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Recent Developments: In re Billman: Disposition of Substitute Assets Possessed by Third Party and Subject to Rico Forfeiture May Be Enjoined

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the bringing of an action.” *Id.* at 257, 577 A.2d at 68. The court explained that the Joneses could only succeed in their suit if they could prove that Dr. Speed had been negligent within the five years prior to filing the complaint. Thus, the doctor could not be held liable for any negligence occurring before that period and, as such, he was protected to the extent that the legislature intended under §5-109. *Id.* at 257, 577 A.2d at 68.

Finally, Dr. Speed argued that the long-standing prohibition against splitting a cause of action prevented the Joneses from bringing suit. He argued that had they brought suit for the initial act of negligence occurring on July 17, 1978, their claim for relief would have necessarily included damages resulting from all subsequent negligent acts when her tumor remained undiscovered. Thus, because the Joneses were precluded from bringing suit on the initial negligence and the initial negligence was so intertwined with the later negligence, to allow the Joneses to proceed on the later counts was the same as permitting them to split their cause of action. *Id.* at 257-58, 577 A.2d at 68.

The court agreed that splitting a cause of action is prohibited in order “to prevent multiplicity of litigation and to avoid the vexation, costs and expenses incident to more than one suit on the same cause of action.” *Ex Parte Carlin*, 212 Md. 526, 532-33, 129 A.2d 827 (1957) quoted in *Jones*, 320 Md. at 258, 577 A.2d at 68 (1990). The flaw with Speed’s reasoning, noted the court, was that the rules prohibiting splitting a cause of action, and application of *res judicata* principles only apply to situations where the plaintiff has in fact brought suit and a final adjudication has occurred. *Jones*, 320 Md. at 259, 577 A.2d at 69. In the Jones’ situation the court explained that prior adjudication addressing the physician’s negligence had never occurred. As such, the court concluded, the Joneses were not precluded from bringing suit as to any acts of negligence occurring within five years of filing their complaint. *Id.*

Through *Jones v. Speed*, 320 Md. 249, 577 A.2d 64 (1990), the Court of Appeals of Maryland has clarified what constitutes a separate cause of action for negligence and thereby starts the accrual of Maryland’s statute of limitations for

medical malpractice. Where a physician repeatedly misdiagnoses his patient’s condition due to negligence, each visit with the doctor may constitute a separate cause of action and thus, begin a new statute of limitations.

— Michael P. Casey

***In re Billman*: DISPOSITION OF SUBSTITUTE ASSETS POSSESSED BY THIRD PARTY AND SUBJECT TO RICO FORFEITURE MAY BE ENJOINED**

In a case of first impression, the United States Court of Appeals for the Fourth Circuit ruled that it was within the power of the district court to enjoin the disposition of substitute assets pending criminal trial or forfeiture under Racketeer Influenced and Corrupt Organizations laws (RICO). The court held that the statute, codified at 18 U.S.C. 1963, prohibited a defendant from avoiding forfeiture of his substitute assets. As a result, transfer of a RICO target’s assets to a third person who did not qualify as a bona fide purchaser for value did not place the assets beyond the court’s jurisdiction. *U.S. v. McKinney*, 915 F.2d 916 (4th Cir. 1990). The Fourth Circuit determined that Congress intended Section 1963 to be construed liberally in order to effectuate its remedial purpose. The purpose, in the context of *McKinney*, was to preserve the defendant’s substitute assets for ultimate forfeiture upon conviction.

Tom J. Billman, implicated in the failure of a savings and loan, was indicted for racketeering, fraud, and conspiracy to commit mail and wire fraud. Before the indictment was issued, however, Billman became a fugitive. After Billman’s flight, Barbara A. McKinney, an alleged co-conspirator, received a number of cryptic telephone calls from Billman’s London attorney and from Billman himself. The purpose of these conversations was to arrange a wire transfer of approximately \$500,000 from the attorney to McKinney. In addition, McKinney agreed to accept \$50,000 from William C. McKnew in order to discharge a debt that McKnew owed to Billman. The debt was listed among Billman’s assets.

