ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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Antitrust is Alive and Well...

Despite repeated invitations from the right to proclaim the demise of the antitrust laws, the Supreme Court and the federal judiciary have declined to pronounce them dead. Nor are the protections afforded under the Sherman Act dying or even seriously ill. Nor could they be. Antitrust is the handmaiden of the free enterprise system. Free enterprise and the full access of every citizen to its bounties requires decentralized and autonomous economic activities — and antitrust protects and ensures this dissipation of power. It is antitrust's role as "traffic cop" that defines the relationship between government and free enterprise.

Maxwell M. Blecher

To protect and preserve the decentralized economic structure that is its primary mission, antitrust has had three principal goals: (1) the prevention of cartels; (2) the prevention or limitation of monopoly; and (3) the prevention of consolidations or practices that would promote cartelization or monopoly. As recent Supreme Court decisions have demonstrated, all of these three primary goals of antitrust are alive and well.

Breaking Up Cartels

The U.S. Supreme Court has reiterated, as recently as this term, that the formation of cartels by horizontal competitors will not be tolerated. No particular group of actors is immune: not doctors, *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); not dentists, *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); not lawyers, *FTC v. Superior Court Trial Lawyers Assoc.*, 110 S. Ct. 768 (1990); not even collegiate football teams, *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984).

That in some of these cases a rule of reason or modified rule of reason has been employed in the assessment of liability has made little difference to the outcome; the plaintiff has prevailed. And there is little doubt that in the most critical cartelization situation, where horizontal competitors are agreeing on price or any aspect of price, the bright line of per se liability is still intact.

In *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), the Court did not even await the filing of briefs, ruling instead on the petition for certiorari alone that a per se offense had been stated by an agreement on credit terms. Nor can even the most profound constitutional interests outweigh the free operation of markets in setting prices, *Trial Lawyers*, 110 S. Ct. 768.

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Thoughts on Successful Law & Motion

Each lawyer appearing on a Law and Motion matter should attend to two important, preliminary things. First, ask other practitioners, and find out by all other means, the kind of judge before whom you will appear. Each judge is unique and each court has its own local, local rules. Those rules may not be written, but they are nevertheless important. Second, in Los Angeles County, a lawyer should be familiar with the Law and Discovery Policy Manual ("LDPM"), which is now part of the local rules of the Los Angeles Superior Court. The LDPM applies to all cases, regardless of whether they are in Direct Calendaring or Master Calendaring courts. A violation of the LDPM can lead to sanctions.

Judge William Huss

Common Pitfalls

The Law and Motion portion of the LDPM is only sixteen pages long. A careful reading of those few pages may provide startling revelations for attorneys and staff who habitually do things incorrectly. For example, a common bad habit is to place underneath the initial caption a smaller one, containing the words, "AND RELATED CROSS-ACTIONS." However, Paragraph 122 of the LDPM requires a full caption including cross-complaints, intervenors and other captions. In addition, many attorneys fail to heed Paragraph 121, which requires that the paragraphs of a pleading be numbered with arabic numerals, consecutively from beginning to end, without repeating numbers, even where there is a new cause of action or affirmative defense. Similarly, some practitioners omit cut-off dates for discovery and motions and the trial date in violation of Paragraph 120.

These requirements are not rules to be slavishly followed for their own sake; there are very practical reasons for them. When a matter comes before a Law and Motion judge, oftentimes only the moving and responding papers along with the opposition papers are before the court. The rest of the file, including Department 3 orders and other pleadings, are not before the court. It can be troublesome if the judge does not know cut-off dates or if all parties are not known.

The skilled and successful practitioner will go through the provisions of the LDPM with the staff members who assist in preparing the actual documentation. This should also be done with younger and inexperienced counsel who frequently are given the responsibility of preparing for and appearing on Law and Motion matters.

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Eliminating Monopolies

In the second important antitrust area, monopolies, the Court has been equally unqualified in its commitment to the Sherman Act. In a case in which no betting antitrust lawyer would have given the plaintiff better than eight-to-one odds, the Supreme Court unanimously affirmed a jury verdict of liability against an Aspen ski operator for its refusal to provide its competitor access to a joint marketing program. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

The Seventh Circuit has struggled to limit the reach of *Aspen Skiing Co.* by characterizing it as a "duty to deal" or "essential facilities" case. *Olympia Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied,* 480 U.S. 934 (1987). However, the plain language of the decision reaches much further — describing the terms of fair competition in a market in which a firm with significant power holds the ability to nurture or destroy competition. The duty, as the Court clearly stated, was to benefit consumers by ensuring the benefits of rivalry and to benefit competitors by ensuring them the opportunity to compete on the merits of their products or services.

Ann I. Jones

Finally, in those statutes aimed at curtailing cartels or monopolies in their incipiency, the Court has been particularly solicitous. In *California v. American Stores Co.*, 110 S. Ct. 1853 (1990), this term, the Court granted private litigants the single most important weapon with which to fight unwarranted mergers: the right to obtain divestiture. This is hardly what one would expect if the Supreme Court's agenda were to limit the scope of the statute or to limit the power of individual plaintiffs to enforce its prohibitions.

