial discovery, the defendant was already made aware of, and has already gathered facts responding to, the new allegations in the proposed amendment.

In many circumstances, an amended complaint may allege issues that are “new” to the pleadings but, as a result of discovery and other pretrial proceedings, are already known to the parties to be the real issues in dispute for resolution at trial. A doctrine that prevents such an amended complaint from relating back because it refers to a different accident, injury, or offending instrumentality than the original complaint is a relic left over from an era before discovery and pretrial orders defined the issues for trial.

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STATE AID TO RELIGIOUS SCHOOLS: FROM EVRSON TO ZELMAN A CRITICAL REVIEW

State funded school voucher programs provide a potential alternative for parents of children trapped in poorly performing urban public schools. Voucher programs, however, raise significant Establishment Clause issues because, in most instances, parents have been allowed to spend the vouchers at sectarian schools. This article seeks to determine if the use of vouchers to pay for religious
based education is constitutional. Before addressing that specific issue, however, the article provides a critical analysis of the modern history of state aid to religious schools from *Everson v. Board of Education* through *Agostini v. Felton.*

The article also briefly explores some of the social and educational pressures that have moved the nation toward increasing acceptance of voucher programs. Consistent with the Supreme Court's decision in *Zelman v. Simmons-Harris,* the article concludes that voucher programs are constitutional, provided certain conditions are met. Included among those conditions is the requirement that parents have genuine non-sectarian educational options from which to choose when selecting schools for their children. When considering whether such non-sectarian choices exist, the Court is entitled to consider all choices before parents including those which may not be a part of the voucher program. In addition, any money that does end up in religious school coffers must do so as a result of independent decisions by parents that have not been influenced by the state.

*Dr. Mark J. Chadsey* ........................................... 699

**ESSAY**

**THE INTERNAL REVENUE CODE AS SODOMY STATUTE**

This essay represents an attempt to bridge the gap between gay and straight understanding of the Internal Revenue Code's impact on same-sex couples. Through a combination of personal narrative and legal analysis, the essay attempts to explain how, from a gay perspective, the Code can be viewed as just another manifestation of the fluid mixture of hostility, bewilderment, and discomfort that generally characterize society's reaction to homosexuality. By explaining the experiences behind his perceptions of the Code, the author hopes to help his heterosexual colleagues to understand just how demeaning and oppressive the Code can seem to gays and lesbians—regardless of any net financial benefit that same-sex couples may receive, or any net financial detriment that they may suffer, under the Code.

*Anthony C. Infanti* ........................................... 763

**COMMENTS**

**PAPER FILES TO COMPUTER FILES: A FEDERAL APPROACH TO ELECTRONIC RECORDS RETENTION AND MANAGEMENT**

Companies historically regarded paper as the best vehicle for the storage of records, as paper records were an excellent long-term storage medium. However, as a result of the technology boom in the late 1990s, computers have become so commonplace that most corporate records are now stored electronically. There are several advantages of storing records in electronic form, including being more cost effective and more environmentally friendly. Electronic records also contain metadata—additional information such as the date and time the document was created—that paper counterparts do not have.

Despite the benefits of electronic records, the ease of electronic information allows companies to create, process, and store information at unprecedented rates, resulting in an out of control "store everything" mentality. The larger the number of records stored, the more rigorous and slower the access to finding them. In
turn, supervisory review of data is often overlooked and the size of unreviewed information can grow to an unmanageable amount.

The lack of a uniform corporate electronic record retention policy perpetuates the problem of unreviewed information. In turn, the mismanagement of such electronic records results in an increase in corporate losses and liability. Accordingly, it is vital for companies to devote extraordinary attention to records that are stored in electronic form. However, no federal law solely addresses the management of electronic records retention and destruction. Companies are left to individually account for developing their own policies, yet are still responsible for incorporating a myriad of inconsistent state and federal laws. In light of this problem, it is critical to reassess the lack of uniformity in electronic records policies and the consequences that follow. Corporate record retention programs are a balance between the potential consequences of destroying corporate documents that will later be needed and the savings that will be realized by reducing the clutter around valuable documents. This comment proposes that the Securities Exchange Commission implement a federal electronic records retention policy, based upon the regulation adopted by the National Archives and Records Administration (NARA), in order to provide publicly traded companies uniform legal standards regarding management of electronic records.

