LAW REVIEW 14032
March 2014

New USERRA Case from the 8th Circuit

By Captain Samuel F. Wright, JAGC, USN (Ret.)

1.1.1.9—USERRA applies to successors in interest
1.2—USERRA forbids discrimination
1.3.1.1—Left job for service and gave prior notice
1.3.1.2—Character and duration of service
1.3.1.3—Timely application for reemployment
1.3.2.1—Prompt reinstatement
1.3.2.2—Continuous accumulation of seniority-escalator principle
1.3.2.11—Furlough or leave of absence clause
1.4—USERRA enforcement
1.6—USERRA statutes of limitations
1.7—USERRA regulations
1.8—Relationship between USERRA and other laws/policies

***Dorris v. TXD Services LP,* 2014 U.S. App. LEXIS 3716 (8th Cir. Feb. 27, 2014).**

This is an interesting but confusing new case arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA). I think that both the plaintiff service member and the defendant employer were poorly represented by the attorneys they hired to represent them. I think that this case was brought against the wrong defendant and with the wrong legal theory. If you are going to hire an attorney to bring a USERRA case on your behalf, you should endeavor to find an attorney who is familiar with USERRA.

Facts of the case

Jonathan Dorris, a Sergeant in the Arkansas Army National Guard, was hired by TXD Services LP (TXD) in early 2007. He worked as a "floor hand" at oil rigs near Morrilton, Arkansas. In April 2007, Dorris received a "warning order" from the Army advising him that in the next six months he would likely be called to active duty for deployment to Iraq. He informed TXD managing partner Joe Poe of the warning order.

Dorris later received his activation orders, and he reported to Fort Chaffee, Arkansas, as ordered, on October 1, 2007. After pre-deployment training at Fort Chaffee, he deployed to Iraq in January 2008 for almost a year of "boots on ground" service. He was released from active duty in December 2008 and promptly applied for reemployment (or at least inquired about employment) both at TXD and also at Foxxe Energy Holdings LLC (Foxxe), which had purchased all of TXD's assets and had hired most or all of the former TXD employees, during the time that Dorris was on active duty in Iraq.

Dorris' last day of work at TXD, before he reported to active duty on October 1, was September 11, 2007, the sixth anniversary of the "date which will live in infamy" for our generation (September 11, 2001). It is unclear why Dorris left his civilian job 20 days before his active duty started on October 1. Dorris may have needed the time to get his affairs in order before reporting to active duty.

As I explained in Law Review 104[1] and other articles, Congress enacted USERRA (Public Law 103-353) on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men (including my late father) for World War II.

I have been dealing with the VRRA and USERRA since 1982, when I left active duty and took a job as an attorney for the United States Department of Labor (DOL). Together with one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in early 1991. The new law that President Bill Clinton signed on October 13, 1994 was about 85% the same as the Webman-Wright draft.

I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice. In 2009, I retired from private practice and joined the full-time staff of the Reserve Officers Association, as the first Director of the Service Members Law Center (SMLC).

As SMLC Director, I received and responded to 9,193 inquiries (766 per month on average) in 2013, from service members, military family members, attorneys, employers, ESGR volunteers, DOL investigators, congressional staffers, reporters, and others. Almost half of the inquiries (48.6%) were about USERRA, and the other half were about everything you can think of that has something to do with military service and law.

USERRA was enacted in 1994 and has been amended several times. This law is codified in title 38, United States Code, sections 4301 through 4335 (38 U.S.C. 4301-4335).

Section 4331 of USERRA gives DOL the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed USERRA regulations, for notice and comment, in September 2004. After considering the comments received and making a few adjustments, DOL published the final USERRA

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,023 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 169 new articles in 2013.

Regulations in the *Federal Register* on December 19, 2005. The Regulations are published in title 20 of the Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002).

Section 1002.74 of the Regulations addresses the issue of a delay between an individual's last day at the civilian job and his or her first day of active duty, as follows:

§ 1002.74 **Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?**

No. At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services:

(a) If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.

(b) *If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.*

(c) If the employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.

20 C.F.R. 1002.74 (emphasis by italics supplied, bold question in original).

If leaving TXD's employment 20 days before his active duty report date was Dorris' choice, then that was a choice that he was certainly entitled to make, and having left 20 days early does not deprive him of his USERRA reemployment rights. If TXD fired him 20 days early, knowing that he would be leaving soon in any case, then TXD violated section 4311(a) of USERRA, which provides: "(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." 38 U.S.C. 4311(a).