Narrowing the Reach of Antitrust Laws

It would be pollyannaish to deny that in some particular areas there has been a narrowing of the reach of antitrust. These are areas which lie beyond the essential core of antitrust concern and are pragmatic reactions to what had become in some instances an impossible situation for American businessmen.

The most obvious area in which the antitrust laws have beaten a hasty retreat from their position at the start of the 1980's is in the area of vertical restraints, frequently involving cases brought by terminated dealers. Until 1977, a termination following a series of dealer complaints was sufficient to permit the jury to infer an agreement between the manufacturer and its dealers. Such conduct was a per se violation of Section 1 of the Sherman Act.

In a series of decisions, the Court has struggled to rectify the paralysis of independent decision making that resulted from such per se condemnation. In 1977, the Court drew the per se line back to vertical price agreements. *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Then, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), the Court directed its attention to the evidence that would be sufficient to permit the jury to infer the existence of a per se vertical agreement, fashioning rules that require cogent evidence of an agreement on a particular price in order to fall within the law's per se prohibitions.

Such limitation is not inconsistent with the beliefs in free enterprise. In fact, in affording the manufacturer a measure of autonomy in his selection and retention of distributors these rules arguably promote the opportunity that lies at the core of the Sherman Act. It is hardly evidence that a death knell has sounded.

Uncertainties Posed

The second area in which critics of antitrust have found support for their claim of the law's demise is in the increased procedural obstacles imposed by the Court as part of its reading of the Clayton Section 4 requirements of injury and standing. *See, e.g., Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990).

The additional scrutiny can be traced directly to the profound shift in who has been enforcing the laws particularly during the past two decades. A review of most antitrust law textbooks demonstrates the shift from an era in which most cases decided by the Supreme Court bore the caption "*United States v.*" or "*Federal Trade Commission v.*"

Tried to a judge and brought on behalf of the people of the United States, these cases afforded fewer concerns that the law might be abused to protect the interest of a particular competitor or that a jury might be carried away by the passions of protecting a weaker rival at the expense of vigorous, albeit hard, competition. Now that private litigants are carrying the antitrust ball, however, these concerns have resurfaced and the Supreme Court has responded with a series of decisions designed to ensure that the antitrust laws are not being disserved.

There is no question that these standing and injury requirements have created tremendous new uncertainties for private antitrust litigants and, in the hands of the lower courts, have been viewed as a way to dispose of complex civil matters and to alleviate crowded dockets. And, there is no question that antitrust injury, its meaning and application, needs to be clarified by the Supreme Court in order to be applied consistently and evenhandedly in the lower courts.

That the Court has required a private party to pass muster as the litigant best able to preserve the primary purposes of the antitrust laws, however, hardly heralds its demise. In fact, by ensuring that self-interest does not overcome the long-term policy justifications of the law, the Court is securing the long-term vitality of the antitrust laws.

Nor is the Court constantly erecting procedural obstacles to private litigants. In two recent cases involving the application of blanket antitrust immunities, the Court has opened the door for the law's application. *Patrick v. Burget,* 486 U.S. 94 (1988); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). In both of these cases the Court resisted lower court attempts to articulate categorical exemptions to the Sherman Act, holding instead that the degree to which conduct is to be afforded immunity depends on the context of the activity and the particular facts of every case. This is hardly the action of a Court determined to eliminate the antitrust laws.

Reduced Federal Enforcement

There is no question that the Reagan years brought a virtual standstill to federal enforcement of the antitrust laws. Filing hundreds of small price-fixing indictments in non-core industries to create the false impression of activity, the Justice Department and Federal Trade Commission have stood by as scores of anticompetitive mergers have taken place.

However, as demonstrated in *California v. ARC America Corp.*, 109 S. Ct. 1661 (1989), and *American Stores,* 110 S. Ct.

1853, the Supreme Court has agreed to delegate that abandoned responsibility to the states. Moreover, while there is still little concrete evidence to support it, the rhetoric of enforcement coming from the Bush Antitrust Division evidences a change in direction even in federal enforcement. Again, these developments can hardly be viewed as evidencing the demise of antitrust.

That the law, particularly as articulated in the Courts of Appeals, has developed a peculiarly economic cast and that the successful litigant must now demonstrate that the defendant's conduct had anti-competitive effects in the marketplace has not made it more difficult to win. In fact, one of the myths of antitrust is that plaintiffs used to win more than they do now. Statistical study would not bear this out.

Plaintiffs Still Win Big

Antitrust plaintiffs are still winning. In *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795 (8th Cir. 1987), for example, the court upheld an award of treble damages in an action by a pet supplies distributor, alleging antitrust violations against a pet supplies manufacturer. The *Hartz* court found there was sufficient evidence to support the jury's finding that the defendant violated Sections 1 and 2 of the Sherman Act when it terminated the distributor's contract and began a "blitz" of the market, bringing in personnel from other areas to draw away the terminated distributor's customers.

