

abtl REPORT

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Letter from the President

After 18 successful years, the Association of Business Trial Lawyers is about to embark on a year of dramatic change.

Do not fear. ABTL's successful dinner programs, which draw together 300 to 500 lawyers every other month, will continue. The only change will be that attendees will soon earn credit in the State Bar's new mandatory continuing legal education program.



Mark A. Neubauer

ABTL's traditional annual seminar will also be maintained. This year's seminar, a trial demonstration by some of California's finest practitioners, is scheduled for Pebble Beach during the weekend of October 4 through 6, 1991, and is already almost fully sold out.

Rather than living on its past success, ABTL is broadening its scope and increasing the involvement of its members. The organization is expanding to Northern California. An impressive array of Bay Area judges and lawyers, chaired by Arthur Shartsis, have worked with us over the past year to establish a Northern California Chapter of the Association of Business Trial Lawyers.

In Southern California, our goal this year is to broaden your participation in ABTL beyond merely attending our dinner programs, our annual seminar, and reading this issue of *ABTL Report*. This year, we hope to establish a series of committees to allow you as an ABTL member to more actively participate in the organization.

The expansion of ABTL to the Bay Area provides opportunities to improve ABTL dinner programs at a time when demand — thanks to continuing legal education requirements — will increase. By sharing resources with the Bay Area Chapter, ABTL will be better able to bring in national speakers as it has done in the past with

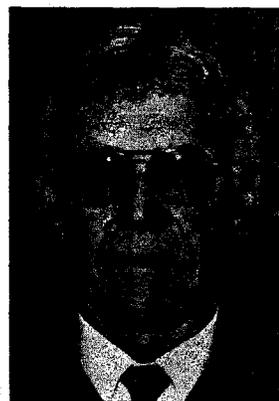
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Motions in Limine: Getting the Judge's Attention

The great day has arrived. After years of painstaking preparation, extensive discovery and frustrating delays, you have been assigned to a department for trial. Finally your client will have his day in court. Justice is near at hand.



Hon. William A. Masterson

You and your opposing counsel take the court file to the department and introduce yourself to a total stranger — a judge who knows nothing about you or your case. How can you best begin the process of persuasion with this judge, the judge whose decisions will be crucial in a jury trial and determinative in a bench trial? A creative advocate should consider use of a motion in limine. Motions in limine are typically thought of as useful only to exclude evidence, but this view overlooks a myriad of purposes that can be served by motions in limine.

A motion in limine can often be the most effective way to get the judge's attention at the start of the trial, the time when the judge is most impressionable. Your initial dealings with the judge assigned for trial are of utmost importance because of the principle of primacy. Psychological research and our own experiences tell us that every person, including judges, remembers best the first information obtained about a subject. These first impressions will establish the judge's mindset and outlook on the entire case.

A motion in limine can present a better opportunity to persuade the court than any other method available at the outset of the case. Unlike a trial brief or counsel's oral statements of the case, a motion in limine commands attention. A ruling is required, it cannot be deferred, and it must be correct. An error in ruling on the motion in limine will undoubtedly prejudice the loser and, if appealed, negate all of the court's and counsel's hard work in trying the case. Consequently the motion in limine demands and gets the court's careful scrutiny.

Laurence Jackson

So what is this motion that presents such opportunities for persuasion? Motions in limine are not restricted to attempts to exclude evidence. It is a misconception that a motion in limine is a motion in limitation of evidence. "In limine" is, in fact, Latin for "at the threshold," derived from the same root that has found its way into our language in the term subliminal, i.e., below the threshold.

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Motions in Limine

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Consequently, a motion in limine is theoretically available to the advocate for any purpose that will serve the client's interest.

The motion in limine is not recognized by the California Code of Civil Procedure or the United States Code. Nonetheless, it is well recognized in both Federal and California state case law. In *United States v. Cook*, in an en banc opinion, the Ninth Circuit wrote: "Motions in limine have proven their value in litigation. They save jury time, and avoid the waste that sometimes results from haste when sidebar matters have to be urged in the course of trial." 608 F. 2d 1175, 1186 (9th Cir., 1979), cert. den. 100 S. Ct. 706 (1980). A California Court of Appeal has upheld the use of pre-trial motions to resolve evidence questions saying: "While the 'motion to exclude' was not a conventional procedure, it was well conceived under the circumstances...It reduces the surprise factor. It is calculated to iron out a disputed issue before the jury trial gets under way...It was an entirely proper mode of objection." *Sacramento and San Joaquin Drainage District v. Reed*, 215 Cal. App. 2d 60, 69-71 (1963).

There are at least three purposes for which a motion in limine may be considered: as a tool of economy, as a settlement tool, and as a tool to determine evidence questions.

Tool of Economy

The motion in limine should be considered as a means to narrow the issues and economize on trial time and cost. It is frequently possible to transform an important substantive issue into an evidence question and obtain an early decision by use of a motion in limine. A particular type of evidence is made the subject of the motion because it is only admissible if a certain substantive issue is in the case for trial. For example, the net worth of the defendant may only be admissible if punitive damages are in issue. If you have a legal argument that punitive damages are not available, as in the case of a plaintiff who is an assignee of the claim, this determinative legal issue can be resolved at the outset by a motion in limine. The validity and legal force of a written contract provision limiting damages that is challenged on contract interpretation grounds could be determined at the outset by a motion in limine to preclude evidence of consequential damages. This use of a motion in limine can narrow the issues and economize on trial time.

A motion in limine for this purpose can have significant advantages over a summary adjudication motion. First, a summary adjudication motion may not even be available. California Code of Civil Procedure § 437c(f) has been amended to restrict the use of motions for summary adjudication. A legal defense to the recoverability of consequential damages, for example, would not appear to be an issue on which summary adjudication can now be obtained. A second major advantage is that the motion in limine will be considered by the trial judge. The opposition will not be assisted by a hearing before a harried law and motion judge whose overcrowded docket leaves little time for consideration of lengthy and complicated summary adjudication motions. The trial judge's perspective may be far different from that of the law and motion judge. If the motion in limine is denied, the trial may be longer and more complicated. Moreover, the legal issue presented will not go away for the trial judge. It will need to be decided in the jury instructions or in the court's decision.

The motion in limine may also be preferable to a summary adjudication motion in narrowing a case because the moving party is not saddled with overcoming the long-standing hesitancy of the courts to grant summary judgment or summary adjudication. Finally, the motion in limine is not subject to the time restrictions imposed on a motion for summary adjudication. This may be par-

ticularly important when the grounds for the motion develop in the later stages of discovery, such as expert witness discovery.

The motion in limine can also function as a tool of economy in providing a preview of the judge's jury instructions or conclusions of law. In a case involving developing or unresolved legal issues, a motion in limine can force a decision regarding these issues or at least provide a preview of the court's inclinations at a time when counsel can still tailor the trial presentation to those theories that will be most advantageous.

Settlement Tool

A well-crafted motion in limine can greatly assist in settlement. This is particularly true where a significant legal issue is unresolved. For example, a recent wrongful termination case was settled after the parties learned how the trial court would apply *Foley v. Interactive Data* as a result of the trial court's rulings on motions in limine. Although important legal issues can frequently be resolved even earlier by motion practice, they sometimes remain unresolved at the time of trial due to tactical decisions, legal impediments — such as the restrictions of CCP § 437c(f) — or the court's failure to determine the legal issue even after it has been presented by a motion. In these instances, a motion in limine can serve as a valuable settlement tool.

