ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

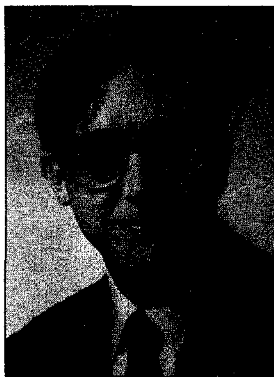
Volume X No. 3

August 1988

Letter from the President

New techniques for alternative dispute resolution have sparked the imagination of trial lawyers to surprisingly productive results. Effective advocates are refining their methods to compel or persuade opponents into entering arbitration — and those trial lawyers who have mastered the techniques of arbitration find that they like it!

Arbitration by Agreement. Recent decisions enforcing arbitration agreements have facilitated efforts to resolve business disputes outside the courthouse. The decision of the United States Supreme Court in the recent *McMahan* case (107 S. Ct. 2332), which enforced arbitration provisions in securities broker dealer agreements, has encouraged the removal of substantial business cases from expensive courthouse rituals to binding arbitration. In virtually all instances, litigation expenses have been reduced and many of these cases have settled as a result. With binding arbitration, plaintiffs no longer can point to substantial defense costs as an appropriate benchmark for settlement; defendants, at the same time, cannot rely on courthouse delay to postpone resolution of disputes. Arbitration provisions are being placed in routine loan agreements by many creditors concerned about lender liability lawsuits. Motions to compel arbitration pursuant to contract provisions are being pursued with increasing frequency and success. For industries beset with punitive damage claims in commercial contexts, arbitration may be the only place to avoid punitive damage exposure.



H.O. (Pat) Boltz

Mandatory Arbitration. Although many lawyers appear not to have gotten the word, the law regarding mandatory arbitration in the superior courts has been changed. Any claim for an amount less than $50,000 can be referred by the court to mandatory arbitration. The superior courts are regularly referring such disputes to mandatory arbitration and, in the process, are often facilitating settlement.

"Rent-A-Judge". The program of using the skills and experience of retired judges to conduct trials under the provisions of the California Code of Civil Procedure has flourished. ABTL members report that they prefer the early trial scheduling and judge selection available under the program. Superb retired judges who devote their energies exclusively to the trial of business cases are diverting substantial numbers of complex business disputes from the courthouse with high quality results.

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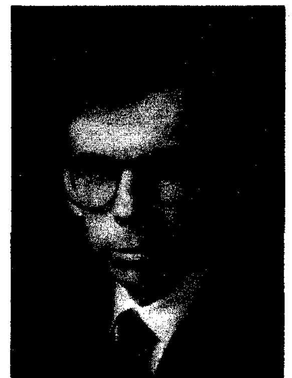
Toward a National Statute of Limitations in 10b-5 Cases

Since implied private rights of action under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 were first recognized, the courts have struggled to fill in the procedural interstices left open by such judicial law making. One of the most vexing gaps has been the lack of express statutory rules governing statute of limitations issues.

The length of the limitations period, when it commences to run, whether it can be tolled, and if so, under what circumstances, have all been difficult issues for courts to resolve, in part because the absence of an express statutory remedial provision required resort to divergent state law. There are signs, however, that the situation may be changing and that a coherent, national set of rules governing statute of limitations issues in 10b-5 cases finally may be emerging.

Until the watershed opinion of the Supreme Court in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, ____ U.S. ____, 107 S. Ct. 2759 (1987), it was clear within the Ninth Circuit that the limitations period applicable to 10b-5 cases was the forum state's statute of limitations for fraud actions. In California this was the three year period set forth in California *Code of Civil Procedure* Section 338. *See United California Bank v. Salik*, 481 F.2d 1012 (9th Cir.), *cert. denied*, 414 U.S. 1004 (1973). Most other courts had adopted a different rule, borrowing the statute of limitations from the forum state's Blue Sky Law. *See, e.g., Diamond v. Lamotte*, 709 F.2d 1419 (11th Cir. 1983); *Herm v. Stafford*, 663 F.2d 669 (6th Cir. 1981). Commentators had urged yet another approach, arguing for the adoption of a single national statute of limitations in 10b-5 actions based upon the express limitations periods provided by Congress in other sections of the securities laws. *See, e.g.*, L. Loss, Fundamentals of Securities Regulation 994-95 (1988).



Michael C. Kelley

The Supreme Court has never had an occasion to formally address this conflict, but, as a pair of recent cases makes clear (including a Ninth Circuit concurring opinion) the Supreme Court has served notice in *Malley-Duff, supra,* that a uniform statute of limitations should be adopted in 10b-5 cases to eliminate the inconsistencies and uncertainties that result from relying on differing state laws. *See Davis v. Birr, Wilson & Co.*, 839 F.2d 1369, 1370 (9th Cir. 1988) (concurring opinion of Judge Aldisert)

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10b-5 Cases

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("[t]he Supreme Court has now sent signals that a uniform limitations period should be established nationwide for cases brought under Section 10(b). . ."); *In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir. 1988) (*en banc* opinion by Judge Aldisert) (accord).

