'Patent Troll' Blogger On Trial in Texas

By Craig Anderson
Daily Journal Staff Writer

Rick Frenkel, the former in-house Cisco Systems Inc. attorney who wrote an anonymous blog in 2007 accusing two Texas attorneys of altering documents in a patent case, went on trial Monday in the Lone Star State for defamation.

Eric Albritton, a Texas plaintiffs' attorney, sued Frenkel and then-employer Cisco for undisclosed damages because of a couple of Frenkel's blog posts that he wrote as the "Patent Troll Tracker."

Albritton and another plaintiffs' attorney, T. John Ward Jr., in separate lawsuits accused Cisco and Frenkel of defaming them by accusing the lawyers of altering the date of a patent infringement complaint by one day so it would not be filed before their client's patent was approved.

Frenkel's blog, which followed ongoing patent litigation from a decidedly pro-defendant position, delighted many litigators who agreed with his sharp perspective but outraged others, such as Chicago patent plaintiff litigator Ray Niro, who offered a reward for Frenkel's identity.

Frenkel outed himself as the blog's author early last year, and then he and Cisco were sued. *Albritton v. Cisco Systems*, 08cv-00089.

Frenkel and Cisco subsequently parted ways when Frenkel got a job as of counsel at Wilson Sonsini Goodrich & Rosati in Palo Alto.

Cisco and Frenkel tried and failed to get the lawsuit dismissed on summary judgment in February, and no settlement was reached in mediation, so the trial is finally starting in Tyler, Texas. Attorneys say they expect the trial, before U.S. District Judge Richard Schell, to last as long as two weeks.

Mallun Yen, Cisco's vice president of worldwide intellectual property and Frenkel's former boss, and John Noh, a former Cisco spokesman, were named as defendants in the complaint but were dismissed from the case.

Some of the Eastern District of Texas clerks involved in the filing are scheduled to testify, as is a prominent Texas patent blogger, Michael Smith.

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Appeals Court Rules Insurer Wrongfully Ended Benefits

By John Roemer
Daily Journal Staff Writer

A major insurance company was wrong to end a southern California man's medical disability insurance after he became ill, the 9th U.S. Circuit Court of Appeals ruled Monday in an opinion likely to stoke the national health care debate.

Hartford Life & Accident Insurance Co. had a conflict of interest because it was both the insurer and the administrator of an employee benefits plan, a unanimous three-judge panel ruled. *Montour v. Hartford Life & Accident Insurance Co.*, U.S.C.A. 9th, DAR p. 13673.

The decision reversed U.S. District Judge Dale S. Fischer of Los Angeles, who granted judgment in favor of Hartford following a 2008 bench trial. The circuit panel ordered that Hartford restore plaintiff Robert Montour's benefits.

Circuit Judge Richard R. Clifton wrote that the panel found "Hartford abused its discretion because its conflict of interest too heavily influenced its termination decision."

Colleagues William A. Fletcher and Milan D. Smith Jr. agreed.

Last week President Obama told a joint session of Congress that under his insurance reform proposal, "It will be against the law for insurance companies to drop your coverage when you get sick or water it down when you need it most."

Republicans have generally opposed Obama's plan. In July, Republican National Committee Chair Michael Steele criticized the president and Democratic House Speaker Nancy Pelosi of San Francisco, saying, "Obama-Pelosi want to start building a colossal, closed health care system where Washington decides. Republicans want and support an open health care system where patients and doctors make the decisions."

In Monday's case, it was Hartford that decided to end coverage for Montour, a 37-year employee of Rockwell International and its semiconductor spinoff, Conexant Systems Inc. of Newport Beach.

Montour, a telecommunications manager, developed symptoms of acute stress disorder and back and knee impairments. Montour's orthopedist performed surgery on his right knee and termed him physically disabled and unable to work in any job. In 2004 Hartford began paying Montour disability benefits under his employer's group long-term disability insurance plan.

In 2006 a Hartford consulting physician concluded that Montour's condition was only "mild to moderate," based on a file review, an interview with Montour and covert video surveillance that showed Montour driving his car and getting a haircut.

> 'This decision fits right into the health care debate. I think the tide is starting to turn toward reform.'
>
> Bradley P. Knypstra, Knypstra & Associates

Hartford ruled Montour was capable of working full time with modest restrictions, such as changing positions every 30 to 45 minutes. Despite Montour's appeals, Hartford terminated his benefits in 2007.

