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By Jamie Weiss

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New Member Spotlight

Shawn J. Gebhardt, Ulmer & Berne LLP



Shawn J. Gebhardt is counsel in the Complex Business Litigation Practice Group at Ulmer & Berne LLP in Chicago, Illinois. His practice runs the gamut from commercial disputes and securities litigation, to professional liability claims, product liability claims, internal investigations, and more. He also has particular expertise defending false-advertising and consumer class action matters.

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Quote of the Week

"All things on earth point home in old October; sailors to sea, travellers to walls and fences, hunters to field and hollow and the long voice of the hounds, the lover to the love he has forsaken."

-Thomas Wolfe, Of Time and the River (1935).

Stop the Clock or Say Grace: When a Federal Court Declines Supplemental Jurisdiction, How Long Does a Plaintiff Have to Refile in State Court?

By Jamie Weiss



Most of you probably remember the concept of "supplemental jurisdiction" from law school: how federal courts have jurisdiction to hear state law claims when they are bundled with a federal claim arising out of the same set

of facts.

Some of you might remember that if the federal court dismisses the federal claims, it can then decline to exercise supplemental jurisdiction over any remaining state law claims, forcing a plaintiff to refile those claims in state court.

But do you remember what happens when the dismissal comes after the statute of limitations would have run on those claims? That's the question that the Supreme Court answered earlier this year in *Artis v. District of Columbia*, 138 S. Ct. 594 (2018), resolving a split among state supreme courts.

The Supplemental Jurisdiction Statute

The supplemental jurisdiction statute, 28 U.S.C. §1367, addresses this precise issue in subsection (d):

The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

In other words, the limitations period for a state law claim falling within supplemental jurisdiction is "tolled" while the claim is pending in a federal court and for 30 days after the claim is dismissed.

The Debate: "Stop the Clock" or "Grace Period"?

The issue for the Supreme Court in *Artis* was to determine what "tolled" meant in section 1367(d). The justices debated two options: (1) the clock on the state law statute of limitations stops while a federal case is pending, and it

begins running again after a dismissal (the "stop-the-clock" reading), or (2) the statute provides only a grace period of 30 days for refiling state law claims after a dismissal (the "grace period" reading).

The five-justice majority opinion, from Justice Ginsburg, settled on the first option and remanded to allow Ms. Artis's claim to proceed.

Background of the Case

A former health inspector for the District of Columbia, Stephanie Artis, was fired in November 2010. Id. She filed a Title VII employment discrimination suit 13 months later, and she also included three claims under D.C. law arising out of her termination. *Id.*

Several years later, the district court granted summary judgment to the District of Columbia on the Title VII claim and declined to exercise supplemental jurisdiction over the remaining D.C. law claims. *Id.* Fifty-nine days later—well after the statute of limitations would have run without any tolling— Ms. Artis refiled her state law claims in the D.C. Superior Court. *Id.*

Interpreting the Statute

Justice Ginsburg noted that the word "tolled" ordinarily means that the limitations period stops running while a claim is pending in a court. It then starts running again when the claim is no longer pending. *Id.* at 601. Conversely, when a legislature wants to provide a grace period, it typically does not use the word "toll"; instead, it uses language such as "the action may be recommenced within one year after such dismissal." *Id.* at 602.

Relying on the plain language of the statute, then, seems to point to the "stop-the-clock" approach. But section 1367(d) tolls the limitation period while a case is pending and for an additional 30 days. If tolling only stopped the clock, why did Congress add that additional 30 days?

The Court explained that this provision is not unusual in similar statutes because it provides a nominal safe harbor in the event that the federal lawsuit was filed with only a few days remaining in the original limitations period. *Id.* at 606. Thus, rather than having only a day or two to refile after a dismissal, Congress wanted plaintiffs to have some breathing space, so it provided for a minimum of 30 days. *Id.* at 605.

Finally, in response to an argument that the stop-the-clock approach disrupted states' ability to control their own limitations periods, the Court noted that the rule does safeguard the primary purposes of limitations statutes. Those are to "prevent surprise" to defendants and to bar "plaintiffs who have slept on their rights." *Id.* at 608. In the supplemental jurisdiction context, defendants have been timely sued and plaintiffs did come to court in the first

instance within the limitations period rather than sleeping on their rights.