Tool for Evidence Determinations

The motion in limine should be considered not only as a means to exclude evidence, but as a means to grease the skids for admission of controversial evidence. Asking the court to rule in advance on the admissibility of evidence that you reasonably expect to be controversial has the advantage of presenting the issue at a time when the judge is receptive to the determination of legal issues. It also avoids disruptions in the trial during your presentation of evidence. It enables the moving party to gain the advantage of primacy. The court's first impression of the issue will be created through the motion in limine. The moving party can also build credibility in the eyes of the court by acknowledging the controversy and dealing with it. This is particularly important at the outset of the trial when the court is still evaluating which counsel's statements will be more credible.

Clearly, a motion in limine should not be made to obtain a ruling on obviously admissible evidence. However, a case that presents controversial evidence, such as the other party's similar bad conduct in another situation, may merit a motion in limine to admit evidence. Furthermore, the court's ruling on the motion may well induce settlement of the case, if the evidence would be highly prejudicial.

Making a motion in limine may be absolutely essential to preclude the jury from learning of highly prejudicial information. A California Court of Appeal has recognized that the "advantage of [a motion in limine] is to avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceedings before the jury." *Hyatt v. Sierra Boat Company*, 79 Cal. App. 3d 325, 337 (1978).

It is not always possible to rely on a timely objection to keep prejudicial information from the jury. The information may not come from a witness's answer; it may come from your opposing counsel in voir dire, opening statement, direct or cross-examination, or final argument.

To preclude the jury from learning about prejudicial information, a motion in limine must be made and granted before voir dire begins and must prohibit both witnesses and counsel from making any mention of the prejudicial information. Further follow-up is necessary to notify non-party witnesses of the terms of the order. If possible, place the onus for notification on the counsel producing or calling the witness.

Generally, the prejudicial information that your adversary may seek to use at trial is painfully obvious from the documents and depositions. In addition, you may benefit from considering in your trial preparation whether any of the following types of prejudicial information may arise at trial:

- (1) related but dissimilar prejudicial acts, *McLain v. Great Amer. Ins. Cos.*, 208 Cal. App. 3d 1476, 1487 (1989) (sexual preferences or conduct);
- (2) related but dissimilar claims or litigation;
- (3) tax consequences of a damage award, *Rodriguez v. McDonnell Douglas Corp.*, 87 Cal. App. 3d 626, 664 (1978);
- (4) criminal convictions or arrests, *U.S. v. Rodriguez*, 922 F.2d 1398, 1401 (9th Cir. 1990);
- (5) defendant's net worth;
- (6) other accidents;
- (7) subsequent alteration or repair, *Charbonneau v. Superior Court*, 42 Cal. App. 3d 505, 507 (1974);
- (8) causation or any other issue following a stipulation on that issue, *Sturgeon v. Leavitt*, 94 Cal. App. 3d 957, 960 (1979); *People v. Tedtaotao*, 896 F.2d 371 (9th Cir. 1990); and
- (9) collateral source payments, *Morse v. So. Pac. Transp. Co.*, 63 Cal. App. 3d 128, 131 (1976) (disability pension).

Finally, a motion in limine should be considered in circumstances when it may not be absolutely essential to preclude prejudicial information, but counsel's credibility with the jury may be enhanced by eliminating trial objections and sidebar conferences. Jury research indicates that jurors dislike objections and sidebars. They don't understand the process; they're bored; and someone, namely the objecting attorney, is trying to hide information from them. It appears that the objecting attorney doesn't trust the jurors. All of this erodes counsel's rapport and credibility with the jurors. It may be advantageous to preserve credibility by anticipating some objections and dealing with them by a motion in limine.

Motion Preparation and Service

In preparing a motion in limine keep in mind that, although the motion on its face addresses only the admissibility of evidence, it should do more. It should also communicate your theory of the case, establish that your theory is correct, and communicate the credibility of counsel. Because these points are incidental to the evidence question presented, the motion must deal with them very succinctly. Above all, be up-front with the court. The motion in limine will create a first and often lasting impression.

Consider serving a motion in limine early, if at all possible. This will go a long way toward ensuring that the motion will actually be considered at the outset of the trial. Opposing counsel will not be able to delay consideration of the motion by claiming insufficient time to oppose it. Minimum notice will be established in Superior Court cases by either the trial setting conference order or by local rules 1106.5 or 1307.5. In individual calendar cases the judge may have established time constraints which must be considered. The local rules for the Central District of California do not prescribe a minimum notice for motions in limine. It is up to counsel either to request that the judge establish a schedule or to allow the motion in limine issues to be addressed in the memorandum of contentions of fact and law prepared under Local Rule 9.5.

—Hon. William A. Masterson and Laurence Jackson

'Soliciting' Your Former Partners' Clients: Legitimate Competition or Bad Faith?

Neil Sedaka's lament about teenage romance ("Breaking Up Is Hard To Do") is no less true when it comes to law firms.¹ The legal profession is not what it used to be. In some quarters, lawyers are no longer regarded as professionals, but as providers of a commodity. Law firms once regarded as institutions have been dissolved or merged into others. Those that remain are often seen merely as temporary employers, even by partners. Relationships between lawyers and clients, law firms and their associates, and even among partners are becoming more and more fragile.



James L. Goldman

Times which are personally traumatic and disruptive become even more so when the partners have failed to anticipate the possibility, and explicitly agree on the consequences, of "divorce." Moreover, the personal trauma and bitterness, as in the case of divorce between spouses, may lead to particularly contentious litigation among the principals. Where the "prenuptial," *i.e.*, partnership agreement, is merely oral, incomplete, unclear or nonexistent, litigation is more likely and the consequences of a break-up uncertain. The legal battles over custody — for associates, space, equipment and, most importantly, clients — can be every bit as acrimonious as those involving children. Invariably, the weapons are charges of breach of fiduciary duty and other tortious conduct.

Typically, litigation includes allegations that:

- The withdrawing partners did not devote sufficient time to, and interfered with, the business of the firm prior to their withdrawal by, among other things, failing to record and bill for time and to collect accounts receivable, and by otherwise impairing the firm's assets.
- The withdrawing partners improperly induced clients and employees of the firm to terminate their relationships with the firm and to retain or join the withdrawing partners by offering "special incentives," and disparaging the remaining partners.
- In the period prior to providing notice of withdrawal, the withdrawing partners made secret plans to leave the firm, and used the firm's resources to help implement those plans and to start their own practice.
- The remaining partners improperly retained the withdrawing partners' capital and share in the net assets of the firm, including undistributed profits, work-in-progress, accounts receivable, and unrealized appreciation in various assets (e.g., art, leases).

Tort Litigation Regarding Client Solicitation

Cases have addressed the relatively straightforward questions of fee splitting where partners left a firm or a firm dissolved. In *Fox v. Abrams*, 163 Cal. App. 3d 610 (1985), the court held that departing partners were entitled to share in fees received after their resignations on cases pending as of their resignation in proportion to their

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interests in the firm. *Jewel v. Boxer*, 156 Cal. App. 3d 171 (1984), held that, in the absence of a partnership agreement, net fees on cases in progress on dissolution were to be shared by former partners based on the partners' respective interests in the partnership regardless of which former partner handled the matter after dissolution.

Thornier questions have arisen in litigation focusing on client solicitation activities. Unfortunately, few cases have addressed the line between permissible solicitation and actionable conduct.

The Massachusetts Supreme Court's decision in *Meehan v. Shaughnessy*, 535 N. E. 2d 1255 (Mass. 1989), provides the most thorough discussion to date of claims based on pre-withdrawal client solicitation. Three partners and an associate left the firm of Coulter, Delay & White. Before leaving the firm they solicited the firm's clients in a meeting and by sending out form letters. When questioned, one of the departing partners falsely denied that he was leaving the firm.