In *Malley-Duff, supra*, the Supreme Court declined to require federal courts to adopt state law for the statute of limitations to govern RICO cases. Instead, the Court looked to another federal statute, the Clayton Act (15 U.S.C. § 15), to provide a uniform federal statute of limitations for such actions. In reaching the conclusion that a single statute of limitations derived from federal law was required, the Court — as recognized by Judge Aldisert in both *Davis, supra*, and *Data Access, supra* — removed the entire foundation for the Ninth Circuit's present rule that 10b-5 cases are governed by the forum state's statute of limitations for fraud actions.

Now it is clear that federal courts should "borrow" a statute of limitations from another federal statute, when that act "clearly provides a closer analogy than available state statutes and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law making." *Malley-Duff, supra*, at 2763, *quoting DelCostello v. Teamsters*, 462 U.S. 151, 171-172, 103 S. Ct. 2281, 2294 (1983).

In concluding that RICO cases presented an appropriate instance for rejecting diverse state rules in favor of a uniform federal limitations period, the Court focused on two factors, each of which appears to be equally applicable, if not more compelling, in 10b-5 cases.

First, the Court noted that RICO litigants faced inconsistency and unpredictability as a result of differing statutes of limitations, which led to wasteful collateral disputes about the applicable statute of limitations, to unfairness between litigants in different states, and to forum shopping. *Id.* at 2764, 2766. The same inconsistencies, unfairness and needless uncertainty have been observed and criticized in 10b-5 actions. See A.B.A. Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 The Business Lawyer 644, 647 (1986) ("the uncertainty and lack of uniformity [in statutes of limitations in 10b-5 cases] promote forum shopping by plaintiffs and result in wholly unjustified disparities in the rights of parties litigating identical claims in different states"). *See also Davis v. Birr, Wilson & Co., supra*, at 1371 (concurring opinion) (noting that solely within the Ninth Circuit, state statutes of limitation range from two to six years).

Indeed, if anything, the anomalies in 10b-5 cases attributable to the application of diverse state statutes of limitations are more acute than in RICO cases.

Cases brought under 10b-5 are much more likely than RICO cases to be class actions where plaintiffs from multiple states are involved. Thus, where the forum state has its own "borrowing" statute of limitations — as many states do — resort to state law in such cases is likely to subject plaintiffs *in the same case* to different statutes of limitations. *See, e.g., Kronfeld v. Advest Inc.*, [Current] Fed.Sec.L.Rep. ¶93,573 (S.D.N.Y. 1987). Such statutes exist in at least 33 states, including such commercially important states as New York, California, Illinois, Delaware, Michigan and Pennsylvania.

For example, if California limitations law is applied in a class action pending in a federal court in California then the claims of members of the investor class who are residents of states with shorter statutes of limitation will be subject to the shorter periods applicable in their states of residence. *See* California *Code of Civil Procedure* Section 361. Based on the survey in the ABA Report there are 21 states with shorter statutes of limitations applicable to 10b-5 cases than the three year period heretofore applied in California. Thus, 10b-5 cases appear to present an even stronger argument for adoption of a uniform national statute of limitations than *Malley-Duff*.

The second ground for the Supreme Court's decision in *Malley-Duff* is also applicable *a fortiori* to 10b-5 cases. There the Court looked to federal law to provide the appropriate statute of limitations for RICO cases because the Clayton Act, which provides for a private right of action in language virtually identical to the RICO statute, provided a closer analogy to a private RICO action than the myriad state law claims to which RICO claims had been compared by lower courts in search of the appropriate statute of limitations. *Malley-Duff, supra*, at 2765-66.

On this point as well, 10b-5 cases are even stronger candidates for borrowing a uniform federal statute of limitations than RICO cases.

Congress has expressly provided statutes of limitations in other sections of the 1934 Act for private actions it created. *See* Securities Exchange Act of 1934, Sections 9(e), 16(b), 18(c), 29(b), 15 U.S.C. §§ 78 i(e), 78 p(b), 78 r(c), 78 cc(b). *See also* Securities Act of 1933, Section 13, 15 U.S.C. § 77m. These sections provide nearly perfect analogies for 10b-5 cases and certainly are closer to 10b-5 actions than common law fraud actions. *See Davis v. Birr Wilson & Co., supra*, at 1373-74 (concurring opinion) ("[t]he Supreme Court instructs that § 10(b) and Rule 10b-5 actions and common law fraud suits are two distinct breeds").

Indeed, it is only because private 10b-5 cases are based upon judicially created implied rights of action that no express statute of limitations exists. Thus, it would be much more appropriate to borrow a statute of limitations for these implied private rights of action from other provisions of the 1934 Act (or even from the 1933 Act) than it was for the Supreme Court to borrow an antitrust statute of limitations for use in RICO cases in *Malley-Duff*.

Moreover, in the RICO case, the Supreme Court had to overcome the assumption that Congress, when it created the private RICO right of action without setting a statute of limitations, relied upon the Court's past cases suggesting that state law would provide the limitations period. *Malley-Duff, supra*, at 2762 ("given our long standing practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law.") This assumption, of course, has no force in the 10b-5 area where the right of action was created by the courts, not Congress. In such cases considerations of judicial efficiency, national uniformity and faithfulness to the overall scheme of securities regulation created by Congress compel adoption of a uniform national statute of limitations derived from other express limitations periods established by Congress, which in virtually every instance has been a "double-barrelled" statute of limitations of one year and three years. *See* L. Loss, Fundamentals of Securities Regulation, at 988-91 (1988).