Most of USERRA's 1994 legislative history (showing the intent of Congress in enacting this law) can be found in the 1994 volume of *United States Code Congressional & Administrative News (USCCAN),* at pages 2449-2515. The legislative history contains an instructive paragraph about this scenario:

"If the employee is unlawfully discharged under the terms of this section [section 4311] prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, and processing of the claim should not await completion of the service, even if only for lost wages." 1994 *USCCAN* at 2456-57.

In October of 2007, while Dorris was on active duty at Fort Chaffee, preparing for deployment to Iraq, TXD's benefits administrator sent him a form letter advising him of his right under the Consolidated Omnibus Budget Reconciliation Act (COBRA) to continue his TXD health insurance coverage (and pay 102% of the entire premium, including the part that the employer normally paid for active employees). The COBRA notice identified the triggering event for the notice as "termination of employment."

Understandably alarmed, Dorris called the TXD human relations office at Morrilton and at Dallas, and he was informed by telephone that he had been "terminated for not showing up for work." Dorris requested that Poe contact him, but Poe never did. TXD does not dispute any of this testimony, except to submit an "exit checklist" showing that Dorris "quit" on September 11, 2007. It is unconscionable that in September 2007, 67 years after Congress enacted the VRRA in 1940 and 13 years after Congress enacted USERRA in 1994, the personnel office of TXD was apparently unaware of its obligations to an employee who had left his civilian job for the purpose of reporting to active duty in the United States armed forces.

It has now been 41 years since Congress abolished the draft and established the All Volunteer Military in 1973. With each passing year, more and more of the individuals who are in charge of things (including personnel departments of private corporations) have never served in the military, and no one in their families and none of their close friends have ever served in the military. They are clueless about military matters. Almost 900,000 National Guard and Reserve personnel have been called to the colors since the terrorist attacks of September 11, 2001, but many personnel directors seem woefully ignorant of their obligations under USERRA. We need to redouble our efforts to educate these folks.

In February 2008, while Dorris was on active duty in Iraq, TXD sold substantially all its assets to Foxxe, which took over TXD's operations without interruption. The sale contract included as an exhibit "a listing of all personnel currently employed by TXD to operate the Equipment, their job titles and descriptions, and current salaries." Article III of the contract further provided that Foxxe "will use reasonable efforts to offer employment . . . to those individuals listed" who Foxxe "determines in its sole discretion are qualified and necessary to operate and manage the Equipment." In what became the crucial issue in this lawsuit, TXD did not place Dorris' name on

that list. Following the asset sale to Foxxe, TXD ceased to operate as a going concern.

Dorris returned to the United States on temporary leave in August 2008 and learned that good friends at TXD were hired by Foxxe, that Foxxe hired "all" of TXD's employees, and that no unemployment claims were asserted against TXD following the sale. The Army[2] then wrote Foxxe a letter to make it aware of Dorris' "unsettling situation," stating that, "[h]ad there been no change of hands between organizations, Sergeant Dorris would have been entitled to reemployment due to wrongful termination." Dorris returned to the United States and was ready to resume work on December 15, 2008. Dorris contends he contacted both TXD and Foxxe seeking reemployment. Poe testified he was told that TXD Trucking, a separate corporate entity, offered Dorris a job and Dorris never followed up. In April 2009, Dorris was hired by Foxxe to the same position he had held at TXD.

TXD violated USERRA by terminating Dorris when he left for service and by excluding his name from the employee list provided to Foxxe.

When Dorris left his job for military service in September 2007, TXD should have recorded his status as "on military leave." TXD should not have recorded him as having "quit" or as having been "terminated." TXD's actions violated section 4316(b)(1) of USERRA, which provides:

"(b) (1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be--
(A) deemed to be on furlough or leave of absence while performing such service; and
(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service."

38 U.S.C. 4316(b)(1).

USERRA's 1994 legislative history expounds upon this provision as follows: "Section 4315(b) [later renumbered 4316(b)] would reaffirm that a departing serviceperson is to be placed on a statutorily-mandated military leave of absence while away from work, regardless of the employer's policy. Thus, terminating a departing serviceperson, or forcing him or her to resign, even with the promise of reemployment, is of no effect. *See Green v. Oktibbeha County Hospital,* 526 F. Supp. 49, 54 (N.D. Miss. 1981); *Winders v. People Express Airlines, Inc.,* 595 F. Supp. 1512, 1518 (D.N.J. 1984), *affirmed,* 770 F.2d 1078 (3rd Cir. 1985)." 1994 *USCCAN* at 2466.