In *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), the Supreme Court upheld an award of $51,146 in compensatory and $6 million in punitive damages in an action alleging antitrust violations and interference with contractual relations, demonstrating that antitrust plaintiffs are not only winning, but often winning big.

— Maxwell M. Blecher and Ann I. Jones

ABTL Seminar Slated for Maui

Cutting edge techniques and technologies for complex business litigation will be explored in the 17th annual ABTL seminar, scheduled for Oct. 12 through Oct. 16, 1990. Issues of the 90's will be tackled in interviews with the Hon. John Paul Stevens, Associate Justice, U.S. Supreme Court, and Malcolm M. Lucas, Chief Justice, California Supreme Court. Techniques will be demonstrated in a mock trial and topics of discussion will include risk evaluation, negotiation, court supervised settlement, jury survey techniques and demonstrative evidence.

The seminar will take place at the new Four Seasons Resort Wailea, on Maui, where participants will have time to enjoy a private beach with snorkeling, wind surfing, sailing, tennis and golf. Enrollment is limited and the deadline for registration is Aug. 15, 1990. For further information, contact Chrystal Council at (213) 839-3954 or Marian Cerilly at (213) 583-9100.

Contributors to this Issue:

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Developments In Directors & Officers Liability Insurance

Insurers that issue directors and officers liability insurance policies have long been the deep pockets that finance business litigation and pay hefty settlements as well as judgments. Those insurers have paid mounting legal fees (which soared to nearly $1.3 million per claim last year) and spiraling claims (see box on page 4). In response, insurers have been struggling to devise ways to change the deep pocket to an empty pocket — or at most a pocket that is only half full.

Toward that end, insurers have revised D&O policies to limit the kinds of claims that are covered. At the same time, they have sought to cut settlement payments in half through inventive positions on the allocation of damages.

Policies Fundamentally Changed

Most significantly, insurers have altered the fundamental structure of D&O insurance by eliminating any distinction between company reimbursement coverage and director and officer liability coverage. As a result, insurers have dramatically reduced the kinds of claims covered under D&O insurance and increased the amount of the "deductible" — or self-insured retention.

Bruce A. Friedman

Traditionally, there were really two policies: one which reimbursed the corporation for sums it spent indemnifying directors and officers against claims; and another which covered the directors and officers directly for claims against them. The two policies differed substantially. The company reimbursement policy had a high deductible, but provided broad coverage for all claims for which the company could legally indemnify the director or officer. The director and officer form had a lower deductible, but the scope of coverage was narrowed by numerous exclusions.

The new policy form, used by a number of major directors and officers liability insurers, retains the high deductible under the company reimbursement coverage, but adds all the exclusions previously applicable only to the D&O coverage form and more. In addition, new policies require that the high deductible company reimbursement form be used whenever the company is legally permitted to indemnify the director or officer. The result, as far as the insurers are concerned, is that the high-deductible company reimbursement coverage is really the only coverage afforded under the policy, unless the corporation is insolvent, and, therefore, not in a position to indemnify.

Claims Related to Mergers Excluded

In addition to merging coverages and exclusions, the new policies add exclusions that specifically target claims related to "merger mania." They include new exclusions directed at claims arising out of mergers, acquisitions, going private, and green mail. For example, the Aetna Casualty & Surety Company form excludes coverage for any claim "based on . . . any offer to purchase, or purchase of securities of the company at a premium over their then current market value, made by the company or by any of the insured persons, except where such an offer or purchase extends to all security holders of the company."

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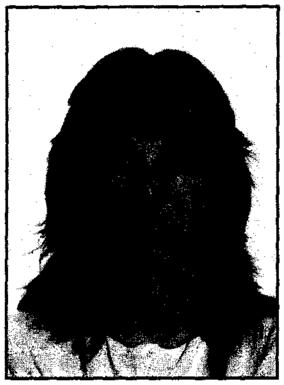
The same policy excludes claims "based on . . . any plan or proposal to sell the parent corporation or any subsidiary or any of the assets or stock of the parent corporation, or of any subsidiary to any directors, officers or employees of the company."

Subsidiaries Not Covered

Whereas coverage under the old policy form was automatically applicable to the officers and directors of a newly acquired subsidiary, the new forms require notice of any acquisition, merger, asset purchase, and an opportunity for the insurer to accept or reject coverage with an increased premium. Otherwise, no coverage is afforded under the policy arising out of or relating to the entity, assets or liabilities which were acquired or merged into the insured corporation.



Joan Dolinsky

New policy forms also exclude coverage for claims against directors or officers of a subsidiary arising out of any act, error, omission, or breach of duty occurring prior to the date that such entity became a subsidiary. In other words, if the acquired subsidiary does not maintain its D&O Insurance, no coverage will be afforded under the parent company's policy for acts occurring prior to the acquisition.

Some policies exclude claims arising under the U.S. securities laws and comparable state laws. Such an exclusion in the policy of a publicly traded company is like a homeowner's policy that excludes destruction by fire.