Thus, once it is clear that the existing federal securities laws provide a better analogy for choosing a statute of limitations than disparate state laws, the choice of which statute of limitations to borrow for 10b-5 cases is quite simple. A 10b-5 case should be barred if it is brought more than three years after the omissions or misstatements alleged by the plaintiff were made or more than one year after the plaintiff discovered, or with reasonable diligence should have discovered, such omissions or misstatements. This is the recommendation of Judge Aldisert, *see Davis v. Birr Wilson & Co., supra* at 1376; *In re Data Access Systems Securities Litigation, supra*, at 1550, as well as most scholarly commentators.

In all probability, this result will be opposed by plaintiffs who will argue that the one year limitations period provided by Con-

gress elsewhere in the securities laws is too short for 10b-5 cases because there is something unique about 10b-5 cases. This argument has little force.

First, while 10b-5 claims do require plaintiffs to prove certain elements, such as scienter or reliance, that are not required in some of the express actions for which Congress has provided a one year statute of limitations, 10b-5 actions are not unique. For example, private actions under Section 9(a) of the 1934 Act for manipulation require proof of manipulative "intent" and private actions under Section 18 of the 1934 Act require proof of reliance, yet both provisions are governed by an express one year statute of limitations.

Second, by definition, application of the one year statute of limitations borrowed from Section 13 of the 1933 Act to 10b-5 cases will rarely, if ever, bar the action of a diligent plaintiff, because the statute will only commence running when the plaintiff knew, or with reasonable diligence should have known, the facts upon which his claim is based.

Third, while it has been observed that Rule 10b-5 should be construed flexibly to effectuate the "remedial purposes" of the securities acts, *Herman & McLean v. Huddleston*, 459 U.S. 375, 386-87, 103 S. Ct. 683, 689 (1983), this hardly justifies a rule preserving a dilatory 10b-5 plaintiff's claim for relief after the time when other express remedies created by Congress have become barred. This is especially true in the numerous cases where a plaintiff's 10b-5 claim is asserted parallel to claims under other sections of the securities laws, such as Section 12(2) of the 1933 Act, which have express one year limitations periods.

Finally, private 10b-5 plaintiffs are not the only source for enforcement of the securities laws and federal claims under the securities laws are not the only remedies available to defrauded investors. Thus, even if there is a rare case where an otherwise viable private 10b-5 case may be barred by the statute of limitations despite reasonable diligence by the private plaintiff, public enforcement by the SEC would still be possible. See ABA Report, *supra*, at 646 n. 7 ("there is no limitations issue in the context of administrative or court proceedings by the Securities and Exchange Commission, as the Commission itself is not subject to any limitations period in 10b-5 cases.") Indeed, private remedies may still be available to a plaintiff whose 10b-5 claims are barred as state law remedies frequently have longer statutes of limitations. *Id.* at 662-66.

There is simply no reason, in legal precedent, logic, statutory interpretation or policy, to perpetuate the anomaly of providing 10b-5 plaintiffs with a unique extension of the statutes of limitations designed by Congress to encourage prompt resolution of securities actions.

Conclusion

One court has referred to the absence of a uniform limitations period in 10b-5 cases as "one tottering parapet of a ramshackle edifice" and concluded that "only Congress or the Supreme Court can bring uniformity and predictability to this field[.]" *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 108 S. Ct. 329 (1987).

While the first statement may be hyperbole, the sentiment behind it is widely shared. As for the second statement, it appears to have been, in part, prophetic. The Supreme Court took the first step toward uniformity and predictability in *Malley-Duff* by freeing the federal courts from having to look to state law for statutes of limitations when a federal statute provides a preferable alternative. However, the next step must be taken by the lower courts by applying the reasoning of *Malley-Duff* to 10b-5 cases.

— Michael C. Kelley

Intentional Infliction of Emotional Distress

Once just a fight over vested employment rights, wrongful termination litigation now often includes issues of psychiatry, post-traumatic stress syndrome and hypochondria.

Searching for the "big score," plaintiffs are not content with merely alleging wrongful termination, breach of contract or fraud, but are now alleging that their employer has "intentionally inflicted emotional distress" in terminating the worker. California courts are increasingly attacking these claims of personal injury in a business dispute.

Indeed, the overly ambitious plaintiff's lawyer may find the wrongful termination case being heard not before a sympathetic jury but before the less generous Workers' Compensation Appeals Board.

Marilyn McDowell

The confusion surrounding the application of the workers' compensation exclusivity provision to intentional infliction of emotional distress claims was cleared as a result of the decision last year in *Cole v. Fair Oaks Fire Protection Dist.* 43 Cal. 3d 148, 160; 233 Cal. Rptr. 308 (1987). There the Court held that, when the employee's claim is based on conduct normally occurring in the workplace, it is within the exclusive jurisdiction of the Workers' Compensation Appeals Board.

