Judges Relying on the Internet for Evidence Should Take Notice, You May Get Reversed

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By **Jeffrey Campolongo** | January 24, 2019

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Judicial notice can become quite the spectacle, especially when it involves the use of information derived from the world wide web. Under Federal Rule of Evidence 201(b), federal courts have the power and authority to take judicial notice of any fact that is not subject to reasonable dispute either because it is generally known within the trial court's

territorial jurisdiction or can be
accurately and readily determined from sources whose accuracy can not reasonably be questioned. It was the latter category of information that was the subject of a recent dispute concerning an arbitration agreement. In *Goplin v. WeConnect*, 893 F. 3d 488 (7th Cir. 2018), *cert. denied*, U.S. Supr. Ct., No. 18-520 (Jan. 7, 2019), a district judge took judicial notice of information appearing on the website of one of the parties, ultimately resulting in a petition for certiorari to the U.S. Supreme Court.

According to court papers, Brooks Goplin worked for WeConnect, Inc. and signed an arbitration agreement called the "AEI Alternative Entertainment Inc. Open Door Policy and Arbitration Program." The arbitration agreement did not reference the name of his employer, WeConnect. Goplin sued for unpaid overtime under the Fair Labor Standards Act and a class action asserting claims under Wisconsin law. WeConnect filed a motion to compel arbitration. In support of its motion, WeConnect attached an affidavit from its director of human resources stating, among other things, that "I am employed by WeConnect, Inc.—formerly known as Alternative Entertainment, Inc. or AEI—as director of human resources." WeConnect invoked the arbitration agreement signed by Goplin with AEI to contend that Goplin's claims against WeConnect must be arbitrated.

Goplin countered that WeConnect was not a party to the original agreement and therefore could not enforce it. Goplin specifically directed the district court to WeConnect's website, which suggested that WeConnect and AEI were two separate, privately held companies. Goplin argued that this language supported his position that AEI and WeConnect were two distinct legal entities and therefore WeConnect could not enforce an agreement that he had entered with another company. In reply, WeConnect argued that it was merely a name change and not a merger between the companies and a contract with AEI was a contract with WeConnect.

The district court denied WeConnect's motion to compel arbitration because WeConnect failed to meet its burden of demonstrating that it was a party to the arbitration agreement. The court discounted the affidavit from the director of

human resources as conclusory and noted that "WeConnect's own website indicates that AEI ceased to exist in September 2016, when it merged with WeConnect Enterprise Solutions to form WeConnect, Inc." WeConnect filed a motion for reconsideration attaching corporate-formation documents and affidavits from its lawyer and CEO to support its claim that AEI had undergone a name change rather than a merger. The district court, however, was having none of it because the evidence was not newly discovered and, with reasonable diligence, could have been discovered and produced during the pendency of the motion.

WeConnect appealed to the U.S. Court of Appeals for the Seventh Circuit arguing that the district court should not have taken its website into account in ruling on the motion to compel arbitration. WeConnect griped that the court took judicial notice without giving the parties the opportunity to be heard. The court refuted WeConnect's assertion because Goplin cited WeConnect's website in his briefing and the district court did not engage in its own internet research to find the website. WeConnect could have addressed the language on its website in its opening brief or even in its reply brief but "it simply failed to use that opportunity," per the opinion.

Moreover, the appellate court found that the website was not the determinative factor in the district court's decision. WeConnect bore the burden of establishing its right to enforce the arbitration agreement. While the district court viewed the website as confirmation that AEI and WeConnect were distinct entities, the lower court's opinion made clear that it would have reached the same result even without the website. The district court did not find the HR director's affidavit to be sufficient proof that WeConnect and AEI were different names for the same entity. The appellate court went a step further and admonished WeConnect for failing to introduce the strongest evidence of its relationship with AEI from the get-go, and instead miscalculating and relying on a conclusory sentence in a human resources affidavit to establish the corporate relationship between WeConnect and AEI.

As a result, the arbitration agreement with AEI was deemed unenforceable. One might think that would end the inquiry, but alas a petition for certiorari was filed by WeConnect with the Supreme Court. As it turns out, judicial notice of information gleaned from the internet was actually the source of a split among circuit courts. In its petition for certiorari, WeConnect contended that our own Third Circuit, as well as the Sixth Circuit, considered the issue of whether it is appropriate for a court to consider information provided on a website, wherein each court recognized that such information is improper for courts to consider. This, WeConnect argued, put the issue squarely at odds with the Seventh Circuit's decision in *Goplin v. WeConnect.*

In *Victaulic v. Tieman*, 499 F.3d 227 (3d Cir. 2007), as amended (Nov. 20, 2007), the Third Circuit vacated a district court's decision taking judicial notice of information the district court gleaned from a website and inappropriately used to establish certain facts about a litigant's business. The Third Circuit explained that "we require that evidence be authenticated before it can be admitted" to ensure that "we allow judicial notice only from sources not reasonably subject to dispute." The Third Circuit offered this interesting nugget about websites: "a company's website is a marketing tool. Often, marketing material is full of imprecise puffery that no one should take at face value (citations omitted). Thus courts should be wary of finding judicially noticeable facts among all the fluff; private corporate websites, particularly when describing their own business, generally are not the sorts of 'sources whose accuracy cannot reasonably be questioned.' " The Third Circuit ultimately concluded that courts "taking a bare fact" that is absent from the record "and then drawing inferences against" a litigant was "too far afield from the adversarial context of litigation," to endorse.

The divide deepens. The Seventh Circuit decision in *Goplin* and the Third Circuit decision in *Victaulic* would appear to be directly at odds, thus making it ripe for a decision by the Supreme Court. Unfortunately, we will have to continue to wait for guidance because the Supreme Court refused to hear the *Goplin* appeal. This means

that the case law in all respective circuits will remain unchanged. For the district judges in the Third Circuit, be aware that relying on extrinsic evidence such as the internet, without some other basis for deciding a case, is likely to get the decision reversed. Judicial notice can be a tricky little thing.

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