

Letter from
the President

Whether the “new millennium” or the “new century” actually begins this year or next, the celebrations around the world that marked the start of the year 2000 could not help but give us reason to reflect upon the 1900’s, and to consider what our own generation’s legacy will be when the world debates which year actually begins the twenty-second century.



Jeffrey C. Briggs

My own reflections were particularly stimulated by recent books touting my grandparents’ and parents’ generations as having tested and brought out the best in the human condition. This made me wonder if we and our children will be viewed by those who usher in the next century as having seized or squandered the opportunity to expand the causes of liberty and justice for which our parents and grandparents fought.

Both of my grandfathers served in the first world war, confident they were fighting the “war to end all wars.” Both then chose the legal profession, one eventually becoming a judge. My father served in both Korea and Vietnam, while others in his generation and the next fought for new liberty and justice within and without our own country. Reflecting on my predecessors’ contributions to the twentieth century made me wonder for what battles will our generation be remembered?

The “Cold War” may have ended, but the causes working against freedom and justice continue in many new guises, as well as some of the old. What will we who usher in the new century leave as our own legacy to the cause for justice in a world where

(Continued on page 12)

The New Anti-Cybersquatting Statute:
Practical Solution or Litigator’s Dream?

In November, the Anticybersquatting Consumer Protection Act was signed into law.

Whether this new law, which adds a series of new provisions to Section 43 of the Lanham Act (15 U.S.C. §1125), will make it easier for businesses and others to resolve domain name disputes or simply will increase legal fees and costs, without measurable benefit over the prior law, remains to be seen.

Prior to the enactment of the new law, litigants involved in domain name disputes usually invoked “traditional” principles of trademark and unfair competition law under the Lanham Act, requiring, among other things, proof that the defendant had engaged in some sort of commercial activity in connection with the plaintiff’s mark, and that, as a result of that commercial activity, there was a likelihood of confusion among consumers. In other words, that the defendant was using the domain name as a mark to indicate the source of the defendant’s goods or services. For registered marks, the Lanham Act requires that the use be “in connection with the sale, offering for sale, distribution or advertising of any goods or services” while for unregistered marks it requires use “on or in connection with any goods or services.” 15 U.S.C. §§1114, 1125.



Gregory J. Sater

As a result, in the context of domain name disputes, the mere act by the defendant of registering the plaintiff’s mark (or a confusingly similar one) as the defendant’s domain name, without commercial conduct thereunder, was held to be not actionable under the Lanham Act, prior to the new statute. *Panavision Int’l L.P. v. Toeppen*, 945 F. Supp. 1296 (C.D. Cal. 1996), aff’d, 141 F.3d 1316 (9th Cir. 1998); *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F.Supp. 949 (C.D. Cal. 1997). Still, despite the limitations of the Lanham Act in the context of cyberspace, courts were able to find a way to deal with cybersquatters or, at least, some of the various sub-species thereof, and arrive at a just result. For instance, where it was found that a defendant had registered its domain name (containing the plaintiff’s mark) for the mere purpose of ransoming it to the plaintiff, the court satisfied the commercial use requirement by finding, essentially, that the defendant was in the domain name ransom business. *Intermatic, Inc. v. Toeppen*, 947 F.Supp. 1227 (N.D. Ill. 1996); *Panavision Int’l L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998). Similarly, where it was found that a defendant had registered its domain

(Continued on page 2)

INSIDE

Defeating the Malicious Prosecution Claim	by John W. Amberg.....p. 3
Proximate Cause: A Question of Fact or Policy?	by Robin Meadow and Jennifer L. Kingp. 5
Responding to Ninth Circuit Concerns: The Innovative Work of the Evaluation Committee	by Hon. Procter Hug, Jr.....p. 7
Cases of Note	by Denise M. Parga.p. 9

name (containing the plaintiff's mark, Planned Parenthood) for the purpose of intercepting potential online visitors to plaintiff's web site and telling them about the defendant's "pro life" view of abortion, the court satisfied the commercial use requirement by finding that the religiously and politically motivated defendant was promoting an anti-abortion book on his web site, and was likely preventing some Internet users from reaching the plaintiff's real web site, thereby harming the plaintiff commercially. *Planned Parenthood Federation of America, Inc. v. Bucci*, 42 U.S.P.Q.2d 1430 (S.D.N.Y. 1997). See also, *Jews for Jesus v. Brodsky*, 993 F.Supp. 282 (D.N.J. 1998) (intent to intercept audience).

Given the creativity and flexibility which has been demonstrated by the federal courts in these and other domain name cases, one must ask whether the new law really adds anything to, or improves, the preexisting law.

Under the new law, a person is liable if he or she "registers, traffics in, or uses a domain name" that is "identical or confusingly similar" to the plaintiff's mark (if it is a distinctive mark) or is "dilutive" of that mark (if it is a famous mark). For liability to attach, there must be proof of the defendant's "bad faith intent to profit" from the plaintiff's mark. Courts "may consider" various factors in determining whether someone had "a bad faith intent to profit" from the mark including, but not limited to, nine factors that are specified in the statute. It remains to be seen, however, whether these nine factors, and the amorphous "bad faith intent to profit" standard to which they are relevant, are going to simplify and streamline future domain name litigation, or make it more factually complicated and more expensive than it was before, with little additional benefit.

Take, for instance, the fifth enumerated factor which courts are advised that they "may" consider: "the person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the

intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site."

This factor is reminiscent of the *Planned Parenthood* case cited above, in which the defendant intended to divert online traffic to his web site not for commercial gain but to promote his religious and political views and disparage Planned Parenthood and its contrary "pro choice" views. But the new law would seem to require future plaintiffs to submit proof on a greater number of elements than the plaintiff had to submit in the original *Planned Parenthood* case, making it harder, not easier, for them to obtain relief under the new statute.

Similarly, factors three and four in the statute, *i.e.*, whether the defendant previously used the domain name in connection with the "bona fide offering of goods or services" and whether his or her use of the plaintiff's trademark qualifies as a "bona fide noncommercial or fair use," also fail to provide much guidance. For one thing, the key term "bona fide" is nowhere defined.

The vague "bad faith intent to profit" standard will not be easy to apply. Would a court find "bad faith intent to profit" where someone has used the plaintiff's mark as part of his or her domain name without intending to sell any goods or services thereunder, or to derive any income therefrom, but, instead, merely intending to attract visitors to its web site and spread a political, economic, educational, or social message (assuming that, unlike the defendant in the *Planned Parenthood* case, this person's message does *not* tarnish or disparage the plaintiff or its mark)? Would that use of the mark (to attract attention online for the defendant's message, but not do anything that would harm the owner of the mark) constitute a "bad faith intent to profit" from the mark, or would it qualify as a "bona fide noncommercial use" or "fair use" thereof? (One could imagine a nike.com web site about Greco-Roman gods, featuring the goddess of victory, Nike.)

With respect to this hypothetical, it seems the new statute will provide courts with little or no further guidance than the old statute did (and perhaps less) and will merely induce attorneys to waste reams of paper arguing about the "bad faith intent to profit" standard and the applicability or non-applicability of the nine elements which the courts are advised to consider.

Another hypothetical: how would a court treat a fan who is obsessed with a celebrity and uses the latter's name as part of the fan's domain name, *e.g.*, hypothetically, vanhalen.com, without attempting to sell goods or services on the web site, or to profit in any way therefrom, but merely discussing, in a positive, salutary, and "fan club" fashion, certain known, public, and true facts about the celebrity in question? Would *that* constitute "a bad faith intent to profit" from the celebrity's name, or would it be a "bonafide noncommercial or fair use" thereof?

What if the celebrity in this hypothetical wanted to have the "dot com" domain name for himself or herself, or for his or her authorized fan club or merchandising arm, and the defendant was preventing the celebrity from realizing that goal by "squatting" on the domain name because he or she just happened to register it first? What if fans on the Internet are looking for the celebrity or his or her authorized fan club or merchandising arm, using the celebrity's name followed by "dot com," with the rational expectation of finding what they seek at that address, only to find, instead, the obsessed fan's web site (or to find no site at all, if the domain name has been registered but not used by the defendant)? Is the loss of Internet traffic to the celebrity's existing or desired *authorized* web site a harm that can be remedied by the new law even though, in this hypothetical, the fan squatting on the "dot com" address has exhibited no intent to "profit" from the site, in a traditionally commercial sense? It seems the harm suffered by the celebrity in this hypothetical *can* be remedied by the Lanham Act and state laws that preexisted the new statute (as in the *Planned Parenthood* case, where it was noted that the

Special Dinner Program

Thursday, February 24, 2000

The Biltmore Hotel
506 S. Grand Avenue, Los Angeles, CA 90071

Judges Reception 6:00 p.m.