The Exclusivity Rule

The thrust of the exclusivity rule is that "[a]n employee who suffers an injury in the course of his employment may recover damages in an action at law only if he comes within certain exceptions to the workers' compensation law." *Foster v. Xerox Corp.*, 40 Cal. 3d 306, 308; 219 Cal. Rptr. 485 (1985). The exclusivity rule accommodates competing interests — the employee gives up the right to pursue his cause of action in front of a jury in return for a speedy resolution of his claim and certain compensation therefor while the employer surrenders its defenses and is, in essence, held strictly liable for an employee's injuries.

For a claim to be barred by the exclusivity rule, the conditions of compensation must first be met. California Labor Code § 3600 provides that the conditions of compensation are met when the employee is injured in the course and scope of his employment and the injury is proximately caused by the employment. Once these conditions exist, provided the employer is subject to the Workers' Compensation Act and the claim is not within any statutory exceptions, workers' compensation is the exclusive remedy available to the employee.

The exclusivity rule itself is codified in Labor Code Sections 3601 and 3602. *Cole's* application of the exclusivity rule to mental disabilities strengthened the argument that workers' compensation is the exclusive remedy for emotional distress inflicted at the job site.

In order to properly evaluate the effect of *Cole*, however, it is necessary to summarize judicial application of the exclusivity rule in pre-*Cole* cases involving claims for intentional infliction of emotional distress. Several appellate courts before *Cole* viewed

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Emotional Distress

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an employee's claim for intentional infliction of emotional distress as an implied exception to the exclusivity rule.

Courts of appeal in pre-*Cole* cases were split on the issue of whether the employee's claim for intentional infliction of emotional distress was barred by the exclusivity rule. Civil causes of action were upheld in *Renteria v. County of Orange,* 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978) and its progeny based on distinguishing physical from mental harm.

In *Renteria*, the employee claimed he had been treated in a rude and degrading manner, placed under surveillance, subjected to lengthy interrogations and discriminated against because of his Mexican-American descent and that all of this had caused him humiliation, mental anguish and emotional and mental distress. The appellate court reversed the trial court's decision to sustain the employer's demurrer for two reasons.

First, pure mental distress without any physical manisfestations was not considered a compensable injury in a workers' compensation proceeding and Renteria had not alleged any physical symptoms. Second, the court concluded that the legislature did not intend to bar civil actions seeking to remedy intentional torts. If that were the case, the "Workers' Compensation Act, created to benefit employees... [would] shield the employer from all liability for such conduct." *Renteria*, 82 Cal. App. 3d at 841. Thus, the court held that the employee's cause of action for intentional infliction of emotional distress was an implied exception to the exclusivity rule of Section 3601.

Renteria's distinction between mental and physical harm was relied on to allow recovery in several later cases; in other cases, the court determined that the requisite physical manifestations were alleged and held that the exclusivity rule barred the emotional distress claims. These cases were all decided *before* 1982 when Labor Code § 3602 was amended.

Section 3602, designed to increase workers' compensation benefits, codified the exceptions to the exclusivity rule. The legislature did not except intentional infliction of emotional distress claims from the bar of the exclusivity rule when it enacted Section 3602.

Following the enactment of Section 3602, courts of appeal still did not agree on how to apply the exclusivity rule to emotional distress claims. In *Hollywood Refrigeration Sales Co. v. Superior Court* 164 Cal. App. 3d 754, 210 Cal. Rptr. 619 (1985), the Second District Court of Appeal held that plaintiff's claim of emotional distress was barred by the exclusivity rule since plaintiff had alleged compensable physical harm. The court also found the plaintiff's prior settlement before the Workers' Compensation Appeal Board was *res judicata* on the issue of compensability. The Fifth District Court of Appeal reached the opposite result in *Young v. Libbey-Owens Ford Co.* 168 Cal. App. 3d 1037, 214 Cal. Rptr. 400 (1985). Citing *Renteria* and emphasizing the intentional nature of the employer's conduct, the Court concluded that the workers' compensation scheme was not a sufficient deterrent to such misconduct and consequently the plaintiff's claim was not barred by the exclusivity rule.

In 1987, the California Supreme Court at last decided *Cole v. Fair Oaks Fire Protection District.* That case involved a firefighter who suffered elevated blood pressure due to unreasonable stress and pressure from an assistant fire chief. The harassment continued until the employee suffered a totally disabling stroke. The Court, in holding that the plaintiff's cause of action for intentional infliction of emotional distress was barred by the exclusivity provisions of the Workers' Compensation Act, stated:

> We have concluded that, when the misconduct attributed to the employer is actions which are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, an employee suffering emotional distress causing disability may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer's decisions as manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance resulting in disability. The basis of compensation and the exclusive remedy provisions is an injury sustained and arising out of the course of employment (former Lab. Code §§ 3600, 3601), and when the essence of the wrong is personal physical injury or death, the action is barred by the exclusiveness clause no matter what its name or technical form if the usual conditions of coverage are satisfied.
>
> If characterization of conduct normally occurring in the workplace as unfair or outrageous were sufficient to avoid the exclusive remedy provisions of the Labor Code, the exception would permit the employee to allege a cause of action in every case where he suffered mental disability merely by alleging an ulterior purpose of causing injury. Such an exception would be contrary to the compensation bargain and unfair to the employer.

Cole, 43 Cal. 3d at 160.