After their withdrawal, two of the departing partners, James Meehan and Leo Boyle, sued to recover amounts to which they claimed entitlement under the partnership agreement. The remaining partners counterclaimed, contending that Meehan and Boyle breached their fiduciary duties and tortiously interfered with certain of the firm's client and business relationships. They asserted similar claims against the other departing lawyers, Cynthia Cohen and Steven Schafer. After a bench trial, the court found in favor of the departing lawyers.

On appeal, the decision was reversed in part, with the Massachusetts Supreme Court condemning the fact that client solicitation activities were done secretly and preemptively and to the firm's disadvantage, and that the communications were substantively improper. The Court focused on the facts that:

1. Prior to giving notice, Meehan falsely denied he planned to leave and had met with a client;
2. Meehan and Boyle used firm letterhead for client authorization forms permitting them to remove files from the firm;
3. Meehan and Boyle delayed responding to a request for a list of clients they intended to solicit until after clients had executed file removal authorizations; and
4. The content of the notice that they sent to the clients did not comply with the relevant American Bar Association standards.

The court observed that violation of an ABA standard would not necessarily make the violator liable for damages. However, applying the ABA standard to the facts, the Court concluded that Meehan and Cohen breached their fiduciary duties by preemptively sending a "one-sided" announcement which failed clearly to present the choice available to the clients thereby effectively precluding the other partners from presenting their services.

The Court then turned to issues of causation and damages, holding that the issue on retrial as to which the departing partners would have the burden of proof, was whether there was a causal connection between their breach of their fiduciary duties and any claimed losses. The amount of damages, if any, would depend on whether clients would have remained with Parker, Coulter but for wrongdoing by the departing partners. The Court identified certain "circumstantial factors" relevant to this determination: the person who generated the client; the person who managed the case; the sophistication of the client; and the reputation and skill of the departing attorney.

If the departing lawyers failed to sustain their burden of proving that particular clients would have followed them regardless of any breach of fiduciary duty, they would be required to account to their firm for the net profits earned on such clients. No damages would be payable if the clients would have followed them regardless.

A California case suggests that a key consideration in determining whether a law firm has a legitimate claim is whether departing members acted to advance their own interests to the detriment of the firm. *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200 (1983). There, two partners, Cohen and Riordan, were handling a major antitrust case on a contingency fee basis. They threatened to leave the firm unless their share of their client's contingency fee was doubled. This demand was rejected and they left the firm. The client later paid them a contingency fee based on a \$33 million settlement.

The firm sued Cohen and Riordan for, among other things, breach of fiduciary duty for dissolving the firm in bad faith in order to cause the client to discharge the firm. The Court held that the remaining partners of the dissolved firm had stated a claim against Cohen and Riordan and were entitled to a constructive trust on the fees received by them. The Court premised its holding on the principle

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that each partner of a dissolved partnership has fiduciary duties to complete the business of the partnership existing prior to its dissolution and not to take any action with respect to such business for purely personal gain.

Actionable conduct has also been found where departing lawyers failed to follow professional standards in soliciting clients. *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A. 2d 1175 (Pa. 1978), cert. denied, 442 U.S. 907 (1979). There, a group of associates mailed announcements to firm clients, each of whom had contingency fee agreements with their firm, advising them that they were forming a new firm. The Pennsylvania Supreme Court held that the associates violated standards set forth in the Model Code of Professional Responsibility, which prohibited self-recommendation to clients who had not sought their advice.

How and When to Solicit Firm Clients

What then should one do upon deciding to leave his or her firm, either alone or with others, in order to avoid claims of breach of fiduciary duty or improper interference with economic relations in connection with any contacts with firm clients?

First, consider whether the firm has a written partnership agreement and, if so, whether it provides for the continuation of the firm or if the withdrawal will constitute a dissolution. If the firm would dissolve, the withdrawing partner's rights and obligations — particularly with respect to future fees on pre-dissolution matters — may be materially different than where the firm survives a partner's withdrawal intact. The nature of those rights and obligations may also depend, in substantial part, on whether each partner has the right to share in fees from, and has the obligation to complete, pre-dissolution/non-deferred fee cases. Further, consider whether there are any enforceable provisions relating to the rights and obligations with respect to post-withdrawal fees on matters removed from the firm.

Second, handle your professional or firm responsibilities no differently as a result of your decision to leave. Maintain a normal schedule. Collect your accounts receivable.

Third, any logistical arrangements regarding your new firm or practice should be made at your own expense and without use of your present firm's resources.

Fourth, disclose your decision to your partners as early as possible, preferably before you have any discussions with your client.

Fifth, consider suggesting to your partners a form of joint notice to the clients and the firm's employees.

In many cases, however, it is not practical, nor is it ethically or legally required, to send out a joint notice or to wait until after the withdrawal has occurred to notify clients of a change in a professional association. This is especially true in the case of long-time or sophisticated business clients, who may well take offense to learning of such information by way of a letter — particularly a form letter — or where the client's interests may be prejudiced by any delay in providing notice of the change.

Sixth, assuming that a decision is made not to send a formal notice, joint or otherwise, you should: promptly inform your partners of the particular clients you intend to contact; limit any pre-withdrawal client contacts to those whom you generated or serviced; advise the clients that they have the right to decide who will represent them, but you may indicate your willingness to continue to represent them; do not make negative comments about your former partners or firm, and do not offer the clients any unusual inducement to retain your new firm — particularly relating to the clients' receivables to your old firm.

—James L. Goldman

¹The author has worked on cases concerning law firm break-ups, including litigation involving Wyman, Bautzer, Kuchel & Silbert (see Neumeier, "The Case of the Battling Barristers," *Los Angeles Magazine* (February 1991), at 61-68). He also was a partner, and is the Chairman of the Liquidating Committee, of Kadison, Pfeilzer, Woodard, Quinn & Rossi, a similar Los Angeles-based law firm in the final stages of dissolution.

Standards Governing Client Solicitation

Some courts have relied on professional standards in deciding whether attorneys acted improperly in soliciting their law firm's clients before withdrawing from the firm. See *Meehan v. Shaughnessy*, 535 N. E. 2d 1255 (Mass 1989). Such standards include Informal Opinion Number 1457, issued in 1980 by the ABA's Committee on Ethics and Professional Responsibility. That Opinion approved a lawyer's proposed letter to clients "for whose active, open, and pending matters he was directly responsible" which simply announced his withdrawal, stated that the withdrawal should not be construed as reflecting adversely on his former firm, and advised the client of his willingness to work on the client's matters and of the client's right to decide who would handle them.

In 1983, the American Bar Association adopted the *Model Rules of Professional Conduct*. The *Model Rules* do not directly restrict the content of withdrawal announcements. However, Rule 7.3 contains restrictions on in-person or telephone contacts with prospective clients and clients with whom the attorney has no prior professional relationship.

The State Bar of California also has attempted to provide guidance relating to client contacts on dissolution or withdrawal. Form Opinion No. 1985-86, published by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California (interpreting Rules 2-101 and 2-111 of the *Rules of Professional Conduct* of the State Bar of California) makes clear that if the client directs inquiries to any attorney involved in a dissolution or withdrawal, he or she has the obligation to answer these questions truthfully. The Opinion also recommends, however, that the firm and attorneys involved provide a joint notice to the clients regarding the change and specifies the substance of such notice:

The notice should identify the withdrawing attorneys, in what field the withdrawing attorneys will be practicing law, and the name, address, and telephone number of the leaving attorneys. This joint statement may also include information as to whether the former firm will continue to handle similar legal matters. Consistent with their obligations, the attorneys should advise the clients as to who will be handling ongoing legal work during the transition period.