Dinner & Program 7:00 p.m.

"Your Client, Co-Counsel, Opposing Client, Opposing Counsel, (the JUDGE): Crime or Fraud, What Do You Do?"

Please join us for a dinner program
with our special guest moderator:

Geoffrey Hazard, Jr.

Trustee Professor of Law, University of Pennsylvania Law School;
Sterling Professor of Law, Emeritus, Yale University; Director
Emeritus, American Law Institute; and author of over 290 books,
articles and reports on legal ethics and the practice of law.

Panelists:

Honorable Alex Kozinski
Judge, United States Ninth Circuit Court of Appeals

Gerald Chaleff
Orrick, Herrington & Sutcliffe

1 (ONE) HOUR OF MCLE ETHICS CREDIT

Advance Price:

ABTL Member \$55.00 • Non-Member \$70.00

Discount on second firm table purchase.

(Continued on next page)

defendant's web site was likely preventing Internet users from reaching the plaintiff's site, causing a harm that could be remedied under the Lanham Act) and an argument can be made that, in order to arrive at this same result, the new statute will provide courts with no further guidance than the old statute did.

And what happens under the new law if a person registers a domain name that includes a mark, or someone's name, and then decides to do nothing with it? No commercial, religious, political, "fan club," or other use is made; no ransom request is made. What happens when the owner of the mark threatens to file suit, and demands that the name be transferred to him or her, and the defendant then, as part of a privileged settlement offer, proposes that some payment be made to resolve the dispute? Can that settlement offer constitute evidence of the defendant's bad faith intent to profit from the mark, or is it simply evidence of his or her intent to resolve the dispute? Again, it seems that whatever the result should be, in this hypothetical, it is a result for which the new statute provides courts with little or no further guidance than the old statute did.

The resolution of these and other conceivable situations may be further complicated by yet another provision of the new statute, which provides that bad faith intent to profit cannot be found where "the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful" (a rather broad escape clause) and also may be influenced by the new ICANN/Network Solutions Domain Name Dispute Resolution Policy, which also sets forth a "bad faith intent" standard and a (different) laundry list of factors to be considered in the "mandatory administrative proceedings" conducted pursuant to that Policy.

This is not to say that there is nothing new, or of interest, in the new statute. Everyone involved in domain name litigation should examine it carefully. For one thing, it authorizes *in rem* actions against disputed domain names where the defendant cybersquatter cannot be found or cannot be made subject to personal jurisdiction, and provides plaintiffs a right to elect either actual damages and profits or statutory damages of not less than \$1,000 and not more than \$100,000 per domain name "as the court considers just." It also contains a specific provision against the registration of any domain name consisting of "the name of another living person, or a name substantially and confusingly similar thereto" without that person's consent and "with the specific intent to profit from such name by selling the domain name for financial gain to that person or to any third party," which is likely to accelerate the extinction of at least *one* sub-species of cybersquatter: the cybersquatter who has the temerity to register a celebrity's name in order to offer it to that celebrity for a price (behavior which, prior to the new statute, would have been dealt with under the *Intermatic* and *Panavision* line of cases, *supra*, assuming the name of the celebrity could be considered a trademark).

In summary, with the new statute focused on the defendant's intent (which is never easy to prove), suggesting that courts undertake a multi-factor analysis in determining that intent (with at least nine non-exclusive factors listed), and providing that there can be no liability for any defendant who "believed and had reasonable grounds to believe" that his or her use of the domain name was "lawful" or "a fair use," it seems the statute is likely to generate significant legal fees and costs as lawyers attempt to apply it to real world situations which do not fit cleanly into its nine enumerated examples and that, after all has been said and done, in at least *some* categories of domain name disputes, the end result is likely to be no different than that which could and would have been obtained under the Lanham Act and similar state laws, as they existed and as they were flexibly applied by the courts, prior to the enactment of the new statute.

— Gregory J. Sater

Defeating the Malicious Prosecution Claim

It has been said that the lawyer's best friend is a client with a grudge and a healthy bank account. But what if the angry party with the war chest is the defendant who just prevailed against your client, and now intends to exact revenge through a malicious prosecution suit? Or what if your client is the prevailing defendant, and now wants you to recover its legal fees and more by suing the unsuccessful plaintiff? Disgruntled litigants are increasingly fighting back against claims they regard as frivolous, but malicious prosecution remains a disfavored cause of action in California and a difficult claim to prove. Knowing the hurdles a party must surmount in order to prevail may provide early leverage to defeat a malicious prosecution claim, or to discourage its filing in the first place.

Establishing a Lack Of Probable Cause

To establish a cause of action for malicious prosecution, a plaintiff must prove that (1) the prior action was commenced by or at the direction of the defendant, and was pursued to a legal termination in his favor, (2) was brought without probable cause, and (3) was initiated with malice. *Sheldon Appel Co. v. Albert & Otiker* (1989) 47 Cal.3d 863, 871; *Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 892-893. The malicious prosecution tort has long been recognized as having a chilling effect on ordinary citizens' willingness to bring a dispute to court, and therefore, is a disfavored cause of action. *Sheldon Appel Co., supra* at 872; *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, modified, ___ Cal.App.4th ___, 2000 Daily Journal D.A.R. 138. The elements of the tort have been carefully circumscribed so that litigants with potentially valid claims will not be deterred from bringing their claims to court. *Sheldon Appel Co., supra*. To further avoid improperly deterring individuals from resorting to the courts, the key issue — the existence or absence of probable cause — is a question of law for a court to decide. *Id.* at 875.

Probable cause is not the same as legal cause. If it were, every plaintiff who loses a case would be liable in a subsequent action for malicious prosecution. *Lucchesi v. Gianni Uniack* (1984) 158 Cal.App.3d 777, 785. Similarly, an attorney is not an insurer that his client will prevail in the litigation. His only duty is to avoid prosecuting untenable claims. *Williams v. Coombs* (1986) 179 Cal.App.3d 626, 640. Put another way, it is not "true charges" that the law seeks to ensure, but merely "legally tenable" claims. Proof of favorable termination does not create a conflict of interest on the issue of probable cause, nor does proof of the element of malice. *Nicholson v. Lucas* (1994) 21 Cal.App.4th 1657, 1665; *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 567, *cert. denied*, 498 U.S. 919 (1990).

The Supreme Court in *Sheldon Appel Co.* defined the test for probable cause:

"[T]he probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, *i.e.*, to determine whether, on the basis of



John W. Amberg

(Continued on page 4)

Defeating the Malicious Prosecution Claim

Continued from page 3

the facts known to the defendant, the institution of the prior action was legally tenable. The resolution of that question of law calls for the application of an objective standard to the facts on which the defendant acted."

Id. at 878. If the facts upon which the defendant acted in bringing the prior action are in dispute, they must be decided by a jury before the court can determine the issue of probable cause. *Ball v. Rawles* (1892) 93 Cal. 222, 227, quoted by *Sheldon Appel Co., supra*, at 877. However, the only relevant factual issue is which facts were known to the defendant when he filed the prior action, not whether they were true or their particular significance. Thus, "[w]hen there are no disputed questions of fact about [the defendant's] preparation and knowledge prior to the institution of the proceeding giving rise to the malicious prosecution claim," the probable cause issue is properly determined by the trial court. *Nicholson v. Lucas, supra*, at 1665. If the trial court determines that the prior action was objectively reasonable, the plaintiff has failed to meet the threshold requirement of demonstrating an absence of probable cause and the defendant is entitled to prevail. *Sheldon Appel Co., supra* at 878.

In defining the nature of probable cause, the *Sheldon Appel* Court rejected the suggestion in *Williams v. Coombs* that probable cause be measured by "whether a prudent attorney, after such investigation of the facts and research of the law as the circumstances reasonably warrant, would have considered the action to be tenable on the theory advanced." *Id.* at 885. Instead, it adopted a more liberal test from *In re Marriage of Flaherty* (1982) 31 Cal.3d 367, 350, in which the Supreme Court had held that an appeal would be found frivolous only if "any reasonable attorney would agree that the appeal is totally and completely without merit." The Court explained: "[W]e believe that the less stringent *Flaherty* standard more appropriately reflects the important public policy of avoiding the chilling of novel or debatable legal claims." *Id.* Therefore, it modified the *Flaherty* standard and announced the new test for probable cause in malicious prosecution cases: "whether any reasonable attorney would have thought the claim tenable." *Id.* at 886. In other words, to establish that the underlying lawsuit was instituted without probable cause, the plaintiff in the malicious prosecution suit must prove that based on the facts known to the lawyers when they filed the lawsuit, no reasonable attorney would have thought that the claims in the action were tenable. *Sheldon Appel Co., supra; Copenbarger v. International Ins. Co.* (1996) 46 Cal.App.4th 961, 964.