Although opposing plaintiff's counsel may disagree, the *Cole* court had persuasive reasons for its decision:

(1) The Court called the distinction between physical and mental harm (drawn in some of the cases discussed above) "an anomaly." *Cole,* 43 Cal. 3d at 156. It rejected the reasoning of *Renteria* and its progeny to the extent those cases permitted recovery because there was no other deterrent to intentional tortious conduct. To the contrary, it found that workers' compensation and the additional recovery available under Labor Code Section 4553 for willful employer misconduct were deterrents to intentional tortious conduct. Further, "an implied exception to a statute should not be applied where the reason for the exception is not applicable." *Cole* at 157; 161.

(2) *Cole* drew a distinction between conduct which may be characterized as "a normal part of the employment relationship" and conduct having only a "questionable relationship to the employment." Demotions, promotions, criticism of work practices and frictions in negotiations as to grievances were listed as "a normal part of the employment relationship." The Court explained that "[a]n employer's supervisory conduct is inherently 'intentional'" and "it would be unusual for an employee *not* to suffer emotional distress as a result of an unfavorable decision by his employer." *Id.* at 160-61.

(3) The employer who "successfully defends the claim of unfairness in criticisms, reassignments, denial of promotions or other frictions" must pay the defense costs as well as disability benefits while the employee sues and may not recover such payments because disabilities caused by stress in the workplace are compensable whether or not the employer was at fault." *Id.* at 160.

Finally, it bears mention that the pre-1982 Labor Code statutes were applied in *Cole* because the plaintiff was injured prior to the effective date of the amendment. When the Labor Code was amended in 1982, effective January 1, 1983, the exceptions to exclusivity which existed for willful physical assaults by the employer, fraudulent concealment and use of defective products manufactured by the employer were codified. The amendment benefits both employers and employees within the system, by keeping down the costs of compensation insurance and preserving the low cost, efficiency and certainty of recovery which characterizes workers' compensation." *Continental Casualty Co. v. Superior Ct.*, 190 Cal. App. 3d 156, 162; 235 Cal. Rptr. 260 (1987).

Since *Cole,* some lower courts have dismissed emotional stress

claims even at the early demurrer stage because of the workers' compensation exclusivity rule. *See Potter v. Arizona Southern Coach Lines, Inc.*, 202 Cal. App. 3rd 126; Cal. Rptr. (1988).

The Prima Facie Case For Emotional Distress

The second basis upon which a claim for intentional infliction of emotional distress may be challenged is that the plaintiff has failed to state a prima facie case. The essential elements of the cause of action are: (1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of emotional distress. *Agarwal v. Johnson,* 25 Cal. 3d 932, 946; 160 Cal. Rptr. 141 (1979).

There is no bright line test for the type of conduct which amounts to actionable outrageous conduct. Such a determination necessarily depends on the facts of each case. Provided the plaintiff properly alleges a cause of action, he will not be denied the right to recover for such a claim merely because of the employer-employee relationship. In fact, plaintiff's employee status may entitle him to a greater degree of protection from outrage than if he were a stranger to defendants. *See Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493, 498, n.2; 86 Cal. Rptr. 88 (1970). In the employment context, "behavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress." *Agarwal* 25 Cal. 3d at 946.

As a general rule, more than termination or insulting language directed to the employee is required to state a cause of action for intentional infliction of emotional distress. For example, the employer did not engage in the requisite outrageous conduct where he deprived plaintiff of a union stewardship, transferred him, verbally insulted him, passed him over for a promotion and then fired him. *Ankeny v. Lockheed Missiles & Space Co.*, 88 Cal. App. 3d 531, 536-37; 151 Cal. Rptr. 828 (1979). Similarly, the employer's instructions to other employees not to help or cooperate with the plaintiff was not "outrageous." *Cornblith v. First Maintenance Supply Co.*, 268 Cal. App. 2d 564 (1968). The often cited standard is that that conduct must "exceed all bounds usually tolerated by a decent society." *Ankeny,* 88 Cal. App. 3d at 537. The court looks for (1) the presence of aggravating circumstances or (2) actions unrelated to the employment. Sufficient aggravating circumstances existed where plaintiff's foreman terminated him in a violent manner; ("You goddam 'niggers' are not going to tell me about the rules.") *Alcorn,* 2 Cal. 3d at 496-97.

Actions by the employer unrelated to the work may also bring conduct to an actionable outrageous level. The Court in *Rulon-Miller v. IBM,* 162 Cal. App. 3d 241; 208 Cal. Rptr. 524 (1984) carefully analyzed this issue. Plaintiff was given "several days to a week" to decide whether to keep her job or continue dating a man who worked for a competitor of IBM. The next day plaintiff's supervisor, saying he was "making up her mind for her," terminated her. The court stated there was an element of deception in the supervisor's conduct (he had known of the plaintiff's personal relationship for some time) and the supervisor had acted in flagrant disregard of IBM policies (a company memo assured plaintiff a right to privacy in her personal life so long as performance on the job did not suffer and there was no evidence of any actual conflict of interest). These elements made the conduct "unfair but not atrocious."