The lessons from *Artis* for defendants and defense counsel are to be aware that state law claims can linger for months or years after a dismissal of a federal claim and to act accordingly.

Jamie Weiss is a partner in the litigation group of Ellis & Winters LLP in Raleigh, North Carolina. His complex commercial litigation practice includes matters as diverse as defending real estate developers from accusations of fraud, prosecuting claims involving trade secrets and employee mobility on behalf of companies and individuals, and defending cases involving crane and rigging accidents. Mr. Weiss serves as the DRI Commerical Litigation Committee co-chair of publications.

Keep The Defense Wins Coming!

Please send 250–500 word summaries of your "wins," including the case name, your firm name, your firm position, city of practice, and e-mail address, in Word format, along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to DefenseWins@dri.org. Please note that DRI membership is a prerequisite to be listed in "And the Defense Wins," and it may take several weeks for *The Voice* to publish your win.

Meghan Hatfield Yanacek



DRI member Meghan Hatfield Yanacek of Goodell, DeVries, Leech & Dann LLP obtained a defense verdict in the Circuit Court for Howard County for her client, a general surgeon. The plaintiff alleged that, despite having symptoms

and imaging consistent with gallbladder disease, the general surgeon should have suspected agenesis of the gallbladder—a very rare condition in which the gallbladder is congenitally absent – and should not have recommended gallbladder removal surgery. The plaintiff further alleged that the common bile duct was negligently injured during the surgery necessitating additional treatment. The defense argued that the surgery was indicated for this patient given the imaging and clinical presentation, that the surgery was performed appropriately, and that the patient had an unforeseeable and unavoidable complication given the atypical anatomy. After a seven-day trial, the jury rendered a verdict in favor of the doctor on both a count of medical negligence and on a count of lack of informed consent.

Jonathan Bruno



DRI member <u>Jonathan Bruno</u> of Rivkin Radler LLP secured a pre-answer dismissal of a thirdparty complaint in the Southern District of New York. Bruno's client represented the plaintiff in a lawsuit concerning his daughter and the defendant/third-party plaintiff represented the same plaintiff in a separate employment litigation case. The two cases were completely separate; however, since the two cases were being litigated at the same time, the two law firms participated in several telephone conferences with their mutual client. During those telephone conferences, plaintiff's claims against his former employer were allegedly discussed.

The defendant/third-party plaintiff permitted the statute of limitations to lapse on several of the plaintiff's available claims against his former employer and the plaintiff subsequently initiated a legal malpractice claim. The plaintiff only brought suit against his attorney in the employment litigation action. The plaintiff did not name Bruno's client who represented the plaintiff in a separate lawsuit concerning his daughter. However, the defendant (the employment litigation attorney) brought a third-party action asserting a contribution claim against Bruno's client. The third-party complaint alleged that Bruno's client was retained by plaintiff, entered into a joint-representation agreement with third-party plaintiff, and served as "concurrent counsel" with third-party plaintiff in the employment litigation action.

The court rightfully rejected the third-party plaintiff's allegations as conclusory and found that the parties had only communicated to "coordinate" the two separate matters and that it was "implausible" that the client had acted as "concurrent counsel" in representing the plaintiff in his claims against his former employer. The court further held that regardless of whether the client represented the plaintiff in his claims against his former employer or whether he provided negligent advice during any of the telephone conference, the third-party complaint provided no basis to infer that the client had contributed to the plaintiff's damages. Therefore, the third-party plaintiff had failed to state a claim for contribution against Bruno's client and the third-party complaint was dismissed with prejudice.

Amicus Update

High Court Grants Certiorari in Home Depot U.S.A. v. Jackson

On September 27, the U.S. Supreme Court granted certiorari in *Home Depot U.S.A., Inc. v. Jackson*, No. 17-1471. To further one of its core objectives—achieving fairness in class action litigation—the DRI Center for Law and Public Policy had filed an amicus brief urging review.