The circuit panel spelled out the problems that arise when an insurance underwriter funds an employee benefits plan and also evaluates claims governed by the federal Employee Retirement Income Security Act of 1974.

"Under these circumstances," wrote Clifton, "the plan administrator faces a structural conflict of interest: since it is also the insurer, benefits are paid out of the administrator's own pocket, so by denying benefits, the administrator retains money for itself."

Deciding whether the administrator abused his or her discretion in an individual case must take the conflict into account, Clifton added, along with many case specific factors involving the insured's medical condition.

Looking at Montour's case, the panel found, "Hartford's bias infiltrated the entire administrative decision-making process" because the company presented "evidence of capability in the best possible light, while failing to subject evidence of capability to the same skepticism and rigorous analysis applied to evidence of disability."

The panel's findings reflect a long-standing concern, according to John Garamendi, California's current lieutenant governor and a former state insurance commissioner. Garamendi, a Democrat who is running for Congress from the East Bay's 10th District, said the Montour decision is "at the heart of the matter" of health care insurance reform.

Garamendi said he continues to lobby for fixing flaws in the Employee Retirement Income Security Act, known as ERISA. "The decision today screams out for adding enforcement mechanisms to ERISA to end the conflicts of interest inherent in the law that we saw the court dealing with," he said. "Otherwise we're going to have toothless reform."

A Hartford spokeswoman, Kelly Carter, said the company is reviewing the decision. Hartford's outside counsel at Sedgwick Detert Moran & Arnold, partner Bruce D. Celebrezze of Chicago and San Francisco, did not immediately return a call seeking comment.

Montour's attorney, Bradley P. Knypstra of Irvine's Knypstra & Associates, said the loss of benefits badly harmed his client. "His wife had to go back to work at age 55, they lost their good credit rating and they almost lost their house," Knypstra said.

"This decision fits right into the health care debate," he added. "I think the tide is starting to turn toward reform."

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Film Executives May Be Headed to Jail Over Bribery Conviction

By Jean-Luc Renault and Ciaran McEvoy
Daily Journal Staff Writers

Two West Hollywood film executives are facing prison time after being convicted of bribing a Thai official to obtain lucrative contracts for an international film festival. The convictions are believed to be the first of an extended examination by prosecutors into entertainment industry involvement in foreign corruption.

Gerald Green, 77, and his wife, 52-year-old Patricia Green, are the first in the entertainment industry to be prosecuted under the Foreign Corrupt Practices Act, which forbids businesses and individuals largely based in the U.S. from paying bribes to foreign government officials to secure unfair advantages for contracts or other business interests.

The case is a sign the government may be putting more scrutiny on film and television productions, which have been known to make cash payments to local officials when shooting overseas.

"The Department of Justice was trying to make an example of these people to Hollywood," said Patricia Green's lawyer, Marilyn Bednarski of Kaye, McLane & Bednarski.

A seven-man, five-woman jury found the Greens guilty on Friday of violating the FCPA, money laundering and other felonies. U.S. District Judge George H. Wu is scheduled to sentence the couple on Dec. 17.

Gerald Green's production credits include the 1986 Oliver Stone film "Salvador" as well as the 2006 film "Rescue Dawn," which stars Christian Bale.

He and Patricia were arrested in December 2007, accused of paying kickbacks to Juthamas Siriwan, then the governor of the Tourism Authority of Thailand, in exchange for receiving contracts to manage and operate the annual Bangkok International Film Festival.

The couple ran the film festival between 2003 and 2006, boosting it from a sleepy local event to a major stop on the global film scene.

The Greens also received an elite tourism "privilege card" offering discounts and perks to wealthy foreigners, prosecutors said.

Between 2002 and 2006, the Greens paid approximately $1.8 million in bribes to the former governor through numerous bank accounts in Singapore, Great Britain and the Isle of Jersey.

The couple also attempted to cover up their bribery by using different business entities, some with fake addresses and telephone numbers, prosecutors said.

They followed "a pattern of secrecy, lies and cover-ups," Assistant U.S. Attorney Bruce Searby told the jury during closing arguments.

The Greens allegedly used those entities to conceal the large amount of money they were paid under the contracts.

The Greens made disguised payments — which they recorded in financial records as "commissions" — to the Thai official through the foreign bank accounts registered in the name of the governor's daughter, Jittisop Siriwan.

The couple also wired money and sent checks made out to the governor's daughter, according to prosecutors.