Skyrocketing Claims and Legal Fees

Insurers have seen dramatic increases in claims brought under directors and officers insurance policies — and equally dramatic increases in associated legal bills. On average, insurers will pay an estimated $1,299,000 in legal defense fees in connection with *each* claim filed in 1989 under a D&O policy, according to the Wyatt Directors and Officers Liability Survey. Legal costs continue to rise at the rate of 8% to 10% per year. An average claim filed under a D&O policy in 1989 was for more than $3.4 million and the number of such claims is climbing.

Companies involved in merger, acquisition or divestiture activity are responsible for almost three times as many D&O claims as companies not involved in such activity. Companies which experienced an after-tax loss in the last five years showed about a 40% greater susceptibility to and frequency of D&O claims than companies with no after-tax losses.

The Wyatt survey reports that, of 625 claims surveyed in June and July 1989, shareholder claims (stock offers, financial reporting and the like) accounted for 49.76%. The next most frequently reported category was employee claims (wrongful termination, discrimination and the like) at 19.52%. A close runner-up was customer claims (ranging from product quality and extension of credit to environmental issues) at 16.80%.

Claims By Federal Regulators Excluded

Nearly all policies issued to banks and savings and loans include a regulatory exclusion for claims made by the Federal Deposit Insurance Corporation, Federal Savings & Loan Insurance Corporation or their successor, the Resolution Trust Corporation. These particular exclusions have been successfully challenged in the courts as either ambiguous (*see American Casualty Co. v. FDIC,* 677 F.Supp. 600 (N.D. Iowa 1987)), or contrary to public policy (*see FSLIC v. Oldenburg,* 685 F.Supp. 609 (D. Utah 1987)).

In addition to adding specific regulatory exclusions to policy forms, insurers also have argued that claims by regulatory entities are barred by the "insured v. insured" exclusion. The insurers contend that the regulatory agency stands in the shoes of the insolvent bank or savings and loan in asserting claims against the former directors and officers. This argument has met with mixed results in the courts. In *Mount Hawley Insurance Co. v. FSLIC,* 695 F.Supp. 469 (C.D. Cal. 1987), Judge Pfaelzer found the exclusion applicable to claims asserted by the FSLIC. Other courts have found the exclusion inapplicable on the basis that the FSLIC sues not only for the benefit of the failed institution, but also for the depositors and creditors. *See American Casualty Co. v. FSLIC,* 704 F.Supp. 898 (E.D. Ark. 1989); *FDIC v. National Union Insurance Co.*, 630 F.Supp. 1149 (W.D. La. 1986).

A Novel View of Allocation

In their effort to sew up the proverbial "deep pocket," insurers have not stopped at employing new exclusions and theories to limit coverage. Even when a claim is unquestionably covered, insurers seek to reduce the amount that they pay to settle the claim on the basis of their novel view of the appropriate "allocation of damages."

In a typical case brought by disgruntled shareholders against the ABC Company and each of its directors, the plaintiffs might offer to settle for $10 million. Fearing that they could be personally liable for payment of a judgment equalling eight times that amount, the defendant directors agree that the case should be settled. The insurer balks, arguing that the settlement amount is too high. Moreover, if the defendants want to settle, the insurer will grudgingly pay 50% of a settlement, up to $8 million. After subtracting the company's $1 million deductible, the insurer offers $3.5 million toward an $8 million settlement offer.

The insurer justifies the 50% allocation by stating that, obviously, the corporation and its directors and officers are jointly and severally liable; therefore, a 50-50 allocation is fair. After all, directors and officers insurance covers only the directors and officers — not the corporation itself.

This is not what your director and officer clients, not to mention corporate counsel, had in mind. They did not expect the insurer to pay only 50% of a claim when the corporation bought a policy to cover the entirety of claims against its directors and officers.

Allocation Based on Relative Fault

The insurer's simplistic view of the appropriate allocation of damages is not supported by the language of the policy or the law. There is authority for the proposition that allocation should be based upon the relative culpability of the insured directors and officers versus that of the uninsured corporation. *Pepsico, Inc. v. Continental Casualty,* 640 F.Supp. 656 (S.D.N.Y. 1986).

The *Pepsico* court dealt with the allocation issue in the context of a Rule 10b-5 action against Pepsico, its directors and officers and accountants. Pepsico settled the underlying suit and sought reimbursement, contending that the D&O insurer should pay the entire amount. The court rejected this contention, holding instead that allocation between Pepsico, the accountants and the D&O insurer should be made on the basis of an approximation of each party's relative fault.

It is unclear whether the *Pepsico* approach would be followed in the Ninth Circuit, but contribution among tortfeasors based upon relative fault is also the usual rule in the Ninth Circuit. *See Smith v. Mulvaney*, 827 F.2d 558 (9th Cir. 1987).

Under *Pepsico*, arguably, the insurer should pay the entire loss, minus any deductible, in a lawsuit based on the conduct of officers and directors. This would hold true, for example, where a lawsuit arises from an action by the board of directors, based upon recommendations of senior management. On the other hand, the insurer may be justified in requesting that the corporation contribute to settlement of a lawsuit arising from erroneous acts or omissions of corporate employees who were not officers or directors.