The traditional rule that the existence of probable cause is judged solely on the basis of the facts known to the malicious prosecution defendant when it filed the prior lawsuit was rejected in *Hufstедler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 65. In *Hufstедler*, the court of appeal considered evidence of the malicious prosecution plaintiff's actions learned during the course of discovery in the underlying lawsuit, and the fact that all of his motions had been denied by the prior court, to reach its conclusion that the attorneys had probable cause to prosecute the suit. The court explained:

"[W]here, as here, the record in the underlying action was fully developed, a court can and should decide the question of probable cause by reference to the undisputed facts contained in that record, and where, as here, undisputed evidence establishes an objectively reasonable basis for instituting the underlying action, a 'dispute' about what the attorney knew or did not know at the time she filed the underlying action is irrelevant."

Id. at 62. Despite approving language in dictum in other cases, see, e.g., *Dourney Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 497-498, the *Hufstедler* holding remains controversial. It

was criticized by some commentators, and the Fifth District Court of Appeal expressly modified a recent opinion to delete a statement that the objective evaluation of legal tenability could be based on "subsequent events in the litigation." *Kendall-Jackson Winery, Ltd. v. Superior Court, supra*.

The *Hufstедler* holding received a boost in another recent decision by the Second District Court of Appeal which suggested that evidence discovered after the underlying action was filed may furnish a defense to a subsequent malicious prosecution lawsuit. In *Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 383, the court held that the denial of a motion for summary judgment in the prior action "normally establishes there was probable cause to sue, thus barring a later malicious prosecution suit." Denial of summary judgment is a reliable indicator of probable cause, the court reasoned, because summary judgment motions usually are heard only after full discovery develops the evidence relevant to the claim, and the judge denying the motion is impartial and "thus, likely will agree with some hypothetical 'reasonable lawyers.'" *Id.* at 383-384. Thus, without acknowledging the controversial implications of its conclusion, the court assumed that evidence developed during discovery is relevant and admissible in determining the existence of probable cause at the time the plaintiff filed the suit. It also assumed that the trial court's denial of summary judgment indicates probable cause to sue, a dubious assumption given the myriad reasons such motions may be denied, and ignored that even an impartial trial judge may be reversed on a writ by the court of appeal. The decision is perhaps more reliable as a gauge of some courts' antipathy to malicious prosecution claims.

In *Kendall-Jackson Winery, supra*, the court of appeal suggested an alternative basis for considering evidence of the malicious prosecution plaintiff's alleged bad acts, even if they were not known to the defendant when it filed the underlying lawsuit. In doing so, it reminded observers that other defenses to the tort exist. The court held that the defendant in a malicious prosecution suit can plead the unclean hands of the plaintiff as an affirmative defense, and rejected a narrow interpretation of the doctrine:

"[A]ny evidence of plaintiff's unclean hands in relation to the transaction before the court or which affects the equitable relations between the litigants in the matter before the court should be available to enable the court to effect a fair result in the litigation. The equitable principles underlying the doctrine militate against limiting the unclean hands defense in a malicious prosecution claim to misconduct that bears on the defendant's decision to file the prior action."

Id. at 985. The court cited two malicious prosecution cases in which summary judgment had been granted based on an unclean hands defense. *DeRosa v. Transamerica Title Ins. Co.* (1989) 213 Cal.App.3d 1390, 1397; *Pond v. Insurance Co. of North America* (1984) 151 Cal.App.3d 280, 286, 290-291.

Establishing Favorable Termination

To establish its cause of action for malicious prosecution, a plaintiff also must prove that the prior action was commenced by or at the direction of the defendant and was pursued to a legal termination in its, plaintiff's, favor. *Sheldon Appel Co., supra*. The Supreme Court observed that a "favorable termination" does not occur merely because the plaintiff has prevailed in the underlying action. *Lackner v. LaCroix* (1979) 25 Cal.3d 747, 751. The termination must be "inconsistent with wrongdoing" to constitute a favorable termination. *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150, quoted with approval, *supra* at 751 n.2. The termination must reflect on the merits of the underlying action. *Id.* at 750; *Eells v. Rosenblum* (1995) 36 Cal.App.4th 1848, 1854.

The mere fact that the prior action was dismissed "with preju-

(Continued on next page)

Defeating the Malicious Prosecution Claim

Continued from page 4

dice" does not satisfy the requirement in the absence of an actual consideration of the merits. See, e.g., *Zeavin v. Lee* (1982) 136 Cal.App.3d 766. Nor should the doctrine of res judicata, which is concerned solely with the need for finality, be confused with a favorable termination which must necessarily reflect on the malicious prosecution plaintiff's innocence. *Dalaney v. American Pacific Holding Corp.* (1996) 42 Cal.App.4th 822, 829. A termination by dismissal is favorable when it reflects the opinion of either the trial court or the prosecuting party that the action lacked merit or if pursued would result in a decision in favor of the defendant. The focus is not on the malicious prosecution plaintiff's opinion of its innocence, but on the opinion of the dismissing party. *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 881.

If the dismissal is on technical grounds or for procedural reasons, it does not constitute a favorable termination. *Lackner v. LaCroix*, supra. The Second District Court of Appeal explained: "The test is whether or not the termination tends to indicate the innocence of the defendant or simply involves technical, procedural or other reasons that are not inconsistent with the defendant's guilt." *Eells v. Rosenblum*, supra. A dismissal that does not unambiguously reflect the dismissing party's opinion that the case lacked merit is not a favorable termination. Thus, a "resolution of the underlying litigation that leaves some doubt as to the defendant's innocence or liability is not a favorable termination, and bars that party from bringing a malicious prosecution action against the underlying plaintiff." *Villa v. Cole* (1992) 4 Cal.App. 4th 1327, 1335 (emphasis in original).

Therefore, for example, there was no favorable termination of the prior lawsuit if it was dismissed based on the statute of limitations (*Lackner v. LaCroix*, supra) or the statute of frauds and parol evidence rule (*Hall v. Harker* (1999) 69 Cal.App.4th 836); was voluntarily dismissed as premature (*Eells v. Robinson*, supra); or was terminated as a result of negotiation, settlement, and agreement. *Dalaney v. American Pacific Holding Corp.*, supra; *Webb v. Youman* (1967) 248 Cal.App.2d 851, 853. See also, *Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 792 n.9; *Villa v. Cole*, supra. When the prior suit is dismissed pursuant to a settlement, it is irrelevant that the malicious prosecution plaintiff was not a signatory to the settlement agreement between the other parties. "The dismissal of a party who refuses to participate in a settlement concluded by other parties does not constitute a favorable termination for the nonsettling party." *Cantu v. Resolution Trust Corp.*, supra at 883; accord, *Oprian v. Goldrich, Kest & Associates* (1990) 220 Cal.App.3d 337, 344; *Haight v. Handweiler* (1988) 191 Cal.App.3d 85, 89.

A dismissal to avoid the payment of further attorneys' fees is not on the merits, and simply reflects a practical decision that further litigation will be too expensive to pursue. *Oprian v. Goldrich, Kest & Associates*, supra, at 345. "It would be a sad day indeed if a litigant and his or her attorney could not dismiss an action to avoid further fees and costs, simply because they were fearful such a dismissal would result in a malicious prosecution action." *Id.* at 344. Furthermore, a change in the evidence that results in the voluntary dismissal of an untenable claim should not automatically give rise to a malicious prosecution suit. "[I]f the pleading originally advanced a tenable theory but subsequent research or discovery proves it to be untenable, the pleading should be amended to change or delete it." *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57. No liability should attach where a party voluntarily drops a claim because the discovery of additional facts renders it untenable. Such amendment does not constitute a favorable termination, and a malicious prosecution claim based on such amendment is inconsistent with

(Continued on page 8)

Proximate Cause: A Question of Fact or Policy?