The Greens maintained the payments were a legitimate investment in a business run by the daughter, Jittisop Siriwan, and that they were mis-identified in accounting records.

"Commissions' was probably a bad choice of words," said Jerome Mooney, Gerald Green's lawyer.

The contracts received by the Greens resulted in more than $13.5 million in revenue to businesses they owned, prosecutors said.

Practically dormant for more than two decades after being signed into law in 1977, federal prosecutors have dusted off the FCPA in recent years. According to the Department of Justice, there were no FCPA enforcement actions in 2000. That number has steadily increased since then, reaching a high point of 17 in 2008.

Lawyers with FCPA and entertainment experience said in general that once the government finds violations in one company, it will closely examine other companies and individuals in that industry.

"What I've seen with the FCPA is that the Department [of Justice] has gone from industry to industry," said Anjali Chaturvedi, an attorney in Nixon Peabody's Washington D.C. office who specializes in FCPA cases.

"If you go after one company, you hear from witnesses, 'We're not the only ones doing this,'" she said.

Mike Koehler, a business law professor at Butler University who writes a blog on the FCPA, said the Green case is a warning to film and television companies that work abroad.

"I think the message to those in the entertainment industry is that your industry is not immune from FCPA scrutiny," he said.

Many companies shooting overseas find they have to pay off a few local officials to make sure things run smoothly during production.

In one case, an analysis of the finances for the 2005 feature film "Sahara" showed the budget included nearly a quarter-million dollars set aside for expenses such as "courtesy payments" and "bribes."

Jim Asperger of Quinn Emanuel Urquhart Oliver & Hedges said the FCPA contains a specific "grease payment" exception.

"It's for small payments, like a shakedown at customs," said Asperger. "An official might say 'I'll only process this camera equipment if you give me $100,'" he said, adding that the exception only applies to ministerial acts, rather than discretionary actions.

Neither the Los Angeles U.S. Attorney's office nor the Department of Justice would comment on possible further efforts to investigate the entertainment industry.

Lanny Breuer, Assistant Attorney General of the Department of Justice's criminal division, said in a statement that the department "would not waiver in its fight against corruption."

"The FCPA is a powerful tool that the Department will continue to use in an effort to stop individuals like the Greens who seek to further their own business interests through bribes paid to foreign officials," said Breuer.

The Greens were convicted on one charge of conspiracy to violate the FCPA and eight charges of violating the act. Each charge carries a maximum of five years in prison.

Each of the six money-laundering charges they were convicted of carry a maximum penalty of 20 years.

Gerald Green also faced one count of obstruction of justice by altering financial documents after the FBI raided the couple's office in July 2007, but the jury could not reach a verdict on the count.

Patricia Green faces an additional three-year sentence for filing a false tax return for 2004.

Bednarski said she plans to appeal after sentencing.

"This is a case that was based on suspicion," she said. "The evidence did not show Gerald Green bribed the governor or anyone else or that his wife who assisted in the running of the office bribed anyone or knew of any bribery scheme."

"We're going to continue to fight," she said.

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Judge Rejects Deal Between SEC, Bank of America Over Bonuses

By Stephen Bernard
Associated Press

Associated Press

A federal judge on Monday, Sept. 14, 2009, rejected a $33 million settlement between the Securities and Exchange Commission and Bank of America Corp. over bonuses paid by Merrill Lynch.

NEW YORK — A federal judge on Monday rejected a $33 million settlement between the Securities and Exchange Commission and Bank of America Corp., saying the SEC's accusations of inadequate disclosure by the bank over bonuses paid at Merrill Lynch must now go to trial.

Separately, New York Attorney General Andrew Cuomo's office is preparing to file charges within the next couple of weeks against several high-ranking executives at Bank of America, claiming they failed to disclose details about the bank's acquisition of Merrill Lynch, according to a person familiar with the investigation.

The ruling in the SEC case comes one month after the agency and Bank of America thought they had put a thorny issue behind them, and leaves the SEC with the task of mounting a case against BofA over one of the most sensitive issues of the financial crisis — executive pay on Wall Street.

The SEC announced last month that it had settled its civil charges against BofA, which agreed to buy the New York investment bank last year, without the bank admitting or denying guilt in the case. BofA has said it didn't violate disclosure rules.

U.S. District Judge Jed Rakoff held up his approval of the settlement, however, and ordered the SEC last month to explain why it didn't pursue charges against specific executives at Bank of America over the accusations.