To curb state court class action abuses, Congress in 2005 enacted the Class Action Fairness Act (CAFA). One of CAFA's key provisions, 28 U.S.C. §1453(b), authorizes "any defendant" to remove a qualifying class action from state to federal court. To circumvent this expanded removal provision—and thereby keep class actions in plaintiff-friendly state courts—class action plaintiff lawyers have been enlisting defendants in ordinary state court debt collection suits to file broad, only tangentially related, class action counterclaims, or third-party class action complaints, against national or multistate corporate defendants. The question presented by the Home Depot appeal is whether such an additional class action counterclaim defendant, or a third-party class action defendant, is "any defendant" for purposes of removal under CAFA. All four circuits that have addressed this issue have held that \$1453(b) does not extend to such defendants. The basis for their holdings is a 1941 Supreme

Court case opinion, *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100, stating that a counterclaim defendant that was the original plaintiff in a debt collection suit cannot remove a case that it filed in state court.

DRI's amicus brief argued that these circuit court rulings conflict with CAFA's text and purpose, which are intended to ensure that national class actions are adjudicated (or settled) in federal, not state, courts. The amicus brief referred to CAFA's accompanying Senate Report, which recounts in detail many types of state court class action abuses, such as certifying even frivolous class actions to force settlements that are lucrative for plaintiffs' lawyers and virtually meaningless for individual class members.

DRI's brief was authored by <u>Lawrence S. Ebner</u>, founder of Capital Appellate Advocacy PLLC in Washington, D.C., fellow of the American Academy of Appellate Lawyers, and chair of the DRI Amicus Committee. The complete text of the DRI brief can be found <u>here</u>.

DRI will be filing a merits-stage amicus brief, urging the Court to enforce the CAFA right-to-remove provision.



NFJE Silent Auction: How to Use BidPal Mobile Bidding

The DRI Philanthropic Activities Committee is pleased to announce that the Ninth Annual Silent Auction benefiting the National Foundation for Judicial Excellence (NFJE) will be held October 17–18, 2018, at The Village (969 Market Street) in conjunction with the DRI Annual Meeting in San Francisco.

This year bids will only be made through BidPal and you can start bidding now! You don't even have to attend the Annual Meeting to bid and win. Please visit our online auction website to get started on bidding on some awesome items to benefit a great cause! You can bid anywhere, on any device with an internet connection.

Here Is How BidPal Works

Simply click on the <u>online auction</u> website link, browse items, click on "SIGN IN" in the upper right-hand corner. You can sign in with email, Facebook, or Google. Create a password for your BidPal account, enter your phone number and name, and click finish. You will then receive a text message with a link to start bidding. Simply add your credit card information to start bidding on items. (<u>Click here</u> for a step-by-step tutorial video of how to use BidPal Mobile Bidding.)

You can bid from anywhere, anytime! Find the item you are interested in and press "BID." You will then be prompted to enter your bid amount and to submit your bid.

You can click "WATCH" to easily keep an eye on items on which you are interested in bidding.

BidPal can also automatically bid for you up to your certain designated amount. Once you have submitted a

bid, you will be prompted to enter a Max Bid. Upon doing so, BidPal Mobile Bidding will automatically bid on your behalf, by increment, whenever you are outbid, up to your Max Bid amount.

You can also donate to the National Foundation for Judicial Excellence by clicking the "DONATE NOW" button at the top. Easily choose the amount you wish to give.

Your Profile gives you access to your activity, receipt, contact info, and credit card. Access your activity from the Menu (top left-hand corner) or Profile icon (person icon in the upper right-hand corner) to see items you have bid on, won, or are watching. Keep an eye on the color-coded icons indicating your current bidding status:



You are the current high bidder



You have been outbid



The item is no longer available for bidding

Outbid alerts and texts let you know when to jump back in and bid!

At the end of the silent auction, check Your Activity to see what you've won! Check your Receipt to see all purchases and payments for the event. You can even email yourself a receipt

Bid high and bid often—you are supporting an important cause! Thanks!.

For The Defense Digital Edition App Now Available

For The Defense magazine is now available to the DRI membership in **both** digital and print formats. Take a minute to watch this <u>brief video</u> that provides an overview of the benefits and the advantages that make FTD digital edition your "go to" DRI publication.

Great news! *FTD* digital edition is also available as an App (click the following links to download the App on Apple or Google Play). Similar to the *FTD* digital edition that comes to your inbox, the App allows you to search and share content with clients and colleagues. The App also allows you to create a favorite, zoom and pinch to see content, search and connect with advertisers and more! It is important to note that you need your DRI website login and password to download issues in the App, the App will notify you when a new issue is available.

Click here to access the most recent issue of *FTD* digital edition.