Determining the Allocation

As far as an allocation determination is concerned, the *Pepsico* court noted that evidence of a good faith settlement of the underlying securities litigation created a presumption that the settlement was covered under the D&O policy. The court noted that the D&O insurer had the burden of proof regarding the amount of settlement which should be excluded from policy coverage. Although placing the burden of proof on the insurer to substantiate allocation has been rejected by some jurisdictions, it appears that this would be the rule in California.

In addressing allocation between covered and uncovered claims with respect to defense of an action against directors and officers, the Ninth Circuit in *Gon v. First State Insurance Co.*, 871 F.2d 863 (9th Cir. 1989), acknowledged the difficulty of reasonably apportioning between covered and uncovered claims. In *Gon*, the court noted that, although the carrier is entitled to apportion expenses between covered and uncovered claims, it cannot do so at the expense of its insureds. The court favored apportionment early in the underlying suit and noted further that while some excluded claims, such as libel or slander, are easy to distinguish from covered claims by analyzing the underlying complaint, where the nature of the claims made in the complaint do not clearly indicate whether they would be covered or uncovered, apportionment is more difficult.

The court noted that although the carrier must pay all legal expenses as incurred, subject to apportionment and reimbursement for defense of uncovered claims after settlement or judgment in the underlying action, nevertheless, the district court may well wish to consider the use of a master or other case management technique to monitor legal fees in order to keep track of those that are attributable to covered and uncovered matters, and to permit an earlier apportionment if it should develop that some portions of the incurred expenses proved to be uncovered and easily separable without prejudice to the defense of the covered claims.

Editorial Help Wanted

ABTL Report needs associate editors and writers. Attorneys with editorial experience who are interested in volunteering their time can contact Vivian Rigdon Bloomberg, Editor, at (213) 614-1990 or *ABTL Report*, Association of Business Trial Lawyers, P.O. Box 67C46, Los Angeles, California 90067.

The California Supreme Court would appear to be in agreement that insurers have the burden of proof with respect to allocation, at least with respect to defense costs. In *Hogan v. Midland National Insurance Co.*, 3 Cal.3d 553 (1970), the Supreme Court stated:

> In its pragmatic aspect, any precise allocation of expenses in this context would be extremely difficult, and, if ever feasible, could be made only if the insurer produces undeniable evidence of the allocability of specific expenses;

In *Hogan*, the Supreme Court returned the issue of allocation between covered and uncovered damages (indemnification) to the trial court for a determination.

Since allocation calculations involve, in the words of the *Pepsico* Court, "a rough approximation of each party's relative fault," there will necessarily be subjective analysis of the facts and theories in each case. Accordingly, allocation issues are best resolved in negotiation between counsel for the insurer and the defendant corporation. The conduct of the defendant directors and officers, the nature of the claims, and the coverage afforded under the policy are the critical elements in the allocation formula.

— Bruce A. Friedman and Joan M. Dolinsky

Annual Update: Time to Trial in Southern California Courts

The rush to trial is like the rush to adolescence: The wait seems interminable; the final event always arrives too soon, leaving everyone somewhat unprepared. An examination of the actual court statistics yields a few surprises. The time to trial in state courts has been sharply curtailed, virtually eliminating the disparity that historically has existed between state and federal courts.

Federal Court

Current statistics indicate that the time to trial in jury cases in federal court varies from one to two years, with the Central District having the shortest delays. These figures are unchanged from August 1988 when *ABTL Report* last published its survey of times to trial in Southern California courts. Generally, the time to non-jury trial is only a few months shorter than the time to a jury trial, with the exception of the Southern District, where a non-jury trial takes place, on average, eight months sooner than a jury trial. Therefore, with the exception of the Southern District, forsaking a jury trial does not significantly expedite adjudication.

One interesting development in the Central District is the decrease in the discrepancy between trial delays in federal and state court. Presently, there is virtually no difference between the Central District of Los Angeles and the Central District of the federal court for non-jury trials. Even with jury trials, you get to trial only six months sooner in federal court. This is in stark contrast to the statistics we presented in 1988, when the discrepancy between the two systems was almost four years.

Indeed, in some Los Angeles Districts, the East and South, you will get to trial sooner than in federal court! These evolving trends, probably attributable to the fast track system in state courts, will make the choice of forum in diversity cases more complex in the future. As the time to trial decreases for certain Los Angeles Districts, it may be that other differences between the state and federal forums (e.g., procedural rules governing discovery) might play a more important role in forum selection.

The situation may be altered in the federal courts, however, by the Biden Civil Justice Reform Act. Administrators throughout the Ninth Circuit believe that the act, if adopted, could speed up civil trials in all federal courts.

