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## COURT THWARTS LAWYERS' ATTEMPT TO ELIMINATE RECORD OF SANCTION

by  
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One sign that judges are becoming less tolerant of time-consuming and resource draining 'junk' lawsuits is a recent increase in court-imposed sanctions on plaintiffs' counsel. In the highly competitive market of plaintiff lawyering, sanctions are an especially unwanted black mark on attorneys' resumes. In *ATSI Communications v. The Shaar Fund, Ltd.*, three attorneys made a creative attempt to use a post-judgment settlement as a bargaining chip to persuade a judge to drop sanctions against the counsel and order the "depublication" of documents relating to the case. *ATSI Communications v. The Shaar Fund, Ltd.*, \_\_\_F.3d\_\_\_, 2008 WL 4614773 (2nd Cir. 2008). The attorneys learned that the old adage "it never hurts to try" does not apply to the filing of baseless lawsuits, and that attempting to use a settlement as leverage to negotiate their way out of the consequences is not an option.

After having their lawsuit against a stock trader thrown out of court, the counsel learned from a New York Southern District Judge that the risk-reward factor of pursuing their weak case in court was not in their favor. Judge Lewis A. Kaplan dismissed the trio's first complaint without prejudice. Not to be dissuaded, the attorneys representing ATSI Communications, Inc. (ATSI) filed a second and third complaint against Knight Capital Markets and several defendants associated with Knight. Relying on the Private Securities Litigation Reform Act of 1995, counsel for Knight moved for sanctions against ATSI and its counsel. The district court opined that counsel for ATSI "lacked any reasonable factual basis for asserting that Knight had violated the federal securities law." *Id.* at 1. The court subsequently imposed \$64,656.69 in sanctions upon ATSI counsel – Knight's cost of defending itself – but denied a motion for sanctions against ATSI.

Counsel for ATSI appealed the sanction judgment, but not before reaching a settlement agreement with Knight, which was contingent upon the district court's vacatur of the sanctions judgment. Not only did ATSI's counsel seek to be relieved of the sanctions, but they also sought a court order directing legal publishers West Publishing Co., Westlaw, the Bureau of National Affairs (BNA) and LexisNexis® to "depublish" court documents and other printed coverage of the case.

The court found precedent in the U.S. Supreme Court's ruling in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). Similar to *U.S. Bancorp*, ATSI's counsel sought review of an unfavorable lower-court judgment and subsequently agreed to settle the case. Counsel for both parties applied for vacatur after executing a settlement, and both counsels sought to voluntarily forfeit their right to review. ATSI's counsel, however, argued that the *U.S. Bancorp* rule did not apply to their case. They argued that the sanctions could be vacated because the settlement agreement was conditional upon vacatur, and therefore the counsel had not yet forfeited their right to review the sanctions. Referring to the district court's judgment, the panel decided that "the parties cannot change that result by sleight of the draftsman's hand – making the settlement contingent upon, rather than in contemplation of, vacatur." *ATSI Comm., Inc.*, 2008 WL 4614773, 3.

As for ATSI's counsel's request that the court advise publishers to erase documents pertaining to the district court's judgment, the panel was equally unimpressed: "We note the extraordinary nature of a request to require privately owned and operated publishers to discontinue publishing public records, raising as it would serious constitutional questions," the court said in response. *Id.* at 4

In assuming responsibility for covering the defendant's legal fees, counsel for ATSI is not alone in having sanctions imposed upon it by an unimpressed judge. However, in its attempt to bargain its way out of the repercussions of the unfavorable decision, counsel for ATSI learned that making their settlement contingent upon the court's reversal of sanctions and a court-ordered "depublishing" of public records surrounding the case is not a strategy judges look kindly upon.

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