DRI and Laurel Road Student Loan Refinancing

One of DRI's newest member benefits is the Laurel Road Student Loan Refinancing Program. Please click here to review program details in their entirety.

Program-at-a-Glance

The Laurel Road Student Loan Refinancing Program offers fixed and variable rate loans in terms of 5, 7, 10, 15, and 20 years. Laurel Road offers qualified DRI members an interest rate discount of 0.25%, contingent on DRI membership. If a program participant drops their DRI membership, their loan rate increases. Laurel Road currently lends to graduates of 5,345 qualified secondary education institutions. They have lent to borrowers in all 50 states. The average lawyer

graduates with \$84K to \$122K in student debt. The average starting salary is \$135K. Laurel Road can save DRI members on average \$20,000 plus over the life of an average student loan.

Recently Added Bonus for Parents

In addition to the established member benefit, Laurel Road now offers its student loan refinancing program to parents who have taken out loans for their children's college education. Parents are able to take advantage of the same low rates that graduates can and are eligible to apply as soon as their child has graduated. More information on the program can be found here.

DRI Circles—Making Lawyer-to-Lawyer Connections Simple



DRI member lawyer-to-lawyer connections have become even easier and even more valuable. The DRI Circles App allows members to connect DRI member lawyer-to-lawyer

with each other by establishing personal networks or "circles." Through DRI Circles, you can create networks based on practice area, geographic region, shared interests, etc. The DRI Circles app allows you to send messages, set up meetings, refer and track business, references and more on your mobile device. Join DRI Circles today or update your app to get even more out of your membership.

Take a look at some of the recently added valuable benefits available through the DRI Circles App:

Added chat functionality within a business referral

- Added functionality to broadcast a message within a group
- Increased circles limit to 250 participants
- Videoconferencing

Important Note: If you are already utilizing the DRI Circles app, you will need to delete the current version and download the newest version to take advantage of these newly added features. Upon downloading the updated version, you will be notified of any future enhancements via Apple or Google.



https://itunes.apple.com/us/app/dri-circles/id1292016061?mt=8



https://play.google.com/store/apps/ details?id=com.dri.circles&hl=en_US

DRI LegalPoint™ Offers Exclusive Member Access to Valuable Articles, Books, and Defense Library Series (DLS)



LegalPoint™ (formerly DRI Online) is a members-only

service providing DRI members with exclusive access to a vast online library of DRI articles, books and materials. DRI members can search thousands of documents and filter them by practice area and resource. LegalPoint $^{\text{TM}}$ includes content from:

- For The Defense
- In-House Defense Quarterly
- Committee Newsletters
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- Seminar Materials
- DRI Defense Wins Reporter

In addition to searching all of DRI's LegalPoint™ content, you can also access Defense Library Series (DLS) books separately and review the table of contents and individual chapters. If you have not yet accessed LegalPoint, please click here to view a brief video and find out what you are missing.

Leverage the expertise of leading defense practitioners and find the on-point articles and resources you need with LegalPoint^m. Visit https://www.dri.org/legal-resources for more information.

Foley & Mansfield on the Move for Charity

YMCA Stair Climb in Los Angeles

The LA office of Foley & Mansfield once again participated in the YMCA Stair Climb to raise money for YMCA community events. Seventy-five floors, 1,664 steps up the <u>U.S. Bank Tower!</u> Here is a link to the results and the top four times from the office.

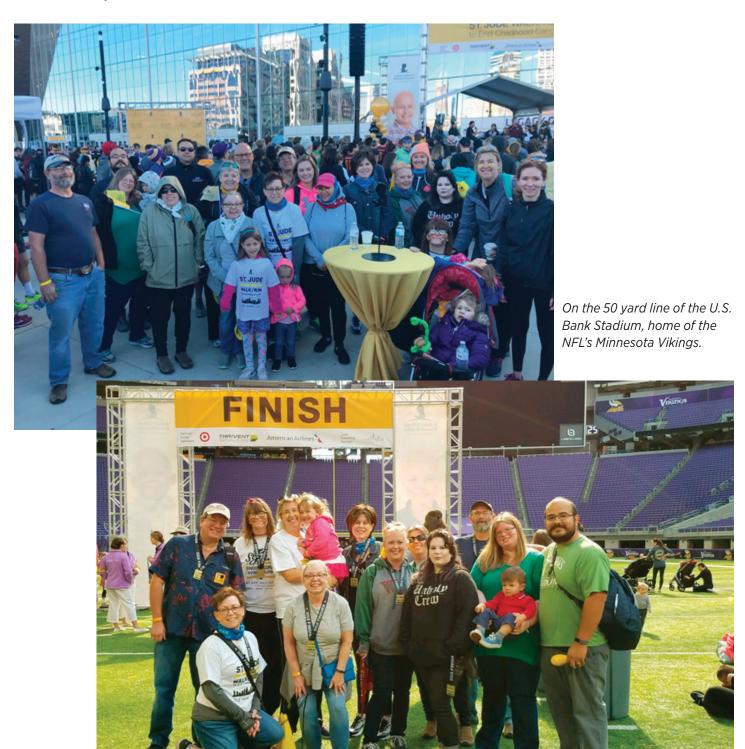
- Ann Park—19:20
- Mark Sayre—20:17
- Susan Graham—20:42
- Keith Ameele—22:30