In addition, the attorneys are required to inform the client of the client's right to select either the former firm, the withdrawing attorney, or another lawyer, to handle their legal matters in the future. The client should be advised of the client's right to have all files, papers, and property delivered either to the client, or to whomever the client wishes to continue to handle the legal affairs.

Finally, the Opinion provides that, if the attorneys involved cannot agree on a joint notice, "each has an obligation and the right to communicate with the client in conformance with" the Opinion.

—James L. Goldman

Conducting Civil Litigation in the Shadow of Potential Criminal Exposure

Almost every attorney who regularly litigates complex commercial disputes today has observed the increasing overlap between matters traditionally the subject of civil resolution and those generally prosecuted as criminal violations. In fields such as securities, tax, banking, and the environment, where regulators often seem to monitor the participants' every move, some of the blurring that this age-old distinction



Stanley Arkin

has recently undergone may be due to parallel civil and criminal statutes governing conduct in these areas, or to the modern prosecutor's zeal to secure a conviction wherever the law even arguably allows one. Yet, these "imaginative" cases have resulted in more elastic definitions of legal concepts such as fraud, misappropriation, and conspiracy, which a prosecutor can then use as weapons against routine commercial transactions that have somehow gone wrong. Thus, what would formerly have seldom amounted to more than a civil dispute between two private parties can handily become a criminal prosecution for some type of fraud.

Since the aggrieved party to a failed complex commercial transaction will usually learn of the facts or circumstances giving rise to his claim long before an investigator or prosecutor, a civil suit in these circumstances will almost always precede any criminal investigation or indictment. This article discusses four potential tools that far sighted and cautious counsel may use in the conduct or settlement of civil litigation to limit a civil client's future criminal exposure: invocation of the Fifth Amendment privilege against self-incrimination, stays of civil discovery, confidentiality stipulations, and settlement agreements.

The article examines a variety of cases from around the country, and discusses what those cases reveal about the relative tactical advantages and disadvantages of each of the four tools. While few California decisions have dealt with these matters, the principles discussed below are of universal application, and the California state and federal courts are sure to look to the law of other jurisdictions when these issues arise here, as they inevitably will.

Invocation of the Fifth Amendment Privilege

Counsel advising a corporate defendant in a civil litigation cannot consider recommending that the client avail itself of the Fifth Amendment privilege against self-incrimination, for the Supreme Court has held that corporations and other collective entities have no such constitutional privilege. *Braswell v. United States*, 487 U.S. 99 (1988). Counsel advising an individual client, however, must consider advising him to claim the privilege, for any potentially incriminating testimony he may give in a civil case may be used against him later in a criminal prosecution. Fed. R. Evid. 801(b) (2) (a); *United States v. U.S. Currency*, 626 F. 2d 11, 14 (6th Cir.); *cert. denied sub nom. Gregory v. United States*, 449 U.S. 993 (1980).

An individual defendant's invocation of the privilege is not without its problems, however, for there must be a real and not merely "fanciful" possibility of prosecution. *In re Corrugated Container Antitrust Litigation*, 662 F. 2d 875, 883 (D.C. Cir. 1981); *Priebe v. World Ventures, Inc.*, 407 F. Supp. 1244, 1245 (C.D. Cal. 1976). Moreover, even if the client's reliance on the privilege may protect him in a later criminal case, the Supreme Court has held that his invocation of the privilege may be introduced as evidence in the civil proceeding to allow the finder of fact to draw an adverse inference against him. *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

Stay of Civil Proceedings Pending Resolution of Criminal Case

It may be possible to avoid the Hobson's choice of having civil testimony used against a client in a criminal proceeding or allowing the civil fact-finder to draw an adverse inference against the client because he invoked the privilege — if counsel can obtain a stay of discovery in the civil case pending resolution of the criminal proceeding. Rule 26(c) of the Federal Rules of Civil Procedure allows a court to deny discovery if so doing will protect a party from "annoyance, embarrassment, oppression, or undue burden or expense". Fed. R. Civ. P. 26(c). A number of courts have employed this rule to stay civil proceedings while a criminal proceeding is under way, on the grounds that allowing the civil case to continue might threaten a party's Fifth Amendment privilege, give criminal investigators more discovery than they are entitled to under Federal Rules, or disclose the party's theory of defense prior to the criminal trial. See *United States v. Kordel*, 397 U.S. 1 (1970); *Afro-Lecon, Inc. v. United States*, 820 F. 2d 1198, 1202-03 (Fed. Cir. 1987); *SEC v. Dresser Indus.*, 628 F. 2d 1368, 1375-76 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980); *United States v. All Funds Held in Name of Vominh*, 727 F. Supp. 1372, 1373 (D. Or. 1990).

Courts do not grant stays of civil discovery simply as a matter of course, however. Civil defendants do not have a constitutional right to a stay, *SEC v. Dresser Indus.*, *supra*, and the decision to grant one is left solely to the discretion of the civil court. *Mid-America's Process Service v. Ellison*, 767 F. 2d 684 (10th Cir. 1985). In weighing a motion for a stay, the court will consider a number of factors in addition to the risks to the defendant, including any prejudice the stay will cause the plaintiff, the court's convenience, and the interests of non-parties to the case. *Arden Way Assoc. v. Boesky*, 660 F. Supp. 1494 (S.D.N.Y. 1987).

A civil stay may be granted at any time after the commencement of a criminal investigation. An indictment need not have been

ABTL Tees Up in Pebble Beach For Trial Demonstration

ABTL's 18th Annual Seminar is almost completely sold out, but there may still be time to sign up. Slated for October 4, 1991, through October 6, 1991, at the Inn at Spanish Bay, Pebble Beach Resorts, the seminar will feature a trial demonstration by some of California's finest practitioners. Participants will include California Supreme Court Chief Justice Malcolm M. Lucas and several federal and state court judges. The faculty will provide tips on all aspects of the trial, including voir dire, opening statements, cross-examination of parties, cross-examination of accounting experts, closing arguments, charge to the jury, and jury deliberations. For further information, contact Karen Kaplowitz at (213) 551-9126.

handed up, and prosecutors need not have begun to present their case to the grand jury. *Brock v. Tolkow*, 109 F. R. D. 116, 119-20 n. 2 (E.D.N.Y. 1985). A stay is unavailable, however, when the defendant merely fears the possibility of a criminal investigation or of indictment, no matter how likely such an event may ultimately be. And when the criminal proceeding has only reached the investigative stage, a court will naturally have reservations about imposing a civil stay of possibly indeterminate length.

Finally, a civil litigant may also be in a position to cooperate with the government in any subsequent prosecution, and thus discovery in the civil case may risk revealing the government's theory of prosecution. Purely as a practical matter, a litigant so situated will stand a better chance of obtaining a stay if the government intervenes in the civil case to support the motion.

Confidentiality Stipulations and Protective Orders

Federal Rule of Civil Procedure 26(c) also allows a court to issue orders sealing or prohibiting disclosure of discovery outside the confines of the civil case. See Fed. R. Civ. P. 26(c). In *Martindell v. ITT Corp.*, 594 F.2d 291 (2d Cir. 1979), the Second Circuit upheld the validity of such an order in the face of the government's informal requests — a phone call and letter to the trial court — for depositions it sought for use in an ongoing criminal investigation. Since the deponents had testified in reliance on the order, and since the government had not shown "some extraordinary circumstance or compelling need," the court held that the public's interest in obtaining evidence for law enforcement was outweighed by the policy of encouraging full disclosure in civil cases by enforcing validly issued protective orders.

