

RECENT DEVELOPMENTS

Ledet v. Seasafe, Inc.:

To Footnote or Not to Footnote?

The Louisiana Third Circuit's decision in *Ledet v. Seasafe, Inc.*, 783 So.2d 611 (La.App. 2001), has drawn considerable attention, both locally (in the *New Orleans Times-Picayune*) and nationally (in the *New York Times*), on an arcane issue unrelated to the decision itself: the use of footnotes in judicial opinions.

The *Ledet* case concerned whether a workers' compensation carrier could seek reimbursement from the injured worker's statutory employer, when the injured worker alleged that he was injured by the employer's intentional act. The Third Circuit panel unanimously agreed that under these facts, the comp carrier could seek reimbursement from the statutory employer.

Rather than joining the majority opinion, Chief Judge Doucet concurred, because the majority's author (Judge Woodard) put all citations in footnotes. Judge Doucet opined that putting citations in footnotes is contrary to the "Blue Book," the citation manual used by most law reviews, lawyers, and judges. Judge Doucet believed that the court rules require that all citations be put in the main text.

Judge Woodard begged to differ. She opined that the Blue Book does not require that citations go in the main text; it simply observes that judges and lawyers often put them there. Judge Woodard advocated using citational footnotes, for a number of reasons:

- Moving the citations to footnotes leaves the main text uncluttered and therefore easier to read.
- Some of the most highly respected jurists in Louisiana have used citational footnotes, including Judges Alvin Rubin and John Minor Wisdom of the U.S. Fifth Circuit and Judge Melvin Shortess of the Louisiana First Circuit.
- Advanced legal writing scholars such as Bryan Garner recommend putting citations in footnotes.
- Putting citations in footnotes is the nationwide trend in both state and federal courts.
- The original reason for putting citations in main text was "the mechanical limitations of typewriters...." Modern word processing software has no such limita-

tions. Because the reason for putting citations in main text no longer exists, the practice itself should cease.

On the other hand, Judge Woodard joined the many writers who abhor substantive or talking footnotes: footnotes with arguments, explanations, or anything more than bare citations. She cited Axel Lute, who has called talking footnotes "excrement in the corridors of academe." She also cited Noel Coward, who said that coming across a talking footnote "is like going downstairs to answer the doorbell while making love." Finally, she cited Judge Abner J. Mikva, who lambasted talking footnotes as "phony excrescences" and "an abomination."

Judge Woodard defended judicial independence in writing style and her own exercise of that independence by using citational footnotes. "[M]y objective for using *citational* footnotes, as opposed to placing a string of citations in the middle of a sentence, is to write my opinions in an uncluttered, flowing, writing style in order to make them accessible and understandable, not only to lawyers and judges, but also to litigants and to the people whom I was elected to serve, without depriving the legal community of necessary references." Judge Woodard recommended that other judges adopt this writing style because "using *citational* footnotes yields stronger, clearer opinions...."

Judge Woodard also pointed out—twice—that Judge Doucet himself had written several opinions in which he put the citations in footnotes. Of course, Judge Woodard used footnotes to list the citations to those opinions by Judge Doucet.

Raymond P. Ward

Sessions, Fishman & Nathan, L.L.P.
New Orleans, LA

*The most beautiful things
are those that madness prompts
and reason writes.*

—André Gide

Williams v. Dallas Area Rapid Transit: Rule Denying Precedential Status to Unpublished Decisions Changes Case Outcome

Federal appellate courts and Louisiana appellate courts publish some, but not all, of their decisions. Published opinions—the ones that literally go into the books—are treated as legal precedents by both trial court judges and the appellate court that issued the opinion. Lawyers routinely cite published opinions in their briefs, and courts routinely cite them in subsequent opinions and decisions.

Unpublished decisions, on the other hand, are generally not treated as legal precedent. Fifth Circuit Rule 47.5.4 states that unpublished decisions "are not precedent." Rule 2-16.3 of the Uniform Rules of Louisiana Courts of Appeal prohibits lawyers from citing any court of appeals decision that is designated "not for publication," except in the same or related litigation.

The practice of denying precedential status to unpublished decisions is coming under increasing attack. One of the latest salvos was fired by Fifth Circuit Judge Smith, who, joined by Judges Jones and DeMoss, dissented from the denial of rehearing *en banc* in *Williams v. Dallas Area Rapid Transit*, No. 00-10361 (5th Cir. June 25, 2001) (panel opinion: 2/22/01, 242 F.3d 315). The controversy over citing unpublished decisions is not merely an arcane, academic question for appellate specialists. In *Williams v. DART*, it changed the outcome.

In 1999, the Fifth Circuit, in *Anderson v. DART*, held that DART is a political subdivision of the State of Texas, and hence immune from suit under the Eleventh Amendment. But the *Anderson* decision was unpublished. In 2001, the Fifth Circuit was faced with the same question in *Williams v. DART*: whether DART enjoys Eleventh Amendment immunity from civil suits. If *Anderson* had been published (or if unpublished decisions were given precedential effect), it would have bound the *Williams* court. But because *Anderson* was unpublished, the *Williams* court was free to depart from it. And depart it did, holding that DART is not a political subdivision and is not immune from suit under the Eleventh Amendment.

So, the same court that gave DART Eleventh Amendment immunity in 1999 took it away in 2001. The same litigant (DART) who appeared twice before the