Some cases every lawyer remembers long after law school. One of them is *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

Recall that Palsgraf's problems began when a railroad guard negligently pushed a passenger. The passenger dropped a bundle of fireworks; the fireworks exploded; the shock of the explosion threw down some scales many feet away at the other end of the platform; and the scales fell on Palsgraf. *Id.*, 248 N.Y. at 341. The majority held that the defendant owed no duty to protect Palsgraf because she was an unforeseeable plaintiff. *Id.* at 345-47. The dissent argued that a duty was owed and that the question that should have been presented to the jury was whether the defendant's conduct was the proximate cause of the damage. *Id.* at 356 (Andrews, J. dissenting). The dissenting judge explained that what courts "mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *Id.* at 352 (Andrews, J. dissenting). He concluded that the fact the events occurred in a natural and continuous sequence, coupled with the fact there was little remoteness in time or space, rendered the issue one of fact for the jury. *Id.* at 356.

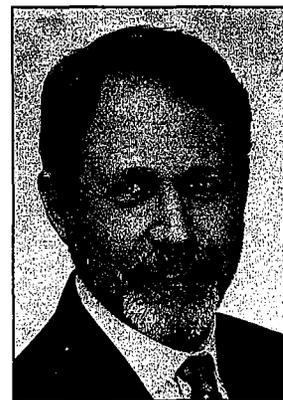
Today, it is likely that the California Supreme Court would agree with the dissent in *Palsgraf*, concluding that the real question was one of proximate cause, not duty. In *PPG Industries, Inc. v. Transamerica Ins. Co.*, 20 Cal. 4th 310 (1999), the California Supreme Court recently confirmed that public policy considerations govern the element of proximate cause and explained that those considerations protect defendants from liability for events beyond a certain point.

This article discusses how courts are applying proximate cause in business disputes, particularly with respect to the determination of damages. Predictions are risky. It is as true today as when Dean Prosser said it over 50 years ago that "Proximate cause remains a tangle and a jungle, a palace of mirrors and a maze." William L. Prosser, *Proximate Cause in California*, 38 Cal.L.Rev. 369, 375 (1950). Nevertheless, *PPG* signals that when the question of proximate cause arises, counsel must carefully analyze both causal relationship and public policy implications.

The Two Elements Of Proximate Cause

Civil Code section 3333 provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." (Emphasis added.) Plaintiffs often urge a cause in fact reading — the idea that once the defendant starts the ball rolling, the defendant is liable for anything the ball hits, no matter how long it has been rolling or what other forces influenced its course. See, e.g., *PPG Industries*, 20 Cal. 4th at 315.

This isn't the law: "Civil Code section 3333 mandates recovery not simply for all detriment caused by defendant's negligence,



Robin Meadow

(Continued on page 6)

but for all detriment *proximately* caused thereby. The wording of the statute is manifestly designed to make the trier of fact focus closely on the issue of proximate cause." *Safeco Ins. Co. v. J & D Painting*, 17 Cal. App. 4th 1199, 1204 (1993) (emphasis in original) (decline in property's value during time required to repair damage from fire caused by defendant was too remote from defendant's conduct).

As the Court of Appeal explained in *Jackson v. Ryder Truck Rental, Inc.*, 16 Cal. App. 4th 1830 (1993), proximate cause requires a two-fold inquiry. The first question is whether the defendant's conduct was the cause in fact or "but for" cause of the plaintiff's injury—that is, "was defendant's conduct a necessary antecedent to plaintiff's injury?" *Id.* at 1847, citing *Marvin v. Widling*, 192 Cal. App. 3d 568, 573 (1987). (Note, however, that since *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1049 (1991), the test for this type of causation is whether the defendant's conduct is a "substantial factor" in bringing about the plaintiff's injury.) The second question is more abstract: whether the defendant's conduct was closely enough related to the plaintiff's loss so that the defendant *should* be held responsible. "This second component of proximate cause, which asks a policy question,



Jennifer L. King

has been termed the 'normative or evaluative element' of proximate cause." *Jackson*, 16 Cal. App. 4th at 1847 (quoting *Mitchell v. Gonzales*, 54 Cal.3d at 1056 (1991) (Kernard, J. dissenting)).

In *PPG Industries*, our Supreme Court explained that the reason for the second component is that without the limitation it provides, causation can go on forever.

In the words of Prosser and Keeton: "[T]he consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.'" [Citation.] Therefore, the law must impose limitations on liability other than simple causality. These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy. [Citation.] As Justice Traynor observed, proximate cause "is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct." (*Mosley v. Arden Farms Co.* (1945) 26 Cal.2d 213, 221 [157 P.2d 372, 158 A.L.R. 872] (conc. opn. of Traynor, J.).)

PPG Industries, 20 Cal. 4th at 315-16 (emphasis in original).

Proximate Cause: The "Normative Or Evaluative Element"

These principles apply to all tort actions. (*E.g.*, *Osborn v. Irwin Memorial Blood Bank*, 5 Cal. App. 4th 234, 251 (1992) (court rejected as "obviously incorrect" the plaintiffs' argument that proximate cause "is not even an element" of a negligent misrepresentation claim); *Pepper v. Underwood*, 48 Cal. App. 3d 698, 710-11 (1975), overruled on other grounds by *Stout v. Turney*, 22 Cal. 3d 718, 730 (1978). *Pepper* specifically demonstrates their application in the fraud context. There, the plaintiffs claimed that the defendants fraudulently induced them into buy-

ing a motel by misrepresenting its value. They sought recovery of their down payment as consequential damages after they lost the property in foreclosure. The court of appeal reversed a judgment for the plaintiffs because, among other reasons, the damages instruction failed to state that the plaintiffs could only recover damages that the defendants proximately caused. The court observed that the plaintiffs' loss of their down payment did not necessarily flow from the defendants' misrepresentations and breach of fiduciary duty:

[T]he jury considering the entire transaction might well conclude that the subsequent loss on foreclosure was neither damage nor proximately caused by the alleged fraud, but by bad fiscal management or other factors.

Id. at 711. Thus, the plaintiffs had to prove *both* that the fraud was why they entered into the transaction (i.e., that the defendant was the cause in fact of their loss, since there would have been no loss if they hadn't entered into the transaction) *and* that the fraud was the reason for the particular loss of their deposit (i.e., that the defendant should be held responsible for the loss).

Similarly, in *Gagne v. Bertran*, 43 Cal. 2d 481 (1954), the plaintiffs bought property in reliance on the defendant's negligent misrepresentation as to the amount of fill. The additional fill caused unexpected construction costs, but the Supreme Court held that the plaintiffs could not recover them: "The additional costs plaintiffs incurred in the installation of the foundation were not caused by defendant's misinformation, however, but by the physical condition of the land." *Id.* at 491. The Court indicated that the plaintiffs themselves broke the causal connection by electing to proceed with construction even though they knew it would be more costly. The Court noted that "this is not a case in which plaintiffs... completed their building before they discovered the truth and thereafter had to abandon it or make costly alterations that would not have been required had they known of the true condition of their land at the outset of construction. Such damages, had they been suffered, would have resulted directly from defendant's failure to report the truth and would clearly be recoverable." *Id.*

Other California fraud cases are in accord. *See, e.g.*, *Helm v. K.O.G. Alarm Co.*, 4 Cal. App. 4th 194, 203 (1992) (affirming nonsuit on fraud claim because the plaintiffs had failed to show "a factual causal nexus between their reliance on the intentional misrepresentations made by the alarm company and the unmitigated theft/arson losses which they suffered"); *Roberts v. Karr*, 178 Cal. App. 2d 535, 542-43 (1960) (misrepresentation as to amount of saleable dirt on land; no recovery of money lost because of absence of dirt, because "[t]he lack of excess dirt, and

(Continued on next page)

Contributors to this Issue

Jeffrey C. Briggs is President of ABTL and a partner with Alschuler Grossman Stein & Kahan LLP.

John W. Amberg is a partner in the Santa Monica office of Bryan Cave LLP.

The Hon. Procter Hug, Jr., is Chief Judge of the United States Court of Appeals for the Ninth Circuit. He wishes to thank Mark Mendenhall, Assistant Circuit Executive, for his assistance in the preparation of this article.

Robin Meadow is a partner and *Jennifer L. King* is an associate at Greines, Martin, Stein & Richland LLP.

Denise M. Parga is Of Counsel with Wolf, Rifkin & Shapiro in Los Angeles.

Gregory J. Sater is a partner with Grace & Sater LLP in Los Angeles.