TXD should have treated Dorris as though he were on a furlough or leave of absence when TXD sold substantially all its assets to Foxxe. Dorris' name should have been included in the list of active TXD employees that TXD provided to Foxxe, at the time of the sale. Excluding Dorris'

[2] This letter was most likely sent by an Army legal assistance attorney at Dorris' request.

name violated section 4316(b)(1), because having his name included in that list was a non-seniority benefit of employment that TXD accorded to other employees who were on *non-military* leaves of absence at the time of the sale of assets.

For example, let us assume that Mary Jones, another TXD employee, was on a leave of absence under the Family Medical Leave Act (FMLA), for the birth of a child, at the time of the sale of assets. TXD likely included Jones' name, or at least should have included her name, on the list of "active TXD employees" that it provided to Foxxe.

Perhaps Dorris was the only TXD employee who was away from work, for whatever reason, at the time of the sale of assets. That fact would not defeat Dorris' claim that TXD violated section 4316(b)(1) by excluding his name from the turnover list. In my view, it would be sufficient for Dorris to prove that if another employee had been on FMLA leave or some other kind of non-military leave (sick leave, jury leave, etc.), his or her name would have been included on the list.

Foxxe violated USERRA by failing to reemploy Dorris promptly, but Dorris did not sue Foxxe.

As I explained in Law Review 1281 (August 2012) and other articles, an individual must meet five conditions to have the right to reemployment under USERRA:

a. Must have left a position of employment (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services. It is clear that Dorris did this.
b. Must have given the employer prior oral or written notice. It is clear that Dorris gave TXD such notice.
c. Must not have exceeded the cumulative five-year limit with respect to the employer relationship for which the individual seeks reemployment. Since Dorris was called to active duty involuntarily, this 2007-08 period of service does not count toward his five-year limit. *See* 38 U.S.C. 4312(c)(4)(A).
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military. It is clear that Dorris was released from active duty in December 2008 and returned to his status as a drilling National Guard member. He did not receive a disqualifying bad discharge.
e. Must have made a timely application for reemployment after release from the period of service.

Dorris clearly meets the first four conditions and probably meets the final one. He testified that after he was released from active duty he made inquiries with both TXD and Foxxe.

It is unclear whether Dorris properly applied for reemployment at Foxxe. An application for reemployment need not be in any particular form of words, and Dorris was not required to

explain the legal rationale for his claim that he was entitled to reemployment at Foxxe, as the *successor in interest* to TXD. The DOL USERRA regulations contain the following statement about what must be included in an application for reemployment:

"§ 1002.118 **Is an application for reemployment required to be in any particular form?**

An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested."

20 C.F.R. 1002.118 (bold question in original).

If Dorris' communication to Foxxe in December 2008 included the crucial piece of information that Dorris was working for TXD at the time he was called to the colors in September 2007, then Dorris' application for reemployment was sufficient, and it is clear that Dorris met the other four conditions for reemployment. If Dorris did not include this crucial piece of information in his communication to Foxxe, Dorris does not have the right to reemployment because he did not make a timely application for reemployment at Foxxe within 90 days after he was released from active duty.[3]

Assuming that Dorris met the five conditions, he was entitled to be reemployed "in the position of employment in which the person [Dorris] *would have been employed* if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform." 38 U.S.C. 4313(b)(2)(A) (emphasis supplied).

The position that the returning veteran *would have occupied if he or she had been continuously employed in the civilian job* is usually *but not always* the position that he or she left. In this case, it is clear that the position that Dorris would have occupied in December 2008 is not the same position that he occupied in September 2007, when he was called to the colors.

In February 2008, while Dorris was on active duty in Iraq, TXD sold all its assets to Foxxe, and most or all of Dorris' TXD coworkers were offered and accepted similar positions at Foxxe. It is reasonable to conclude that if Dorris had not been called to the colors in September 2007 he (along with his colleagues at TXD) would have gone to work for Foxxe as part of the seamless transition from TXD to Foxxe. Dorris was entitled to reemployment in December 2008, but at Foxxe and not at TXD.