State Courts

Every court administrator interviewed by the author agreed that the fast track system was having an impact on litigation and that it would probably be expanded. Generally court administrators paint a picture of a system in flux — searching for the correct method of fast-tracking. They believe that litigation can be accelerated by creating deadlines for service of process, completion of discovery and the filing of the at-issue memorandum. No one seriously suggests that decreasing the demand for judicial resources (i.e., lowering the number of filings) or increasing the supply of judicial resources (judges and court rooms) is a realistic possibility in today's climate of avaricious plaintiffs and carefully guarded state treasuries.

State statistics on trial time are difficult to interpret. Some courts measure trial times from the filing of the complaint, others measure from the date of the at-issue memorandum. Even courts that use the at-issue memorandum are difficult to compare,

U.S. DISTRICT COURTS[1]

Median months from issue to trial as reported by the Annual Report of the Director of the Administrative Office of the U.S. Courts for the period ending June 30, 1989.

District	Jury	Non-Jury
Central	13	12
Northern	16	14
Southern	24	15
Eastern	20	22

LOS ANGELES COUNTY SUPERIOR COURT

District	Jury Trial[2]	Non-Jury Trial
Central	18.5[3]	11
East	8.5	6
North Central	6	7
North East	NA	6
North Valley	23.5	20
North West	21	16
South	12	NA
South Central	47.5	NA
South East	21	16
South West	45.5	21
West	48	15
AVERAGE	21	11

OTHER SUPERIOR COURTS — CURRENT DATA (1990)

VENTURA COUNTY[4]

Time from At-Issue to Trial Setting Conference	60 days
Time from Trial Setting to Trial	5-6 months
Total time from At-Issue to Trial	7-8 months

SANTA BARBARA COUNTY[5]

Time from At-Issue to Trial Setting Conference	45-60 days
Time from Trial Setting to Trial	45-60 days
Total time from At-Issue to Trial	3-4 months

RIVERSIDE COUNTY[6]

Short Causes[7]	Trial Set 6-8 weeks from At-Issue
Long Causes	Trial Set 12-18 months from complaint[8]

SAN BERNARDINO COUNTY[9]

	Jury[10]	Non-Jury
Central	12 months from at-issue to trial	4-5 months
West	12 months	NA

SAN DIEGO COUNTY

San Diego & Vista	Trial Set 18 months from complaint[11]

ORANGE COUNTY[12]

Jury Trial	median 50 months from complaint to trial (11 months from at-issue)
Non-Jury	median 25 months from complaint to trial (8 months from at-issue)

[1] The Biden Civil Justice Reform Act, if adopted, might expedite trial in Federal Courts.

[2] All statistics are based on the February 1990 conspectus which includes data for a three month reporting period. Data is not separately available for the fast track program and therefore the data is collapsed for fast track and "slow" track.

[3] All data reflect the median number of months from the filing of the at-issue memorandom until trial.

[4] Information supplied by the Calendar Management Unity. Estimate is for all civil cases. Ventura does not have a fast track system but has converted from a master calendar system to a "Vertical Case Management System" in which each case is assigned to a judge for all purposes.

[5] Santa Barbara has a fast track calendar system in which cases are expedited primarily by careful control and monitoring of arbitration and settlement.

[6] Most courts are on a fast track system. Generally you must serve process within 60 days and a general trial conference is ordered within 140 days of filing. The judge will usually order the at-issue memorandom filed at the general trial conference. Therefore, from at-issue to trial is approximately 14 months.

[7] Court trial less than two days.

[8] Until recently cases were set within 12 months from the filing of a complaint, but the trailing delays became unacceptably long. For each case, one judge monitors proofs services and at-issue memoranda. A different judge tries the case. The administrative office of the County noted a recent increase in the number of civil filings which might portend great delays.

[9] The County is not currently on a fast-track system. Attorneys control the filing time for the at-issue memorandum.

[10] Actually "non-jury" refers to short cause matters where trial is less than one day. Data is not available on true non-jury civil cases.

[11] At-issue memoranda dates are not used in calendaring. They are on a fast track system for all new filings.

[12] Orange County does not monitor cases before the at-issue, except in expedited trial program, and therefore attorneys control the delay from complaint to at-issue. The County's goal is to set within 270 days of the filing of the at-issue. Currently, personal injury cases are not a part of the fast track program. However, the court foresees that these cases will soon be monitored during the pre-at-issue stage.

because some compel the filing of the at-issue memorandum, thereby accelerating trial, while others leave the filing of the at-issue memorandum in the hands of counsel. Finally, some court clerks admit that trial settings can be misleading because of continuances. For this reason, attorneys should use the data provided in the tables accompanying this article with caution when attempting to choose between alternative potential venues.

The time to trial is highly variable in the Los Angeles Superior Court. In the North Central District the time from at-issue to trial is about six months, while in the West District, for jury trials, it is 48 months. Because the West District does not have a fast track program, this data may simply reflect the impact of the fast track program in the other districts. One administrative officer suggested that districts with a fast track program had a psychodynamic favoring early trial in all cases — namely, "slow" track judges sometimes compete with their fast track colleagues.

The general trend over time in Los Angeles is clear — time to trial is shortening. The average total time to trial has decreased by six months since 1988. The average total time to a non-jury trial has decreased by 13 months.