Proximate Cause

Continued from page 6

not the misrepresentation of fact, caused the loss of contemplated revenue").

Outside California, federal courts and other state courts have elaborated on the normative proximate cause requirement in a variety of situations. Many of these courts use "transaction causation" and "loss causation" to denote the two components of proximate cause, and they require the plaintiff to prove both:

[T]he plaintiff must prove both transaction causation, that the violations in question caused the plaintiff to engage in the transaction, and loss causation, that the misrepresentations or omissions caused the harm.

McGonigle v. Combs, 968 F.2d 810, 820 (9th Cir. 1992) (securities claims; court affirmed dismissal of specific claims as a matter of law).

The Ninth Circuit and six other federal circuits, the Illinois Supreme Court and the Arizona Court of Appeals explicitly follow this approach. See *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994) (RICO claims; rule 12(b)(6) dismissal affirmed); *Gasner v. Board of Supervisors*, 103 F.3d 351, 360-61 (4th Cir. 1996) (securities claims; court affirmed summary judgment for defendants); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 548-50 (5th Cir. 1981) (securities claims; error in refusing to submit loss causation to jury); *Bastian v. Petren Resources Corporation*, 892 F.2d 680, 684-86 (7th Cir. 1990) (securities claims; rule 12(b)(6) dismissal affirmed); *Arthur Young & Co. v. Reves*, 937 F.2d 1310, 1327-28 (8th Cir. 1991) (securities claims; plaintiff's verdict as to this issue affirmed); *Currie v. Cayman Resources Corp.*, 835 F.2d 780, 785 (11th Cir. 1988) (securities claims; directed verdict on this issue affirmed); *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 58-61, 643 N.E.2d 734, 746-47 (1994) (consumer fraud; judgment for plaintiffs on this issue reversed); *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 343-45 (Ariz. Ct. App. 1996) (auditing misrepresentations; jury verdict affirmed).

These courts recognize that the transaction causation/loss causation analysis embodies common law principles:

[L]oss causation' is the standard common law fraud rule [citation], merely borrowed for use in federal securities fraud cases. It is more fundamental still; it is an instance of the common law's universal requirement that the tort plaintiff prove causation.

Bastian, 892 F.2d at 683-84.

The factual variety of the cases in which the courts have applied these principles shows that, regardless of the label, it is never enough for a business-tort plaintiff to show transaction causation — that the defendant started the ball rolling. The plaintiff must also show a substantive connection between the misrepresentation and the specific loss claimed. For example:

- In *Bastian*, 892 F.2d 680, the plaintiffs alleged that they invested in oil and gas limited partnerships on the basis of misrepresentations about the defendants' competence and integrity. The partnerships became worthless, and plaintiffs sought to charge defendants with the entire loss. The Seventh Circuit, speaking through Judge Posner, rejected the plaintiffs' argument that they had sufficiently proven causation by showing that "they would not have invested but for the fraud; for if they had not invested, they would not have lost their money, and the fraud was therefore the cause of their loss." *Id.* at 683. The court held that the plaintiffs had to negate external reasons for their loss, such as a drop in oil and gas prices. "If the plaintiffs would have lost their investment regardless of the fraud, any award of damages to them would be a windfall." *Id.* at 684-85.

(Continued on page 10)

Responding to Ninth Circuit Concerns: The Innovative Work of the Evaluation Committee

In the early spring of 1999, I appointed a distinguished 10-member Evaluation Committee "to examine the existing policies, practices, and administrative structure of the Ninth Circuit Court of Appeals, in order to make recommendations to its judges to improve the delivery of justice in the region it serves." This is part of the Ninth Circuit Court of Appeals' effort to provide a constructive response to some of the perceived concerns about the court's operations in relation to the proposal to restructure the court into autonomous divisions. This approach, the court believes, is a far more responsible manner of addressing and resolving legitimate concerns than the imposition of a disruptive and untested appellate restructuring with countless unanticipated and counterproductive side effects.

Membership and Objective

The Evaluation Committee, chaired by Senior Circuit Judge David R. Thompson of San Diego and consisting of circuit judges from each of the court's three administrative units, a representative of the district court bench, a prominent scholar of the federal appellate courts, and an experienced appellate practitioner, has been meeting regularly for the last nine months to investigate and study concerns and issues raised in relation to the Ninth Circuit Court of Appeals. The committee has focused on consistency of decisions, regional sensitivity, productivity and delay, and the *en banc* process. In addition to meeting regularly and reviewing research work by the court's staff attorneys, the committee has heard from academics and has conducted bench-bar focus groups at a variety of locations in the circuit to obtain the views and suggestions of the Ninth Circuit bar. It has also widely circulated a detailed call for comments from judges, lawyers, and other interested parties from across the circuit and across the country. The preliminary results of this initiative have been encouraging. As an ongoing process, it should continue to yield positive benefits for circuit operations for years to come.

Consistency of Law

In the area of consistency of decisions, while there is no objective evidence that Ninth Circuit decisions are subject to greater inconsistency than those in other circuits, the perception remains that such a large circuit cannot avoid inconsistencies with so many panels issuing so many opinions. The committee has focused its efforts on strengthening the court's ability to recognize potential or perceived conflicts early and address them directly and immediately. Several innovative approaches are under consideration, including (1) an "electronic mailbox" through which judges and lawyers can notify the court of perceived conflicts; (2) the use of staff attorneys' specialized expertise and objective criteria to spot potential conflicts and sensitive decisions and bring them to the court's attention for extra scrutiny prior to publication; and (3) the use of internal review to check all opinions for consistency before they are released.

Regionalism

The committee has suggested an experiment involving the regional assignment of judges in response to various concerns



Hon. Procter Hug, Jr.

(Continued on page 8)

about the need for a regional perspective in appellate decision making. The court has already adopted and implemented a recommendation that at least one judge who resides in the administrative unit (northern, middle, southern) where the case originated be assigned to the appellate panel hearing that case. Also, the court is conducting an experiment to hold panel sittings in a greater number of cities across the circuit and combine them with bench-bar activities to increase outreach to and communication with all parts of the region. This past year alone the court has conducted oral arguments and bench/bar meetings in Anchorage, Coeur d'Alene (Idaho), Missoula (Mont.), San Diego, Phoenix, and Honolulu, in addition to its regular sittings in Pasadena, San Francisco, Portland, and Seattle.

Productivity

The court has achieved great gains in productivity from the use of its innovative motions and screening calendars. Every month a screening panel of three judges sits in San Francisco to consider less complex cases that are readily resolved by the application of clearly defined circuit precedent. These screening panels will decide an average of 340 motions and dispose of an average of 140 appeals on the merits. The committee is considering other approaches to increasing productivity, including (1) increased "batching" of cases with the same issues or involving the same statute before the same argument panel for quicker dispositions; and (2) designating "lead cases" in which the panel decision would affect a whole series of following cases with a common issue. The court is expected to experiment with these and other combinations of proposals to see if it can continue to make productivity gains without additional resources.

En Banc Process

The Ninth Circuit believes its unique limited *en banc* process is an efficient and effective use of scarce institutional resources that operates in a manner that respects the needs and interests of each judge to have a role in the process of declaring circuit law. After a three-judge panel has issued its opinion in a case, any judge on the court, including a senior judge, may call for a rehearing *en banc* and write memos in support of the call. This results in an insightful exchange where every active and senior member of the court is able to express a view on the call and on the underlying substantive legal issues in the case. At the end of this exchange, all of the active judges on the court vote on whether to take the case *en banc*. If a majority is not attained, it represents a decision of the full court that the panel opinion should stand. By tradition and understanding in the Ninth Circuit, limited *en banc* decisions are fully accepted by the court as being the final decision of the court as a whole. Since 1980 when Congress authorized the court to employ the limited *en banc* process, there have been more than 170 limited *en banc* decisions, one third of which were unanimous and three quarters of which were rendered by a majority of 8 to 3 or greater. This is a strong indication that a full-court *en banc* would have reached the same decision.

The Evaluation Committee recognized that some observers perceive that the *en banc* decision may not reflect the views of all of the judges because not all of the active judges actually sit on the *en banc* court. While statistical study has shown that the 11-judge court does fairly represent the court as a whole, the court is as concerned with perception as with reality, and the committee has recommended an increase in the size of the *en banc* court.