These elements *plus* the "I'm making the decision for you" statement brought the "conduct to an actionable level" and tended to humiliate and degrade the plaintiff. *Id.* at 255. "To be denied a right granted to all other employees for conduct unrelated to her work was to degrade her as a person." *Id.* The supervisor's "unilateral action in purporting to remove any free choice on her part contrary to his earlier assurances *also* would support a conclusion that his conduct was intended to emphasize that she was powerless to do anything to assert her rights as an IBM employee. And such powerlessness is one of the most debilitating kinds of human oppression." *Id.*

Conclusion

The two bases upon which to attack a claim for emotional distress are quite closely related in at least one respect. The initial determination of whether the employer's conduct is a normal part of or incident to the employment relationship is critical

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to both the exclusivity and the prima facie case challenge. If the employer acts within the scope of the employment relationship, any resulting injury to the employee ought to be covered by the Workers' Compensation remedy and a cause of action will be barred by the exclusivity rule.

When the employer's act is outside the scope of the employment relationship or unrelated to the employment, the question then becomes whether the conduct rises to the level of actionable "outrageous" conduct. Generally, it will be a question of fact for the jury whether conduct is sufficiently extreme and outrageous to result in liability. *Alcorn,* 2 Cal. 3d at 499. Allegations of employer conduct which is egregious, criminal or statutorily prohibited, such as sexual or racial harassment, would probably state a claim.

There may be, however, cases in which reasonable men could not differ. For example, in *Cornblith v. First Maintenance Supply Co.*, 268 Cal. App. 2d at 565 the plaintiff alleged that, among other things, his employer refused to let plaintiff's co-workers service his accounts while he was recovering from an accident and instructed other employees not to help the plaintiff when he returned. The court sustained plaintiff's demurrer without leave to amend because the employer was entitled to direct the job activities of plaintiff and his fellow salesmen and determine office procedure.

Cornblith and other cases, for example *Priest v. Rotary*, 634 F. Supp. 571, 583 (N.D. Cal. 1986) suggest that even extreme and outrageous conduct may be privileged where the defendant acts, in fact, under a legal right or in a good faith belief that he is acting under a legal right. Moreover, the First District Court of Appeal recently stated in *LaGoe v. Duber Industrial Co.*, 194 Cal. App. 3d 349, 356; 239 Cal. Rptr. 445 review granted 241 Cal. Rptr. 460 (1987) that "the employer's determination of his own legitimate business interests are, *as a matter of law,* sufficient for the termination of an employee if done in good faith and if the probability of truth favors the stated reason for termination."

In summary, regardless of the ground upon which an emotional distress cause of action is attacked, the single most important consideration is whether the employer's conduct was related to the employment relationship and whether there were legitimate business reasons for its actions.

— Marilyn McDowell

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Annual Update: Time to Trial in Southern California Courts

From five months to almost five years — the waiting time for trial continues to vary widely in the Los Angeles County system, according to the latest ABTL survey.

Overall, Los Angeles County Superior Courts have cut the waiting time for a jury trial by six months since the ABTL last published a survey based on August 1986 data. However, the waiting time for nonjury trials has jumped six months. On average, February jury trials started 27 months after the at-issue memorandum was filed, compared with 33 months in August 1986. For nonjury trials, the average was 24 months, compared with 18 months in August 1986.

These county-wide figures obscure dramatic shifts in waiting times that have occurred among districts heavily impacted by the Short-Term Rescue Program. Under that program, cases on file for nearly five years and those entitled to preference have been transferred out of overloaded districts. This resulted in longer waiting times for districts that received transferred cases and shorter waiting periods for districts benefiting from the program. There was a dramatic cut in waiting times in the Northeast District (Pasadena), with the average wait for jury trials slashed from 61 to 14 months and the waiting time for nonjury trials cut from 31 to 26 months.

"If we have cut the waiting time, it hasn't been by trying the cases in Pasadena," said Judge George Xanthos, Supervising Judge in the North East District. "Through Operation Rescue, we have farmed out cases with time estimates of 10 days or less. Long Beach, Santa Monica and Pasadena were the beneficiaries of the program. I don't want to take credit."

Districts hurt by the program have included the Southeast District (Norwalk), where the waiting time for nonjury trials jumped from 13 to 58 months. The clerk for Norwalk's Department A disputed these figures, which are issued by the Los Angeles County Superior Court. He said the waiting time for cases with trial estimates over two days has been running about 16 months (100 days from at-issue memorandum to trial setting conference and then eight months to trial). He conceded, however, that the waiting time has doubled since last year, when there was a four-month wait from trial setting conference to trial.

Between February 1, 1988, when the Rescue Program began, and July 5, 1988, 252 cases were transferred from overloaded courts in the Central, West (Santa Monica), South (Long Beach) and Northeast (Pasadena) districts, said Civil Courts Coordinator Arnold Pena.