In *United States v. Davis*, 702 F.2d 418 (2d Cir.), cert. denied, 463 U.S. 1215 (1983), however, the Second Circuit held that information sought by grand jury subpoena rather than by informal request must be produced when it was subject to a confidentiality agreement that had been neither reduced to writing nor ordered by the court, and when the objecting witness was unable to show that he had testified in reliance on the confidentiality agreement. And in *In re Grand Jury Subpoena (Under Seal)*, 836 F.2d 1468 (4th Cir.), cert. denied sub nom. *Doe v. United States*, 487 U.S. 1240 (1988), the court upheld an order refusing to quash a grand jury subpoena that sought deposition testimony given in explicit reliance on a validly entered protective order and a properly executed confidentiality stipulation. Even though the protective order was issued solely so that witnesses could testify rather than being forced to claim the privilege, the court held that a protective order can never be a sufficient substitute for immunity or invocation of the privilege.

Settlement Agreements

Parties to a civil dispute may, upon settling their differences, structure the settlement to contain a provision prohibiting the parties from disclosing the terms of the settlement to third parties. Where the parties foresee the possibility of a criminal investigation, the settlement agreement may also include a provision in which each party agrees not to cooperate with an investigation without the consent of the other party or parties, or one that requires the parties to work together in preparing responses to investigative inquiries or grand jury subpoenas. Finally, an agreement might require the parties to cooperate with an investigation in the least revelatory manner possible.

While such agreements may provide their signatories with some degree of comfort if the anticipated criminal investigation fails to

materialize, they will be rife with problems once an investigation begins. The worst of these is doubtless the possibility that a prosecutor will view a settlement agreement requiring the parties to cooperate halfheartedly or restricting the amount of information they make available to investigators or the grand jury as an obvious attempt to obstruct justice. Indeed, if the parties attempt to abide by such an agreement and are later tried for obstruction, a court or jury is likely to agree with the prosecutor's view.

To Abide Or Not to Abide?

From a practical standpoint, the parties to such an agreement may each want to be in a position to cooperate with authorities once an investigation begins, and thus counsel must decide whether or not to advise the client to abide by the agreement. If adopting a cooperative stance will increase the client's chances of surviving the investigation, counsel may recommend that the client breach the agreement and provide investigators and the grand jury with documents and testimony. Conversely, however, counsel and the client must expect the other party to the agreement to consider breaching and cooperating as well.

In the event of a breach, it seems unlikely that a settlement agreement incorporating the restrictive terms set forth above would ultimately be enforced. While we are unaware of any reported decisions discussing this question, a court would probably find an agreement calling for less than fully forthcoming cooperation to be clearly unenforceable as against public policy. In addition, even if some renegade court were to enforce such a restrictive settlement agreement, it is difficult to imagine how it would calculate damages.

A second set of questions facing counsel is the extent to which such a settlement agreement may be used in the investigative process. In *Palmieri v. New York*, 779 F.2d 861 (2d Cir. 1985), the Second Circuit upheld a sealing order entered by the district court precisely to protect the terms of a settlement agreement from disclosure to the Attorney General of New York, who was conducting his own investigation into the parties' industry. The court noted that the Attorney General had broad investigatory powers that were unavailable to private litigants and thus could not show "extraordinary circumstances" or "compelling need" for the agreement. And in *United States v. Gullo*, 672 F. Supp. 99, 103-04 (W.D.N.Y. 1987), the court held that statements the defendant made in the course of civil arbitration were privileged, and that, while improper disclosure of those statements to the grand jury was not grounds for dismissing the indictment, the evidence was properly excluded at trial.

Civil Settlement Agreements As Criminal Evidence

Yet another set of questions facing counsel is the extent to which a civil settlement agreement may be used as evidence in a criminal trial, and for what purposes. In the federal courts, the admissibility of settlement agreements is governed by Federal Rule of Evidence 408, which allows a settlement agreement to be offered to show that a witness is biased or that he has tried to obstruct justice, but not to show that, simply because he paid money or agreed to other terms in order to settle civil claims against him, he was liable in the civil suit. See Fed. R. Evid. 408, see also *United States v. Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981), cert. denied, 456 U.S. 946 (1982).

While each state follows its own evidentiary case law and rules, the principles state courts look to in deciding whether to admit civil settlement agreements are the same as those underlying Rule 408. Thus, in holding that the settlement agreement reached in a court-ordered mediation hearing was inadmissible in the criminal case

(Continued on next page)

that resulted when the defendant failed to abide by the agreement's terms, the Georgia Court of Appeals noted that:

(1) offers of compromise are privileged because public policy encourages the settlement of disputes without trial; (2) such offers are irrelevant because they are not intended as admissions; and (3) the negotiation process establishes express or implied agreements that admissions made during negotiations will be excluded and courts will enforce those agreements.

Byrd v. Georgia, 367 S.E. 2d 300, 303 (Ga. Ct. App. 1988).

In *United States v. Hays*, 872 F. 2d 582, 588-89 (5th Cir. 1989), the Fifth Circuit held that the government was not allowed to introduce evidence of a settlement agreement to "assist[] the jury in... understanding... the breadth of the conspiracy" charged against the defendants. Holding that the introduction of the evidence for that purpose directly contravened Rule 408's prohibition against using a settlement agreement to show liability, the court noted that "[i]t does not tax the imagination to envision the juror who retires to deliberate with the notion that if the defendants had done nothing wrong, they would not have paid the money back." *Id.* at 589.

Settlement Agreements Admitted to Show Facts

As the language of Rule 408 would suggest, courts frequently admit settlement agreements that are introduced not to show liability, but only to show another fact important to the case. Thus, in *United States v. Wilford*, 710 F. 2d 439, 451 (8th Cir. 1983), *cert. denied*, 464 U. S. 1039 (1984), the Eighth Circuit affirmed the admission of an agreement to show that certain payments were made pursuant to the settlement of a civil suit. And in *United States v. Gilbert*, *supra*, 668 F. 2d at 97, the Second Circuit approved the trial court's admission of an SEC civil consent decree to show that the criminal defendant was aware of the decree's reporting requirements.

In some cases, however, this readiness to admit a settlement agreement to prove something other than liability is stretched to the logical breaking point, allowing the jury to infer the kind of ultimate facts Rule 408 and the policies underlying it were apparently designed to exclude. Thus, in *California v. Massey*, 151 Cal. App. 2d 623 (1957), the court upheld the admission of a settlement agreement in which the defendant had refunded \$25,000 to one of the complaining witnesses, holding that "the facts and circumstances under which a compromise of civil liability is made may be considered by the trier of facts in connection with whether such conduct was occasioned by consciousness of guilt." *Id.* at 312 P. 2d 386.

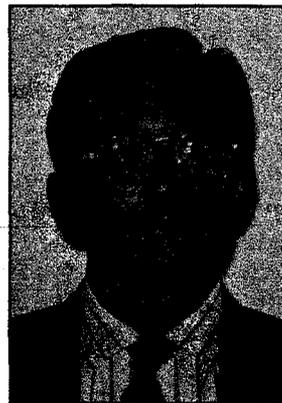
Similarly in the Second Circuit case of *United States v. Gonzalez*, 748 F. 2d 74, 78 (2d Cir. 1984), the court held that the defendant's admissions in settling a prior civil suit that a note he had given a foreign bank was a forgery and that he was personally liable on the full amount of the note were admissible under Rule 408 in his mail fraud trial. The court held that the statements were properly "admitted to show that [the defendant] committed a crime, and their relevance to that issue does not depend on an inference that [the foreign bank] had a valid claim against" him. *Id.* The court reasoned that though "Rule 408 is premised on the idea that encouraging settlement of civil claims justifies excluding otherwise probative evidence from civil lawsuits..., encouraging settlement does not justify excluding probative and otherwise admissible evidence in criminal prosecutions." *Id.*

—Stanley Arkin

Summary Judgment: New Rules Mean New Roles

Since January 1, 1991, California litigators have had to contend with an entirely new set of procedural rules when making motions for summary judgment and adjudication. In general, the summary judgment statute has been amended as follows:

- Evidentiary objections to a motion for summary judgment are deemed waived unless made prior to or at the hearing.
- An attempt to rely on the court file must be made with specificity and a party may not incorporate the entire file.
- A summary adjudication motion is now limited to instances where it would dispose of an entire cause of action, an affirmative defense, a claim for punitive damages or a duty owed to the plaintiff.
- The trial court must state its reasons for either granting or denying the motion.
- Summary judgment cannot be based on issues asserted in a previously denied motion for summary adjudication unless based on new facts or circumstances.



