

Letter from  
the President

At ABTL's Annual Seminar on Maui last October, participants took part in a mini-trial and court-supervised settlement conference. The case was a complex three-sided dispute centering around a failed leveraged buy-out. It involved a bank, the selling shareholders and the unsecured creditors of the failed company.



Richard R. Mainland

Despite the efforts of counsel and United States District Judge Eugene Lynch, a talented settlement judge, *the case did not settle*. In reflecting on this aspect of the seminar, I was reminded that today's sophisticated settlement mechanism—mini trials, summary jury trials, settlement conferences and mediations—while helpful tools in resolving disputes, are not the complete answer. Some cases simply need to be tried, and our lives as business trial lawyers are impacted by changes, for better or worse, in the system of *trying cases*.

With these thoughts in mind, ABTL members should be aware of two developments—one actual and the other on the drawing boards—affecting the trial of business cases in the Los Angeles Superior Court:

**Good-By to Department One**

Presiding Judge Robert Mallano recently announced that, effective March 29, the downtown Los Angeles Superior Court will convert to individual calendaring for all civil cases. This development completes the "federalization" of case administration in the downtown Court and calls for a farewell to Department One, in

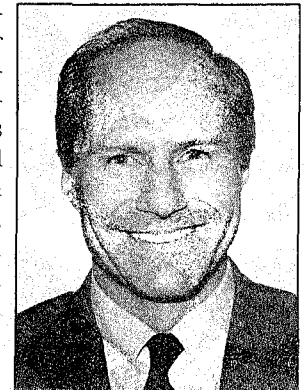
*(Continued on page 7)*

INSIDE

Trends in D&O Claims and Related Legal Fees	by Joan M. Dolinsky	..... p. 3
Recent Developments in Directors and Officers Liability Insurance	by Joan M. Dolinsky	..... p. 3
Depositions and Discovery: Overkill Practices	by Larry C. Russ	..... p. 5
Cases of Note	by Mary Lee Wegner	..... p. 5

Environmental Litigation: How to Deal  
with 'As-Is' Contract Language

Over the last ten years, litigation over environmental clean-up costs has increased geometrically. The average cost to clean up each of the nation's 12,000 plus "Superfund" sites exceeds \$30 million. The Environmental Protection Agency estimates that annual environmental compliance costs now far exceed \$120 billion. Such expenses can be financially crippling for a company facing environmental liabilities and remediation costs. The debilitating impacts on individual businesses include clean-up obligations that bleed profits, regulatory orders to shut down plants and manufacturing operations, inability to sell or transfer interests in contaminated property, fines and jail terms for corporate executives, and protracted litigation over cost allocation for remediation of polluted resources.



Craig J. de Recat

It is therefore not surprising that a company faced with such enormous liabilities will try to shift the costs through litigation against prior owners and operators of the property. The present owner of contaminated property can seek contribution for clean-up costs from any prior owner or operator responsible for the release of contaminants under the Comprehensive Environmental Recovery Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607. Commonly, the inquiry begins with the person or entity who sold the property.

A trial attorney representing a client in an environmental cost recovery action often faces a Purchase and Sales Agreement containing vague or generalized language regarding responsibility for discovery of hazardous waste contamination. Frequently, the attorneys are faced with a sales agreement that includes generalized waiver or indemnification language, and often includes an 'as-is' clause. The seller will assuredly assert that the clause relieves the seller from any responsibility.

**Weaknesses of the 'As-Is' Clause**

The 'as-is' clause is often seen by trial counsel as a formidable defense in these cases. This article reviews some of the strengths and weaknesses of the 'as-is' clause, and provides theories and strategies for dealing with such language.