Some observers, including the United States Department of Justice and the Circuit Justice, have suggested that the court take more cases *en banc* each year. Both of these suggestions — relating to the size of the *en banc* court and the vote required to go *en banc*, along with the requirement of geographical representation on all panels mentioned above — are the subject of proposed

legislation by Senator Dianne Feinstein. The court has voted to endorse Senator Feinstein's bill as a reasoned, responsible alternative to the radical restructuring proposed by S. 253, The Federal Ninth Circuit Reorganization Act of 1999. Anticipating that the number of *en bancs* will increase as a result of changes to the process, the court has adopted a new procedure, on an experimental basis, for the *en banc* court to sit quarterly throughout the year to keep pace with the additional hearings required.

In addition, the court last summer discussed and referred to its Advisory Rules Committee the subject of citation to unpublished memorandum decisions. This is a sampling of the many issues explored and decisions made by the Evaluation Committee as the court seeks to fashion appropriate responses to perceived concerns about its operations. These and other proposals are developed by the committee and then are periodically taken to the full court for further consideration and possible approval and implementation. The process is an ongoing one and reflects the Ninth Circuit's continuing commitment and willingness to re-evaluate itself and to further the process of experimentation and innovation that will lead to even greater efficiency and effectiveness in the years to come.

— Hon. Procter Hug, Jr.

Defeating the Malicious Prosecution Claim

Continued from page 5

public policy. As the court noted in *Leonardini v. Shell Oil Co.*, *supra* at 571:

"[T]he law favors the early resolution of disputes, including voluntary dismissal of suits when the plaintiff becomes convinced he cannot prevail or otherwise chooses to forgo the action. This policy would be ill-served by a rule which would virtually compel the plaintiff to continue his litigation in order to place himself in the best posture for defense of a malicious prosecution action."

Accord, Oprian v. Goldrich, Kest & Associates, supra.

If a defendant seeks and obtains the dismissal of the prior lawsuit on a procedural ground, it is barred from bringing a subsequent malicious prosecution lawsuit. In *Warren v. Wasserman, Comden & Casselman* (1990) 220 Cal.App.3d 1297, the court held that the dismissal of the underlying lawsuit on statute of limitations grounds did not constitute a favorable termination that would support a malicious prosecution claim. *Id.* at 1304. The court rejected the malicious prosecution plaintiff's attempt to circumvent the procedural ground for the dismissal by alleging that the defendants had prosecuted the underlying action with the knowledge that the statute had run. Notwithstanding the allegation of wrongful subjective intent, the court refused to look behind the plain procedural grounds for the dismissal, and affirmed summary judgment for the defendant attorneys. It instructed:

"[I]f a litigant wants to pursue a malicious prosecution action under those circumstances, he must eschew the procedural defense, forego the easy termination, and obtain a favorable judgment on the merits."

Id. at 1303. Otherwise, the court explained, the policy reasons for requiring a favorable termination could be thwarted simply by alleging ulterior motives and wrongful intent on the part of the defendants. Thus, for example, if the plaintiff's actions in the prior suit reflect a lack of confidence in the merits, the defendant should unambiguously move to dismiss for failure to prosecute the action, a dismissal which is not on technical or procedural grounds. *See, e.g., Minasian v. Sapse* (1978) 80 Cal.App.3d 823,

(Continued on next page)

827. If it fails to do this, a malicious prosecution suit is barred. *Warren v. Wasserman, Comden & Casselman, supra.*

The defendant in the prior lawsuit is limited to the terms of the order dismissing the action, and may not go behind the judgment or introduce evidence of prior conduct in the case to interpret the ruling. Thus, in *Freidberg v. Cox* (1987) 197 Cal.App.3d 381, 385, the Court of Appeal stated:

"The criterion... is the decree itself in that action. The court in the action for malicious prosecution will not make a separate investigation and retry each separate allegation without reference to the result of the previous suit as a whole."

The Supreme Court cited *Freidberg* approvingly in *Crowley v. Katleman* (1994) 8 Cal.4th 666, and confirmed that whether a prior action terminated favorably would be determined from the face of the judgment. The Supreme Court approved *Freidberg's* refusal to permit the malicious prosecution plaintiff to go behind the judgment. *Id.* at 684-685.

Concessions By the Client

An attorney may be sued and held separately liable for malicious prosecution where there is no probable cause and no tenable basis for pursuing the underlying action. *Westamco Investment Co. v. Lee* (1999) 69 Cal.App.4th 481. However, even if the plaintiff's actions cast doubt on the merits of the suit, such inference cannot be imputed to the plaintiff's lawyer. The client is not the agent of the attorney. When the underlying case is dismissed because of the client's conduct, that conduct will not be attributed to the lawyer for purposes of favorable termination. *Zeavin v. Lee, supra*, 136 Cal.App.3d at 772-773; *De La Pena v. Wolfe* (1986) 177 Cal.App.3d 481.

In *Zeavin*, a malicious prosecution lawsuit was brought against a lawyer who had sued two doctors for medical malpractice. The malpractice case was dismissed with prejudice after the underlying plaintiff refused to cooperate with her lawyer and refused to provide discovery. The malicious prosecution plaintiffs argued that the lawyer's client had abandoned her lawsuit because it lacked merit, and this constituted a favorable termination that would support their claim against the lawyer. However, the Second District Court of Appeal refused to attribute the client's implied concession to the attorney. *Id.* at 771-772. It distinguished the situation in *Minasian v. Sapse, supra*, where a malicious prosecution claim was permitted to proceed based on the malicious prosecution defendant's own failure to prosecute the underlying action. "That rule should not be extended to make every lawyer who files an action on behalf of a client the insurer of the client's adversary in that action." *Id.* at 772. The Second District refused to interpret the client's abandonment of the claim as a concession by the lawyer:

"While it may sometimes be proper to hold that a prior action was unfavorably terminated against a party solely because of her conduct in refusing to cooperate or make discovery or by reason of her unilateral abandonment of that action, the attorney is not the insurer of his client's conduct, and the law wisely places no burden on that party's attorney solely by reason of his client's conduct in that regard."

Id. at 773 (emphasis in original). It held there was no favorable termination which would support a malicious prosecution claim against the attorney. *Id.* In *De La Pena v. Wolfe, supra*, the Second District affirmed the *Zeavin* rule that the client is not the representative of the lawyer for purposes of favorable termination, and noted a further ground for its ruling: any concession by

(Continued on page 11)

Civil Procedure

In *St. Joe Minerals Corp. v. Zurich Ins. Co.*, 1999 Daily Journal D.A.R. 10181 (Court of Appeal September 28, 1999), 75 Cal. App. 4th 261 (1999), the Fourth Appellate District held that a minute order granting a policy holder's motion for summary adjudication on the duty to defend issue is not appealable as a final judgment.

In *Darling, Hall & Rae v. Kritt*, 1999 Daily Journal D.A.R. 10973 (Court of Appeal September 27, 1999), as modified on denial of rehearing (October 26, 1999), 75 Cal. App. 4th 1148 (1999), the Second Appellate District held that the trial court retains the inherent authority to change its interim decisions at any time before entry of final judgment.

In *Canal Street, Ltd. v. Sorich*, 2000 Daily Journal D.A.R. (Court of Appeal January 13, 2000), the First Appellate District held that the time during which a settlement agreement is in effect tolls the five year period in which to reduce an action to judgment.



Denise M. Parga

Insurance

In *Palmer v. Trick Insurance Exchange*, 1999 Daily Journal D.A.R. 12247 (Supreme Court December 6, 1999), 21 Cal. 4th 1109 (1999), the California Supreme Court held that the insurance provision providing coverage for "advertising liability" resulting from infringement "of title or of slogan" when read in conjunction with a clause excluding coverage for trademark infringement can only mean infringement of the name of a literary or artistic work or of "a brief attention-getting phrase used in advertising or promotion." Thus, the court held that the infringing use of a trademark that is merely a word in a phrase used as a slogan is not the same as the infringing use of a slogan.

Contractual Arbitration

In *Valley Casework, Inc. v. Comfort Construction, Inc.*, 1999 Daily Journal D.A.R. 12347 (Court of Appeal December 6, 1999), 76 Cal. App. 4th 1013 (1999), the Fourth Appellate District reversed a judgment confirming an arbitration award because it held that Scottsdale Insurance Company, Comfort Construction, Inc.'s insurer, did not have standing to pursue arbitration pursuant to an agreement between Comfort Construction, Inc. and Valley Casework, Inc. because it was a nonparty to the arbitration agreement.