While there is less variation in times to trial outside of Los Angeles County, there is still considerable variation. In Santa Barbara the delay from at-issue to trial is three to four months. Ventura gets you to trial in seven to eight months.

Comparing 1988 and 1989 data reveals that, while the time to trial has slightly decreased outside of Los Angeles in the last year, the gains are small. Some administrators speculate that the advent of fast track systems outside Los Angeles began simultaneously with an increase in filings due to population growth, producing a limited net change.

Conclusion

Trial dates have two very different functions. First, a trial on the merits determines when justice (or injustice) is done. This is a rare function of trial dates, because trial is itself a rare event in civil litigation.

The second function of a trial date is that it determines when settlement occurs; it compels the final psychological confrontation with the down-side risks to the parties. Interestingly, this latter function requires a firm trial date and a settlement judge, but does not really require an available trial judge or court. That is, courts may have some flexibility in setting trial dates, regardless of the availability of trial resources.

Of course, such a game of judicial "chicken" could backfire if the percentage of non-settling cases increases slightly. That is, manipulation of trial dates, without altering the demand for judicial resources (complaints) or the supply of resources (judges), only effects an increase in judicial economy and speed, when the psychological threat of trial increases the percentage of settling cases. Arguably, early trial settings should have this effect because they would increase the cost of trial, as a percentage of all legal fees. That is, assuming that long trial delays naturally increase legal fees, when there is a long delay, the cost of trial might effect a relatively small increment in litigation costs. Alternatively, early trial setting may allow the parties to make a great relative savings in total costs by quick settlement. Suffice it to say, no one knows how this speculation accords with reality.

In sum, setting a case for early trial is both a result of an efficient legal system and a method of achieving efficiency. Early settlement not only eliminates the demand for trial resources, but equally important, it reduces the demand for pre-trial judicial resources.

— Rex Julian Beaber

Law & Motion

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From the Simple to the Complex

The matters that are heard in Law and Motion generally fall into three broad categories: routine matters, relatively simple matters, and complicated ones.

Routine matters, which generally are unopposed, require little time for the court to examine or rule upon, such as motions to dismiss after five years have elapsed, claims for property and forfeiture in narcotic arrests, and other matters of a simple nature. The second category is comprised of things such as relatively simple demurrers, motions to expunge lis pendens, and most discovery motions. The third category of more complicated matters encompasses motions for summary judgment and/or summary adjudication of issues, complicated demurrers, and other time-consuming matters.

The new LDPM applies to all three categories of Law and Motion matters, and it must be strictly followed. Failure to do so causes unnecessary burdens for the court and counsel. For example, a motion to be relieved as counsel should be a simple matter and the vast majority of them are unopposed. For some inexplicable reason, however, the vast majority are also defective in that counsel do not confirm the client's current address or properly word the proposed order, as required by LDPM Paragraphs 234 and 237. Rather than deny these motions and require counsel to refile them, some courts, including Department 82, will grant the motion on condition that a declaration evidencing compliance with those two Paragraphs is filed and sanctions are paid to the court. Thus, what should be a very simple, uncomplicated matter becomes a relatively time-consuming one in the face of non-compliance with the LDPM.

Demurrers

Similarly, demurrers should comply with the LDPM. Paragraph 173 requires a separate statement of the grounds for each demurrer. Consistently, in practice, counsel set out each ground of demurrer citing the Code of Civil Procedure Section referring to demurrers and, oftentimes, each ground is repetitive. This qualifies for the incantation theory of Law and Motion practice. Such mindless repetition of statutory citations, without substance, is a true waste of everyone's time.

In addition to the statutory reference, the moving party should provide a brief, plain-language description of the demurrers' bases, such as "the contract is not alleged as a written or oral contract," or "the statute of limitations has elapsed." This approach is practical because it quickly captures the reader's attention with the reason for the demurrer.

This same approach should be used in every pleading brought before a Law and Motion court, whether it is an initial pleading or an opposition pleading. Capture the court's attention with a clear statement of the gist of your motion or opposition. The time pressures on a Law and Motion court do not permit the luxury of a leisurely perusal of the documentation that the parties have filed.

The introductory or factual statement should contain the *concise* position of the party; then, everything else falls into place in the court's mind in examining the rest of the documents on file. A long narrative giving the history of the case may be beneficial, but it should come *after* the essential position has been stated.

Summary Adjudication

Almost every case has certain legal issues which can be isolated and brought before the court for adjudication by a motion for summary adjudication of issues. However, the court can adjudicate *only* issues of law based upon undisputed, material

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facts. This is clearly emphasized in Paragraph 210 of the LDPM. Any practitioner should be appalled to know how many lawyers — presumably experienced and well-schooled lawyers — present to the court great, long lists of issues to be adjudicated, each of which is a question of *fact*.

Black's Law Dictionary defines fact questions as those issues in a trial or hearing which concern facts or events, *whether* they occur, and *how* they occurred. That same dictionary defines law questions as those issues or questions in a case which do not require findings of fact, but are addressed to the judge for application of the law. Such a simple definition should be easy to follow. Counsel should look to Paragraph 209(e) of the LDPM for a guide as to the wording of the issues, and note the required format.