Arnold P. Peter

avoidable appellate oversight of decisions properly committed to the discretion of the trial court.

Evidentiary Objections

The California Legislature amended Section 437c(a) to require that a party register any and all objections to the form and substance of both the moving and opposing papers in the trial court. The hopeful outcome of this change will be to place the responsibility of interposing evidentiary objections on counsel rather than the trial judge. Allowing evidentiary objections to be raised in the first instance by an appellant or the appellate court itself causes an unnecessary relitigation of issues and creates an

Incorporation of Court Files

The party opposing summary judgment or adjudication frequently incorporates the complete files and records of the case in a last ditch effort to salvage its claims or defenses. This places an unreasonable burden on both the trial court and the adversary. First, the trial court must sort through the entire file to determine whether *anything* at all in the file supports the propositions being advanced. Second, faced with a wholesale incorporation, the adversary is hard pressed to object to the relied-upon evidence.

Under the 1991 amendment to Section 437c(b), the party attempting to rely on the case file cannot simply incorporate the entire file but must now clearly identify the portions of the file being relied upon. This provision should help avoid a "wild goose chase" for the court and opposing counsel.

Summary Adjudication

The most significant change brought on by the 1991 amendment to section 437c concerns partial summary adjudication. Prior to the amendment, a party could move for summary adjudication of

sues." Because the term "issue" was not statutorily defined, it was unclear whether the issues that could be summarily adjudicated were limited to issues of law (such as whether there was a sufficient offer, an acceptance, or consideration in a contract action; whether a claim was time barred; or a determination as to the proper choice of law) or also included purely factual issues (such as who signed a contract, who was present during a conversation, or the date when an accident occurred).

Arguably, former subdivision (f) of section 437c allowed resolution of pure issues of fact. Courts and commentators, however, suggested that it was improper to adjudicate such factual issues. One commentator suggested that a motion for summary adjudication could only be used to resolve a "legal" issue, defined as requiring an application of law to fact. Some courts only resolved "ultimate" factual issues which were those deemed necessary to establish a cause of action or a defense. Other courts simply refused to adjudicate what they defined as "evidentiary facts."

Motions for summary adjudication of issues which did not dispose of an entire cause of action or defense were a tremendous waste of judicial resources whether granted or denied. In response, the Legislature has amended section 437c in two important respects. First, subdivision (f) has been amended to require summary adjudication when a party contends that:

- One or more causes of action have no merit.
- There is no defense to one or more causes of action.
- There is no merit to an affirmative defense.
- There is no merit to a claim for punitive damages.
- A defendant owed or did not owe a duty to the plaintiff.

Second, the Legislature defined a "meritless" cause of action as one where "one or more of the elements of the cause of action, even if not separately pleaded, cannot be established."

Cause of Action Versus Theory of Recovery

The substantial revision of summary adjudication procedures makes it clear that a party can move for summary adjudication only if the motion fits into one of the above categories. A litigant no longer has the absolute right to obtain a ruling on a motion that does not entirely dispose of a cause of action or defense, although this author believes the court retains the inherent power to decide non-dispositive issues on a motion for summary judgment.

Unfortunately, the Legislature did not define a "cause of action" to which summary adjudication is now limited. As explained below, this leaves some confusion about what claims can be disposed of on a motion for summary adjudication.

California, like the vast majority of other jurisdictions, has adopted the code pleading rules under which the pleader has but one cause of action for invasion of each primary right but may state alternate theories of recovery. Unfortunately, the meaning of "cause of action" remains elusive. Specifically, California lawyers continue to plead theories of recovery as causes of action. For example, in a typical breach of contract case it is common practice to plead *alternate theories of recovery* for breach of contract and breach of the implied covenant of good faith and fair dealing as *causes of action*. Technically, this is not accurate and it would be more precise to label theories of recovery as "counts" as is done in federal court.

The amendment only allows summary adjudication of causes of action or defenses to causes of action and it might seem, therefore, that a defendant cannot move for summary adjudication of a theory of recovery unless it also effectively disposes of the entire case. Such a result, however, would be inconsistent with the time-honored, albeit confusing, pleading rules of this state.

While it did not directly confront this issue, it does not appear that the Legislature intended to deprive defendants of the right to seek summary adjudication of specific theories of recovery. It ap-

pears that the Legislature understood the term "cause of action" in the same sense that most California lawyers do (as theories of recovery). This is consistent with the interpretation of the Judicial Council which, in urging the Governor to approve the amendment, explained that the amendment was intended to "limit summary judgment motions to situations where an entire *theory of recovery* can be resolved...." Accordingly, the amendment should not preclude a defendant from seeking summary adjudication of individual theories of recovery.

Discretionary Power of Court to Adjudicate Issues

Another important question that the Legislature apparently did not consider and did not explicitly address is whether a trial court, while not *required* to adjudicate non-dispositive facts or issues, nonetheless has the *discretion* to do so. Permitting trial courts to exercise the discretion to summarily adjudicate non-dispositive facts or issues when they otherwise deny a motion for summary judgment or adjudication makes sense for the sake of judicial economy.

It would save judicial time and resources if, in ruling on a motion that is not entirely successful, the trial judge could decide some issues, to avoid relitigating the same issues again at trial and enhance the potential for settlement.

To illustrate how this power could be exercised effectively, assume that a defendant moves for summary adjudication as to a cause of action for breach of contract by arguing that there was no contract due to a lack of consideration and even if there was a contract, the parties entered into an accord and satisfaction. Further assume, in ruling on the motion, the court concludes that there is no substantial controversy about the existence of a contract but that there is a triable issue as to the validity of the accord and satisfaction defense. Under these facts, the court could not grant a summary adjudication motion under the amendment as it would not dispose entirely of the breach of contract cause of action.

Nonetheless, under these facts, the court should determine that there was a valid contract. This is a classic situation where the court's decision would narrow the issue for trial and promote settlement possibilities. First, there would be no issue at trial about the existence of a contract and the court could immediately focus on the accord and satisfaction defense. Second, the defendant faced with a definitive ruling on the threshold defense might seriously consider a non-judicial resolution of the case.

Statement Of Decision and Renewed Motions

Under the old law, the trial court was required to issue a written or oral order specifying the triable issues of material fact which preclude summary judgment only when a motion was *denied*. There was no similar requirement when a motion was granted. The amendment to subdivision (g) of section 437c corrects this imbalance and requires the trial court to state its reasons both when denying or granting summary judgment motions.

The current version of section 437c also addresses the procedures to be following in making a successive motion for summary judgment or adjudication based on a change in the law or the underlying facts. Generally, either the moving or opposing party has the right to make a motion for reconsideration when warranted by a different set of facts within a ten-day period. Additionally, the moving party can avoid the ten-day rule by "renewing" a motion that has been denied.