It is clear that Foxxe was the *successor in interest* to TXD, and Foxxe inherited the obligation to reemploy Dorris upon his return from active duty. The fact that Dorris' name was not included

[3] *See* 38 U.S.C. 4312(e)(1)(D).

in the turnover list does not defeat Dorris' claim that Foxxe should have reemployed him upon his application in December 2008.

Section 4303 of USERRA defines 16 terms that are used in this statute, including the term "employer" which is defined as follows:

"(4)
(A) Except as provided in subparagraphs (B) and (C), the term "employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including--
(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;
(ii) the Federal Government;
(iii) a State;
(iv) *any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph*; and
(v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.
(B) In the case of a National Guard technician employed under section 709 of title 32, the term "employer" means the adjutant general of the State in which the technician is employed.
(C) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318.
(D) (i) Whether the term "*successor in interest*" applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be determined on a case-by-case basis using a multi-factor test that considers the following factors:
(I) Substantial continuity of business operations.
(II) Use of the same or similar facilities.
(III) Continuity of work force.
(IV) Similarity of jobs and working conditions.
(V) Similarity of supervisory personnel.
(VI) Similarity of machinery, equipment, and production methods.
(VII) Similarity of products or services.
(ii) *The entity's lack of notice or awareness of a potential or pending claim under this chapter at the time of a merger, acquisition, or other form of succession shall not be considered when applying the multi-factor test under clause (i).*"

38 U.S.C. 4303(4) (emphasis supplied).

On October 13, 2010, President Obama signed into law the Veterans'Benefits Act of 2010 (VBA-2010), Public Law 111-275. This important new law makes several welcome amendments to USERRA and the Servicemembers Civil Relief Act (SCRA). Section 702 of VBA-2010 is titled "Clarification of the Definition of 'Successor in Interest."

It should be noted that Dorris returned from active duty and applied for reemployment at Foxxe 22 months before Congress enacted and President Obama signed VBA-2010. It is unclear whether the 2010 changes, with respect to the liability of successors in interest, are to be applied retroactively, but that issue probably does not matter because in my view Dorris was entitled to reemployment at Foxxe based on the version of USERRA that was in effect in 2008. USERRA's 1994 legislative history addresses the liability of successors in interest as follows:

"This provision [section 4304(4)] would also have the effect of placing liability on a *successor in interest*, as is true under current law [the VRRA]. The Committee [House Committee on Veterans' Affairs] intends that the multi-factor analysis utilized by the court in *Leib v. Georgia-Pacific Corp.,* 925 F.2d 240 (8th Cir. 1991) is to be the model for successor in interest issues, *except that the successor's notice or awareness of a reemployment rights claim at the time of merger or acquisition should not be a factor in this analysis.* In actual practice, it is possible that the successor would not have notice that one or more employees are absent from employment because of military responsibilities and a returning serviceperson should not be penalized because of that lack of notice."

1994 *USCCAN* at 2454 (emphasis supplied).

DOL promulgated its final USERRA Regulations on December 19, 2005, five years before Congress enacted VBA-2010. The USERRA Regulations contain two sections about the liability of successors in interest, as follows:

"§ 1002.35 **Is a successor in interest an employer covered by USERRA?**

USERRA's definition of 'employer' includes a successor in interest. In general, an employer is a successor in interest where there is a substantial continuity in operations, facilities, and workforce from the former employer. The determination whether an employer is a successor in interest must be made on a case-by-case basis using a multi-factor test that considers the following:

(a) Whether there has been a substantial continuity of business operations from the former to the current employer;

(b) Whether the current employer uses the same or similar facilities, machinery, equipment, and methods of production;

(c) Whether there has been a substantial continuity of employees;

(d) Whether there is a similarity of jobs and working conditions;

(e) Whether there is a similarity of supervisors or managers; and,

(f) Whether there is a similarity of products or services."

20 C.F.R. 1002.35 (bold question in original).

"§ 1002.36 **Can an employer be liable as a successor in interest if it was unaware that an employee may claim reemployment rights when the employer acquired the business?**

Yes. In order to be a successor in interest, *it is not necessary for an employer to have notice of a potential reemployment clai*m at the time of merger, acquisition, or other form of succession."