Admittedly, there may be occasions where an issue constitutes a mixed question of law and fact. Counsel should understand that the Law and Motion Court is not equipped to undertake the elaborate appellate court style of analysis of such issues. It is therefore up to the individual practitioner to keep the issues as concise and narrow as practicable.

In order to rule properly on the issues of law, Paragraph 207 of the LDPM sets out the *required* format for the moving party's undisputed facts and the responding party's undisputed facts. *Both* parties must follow the format. Very frequently, however, responding parties neglect to do so, perhaps because they think that the format applies only to the moving party.

The practical reason for the format is so that the court can place the moving party's separate statement alongside the responding party's separate statement and compare them quickly to determine which are the undisputed and disputed facts, and the evidentiary basis for each fact. This saves an enormous amount of time, because the court does not have to go back and forth between pleadings to decipher the facts upon which the issues of law rest.

Additionally, the required format allows the Court to quickly grasp the evidentiary basis for the issues, which should be separately stated in the Notice in accordance with LDPM Paragraph 209(a). The issues should also be listed in the points and authorities with an explanation of how the issue is established to be without substantial controversy. Thus, the issues must be set out twice, not once, and, under LDPM Paragraph 209(c), the explanation is required.

This can turn out to be somewhat of a trap for counsel, because there is a 15-page limitation on the points and authorities. If a lawyer attempts a massive, last minute, motion for summary judgment and summary adjudication of issues, the points and authorities portion of the moving papers may be inadequate to accomplish the job. What could have been a well-taken motion will be denied because the lawyer tried to do too much too late.

There is no limitation, without reason, on the number of justified motions for summary adjudication of issues that can be brought. Consequently, the 15-page limit can be quite sufficient for single issues or small groups of issues that are to be adjudicated at any one time. Although an *ex parte* order may be obtained extending the number of pages to twenty for demurrers and twenty-five for motions for summary adjudication of issues or motions for summary judgment, this still may not be sufficient.

Summary Judgment

Much of what has been said with regard to summary adjudication motions can be said for summary judgment motions. Obviously, the latter are more all-encompassing and frequently can be successful if the case involves a single issue or a relatively small number of issues that can be determined easily. In general, however, the most successful motions for summary judgment are brought *after* issues of law have been decided in previous motions for summary adjudication of issues. Sometimes, these motions are brought in sequence, rather than all at once. It would seem that this approach would be the better practice, because the Court can focus on the issues more easily within the limited time constraints that are the natural order in a Law and Motion Department.

On the other hand, if the lawyer knows that the judge prefers to work a file only once, or as few times as possible, and prefers to have the motions for summary judgment and summary adjudication brought all at once, then the lawyer must govern the structure of the motions accordingly. This is one of the best reasons for knowing the individual judge's proclivities.

It may be risky to make all of the motions at once if counsel waits until the last minute. The Department 3 order setting up motion cut-off dates will not be modified by another court. If the massive motion contains some technical defects which require denial, there may be no recourse but to seek an extension of the cut-off dates from Department 3. That option may not be available, and the motion may never be heard on its merits.

It should be clear to all civil litigators, particularly in the Central District, that Department 3 orders are designed to facilitate the court's file management. Such orders will be adhered to and will not be extended or otherwise modified by the Law and Motion Departments.

Discovery Sanctions

The majority of the discovery sanctions brought against counsel are the result of violations of the provisions of the LDPM. Discovery sanctions, in particular, are oftentimes quite severe, primarily because no good faith effort has been made to informally resolve the discovery disputes. Without exception, the most important way to establish good faith is to offer to meet with opposing counsel in their office to go over the discovery disputes and resolve them. Certainly, practical considerations prevent such meetings on occasion, but a good faith attempt at such meetings will be considered by every court that is ruling on a discovery motion. A face-to-face meeting, with everyone's feet under the same table, so to speak, is the best way to inexpensively handle discovery disputes. Many times, large numbers of issues are resolved, leaving only legitimate disputes which require court intervention.

When seeking discovery orders from the court, it is the better practice to obtain specific deposition dates, as well as definite dates for responses to interrogatories, request for admissions, and production of documents. The value of the court's time is enhanced when discovery is ordered to be completed on certain dates.

A frequent, useful means of modifying discovery orders is by a stipulation among the parties with a court order thereon. As the courts increasingly take over the management of the files in the Superior Court system, changes in Orders and modifications of deadlines will, in all probability, be accomplished only by court order. A stipulation with an order thereon accommodates both the court and counsel.

In many ways, Law and Motion practice is a great opportunity for lawyers to demonstrate the high degree of professionalism to which we all should aspire. It is the place where litigation skills can be exhibited most often. The foundation of those skills is built upon the LDPM and its provisions. Beginning there, a practitioner can construct a motion or other similar pleading that will pass muster in any judge's court and will carry with it the probabilities of success.

— Judge William Huss