A new amendment to subdivision (f) of section 437c addresses the not unusual situation where a party makes a motion for summary judgment but relies on issues asserted in a previously denied motion for summary adjudication. Under the amendment, the moving party must provide a new and different set of facts or circumstances supporting the "issues" that have been reasserted in

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the summary judgment motion. The amendment states that a subsequent summary judgment motion may not be based on "issues" asserted in the prior summary adjudication motion but does not define the term "issues." The impact of this rule is difficult to assess because there is scant legislative history on its origin and its meaning will only be ascertained once it is applied by the courts.

For example, assume that a defendant moves for summary adjudication of a cause of action for breach of contract in a case involving multiple theories of recovery and the motion is *denied* because of procedural defects. Can that party subsequently make a motion for summary judgment as to all causes of action (including the denied breach of contract cause of action)? The answer to this question is unclear.

An earlier version of the amendment provided that "nothing in this section authorizes parties to repeat contentions regarding issues in motions for summary judgment following adjudication in motions for summary adjudication." This confusing provision was abandoned and replaced with the following language: "[A] party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court, unless that party establishes to the satisfaction of the court, newly discovered facts or circumstances supporting the issues reasserted in the summary judgment motion." This revision suggests that, while concerned with attempts to reassert contentions previously rejected on a summary adjudication motion, the Legislature did not want to completely deprive a defendant of the opportunity to renew the contention if new or different facts surfaced.

Accordingly, the moving party must produce new or additional underlying evidentiary facts to support the argument that a particular cause of action is without merit if the court has already reviewed and rejected a summary adjudication motion on the same set of facts. The amendment should not preclude a party from asking the trial court to dismiss a cause of action for a second time if the renewed motion is based on new or additional facts. In our example, the party moving for summary judgment should be allowed to move for summary adjudication of the breach of contract claim for a second time so long as it relies on facts different than those it relied on when originally moving for summary adjudication (and hopefully corrects the procedural defects). Any other interpretation would promote relitigation and, therefore, defeat the intent of the amendment.

Designed to streamline and expedite the process, the 1991 amendment to the summary judgment statute has changed the rules under which motions are made and resolved. It is important that California judges and lawyers learn these rules and understand the new roles they must play in making and ruling on such motions.

—Arnold P. Peter

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The trend in recent cases suggests that the State and Federal Supreme Courts have little time to review civil cases; the majority of cases concern criminal matters.

Punitive Damages and Insurance

Opsal v. USAA, 91 Daily Journal D.A.R. 7094 (4th App. Dist.)



Rex Julian Beaber

(June 18, 1991), reversed an award of compensatory and punitive damages in an insurance bad faith case while upholding the determination that insured was covered and the insurer was *contractually* liable. The court first noted that: "It is now clear under California law that an insurer's erroneous failure to pay benefits under a policy does not necessarily constitute bad faith entitling the insured to recover tort damages." The court upheld the general principle that the insurer must be *unreasonable* and that "unreasonable" essentially means refusing to cover "without proper cause." Essentially, the court found that the denial of coverage was *with*

"proper cause" if there were "genuine" legal issues regarding coverage under California law, even if ultimately the insured's legal contentions were rejected. Regarding communications to the insured, the *Opsal* court noted: "[W]e do not believe the duty of good faith and fair dealing requires such a letter to brief the legal arguments which might defeat the insurer's position.... The implied covenant does not require an insurer to research and present the contrary legal argument which could be made by the insured."

Continental Casualty Co. v. Fibreboard Corp., 762 F. Supp. 1368 (N.D. Cal. 1991). The court ruled that, notwithstanding the California rule against insuring against punitive damages, under some circumstances there may be coverage for punitive damages awarded in other states. *Fibreboard* teaches that a careful analysis of the substantive law and policy regarding punitive damage awards in other states *may* dictate coverage for punitive damages even when the parties entered into the insurance contract in California and premiums were paid in California. This case should be read before you tell any product liability defendant that they are not covered for punitive damages. Given the potential amounts in controversy, a painstaking analysis is required.

Practice Hint

Gilman v. Beverly California Corp., 91 Daily Journal D.A.R. 7024 (6th App. Dist.) (June 17, 1991). Beware of joint CCP § 998 settlement offers. *Gilman* reversed the trial court's award of expert witness fees and prejudgment interest because the CCP § 998 offer was made jointly and therefore it was not possible to assess for each plaintiff if the final award exceeded the offer. Hint: Make individual CCP § 998 offers for each plaintiff and each defendant, especially where you represent both entities and individuals.

Sanctions

Chambers v. NASCO, Inc., 91 Daily Journal D.A.R. 6585 (U.S. Supreme Court) (June 7, 1991). When practicing in Federal Court, Rule 11 is not the only method of winning sanctions. *Chambers*

held that, notwithstanding the American Rule, a Federal Court has the "inherent" power to assess attorney fee sanctions for bad faith, vexatious conduct, or wanton conduct working a fraud on the court. The Supreme Court upheld a sanction of almost a million dollars for conduct which included tactics of delay, oppression, and harassment calculated to produce exhaustive compliance by plaintiff. Sound familiar?

Laguna Auto Body v. Farmers Ins. Exh., 91 Daily Journal D.A.R. 7385 (4th App. Dist.) (June 26, 1991), upheld complete dismissal of plaintiff's bad faith action against his insurer as a sanction for discovery abuse, including frivolous objections to interrogatories and late and incomplete responses to the same interrogatories after the court ordered responses. The dismissal sanction was the first sanction against the plaintiff; the court did not attempt to first use monetary sanctions or evidentiary preclusions.

Anti-Trust Claims

Summit Health LTD. v. Pinhas, 91 Daily Journal D.A.R. 6166 (U.S. Supreme Court) (May 29, 1991). In *Pinhas* the Court held that the interstate commerce requirement for federal jurisdiction over anti-trust claims is met by examining the impact of the restraint on other participants and potential participants in the relevant market, and does not require a showing of actual impact. Accordingly, in *Summit*, jurisdiction was upheld even though the questioned conduct was directed at a single physician practicing in only one state. *Summit* will make it easier to bring anti-trust claims under the Sherman Act, especially when the defendant does business in more than one state.

Good Faith Settlements

Security Union Title Ins. Co. v. Superior Court, 230 Cal. App.3d 378 (1991). *Security Union* qualifies as the cutest decision written on the application of Tech-Bilt factors in the determination of "good faith" settlements. The court carries the ballpark metaphor *ad absurdum*, managing to quote both Holmes and the arcane, "The Common Law Origins of the Infield Fly Rule." The core holding seems to be that cases that have novel legal or factual issues dictate a wider latitude of acceptable settlements because "[e]ven an attorney rarely has powers to 'prophesy with a wink of his eye, peep with security into futurity...'" The court granted a preemptory writ compelling approval of a settlement. Cite this case in your next good faith motion, it has great quotable language throughout.

Bad Faith Liability

Weiner v. Fireman's Fund Ins. Cos., 1991 Daily Journal D.A.R. 8837, (4th App. Dist.) (July 18, 1991)... A third-party claimant may sue an insurance company for infliction of emotional distress where the insurance company fails to enter into a reasonable settlement. In so holding, the court carved out an exception from the rule of *Moradi-Shalal v. Fireman's Ins. Cos.*, 6 Cal.3d 287 (1988), which barred third party claims for unfair settlement practices under Insurance Code § 790.03.