Rakoff, in his ruling, found that the proposed settlement "suggests a rather cynical relationship between the parties: the SEC gets to claim that it is exposing wrongdoing on the part of the Bank of America in a high-profile merger, the bank's management gets to claim that they have been coerced into an onerous settlement by overzealous regulators. And all this is done at the expense, not only of the shareholders, but also of the truth."

Cuomo's office is likely to file civil charges against the executives over their role in failing to alert shareholders to mounting losses and accelerated bonus payments at Merrill, said the person, who requested anonymity because no charges have been filed yet.

The AG's office has also questioned whether Bank of America failed to tell shareholders about its consideration of backing out of the deal and mounting write-downs at one of Merrill's mortgage lending subsidiaries.

Both the attorney general's office and Rakoff have questioned whether the bank knowingly hid details about the acquisition from shareholders ahead of a vote to approve the deal.

After receiving additional statements from the SEC and BofA last week, Rakoff ruled Monday that the proposed $33 million settlement "cannot remotely be called fair," and ordered that the case go to trial beginning Feb. 1.

Bank of America agreed to acquire Merrill Lynch in a hurried deal exactly one year ago today, just as Lehman Brothers was preparing to file for bankruptcy. It was later revealed that Merrill, with the knowledge of Bank of America executives, accelerated $3.6 billion in bonus payments before the deal closed on Jan. 1.

Merrill wound up paying the bonuses for 2008 despite losing $27.6 billion that year, a record for the firm. Those losses affected the bottom line at Bank of America, one of the largest recipients of U.S. government bailout funds.

Bank of America did not provide immediate comment on the ruling.

"As we said in our court filings, we believe the proposed settlement properly balanced all of the relevant considerations," SEC spokesman John Nester said in a statement. "We will carefully review the court's most recent order."

Prop. 8 Supporters Subpoena Activist Who Revealed Their Campaign Contributors

Continued from page 1

Colceson & Bostrom. Bopp did not return several calls seeking comment.

According to court records, the group is challenging the constitutionality of campaign finance disclosure requirements, claiming donors to Proposition 8 have been ravaged by e-mails, phone calls, postcards and even death threats.

In the suit, Bopp claims that the requirements of California's Political Reform Act of 1974 are unconstitutional by virtue of the First and Fourteenth Amendments.

Karger's website, www.californiansagainsthate.com, currently lists the names, addresses and donation amounts for the top 12 contributors to the Yes on Proposition 8 campaign, under the heading "Dishonor Roll."

The Yes on 8 campaign raised nearly $30 million and won the ballot battle over gay marriage last November by a vote of 52 percent.

Karger contends the subpoena is simply an act of revenge for the complaints he filed with the Fair Political Practices Commission against the Mormon Church for its alleged failure to report non-monetary contributions to the Yes on 8 campaign.

"This is all part of the PR [public relations] offensive being carried out by the Mormon Church," Karger said.

The Utah-based church did not directly donate to the campaign, but its members provided millions of dollars to it.

The Mormon Church is not a party to the January lawsuit.

California Attorney General Jerry Brown is defending the political reform act, arguing in court that disclosure requirements assist the state in detecting efforts to hide the identities of large donors and illegal spending of political funds for personal use.

"Political democracy demands open debate, including prompt disclosure of the identities of campaign donors," Brown said in a prepared statement.

The most recent action in the case came on Jan. 28, when U.S. Eastern District Judge Morrison C. England Jr. turned down the Yes on 8 group's request for a preliminary injunction exempting the group from campaign disclosure laws, saying that he was not persuaded that the threats were serious enough.

The group's subsequent report, made public Feb. 2, included its first disclosure of "major donors" who had given more than $10,000 to the campaign since June 30, 2008.

The Sacramento case is not the only effort by anti-gay rights groups to roll back campaign finance disclosure laws.

Bopp filed suit against the Washington Secretary of State July 28 to prevent the state from releasing the names and addresses of more than 138,500 Washington citizens who signed a petition in favor of Referendum 71.

The ballot referendum asks voters in Washington this November whether they want to expand domestic partnership rights and obligations in the state's originally limited domestic partnership legislation.

Washington Governor Christine Gregoire signed off on an expansion of rights for domestic partners in May, but opponents of that move rounded up 137,689 signatures to have the issue brought to voters this year.

In an enormous win for the group, a federal district judge ruled on Thursday that Washington officials were not allowed to reveal the names of those who signed the petition.

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