St. Jude Walk in Minnesota

Thanks to everyone in the Minneapolis office of Foley & Mansfield who donated to St. Jude last month! Together the office raised more than \$6,000, which put them in the top 10 fundraising teams. And thanks to a great group of walkers!

A chilly start to the 5k walk outside U.S. Bank Stadium.



Asbestos Medicine Seminar, November 8-9, 2018



Pack your boots and two-step south by southwest to Austin for DRI's 2018 Asbestos Medicine Seminar! This seminar brings together the finest litigators with the top experts in medicine and science to provide an insightful and interactive event. With presentations on the latest in asbestos and talc litigation and the application of knowledge to case work-up, this seminar is a must for practitioners of all levels. No trip to the "live music capital of the world" would be complete without mixing songwriting talent with litigation skills. Attendees will enjoy lively networking receptions, where business development is the name of the game. You'll depart with invaluable information to keep you at the forefront of asbestos and talc defense. Click here to view the brochure and register for the program.

Professional Liability Seminar, November 29–30, 2018



The 2018 DRI Professional Liability Seminar will provide you with the tools to defend any professional successfully in our current legal climate. With presentations by the most prominent and experienced professional liability lawyers, experts, and insurance professionals in the country, this year's seminar will again provide attendees with the most up-to-date information regarding new issues, defenses, and strategies. Through the insight, tools, and skills that you will gain at this seminar, we hope to build on DRI's renowned foundation of success by putting you at the forefront of establishing efficient and creative ways to defend the modern professional. Click here to view the brochure and register for the program.

Insurance Coverage and Practice Symposium, November 29-30, 2018



The DRI Insurance Coverage and Practice Symposium is the foremost educational event for insurance executives, claims professionals, and outside counsel who specialize in insurance coverage. This year's symposium will once again offer an unparalleled opportunity to engage with a distinguished faculty of insurance industry leaders, experts, and coverage lawyers on emerging issues, recent court rulings, national trends, and the future of insurance coverage law. In addition, the symposium will provide exceptional networking events, as well as an opportunity to experience the wonder of New York City during the holiday season! Click here to view the brochure and register for the program.

Women in the Law, January 23-25, 2019



DRI's Women in the Law Committee proudly presents this premier educational and networking event designed to bring together women attorneys within corporate legal departments or law firms to connect and grow. We gather distinguished faculty from around the country, including in-house lawyers from some of the most recognized companies in America, experienced and successful trial lawyers, and nationally prominent business and professional coaches. Our superior programming provides concrete tools, real-world data, and experienced-based advice to invigorate our practice, increase our connections, and rise together in our professions and in our communities. Click here to view the brochure and register for the program.

How to Use Technology and Animations to Visualize Your Case, October 11, 2018, 12:00 p.m.-2:45 p.m. CST



The presentation will go over the uses of different types of visuals and technology in today's litigation landscape. Visualizations can take the form of 3-D animations, illustrations, and stitched together laser scan data to name a few. Virtual reality technology will also be covered along with the benefits that come from using it with animation. Click here to learn more and register for the webinar.

DOT Highway Projects Accidents: Who's Responsible?, November 1, 2018, 12:00 p.m.-1:00 p.m. CST



Understanding the myriad of players involved in a DOT Construction project and their distinct responsibilities when something goes wrong. You have the owner(DOT), the engineer of record (designs project), the consultants (they oversee the project), the contractor (who builds it in compliance with bid documents) It's common that attorneys don't even realize that so many parties are involved and may or may not be responsible for accidents, mishaps, and defective construction. Click here to learn more and register for the webinar.