Securities Litigation

The U.S. Supreme Court has finally established a uniform statute of limitations for cases brought under Section 10(b) of the Securities Exchange Act of 1935 and Rule 10b-5. (See M. Kelley, "Toward a National Statute of Limitations in 10b-5 Cases," *ABTL Report*, Aug. 1988). In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 91 Daily Journal D.A.R. 7264 (June 20, 1991), the U.S. Supreme Court held that federal law determined the statute of limitations applicable to actions under Section 10(b). The Court ruled that litigation must be commenced within one year after discovery of the facts constituting the violation or, at the latest,

three years after such violation.

The Court reversed a decision by the Ninth Circuit Court of Appeals, which applied state "borrowing" principles and applied Oregon's two-year limitations period for fraud claims as the most analogous forum-state statute. The U.S. Supreme Court held that state borrowing principles should not be applied where the claim asserted is one implied under a statute also containing an express cause of action with its own time limitation.

Insurance Coverage

The U.S. District Court for the Northern District of California held that a homeowner's policy which covered liability arising from accidents did not extend to claims for negligent misrepresentation or tort liability predicated on the breach of a contractual duty. *Allstate Ins. Co. v. Hansten*, 91 Daily Journal D.A.R. 7327 (9th Cir. June 21, 1991). Citing *Home Indem. Co. v. Avol*, 706 F. Supp. 728, 729-30 (C.D. Cal. 1989), the court stated that:

It is axiomatic under California law that insurance policies such as the one between Allstate and the Hanstens only cover tort liability, not contract liability.... Contract liability for insurance coverage purposes includes claims that sound in tort, but are predicated on the breach of a contractual duty.

Procedural Tips

United Community Church v. Garcin, 282 Cal. Rptr. 368, 91 Daily Journal D.A.R. 7258 (2nd App. Dist.) (June 21, 1991), is must reading if you are going to file a summary judgment motion in the Second Appellate District. The divided appellate court overruled a grant of summary judgment for plaintiff in an attorney malpractice case, because of the adequacy of the Separate Statement. The Appellate Court elevated the Separate Statement from a procedural convenience to a vehicle for due process. The lesson is clear: Be very careful that your Separate Statement contains evidentiary facts on all elements of the cause of action.

Pacific Lining Inc. v. Raging Waters, Inc., 91 Daily Journal D.A.R. 7808 (2nd App. Dist.) (July 2, 1991), upheld judgment on the pleadings predicated on deemed admissions and set a new and frightening standard for excusable neglect. A verified response to RFA was sent on behalf of the president of *Raging Waters, Inc.*, but not the corporate entity. The court treated the requests as admitted, as to *Raging Waters, Inc.* and granted judgment on the pleadings. The court refused to grant relief under CCP § 473 despite a showing that no prejudice resulted from the inadvertent omission of a verification form signed on behalf of the corporation. The lesson: Mind Your Ps, Qs, and entity verifications.

Gann v. Willie Brothers Realty, Inc., 91 Daily Journal D.A.R. 8353 (2nd App. Dist.) (July 12, 1991), affirmed the trial court's denial of a jury trial because plaintiff failed to deposit jury fees at least 25 days before the date set for trial. Don't forget, if you want a jury trial, post the fees.

Adams v. Murakami, 91 Daily Journal D.A.R. 10059 (Cal. Supreme Court) (Aug. 19, 1991), held that: 1) Proof of a defendant's financial condition is a prerequisite to an award of punitive damages and 2) It is plaintiff's burden to put on this evidence. This long awaited opinion resolves a split among the districts. The opinion offers no guidance regarding the appropriate ratio of punitive damages to wealth. After *Murakami*, there should be intensive focus on wealth discovery under CCP 3295. A failure to do complete pre-trial discovery on defendant's wealth may leave plaintiff unable to rebut testimony from defendant's witnesses that defendant's profits are less than might appear.

—Rex Julian Beaber

Letter from the President

Continued from Page 1

individuals such as Arthur Miller from Harvard and Michael Tiger from Texas.

The strength of ABTL has always stemmed from the quality of its membership. The individuals who are leading the Northern California chapter of ABTL include some of the most prominent lawyers in the Bay Area, which assures that ABTL's tradition will continue as ABTL spreads throughout the state. We welcome our Northern California litigators.

The new committee system is intended to foster greater dialogue between lawyers and judges. It should also increase camaraderie among business litigators and provide a vehicle for resolving problems and issues we face in business litigation.

In the past, ABTL has often been asked by the judiciary to provide assistance and input with regard to court reform and improvement of the judicial process. Committees that focus on issues of concern to business litigators will provide a means for our organization to respond from the broad base of its membership. In that way, ABTL can enhance its ability to serve as a force in the legal community.

Potential New Committees

Although the committee system is still in the formative stages, potential committees include:

Trial Delay Reduction Act. ABTL has participated in the past on the general advisory committee with respect to implementation of the Trial Delay Reduction Act. The purpose of this committee would be to study business litigators' experience with the program to look for potential problems and ways in which we can assist the Superior Court in this important reform and how we can work to help the overburdened judges participating in this individual calendaring approach to litigation.

Private Judging. Business litigators are probably the single largest consumer of this growing industry. Among the potential projects for this committee would be preparation of a directory of private judges, including detailed information on the judges' strengths and weaknesses and obtaining feedback from ABTL members who have employed particular judges. In short, providing a base for consumer information beyond merely "word of mouth."

Law and Motion. This is probably the "bread and butter" of business litigation. Far more cases are won in this arena than at trial. The purpose of this committee is to review and provide input on recent changes in law and motion practice, including this year's dramatic curtailment of partial summary judgment motions under California Code of Civil Procedure Section 437c. Strong legislative moves are also afoot to abolish demurrers in state practice and adopt a state version of Federal Rule of Civil Procedure Rule 12 (b) (6). Again, this is a topic which will dramatically impact the practice of each business litigator. ABTL members need to be informed and to provide input to the judiciary.

Experts. As with private judges, business litigators are major consumers of expert witnesses. ABTL members can provide resource material regarding the locations and backgrounds of potential expert witnesses in the business litigation arena similar to those developed by the personal injury bar.

Discovery. Business litigation concentrates more on examination of witnesses at depositions than trials. The 1986 Discovery Act is now approaching its fifth anniversary. We are all searching for ways to balance the need for pretrial discovery against the cost of pretrial discovery. This committee would provide guidance on one of the

more explosive issues in business litigation.

Voluntary Settlement Officers. For a number of years, ABTL has been assisting the Superior Court in providing voluntary settlement officers with a business litigation background. Given the staggering backlog in the Superior Court, ABTL needs to redouble efforts to provide this assistance to the court.

Insurance. All of us have struggled with the new adversarial relationship between business litigators and their clients' carriers created by Civil Code Section 2860. Indeed, this year's keynote ABTL dinner program will focus on the use of insurance in business litigation. This committee will provide information on dealing with insurance companies' aggressive use of Civil Code Section 2860 and create an information resource pool regarding coverage issues which increasingly dominate business litigation.

In-House Counsel. For many of us, these are our clients. This committee would foster greater dialogue between in-house counsel and the business litigation bar to promote a more effective and (heaven forbid) economic delivery of business litigation services for everyone's mutual benefit.

These committee ideas are not carved in stone, and we would welcome your comments and your interest in serving on these potential committees.

The success of groups such as the ABA's Litigation Section has shown that committees can provide an important function for a bar organization such as ABTL. By fostering greater dialogue among lawyers and between lawyers and judges, by sharing both information and perceptions, we can improve the quality of business litigation practice.

Indeed, that is the reason that a group of 67 lawyers from 30 leading law firms created ABTL 18 years ago. The time has come to fashion a new vehicle to more effectively carry forward their vision.

—Mark A. Neubauer

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