At the commencement of the action, the United States District Court for the District of Maryland entered a tempo-

rary restraining order (TRO) prohibiting McKinney from disposing of the \$550,000. *McKinney*, 915 F.2d at 919. The court subsequently held a hearing to determine the validity of the TRO, and to rule on a motion by the United States requesting an injunction restraining disposition of the funds pending the forfeiture proceedings. *Id.*

The district court vacated the TRO and denied the government’s motion for an injunction, reasoning that section 1963 makes only those assets which the government proves are connected to the fugitive’s alleged racketeering activity subject to pretrial restraint. *Id.* The court’s decision was based on the government’s inability to trace \$22,000,000 deposited by the conspirators in Swiss bank accounts to the assets held by McKinney. Specifically, the lower court ruled that the government had failed to prove that the funds in question were actual RICO proceeds, and further determined that after the wire transfer, the funds belonged to McKinney. *Id.*

Believing that a more liberal reading of the statute was appropriate, the court of appeals held that an injunction should have been issued. *Id.* at 919-20. Compelled to follow the lower court’s findings of fact the court treated the questioned funds as legitimate, despite its own opinion to the contrary. *Id.* at 920. Noting that under RICO the money was still subject to forfeiture as substitute assets, the court held that an injunction was proper against a third party who did not qualify as a bona fide purchaser for value. Thus, by determining that McKinney was not a bona fide purchaser, the court held that the TRO was proper. *Id.* at 921.

In its analysis of §1963 (a)(1) and (3), the court recognized that a forfeiture proceeding against funds derived from RICO criminal activity is “an *in personam* proceeding against the defendant, and the forfeiture constitutes partial punishment of the offense.” *McKinney*, 915 F.2d at 920.

Furthermore, amended section 1963 (m) provides for the forfeiture of substitute assets when actual RICO proceeds are unavailable. Subsection (m) specifically provides that “[i]f any of the property described in subsection (a), as a result of any act or omission of the defendant . . . (3) has been placed be-

yond the jurisdiction of the court; . . . the court shall order the forfeiture of any other property of the defendant. . . ." *McKinney*, 915 F.2d at 920. Because Billman was alleged to have placed the misappropriated funds in Swiss banks, beyond the court's jurisdiction, the Fourth Circuit held that the district court could have properly ordered forfeiture of Billman's substitute assets after his conviction. *Id.*

Under the court's reasoning, McKinney's possession of Billman's substitute assets would not alter the government's entitlement to forfeiture after conviction. The court observed that McKinney had presented insufficient evidence to meet the requirements of section 1963 (c). Specifically, it was not shown that she was "a bona fide purchaser for value of . . . [the] property [in question] who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section." *Id.*

Given its finding that the funds in McKinney's possession would be within the district court's jurisdiction following Billman's conviction, the court turned to the remaining question of

whether the substitute assets could be restrained pending trial. *Id.*

Section 1963(d)(1)(A) authorized the court, "[u]pon application of the United States . . . [to] take any . . . action to preserve the availability of property described in subsection (a) for forfeiture under this section," subject to certain procedural requirements. The court determined that the purpose of this section was to prevent the disposal of property which, upon conviction of a RICO defendant, would be subject to forfeiture. *Id.* at 921. In order to achieve this purpose, a liberal construction of section 1963 was necessary, which required the court to read subsections (d)(1) (a) and (m) together. *Id.*

Applying this liberal construction, the court of appeals held that "the pretrial restraining provisions of 1963 [did] not permit a defendant to thwart the operation of forfeiture laws by absconding with RICO proceeds and then transferring his substitute assets to a third person who [did] not qualify as a bona fide purchaser for value." *Id.*

In *McKinney*, the United States Court of Appeals for the Fourth Circuit considered for the first time whether a de-

fendant's substitute assets could be restrained pending criminal trial or forfeiture under RICO. By construing section 1963 liberally, the court held that a defendant's assets could be restrained if transferred to a person not qualifying as a bona fide purchaser for value. This reasoning was found to apply even where the assets were placed outside the jurisdiction of the court.

The court's ruling has identified the broad reaching effect of section 1963 to freeze funds derived from activities RICO proscribes. The court has acted to ensure that even substitute proceeds could not easily be placed out of the reach of both the judiciary and the government officials charged with strict enforcement of the statute. In so doing, the Fourth Circuit guaranteed that justice was not easily evaded. Importantly, the court was the first at the federal circuit level to hold that a defendant's substitute assets could be restrained pending trial, an issue which has yet to be addressed by the Supreme Court.

— Charles Szczesny

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