The program may have spurred the settlement of cases where parties were reluctant to change districts. Of the cases transferred, Pena said 46 percent settled, 37 percent were tried by a jury, 9 percent were tried without a jury and 4 percent were dismissed. The Rescue Program ended July 5, 1988, and Pena said it would be replaced by a more limited program involving the transfer of a few cases each week, beginning in August. "They have to do something. It's really helped. It has relieved

U.S. DISTRICT COURTS

	Months From Issue To Trial (Median) as of 12/31/85[1]	Months From Issue To Trial (Median) as of 6/30/87[2]		
	Total	Total	Jury	Non-Jury
Central District	16	13	13	12
Northern District	15	13	15	12
Southern District	20	22	24	21
Eastern District	18	20	20	19

LOS ANGELES COUNTY SUPERIOR COURT

	Months From Filing At-Issue To Trial (Median) as of 8/31/86[3]		Months From Filing At-Issue To Trial (Median) as of 2/29/88[4]	
	Jury	Non-Jury	Jury	Non-Jury
Central District	50	21.5	53	33.5
West District (Santa Monica)	34.5	22	43*	11*
East District (Pomona)	21	30.5	7	5
North Central District (Burbank-Glendale)	2.5	5	14	12.5
Northeast District (Pasadena)	61	31	48	36.5
North Valley District (San Fernando)	27	13	14	26
Northwest District (Van Nuys)	20.5	17	25	21
South District (Long Beach)	50	42.5	45	7
South Central District (Compton)	15	14	57*	14*
Southeast District (Norwalk)	15	13	20.5	58
Southwest District (Torrance)	37.5	9	23	37
AVERAGE	33	18	27	24

*Most recent statistics available in the West District (Dec., '87), in the South Central District (Nov., '87).

OTHER SUPERIOR COURTS — 1986

	Months From Filing At-Issue To Trial as of 1986[5]
Orange County	8.5
San Diego	16-18
San Bernardino	6
Ventura	5
Santa Barbara	17
Riverside	18

OTHER SUPERIOR COURTS — 1988

	Months From Filing At-Issue To Trial as of 1988[6]	
	Jury	Non-Jury
Orange County	16	11
San Diego*		
San Diego	12*	12*
Vista	12*	12*
San Bernardino		
Central	9	6
West-Vista Cucamonga	10	8-10
Ventura		
Trials of 1 day or less	1.5	1.5
Trials of 2 days or more	8	8
Santa Barbara	6	7
Riverside	22	4

*Only includes data for cases assigned to the "fast track" under the Trial Court Delay Reduction Act.

[1] From Annual Report of the Office of the Circuit Executive of U.S. District Court for the 12 months ending December 31, 1985.

[2] From Annual Report of the Director of the Administrative Office of the U.S. Courts, 12 month period ending June 30, 1987.

[3] From Los Angeles County Monthly Conspectus for August, 1986, issued by Los Angeles County Superior Court and from the July, 1986 Conspectus.

[4] From Los Angeles County Monthly Conspectus for February, 1988, issued by the Los Angeles County Superior Court.

[5] This represents unofficial information obtained from the respective courts. The data upon which the figures are based differ; some are based on median time calculations and others on current estimates of the Clerk's office.

[6] Represents the latest unofficial information obtained from the respective courts. Court clerks indicated that they were providing data submitted to the Judicial Council for the following months: Orange, March, 1988; San Diego, March, 1988; San Bernardino, February, 1988; Ventura, April, 1988; Santa Barbara, January, 1988; and Riverside, December, 1987.

the pressure,'' Pena said. The new program had not been named at presstime.

The districts that benefited from the Rescue Program continue to have the heaviest caseloads. With 17,055 civil cases awaiting trial, the Central District has by far the largest backlog in the County. In contrast, cases awaiting trial in the Eastern, South Central and North Valley Districts totaled 375, 1,119 and 1,172. Countywide, there were 33,044 cases awaiting trial as of February, 1988, slightly fewer than the 33,602 of the year before.

The Rescue Program may have contributed to a reduction in the backlog in the Central District. The number of cases awaiting trial declined to 17,055, falling by 1,337 from February, 1987, when there were 18,392 civil cases awaiting trial in that district. The Southern District also enjoyed a slight improvement in its backlog, with the number of cases awaiting trial declining to 2,297, compared with 2,317 in 1987. Other overloaded districts have seen increases, however, despite the Rescue Program. In the Northeastern District the number of cases awaiting trial rose from 1,295 in February, 1987 to 1,341 in February, 1988. In the Western District, 2,694 civil cases were awaiting trial in February, 1988 — 353 more than in the year before.

The Rescue Program was implemented in part to compensate for extraordinary delays resulting from the Crash Program, conducted from July to October 1987, Pena said. In response to a lawsuit filed by the American Civil Liberties Union, civil courtrooms were turned over to the trial of criminal cases in an experimental effort to reduce jail overcrowding. In 1987, 675 criminal cases were transferred from the Criminal Courts Building, Pena said.

Although the Crash Program officially ended last year, criminal cases are still being transferred. Pena said that 209 such cases were tried in civil courtrooms between January 1 and April 30, 1988. If the current rate continues, ''by the end of December we will be up over 600 again,'' Pena said.

In the North Valley District (San Fernando), the Crash and Rescue programs have forced the waiting time for nonjury trials up from 5 to 30.5 months, and the time for jury trials has jumped from 7 to 21 months. For the duration of the Crash Program, civil trials were suspended in that district, said Supervising Judge Robert D. Fratianne. At the end of 1987, the district was starting to catch up on its civil trial calendar, when the Rescue Program prompted the transfer of 50 cases from other districts, Fratianne said. ''We are only trying five-year cases now. We are trying cases that are six or seven years old.''