20 C.F.R. 1002.36 (bold question in original, emphasis by italics supplied).

The 2010 amendment was very helpful and welcome in clarifying and strengthening the application of USERRA to successors in interest, but it is clear that Dorris had the right to reemployment at Foxxe (assuming that he made a proper and timely application for reemployment) based on the law that was in effect in December 2008.

Dorris sued the wrong defendant.

I believe that Dorris' counsel made an important strategic error by suing TXD instead of Foxxe. I believe that TXD violated USERRA when it treated him as having "quit" or as having been "terminated" when he was called to the colors in September 2007, rather than treating him as having been on a "military leave of absence." I believe that TXD should have included Dorris' name in the list of active employees that it provided to Foxxe at the time of the sale of assets, and I believe that excluding Dorris' name violated section 4316(b)(1) of USERRA.

I believe that Foxxe violated USERRA by failing to reemploy Dorris promptly in December 2008, when he left active duty and applied for reemployment. Dorris was hired by Foxxe four months later, in April 2009, but as a new hire, not as a reemployed veteran. Foxxe had a duty to reemploy Dorris and have him back on the payroll within two weeks after he applied for reemployment in December 2008. *See* 20 C.F.R. 1002.181.

Section 4323(d)(1) of USERRA sets forth the remedies that a United States District Court may award to a successful USERRA plaintiff, as follows:

"(d) Remedies.
(1) In any action under this section, the court may award relief as follows:
(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful."

38 U.S.C. 4323(d)(1).

Dorris' counsel apparently did not consider carefully what remedy might be available against TXD even if the lawsuit were successful. TXD did not have the power to reinstate Dorris, because TXD went out of business ten months before Dorris returned from active duty and applied for reemployment. TXD violated USERRA in September and October 2007, but the company and the court cannot turn back the hands of time and undo the violation. There is no remedy against TXD under 38 U.S.C. 4323(d)(1)(A).

Dorris was apparently unemployed between December 2008 (when he left active duty and applied for reemployment) and April 2009 (when Foxxe hired him as a new hire). If the court concludes that Dorris lost pay and benefits *by reason of* TXD's violation of USERRA, the court can order TXD to compensate Dorris for the lost wages and benefits, under section 4323(d)(1)(B). But I question whether this loss of wages and benefits was *by reason of* TXD's USERRA violation. I think that the *intervening cause* for the loss of wages and benefits between December and April was Foxxe's USERRA violation, or possibly Dorris' failure to make a proper and timely application for reemployment with Foxxe.

Under section 4323(d)(1)(C), the court is to double the money damages if the court found that the defendant violated USERRA *willfully.* You don't need a master's degree in mathematics to understand that if you double zero you still have zero.

If I had been Dorris' lawyer, I would have sued Foxxe, in addition to or instead of suing TXD. *It is probably not too late to sue Foxxe now.* On October 8, 2008, Congress amended USERRA by adding a new section 4327. Section 4327(b) provides: "If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a Federal or State court under this chapter, *there shall be no limit on the period for filing the complaint or claim."* 38 U.S.C. 4327(b) (emphasis supplied).

Section 4327(b) clearly provides that there is *no statute of limitations* for filing a USERRA claim, and this preclusion of statutes of limitations clearly applies to causes of action that accrued on or after October 8, 2008. Dorris' cause of action against Foxxe accrued in December 2008, when Dorris returned from active duty and applied for reemployment and was not promptly reemployed. Dorris' cause of action against Foxxe is not time-barred, but if Dorris were to sue Foxxe now he would have to overcome a likely Foxxe argument that he is *equitably estopped* from bringing such a suit at this time because he has already sued another defendant based on an inconsistent legal theory.

How did the District Court and the Court of Appeals treat the lawsuit that Dorris brought?

I believe that Dorris' lawyer should have sued Foxxe, in addition to or instead of suing TXD. But the District Court and the Court of Appeals had to address the lawsuit that Dorris brought, not the lawsuit that I think that he should have brought. After discovery, TXD filed a motion for summary judgment, contending that there was no material issue of fact and that TXD was entitled to judgment as a matter of law. The District Court granted TXD's motion for summary judgment, and Dorris appealed to the 8th Circuit.

The 8th Circuit reversed the summary judgment, correctly in my view. That means that the case has been remanded to the District Court for trial, unless the parties settle (always a possibility). We will keep the readers informed of developments in this interesting and important case.