Discovery

In *Wilcox v. Birtwhistle*, 1999 Daily Journal D.A.R. 11789 (Supreme Court November 22, 1999), 21 Cal. 4th 973 (1999), the California Supreme Court held that a party can withdraw admissions deemed admitted for failure to respond to discovery if failure was due to mistake, inadvertence or excusable neglect.

Consumer Contracts

In *Arya Group, Inc. v. Cher*, 2000 Daily Journal D.A.R. 505 (Court of Appeal January 13, 2000), the Second Appellate District held that a contractor may seek to enforce its oral contract for residential construction against an owner to the extent the owner would otherwise be unjustly enriched as a result of her failure to compensate the contractor for the reasonable value of its work even though the contractor did not secure a written contract in accordance with Business & Professions Code §7164.

— Denise M. Parga

• *Movitz v. First Nat. Bank of Chicago*, 148 F.3d 760 (7th Cir. 1998), followed the reasoning of Bastian in a non-securities context. A bank agreed with a real estate investor, Estock Corporation, to assist Estock in evaluating and buying property in Houston and then to operate and maintain it. Estock bought an office building for \$5.1 million (including \$2.2 million in cash) and later invested an additional \$800,000, but ultimately lost its entire investment in foreclosure in the midst of Houston's early-1980s real estate depression. It turned out that the bank had failed to detect serious construction defects and had grossly overestimated the rental income. In its suit for breach of contract and breach of fiduciary duty, Estock recovered \$3.3 million, representing its total out-of-pocket losses. The Court of Appeals, again speaking through Judge Posner, reversed the judgment with directions to enter judgment for the bank, because Estock had failed to prove loss causation. Rather, the evidence of loss was tied to the collapse of the Houston real estate market, and the loss would have occurred regardless of how well the bank had performed. The court rejected Estock's argument that loss causation analysis is limited to securities cases: "The requirement of proving loss causation is a general requirement of tort law." *Id.* at 763. And, in language reminiscent of the quotation from Prosser in *PPG Industries*, 20 Cal. 4th at 315-16, the court observed:

As Estock reluctantly concedes, however, a finding of 'but for' causation (what philosophers call a 'necessary condition') is not a sufficient basis for imposing legal liability. If it were, then the estates of Santa Anna, Sam Houston, or Columbus might also be liable to Estock, plus the inventor of the elevator or the steel girder, or Hashim's [Estock's owner] parents, or OPEC, which brought about the increase in oil prices that fueled Houston's real estate boom in the 1970s, a boom that made investing in that real estate seem so attractive a prospect in 1980.

Id. at 762.

• *McGonigle*, 968 F.2d 810, arose when the value of private placement stock in a horse breeding operation plummeted. The District Court dismissed claims alleging various concealments that did not go to the value of the investment. *Id.* at 819. The *McGonigle* plaintiffs argued that the misrepresentations caused the loss because the investment and the loss "would not have occurred if the misrepresentations had not been made." *Id.* at 821. The Ninth Circuit rejected this argument, "because it renders the concept of loss causation meaningless by collapsing it into transaction causation." *Id.* Transaction causation and loss causation "are analogous to the basic tort principle that a plaintiff must demonstrate both 'but for' and proximate causation." *Id.*; see *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d at 343-45 (following *McGonigle*).

• The Second Circuit adopted the same approach in a lender's RICO case against borrowers who allegedly induced loans by misrepresenting the value of the collateral: "[W]hen factors other than the defendant's fraud are an intervening direct cause of a plaintiff's injury, that same injury cannot be said to have occurred by reason of the defendant's actions." *First Nationwide Bank v. Gell Funding Corp.*, 27 F.3d at 769. This causation analysis is designed "to fix a legal limit on a person's responsibility, even for wrongful acts." *Id.* The plaintiff must prove that "external factors" did not contribute to the injury. *Id.* at 770. "Many considerations enter into the proximate cause inquiry including 'the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection.'" *Id.* at 769.

• Illinois also requires proof of loss causation. In *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, the plaintiffs alleged that a commodities options broker misrepresented the nature of transaction fees. The trial court awarded the plaintiffs their full

investment losses because "but for Heinold's misrepresentations, plaintiffs would not have purchased LCO's [options] through Heinold." *Id.* at 43. Rejecting this analysis, the Illinois Supreme Court held that a plaintiff must prove proximate causation "even in instances of intentional torts where fiduciaries are involved." *Id.* at 59. The court framed the relevant question in Prosser's words: "'Would the decline in plaintiff's investment have occurred even if defendant's misrepresentation had been true? If the answer to this question is 'yes,' plaintiff has failed to prove that the misrepresentation proximately caused the decline.'" W. Prosser, *Torts* § 110, at 732 (4th ed. 1971)." *Id.* at 62 (emphasis added). Indeed, "defendants, even where an intentional tort is committed, do not become insurers of plaintiffs who make unwise investments." *Id.*

• The court in *Criqui v. Pearl Music Company, Inc.*, 41 Ore.App. 511, 599 P.2d 1177 (1979), refused to permit a defrauded plaintiff to recover business operating losses, even though he bought the business partly in reliance on misrepresentations about the business' legality: "While there is no sympathy for one who commits fraud, such attenuated causation is not a sufficient basis for holding one responsible to make up every loss that would not have occurred had there been no fraud." *Id.* at 517.

How To Determine The Bounds Of Proximate Cause

Although causation is generally a question of fact, "[t]he outer bounds of legal causation are also for the Court to decide. This is because the existence of legal cause 'essentially depends upon whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred.'" *Estate of Macias v. Lopez*, 42 F. Supp. 2d 957, 965 (N.D. Cal. 1999), quoting *Sundance Land v. Community First Federal*, 840 F.2d 653, 663 (9th Cir. 1988). Fortunately or unfortunately, courts have not elected to adopt bright-line rules to govern the setting of these bounds. Instead, "courts must examine the issue on a case-by-case basis, and in light of considerations of logic, common sense, justice, policy and precedent." *Id.* As the California Supreme Court noted in *People v. Roberts*, 2 Cal. 4th 271, 320, n.11 (1992):

[T]here is no bright line demarcating a legally sufficient proximate cause from one that is too remote. Ordinarily the question will be for the jury, though in some instances undisputed evidence may reveal a cause so remote that a court may properly decide that no rational trier of fact could find the needed nexus.

See also *Mosley v. Arden Farms Co.*, 26 Cal. 2d at 221 ("[a]lthough the doctrine of proximate cause is designed to fix the limitations upon liability, it has not yet been so formulated as to have a fair degree of predictability in its application in marking the boundary between liability and nonliability") (Traynor, J. concurring).

On occasion, there may be circumstances where the public policy against imposing liability, standing alone, is so overwhelming that the court can decide, as a matter of law, that there is no proximate cause. *PPG Industries, Inc. v. Transamerica Ins. Co.* is a prime example.

In that case, the plaintiff suffered a judgment for compensatory and punitive damages. The insurer refused to pay the punitive damages. In its subsequent action against the insurer, the plaintiff alleged that the insurer unreasonably failed to settle the earlier lawsuit and that the failure to settle caused it to be personally liable for punitive damages. 20 Cal. 4th at 313-14. The Court affirmed summary judgment in favor of the insurer. It found that while the failure to settle was a cause in fact of the plaintiff's liability for punitive damages, multiple public policy considerations precluded the plaintiff from shifting its punitive damage obligation to its insurer. *Id.* at 316. According to the

(Continued on next page)

Court, "[t]o allow such recovery would (1) violate the public policy against permitting liability for intentional wrongdoing to be offset or reduced by the negligence of another; (2) defeat the purposes of punitive damages which are to punish and deter the wrongdoer; and (3) violate the public policy against indemnification for punitive damages." *Id.* at 319.

Few cases, however, fall at the far end of the public policy spectrum. More often, each side will be able to articulate one or two public policy principles in support of its position. In that event, the inquiry becomes more fact-based, focused on the degree of connection between the defendant's conduct and the plaintiff's loss.

The dissent in *Palsgraf* offered some criteria for determining proximate cause under this type of analysis:

The proximate cause, involved as it may be with other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or, by the exercise of prudent foresight, could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space.

Palsgraf, 248 N.Y. at 354.

In *People v. Roberts*, 2 Cal. 4th 271, the California Supreme Court implicitly adopted many of these criteria. There, the defendant, a prison inmate, stabbed another inmate who then seized a knife, ran up a flight of stairs and fatally stabbed a guard. The question was whether the defendant proximately caused the guard's death. Acknowledging that there is no bright line separating a legally sufficient proximate cause from one too remote, the Court concluded that the question of proximate cause was one for the jury, since it was "foreseeable that a wounded inmate might try to arm himself with a weapon abandoned at the scene of a prison melee and pursue his attackers a short distance." *Id.* at 321.