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A RIVER RUNS TO IT: CAN THE PUBLIC TRUST DOCTRINE SAVE WALKER LAKE?

The Walker Lake is a remnant of a much larger prehistoric lake located in the Nevada desert. The lake's only source of fresh water is the Walker River, which flows through California and Nevada before it reaches Walker Lake. Since the first settlers arrived in the late 1800s, both Walker Lake and Walker River have provided sustenance by allowing farmers to cultivate the dry lands in this arid region. Unfortunately, Walker River is unable to provide adequate water for the agricultural demands and maintain the Lake's water level. As a result, Walker Lake has continued to decline since its first measurements. This decline in the Lake's water level has had a significant effect on the water quality, and is threatening to decimate much of the Lake's ecological environment. Environmentalists have attempted to prevent the water users from continuing to divert water from the River, but have had little success. In 2000, Mineral County and the Walker Lake Working Group argued before the Nevada Supreme Court that the public trust doctrine requires the State to prevent water users from taking water that would have an adverse effect on the Lake's water quality, thus impairing the public's enjoyment of the resource. Although the court did not deny the claim, it failed to address whether the scope of the public trust doctrine should be extended to protect lakes such as the Walker Lake. This comment examines Nevada water law and the public trust doctrine by comparing it to California's use of the public trust doctrine to save Mono Lake.

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PEER-TO-Peer FILE SHARING AND COPYRIGHT INFRINGEMENT:  
DANGER AHEAD FOR INDIVIDUALS SHARING FILES ON THE  
INTERNET

One Internet activity that has become popular over the last few  
years is file sharing, specifically peer-to-peer (P2P) file sharing. P2P  
file sharing's popularity is such that the overall Internet bandwidth  
used by those sharing files dwarfs that used by regular Internet  
users. The vast majority of files shared on these file-sharing  
networks are unlicensed copyrighted works. One study indicates that  
as many as eighty-one percent of computer users in the eighteen to  
twenty-four age group have downloaded and stored music files on  
their computers. Although the popularity of file sharing continues to  
grow, many users apparently lack an understanding of the legal  
issues, especially copyright infringement issues, and the legal  
ramifications of sharing files on a P2P network. Napster set the  
limits for the networks themselves; now the focus has turned to the  
individual users. With the RIAA's recent crackdown on individuals  
using the file-sharing networks, an understanding of an individual  
user's liability is critical.

The copyright owners scored an early victory in Verizon and an  
early loss in MGM. Although the reversal of the original Verizon  
ruling was a loss for the RIAA and increases the difficulties in  
identifying individual users of the file-sharing networks, users of file-  
sharing networks are still not anonymous. If the reasoning in the  
district court's summary judgment ruling in MGM is followed in other  
cases, the RIAA and others will be unable to pursue Napster-like  
suits against the file-sharing networks, and will have no choice but to  
go after the direct infringers—the users of the file-sharing services.  
Direct copyright infringement lawsuits against individual users of  
the file-sharing systems are simply a matter of when, not if.

Unfortunately for patrons of P2P file-sharing networks, under  
current statutory and case law there is no “safe harbor” for those  
users wishing to download or share copyrighted material without an  
express license or authorization from the copyright owner. Users who  
want to continue to make use of P2P file-sharing networks must  
either shift their usage to downloading lawful files—files for which an  
express license to download and reproduce is given or files that are in  
the public domain—or they must accept the fact that every time they  
download or share a copyrighted work, they are violating the law and  
must be willing to face the RIAA and other organizations looking to  
protect their exclusive rights. Since the copyright laws provide for  
both civil and criminal penalties for infringement, users who wish to  
continue their use of P2P networks must do so with their eyes open to  
the possible consequences.

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