Successfully Managing the Insurer/Employer Relationship, November 6, 2018, 12:00 p.m.-1:00 p.m. CST



Employers and their insurers (and other third-party vendors) typically work together in a harmonious fashion to provide a broad range of employee benefits to employees. However, there are numerous traps for the unwary in managing the employer-insurer relationship particularly with the increased regulatory and compliance demands on employers and insurers. It makes sense for the parties to spend time at the

front end to properly set expectations and understand the needs of the employer. In doing so, potential conflicts around the following topics can be avoided and/or minimized at claim time. Click here to learn more and register for the webinar.

Counseling Drug and Medical Device Companies on Risk Prevention Strategies, November 8, 2018, 12:00 p.m.-1:00 p.m. CST



Pharmaceutical and medical device manufacturers encounter numerous risks which, if not handled properly, could lead to litigation. Risks include the challenges of properly marketing products, complying with numerous regulations and emerging adverse events. Mass tort litigation, and challenges based on the False Claims Act and the Anti-kickback Statute among others, pose perpetual risks along with handling

the erosion of time tested defenses such as the learned intermediary doctrine. With an ever-shifting tide, it is important to stay current on these topics. Register now to learn from top attorneys whose focus is watching for and defending against these risks. Click here to learn more and register for the webinar.

In Memoriam

Peter J. Horst

Associate Clyde & Company, Chicago, IL 7/30/1965-8/21/2018 DRI member since 2017

Make the Most of Your Membership: Join a Committee!

Committee membership is a great way to engage with the DRI Community, enhance your career, and grow your network. Committees offer numerous opportunities to network, exchange ideas, offer client referrals, and collaborate with other members with similar interests. Being a committee member will keep informed about key issues within the practice, as well as upcoming committee activities such as meetings, seminars, webcasts, and publications. Most committees have "specialized litigation groups" (SLGs) that focus on even more specific areas of practice. Best of all, there is no charge to join any of DRI's 29 committees.

Customize your DRI experience and get involved in committees in the following capacities:

- Speak at a DRI seminar or webinar;
- See your written scholarship published in a committee newsletter, For The Defense, In-House Defense Quarterly, The Voice, or the Defense Library Series;
- Help organize a seminar, webinar, or other networking event;
- Serve on a committee steering committee in one of the many leadership roles available;
- And more!

Visit https://www.dri.org/committees/committee-listing.

New Member Spotlight

Shawn J. Gebhardt, Ulmer & Berne LLP



Shawn J. Gebhardt is counsel in the Complex Business Litigation Practice Group at Ulmer & Berne LLP in Chicago, Illinois. His practice runs the gamut from commercial disputes and securities litigation, to professional liability claims, product liability claims, internal investigations, and more. He also has particular expertise defending false-ad-

vertising and consumer class action matters.

Mr. Gebhardt dedicates significant time to pro bono matters, primarily representing asylum seekers. For his efforts, he was named a 2017 "Rising Star" by the National Immigrant Justice Center (NIJC), a nonprofit organization dedicated to providing comprehensive legal services to immigrants, refugees, and asylum seekers.

Mr. Gebhardt is a member of several American Bar Association committees, serves as a co-chair of the NIJC Junior Leadership Board, and volunteers as a commissioner on the Village of Skokie Fine Arts Commission. He is a graduate of the University of California Berkeley School of Law, where he served as the senior publishing editor of the California Law Review, and he received his undergraduate and graduate degrees in economics from the University of Missouri, Kansas City.

Mr. Gebhardt is admitted to practice in Illinois, each of its federal district courts, and the Second and Seventh Circuits. He also has been admitted pro hac vice in courts across the country.

Mr. Gebhardt is the proud father of three-and-a-halfyear-old twin boys who always keep him on his toes. On the rare occasions when he isn't working or parenting, he enjoys spending time with friends, listening to podcasts, and reading biographies and historical fiction.

Quote of the Week

"All things on earth point home in old October; sailors to sea, travellers to walls and fences, hunters to field and hollow and the long voice of the hounds, the lover to the love he has forsaken."

-Thomas Wolfe, Of Time and the River (1935).