Offering some insight into the basis for its conclusion, the Court described examples of situations where proximate cause could and could not be found:

Shots that cause a driver to accelerate impulsively and run over a nearby pedestrian suffice to confer liability [citation]; but if the driver, still upset, had proceeded for several miles before killing a pedestrian, at some point the required causal nexus would have become too attenuated for the initial bad actor to be liable.... It is a natural consequence that shots fired at a boat may cause a passenger to leap out and thereby cause another in the boat to drown [citation]; but if the boat had capsized, floated some miles down the river and over a waterfall, and fallen on the head of another boater, the shooter probably would not be criminally liable for that boater's death.

Id. These examples demonstrate that, at some point, a court can determine as a matter of law that an actor's conduct is too remote, too disconnected from the loss, to impose liability. When the plaintiff is able to make a threshold connection between the conduct and the loss, however, the issue of proximate cause will go to the jury.

Counsel addressing a proximate cause question should therefore engage in a two-fold inquiry:

1. First, counsel should examine whether any public policy weighs either in favor of or against imposing liability. As *PPG Industries* indicates, public policy considerations alone may dispose of the issue.

2. Second, assuming there is no overwhelming policy dictating the result, counsel must focus on the factual connection between the defendant's actions and the plaintiff's loss. Defense counsel should look for breaks in the chain of causation and examine the impact of other causal factors, such as market forces. Plaintiff's counsel should try to anticipate the existence of other causative forces and be prepared to demonstrate a direct and substantial connection between conduct and loss. Perhaps even more significantly, plaintiff's counsel should be able to demonstrate that it makes sense to impose liability under the circumstances — that it is logical and fair to impose liability because the defendant's actions and ultimate result were not too distant from one another.

At bottom, the question of proximate cause involves a spectrum of possibilities. At one end, the court may make the determination of nonliability. Indeed, Prosser recognized that this was precisely the type of determination made in *Palsgraf*:

What is the true reason that so many of us feel that the case was correctly decided, and that Mrs. Palsgraf should not recover?... It is that what did happen to her is too preposterous. Her connection with the defendant's guards and the package is too tenuous; in the old language, she is too remote. The combination of events and circumstances necessary to injure her is too improbable, too fantastic....

William L. Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 27 (1953). Thus, while defense counsel will endeavor to keep the debate at this end of the spectrum, it is the responsibility of plaintiff's counsel to move the issue along the spectrum to the point — admittedly, a point that will be determined on a case-by-case basis—at which the issue becomes one of fact.

— Robin Meadow and Jennifer L. King

Defeating the Malicious Prosecution Claim

Continued from page 9

the client that the case lacked merit could not be binding on the attorney in that case because he had not represented the client when the abandonment occurred. *Id.* at 494-85.

Proving an Improper Purpose

The third element of the malicious prosecution cause of action, malice, goes to the malicious prosecution defendant's intent in initiating the prior action. *Sheldon Appel*, *supra* at 874. The test is legal malice, not actual hostility or ill will toward the plaintiff, although the latter also may be present. *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1157.

Malice is present when proceedings are instituted primarily for an improper purpose. Evidence of an improper purpose include: "(1) the person initiating [the suit] does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim." *Albertson v. Raboff* (1956) 46 Cal.2d 375, 383. However, subjective intent cannot be inferred merely from an absence of probable cause. *Downey Venture v. LMI Ins. Co.*, *supra*, at 498.

Since the malice element of the malicious prosecution cause of action is necessarily subjective, it affords fewer opportunities to dispose of the claim by motion. However, since the malicious prosecution plaintiff must establish all three elements to prove its case — probable cause, favorable termination, and malice — the party faced with the claim has ample opportunities to defeat it.

— John W. Amberg

the rule of law still has hearts and minds to conquer?

Today's evils may be less obvious or personified than those our ancestors faced, but the ongoing battles to establish and preserve justice in our world are no less important for us and for our successors. Each of us needs to reflect on what our ancestors did for us in the twentieth century and what we will do for our successors in the twenty-first. In 1969, William Gossett, President of the American Bar Association, reminded lawyers that justice needs continuous care for its preservation in words that bear contemplation as the year 2000 begins:

The rule of law can be wiped out in one misguided, however well-intentioned generation. And if that should happen, it could take a century of striving and ordeal to restore it, and then only at the cost of the lives of many good men and women.

Our generation's legacy will be written first in our own homes and neighborhoods, with our own children and our neighbors' children, but it will not end there. The Internet is only the latest



Marsha McLean-Utley
1939-2000

Marsha McLean-Utley was an active participant in the ABTL and in the State bar and other bar organizations for many years. She served not only on the Board of Governors of the ABTL, but also as its President in 1982-83. I first met Marsha when I was a summer associate at Gibson, Dunn & Crutcher, where she practiced between 1964 and 1988, and where she became the firm's first female partner in 1971. Marsha was one of the first lawyers who talked to me about what she gained in her practice and in her personal life from her experience in bar organizations. She impressed upon me the fact that bar activity makes the profession more personal—she decried “Rambo” litigation tactics, and told me that because it is harder to “be a jerk” to someone you know, there would be a lot fewer “jerks” in the practice if more lawyers acquainted themselves with one another through bar organizations. She practiced what she preached, most recently at the firm of Daar & Newman.

Marsha McLean-Utley passed away on January 12 after a bout with cancer. Those few who had the good fortune to practice with her during her distinguished career, and those many others who had the opportunity to get to know her through the ABTL and her many other bar activities, will miss her. We will remember her every time we think of the larger issues and cooperate with opposing counsel on the smaller ones. Her legacy is one we all would be fortunate to leave.

— Jeffrey C. Briggs

technological development that relegates isolationist perspectives to history's ashcan; we now experience what happens beyond our own neighborhood, state, country, and hemisphere more directly than our ancestors could. To ignore what our new technology allows us to see and hear would be to squander the opportunity to further the cause of justice both at home and abroad.

We lawyers have a particularly important role in fashioning our generation's legacy. We must *not* see ourselves as mere practitioners of the rule of law; as its inheritors from our recent ancestors, we are also its preservationists and developers. However else we may choose to participate in the writing of our generation's legacy, we will do so in the courthouses and with the clients and judges we instruct and from whom we learn. As this new year begins, we should reflect on how we can participate, as lawyers and as citizens, in the writing of our generation's legacy. With our minds as our weapons, let us hope that we continue the efforts our predecessors valiantly began to substitute the rational procedures of the rule of law for the prejudice and injustice that remain unconquered.

— Jeffrey C. Briggs

abtl REPORT

P.O. Box 67C46
Los Angeles, California 90067
(323) 939-1999 • FAX: (323) 935-6622
e-mail: abtl@mediaone.net • www.abtl.org

OFFICERS

Jeffrey C. Briggs
President
(310) 277-1226

Barbara Reeves
Vice President
(213) 689-5800

Seth Aronson
Secretary
(213) 669-6000

Robert S. Span
Treasurer
(213) 683-6253

BOARD OF GOVERNORS

Vivian R. Bloomberg • Christine W.S. Byrd
Patrick A. Cathcart • Deborah A. David
David Enzminger • Alan E. Friedman
Hon. Haley Fromholz • Peter B. Gelblum
Michael K. Grace • Hon. Patti Kitching • Joel Krischer
Hon. Carolyn B. Kuhl • Margaret Levy • Brian C. Lysaght
Elizabeth Mann • Hon. Alejandro N. Mayorkas
Bryan A. Merryman • Robert A. Meyer
Hon. Carlos Moreno • Hon. Margaret Morrow
Hon. Margaret Nagle • Dennis M. Perluss
Glenn D. Pomerantz • Michael A. Sherman
Richard L. Stone • Mark E. Weber • Jeffrey S. Westerman

EXECUTIVE DIRECTOR

Rebecca Lee Cien

EDITOR

Vivian R. Bloomberg

CONTRIBUTING EDITORS ON THIS ISSUE

John W. Amberg • Michael A. Bertz • Jill Costarez
John A. Dito • Michael K. Grace • David Harris • Joel Mark
Robin Meadow • Daniel B. Mestaz • Denise M. Parga
Jon Rapore • Larry C. Russ • Peter S. Selvin

MANAGING EDITOR

Stan Bachrack, Ph.D.