Asked how he felt about the impact of the Crash and Rescue programs, Fratianne said, ''Somebody's got to do it.'' Meanwhile, in Pasadena, Supervising Judge Xanthos said, ''I'm very upset by it. We don't have enough manpower to try civil cases. I think civil litigants are entitled to try their cases. We're doing mostly criminal work.''

California's Federal Courts continue to offer shorter delays before trial, and those delays dropped in two districts. The waiting period from the date when a case is at issue until trial fell from 16 to 13 months in the Central District of California and from 15 to 13 months in the Northern District. Elsewhere, waiting periods increased slightly, rising from 20 to 22 months in California's Southern District and from 18 to 20 months in the Eastern District.

— Vivian D. Rigdon

Letter from the President

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Many of these judges attend ABTL dinner meetings and afford a special opportunity for trial lawyers to meet those judges available to conduct trials in business disputes. Under the "rent-a-judge" rules, the parties know exactly who will try their dispute and enjoy the convenience of scheduling the time and place for their trial. Moreover, these trial judges are usually available to resolve pretrial and trial disputes under arrangements worked out by counsel, which can greatly ease the logistics of trial and reduce the expense.

Settlement Officer Program. Judges Richard Byrne, Robert Weil, Norman Epstein and Robert O'Brien have organized a program whereby certain ABTL members and other trial lawyers are currently serving as settlement officers in Mandatory Settlement Conferences ordered by the Los Angeles Superior Court. The sheer volume of pending cases at the courthouse has required the Superior Court to enlist assistance from experienced trial lawyers to act as settlement officers. As parties appear for their Mandatory Settlement Conference, Judge Weil refers many cases to settlement officers who conduct the required conference with counsel for all parties and recommend, if appropriate, placing any settlement on the record or entering sanctions against those who fail to comply with settlement conference requirements. Judge Weil considers that program "absolutely marvelous" and reports that "the settlement officers under program are top caliber." The program is settling close to 40 percent of the cases. While the program was initiated to address the backlog of cases waiting for a courtroom to start trial, the new AB 3300 judges have now discovered the program. As a result, nearly half of the cases in the program are sent by "fast track" judges. The program, sponsored and funded in part by ABTL, will be institutionalized by Los Angeles County beginning July 1.

Settlement Strategies. When all else fails, the trial lawyer has an obligation to the client to mount every reasonable effort to resolve his or her case prior to trial. The following suggestions may help to maximize your opportunities to settle business disputes:

Insist that your client articulate settlement objectives from the outset. Before filing a lawsuit, or upon assuming responsibility for any defense, ask your client to articulate his or her settlement objectives. This simple step requires you and your client to confront possible resolutions of the dispute from the outset. Unfortunately, the discussion of settlement goals often becomes postponed by the lawyer or the client in the press of litigation; settlement opportunities are thereby lost and resources which could have contributed to a settlement are expended in litigation. Unless the client has articulated clear and realistic objectives to the lawyer, litigation strategies are largely wasted energy. Compelling a client to formulate detailed settlement objectives will cause that client to confront the cost and risks of litigation and to discard any unrealistic expectations or emotional motivations for pursuing litigation.

Identify the other party's objectives and pursue all opportunities to satisfy those goals which impose no costs upon your client. The trial lawyer will not always appreciate, particularly in business litigation, the variety of opportunities in a given industry or marketplace by which a client may be able to satisfy an opposing party's objectives or needs. Litigators should master the details of both parties' business circumstances and explore carefully with corporate and tax lawyers any potential business opportunities which could afford a framework for settlement. Non-litigators may be able to suggest potential settlement arrangements from the beginning of a lawsuit which both sides would find appealing and which the litigator otherwise would simply overlook.

Consider the involvement of non-litigators in settlement negotiations. Sometimes tensions in litigation interfere with the consummation of sensible compromises. A change in personalities may facilitate a resolution. Consider the possible involvement of the client, the client's inside lawyer or a non-litigator from your office in discussions for settlement. It is important to coordinate your pursuit of the litigation with any settlement opportunities so as to maximize your client's prospects for achieving its objectives.

Prepare your case for trial and present it for settlement. Instead of launching and receiving mindless salvos of discovery, identify the evidence and finalize the arguments which you expect to present at trial in support of your client's position. Present your most compelling evidence as early and as persuasively as you can directly to the opposing party. As a practical matter, holding your presentation to "surprise" your opponent at trial is usually wasting your efforts; surprise at trial rarely occurs (since over ninety-five percent of civil cases settle before trial) and is usually overrated. An effective pretrial presentation of your most powerful evidence to the opposing party can, however, motivate an opponent to become more flexible and will demonstrate to the other side the degree of your confidence in and preparation of your case. Such effort can have a significant impact upon your opponent's assessment of his or her risks and can dramatically improve the outcome of your settlement negotiations.

Involve a third-party mediator in your explorations of settlement. Litigators who have utilized settlement judges or other third-party mediators report significant benefits from the involvement of some independent party in settlement negotiations. If a particular issue or term is hindering the completion of a settlement, consider referring the specific problem for resolution by a third-party mediator, retired judge or representative of the American Arbitration Association. A candid assessment or suggestion from an independent mediator may break down the final barriers to a sensible resolution in a business dispute.

— H.O. (Pat) Boltz

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