The first step for any attorney attempting to prosecute or defend an environmental cost recovery action is to carefully review all the purchase and sale agreements. Frequently, a seller will try to transfer the property in an 'as-is' condition. Occasionally, an owner of

*(Continued on page 2)*

property faced with an environmental clean-up will review the purchase documentation only to discover that the property was acquired 'as-is' long before any environmental problems were recognized. An 'as-is' clause does not necessarily guarantee freedom from future liability for the seller. A carefully thought out litigation strategy must capitalize on the nature of the representations and the degree of disclosures prior to the sale.

Consider a typical hypothetical: Your client purchased a manufacturing facility after it had been in existence for 25 years. For the last fifteen years, an underground storage tank (UST) has been used to store solvents. Recently your client removed the UST only to discover significant soil and groundwater contamination resulting from leaks that began long before your client purchased the property. The client now faces a Cleanup and Abatement Order (CAO) imposed by the regulatory agency. Your environmental consultants advise you that the clean-up will cost approximately five million dollars.

When you approach the seller to discuss contribution towards the clean-up, you are pointedly referred to the purchase and sales agreement. It states that your client agreed to purchase the property 'as-is.'

#### **The 'As-Is' Clause As a Shield**

In California, any implied warranties may be excluded by a disclaimer such as the terminology 'as-is' "as they stand" and "with all faults." Witkin, *Sum. Cal. Law*, 9th ed., Sales, § 83; U.C.C. 2316(3)(a). Further, no warranties of quality or condition are implied in the sale of real property, except where property is of new construction. Cal. Civ. Code § 1113.

An 'as-is' clause was applied to deprive a purchaser of recovery in *Shapiro v. Hu*, 188 Cal.App.3d 324 (1986). There, the court considered a case where the purchaser, after a sale with an 'as-is' clause, discovered a bulge in a basement wall. The court relied heavily on the purchaser's eagerness to buy and his willfully foregoing reasonable inspections prior to the sale. The court rejected the defendant's argument that an 'as-is' provision discharges warranties only for defects which are visible or observable. Under the analysis of *Shapiro*, where a sales agreement includes an 'as-is' clause, the buyer will obtain relief only where the seller, through fraud or misrepresentation, intentionally conceals material defects not otherwise visible or observable to the buyer.

Similarly, in *Niecko v. Emro Marketing Co.*, 769 F.Supp. 973 (E.D. Mich. 1991), the court used an 'as-is' clause to deny recovery to a plaintiff. In *Niecko*, the contract for the purchase of a former gas station site included language that the seller had made no "warranties or representations," that the buyer had inspected the property and the buyer assumed responsibility for damages caused by conditions on the property upon transfer of title. In the battle between the buyer's claim of failure to disclose and the seller's defense based on contract, the buyer lost. Held: purchasers had contractually assumed the risk of unknown soil contamination conditions.

No California case has precisely outlined the impact of an 'as-is' provision. See *Lingsch v. Savage*, 213 Cal.App.2d 729, 740-742 (1963). Some courts have construed the presence of an 'as-is' clause to mean that the buyer takes the property with the conditions visible or observable to him. *Crauford v. Nastros*, 182 Cal.App. 659 (1960). An 'as-is' clause may be characterized as an "assumption of risk of injury arising from what the seller is to do or leaves undone." *Coates v. Newhall Hand & Farming, Inc.*, 191 Cal.App.3d 1, 8 (1977). However, importantly, both *Shapiro* and *Niecko* focus

on the buyers' ability to fully inspect the property prior to sale, and the failure to do so.

#### **Obtaining Representations and Warranties in the Sale Agreement**

Counsel for the seller should attempt to establish that the purchaser was provided a reasonable opportunity, prior to the acquisition, to perform a complete and thorough examination of the property, facilities and relevant business documents. The seller's counsel also should try to establish that the buyer had the opportunity to extract a comprehensive and thorough set of representations and warranties in the sales document which could lead to identification of environmental issues.

**A**bsent evidence to the contrary, a purchaser is generally assumed to have the opportunity to investigate and identify a complete description of all activities that have been conducted on the property for as far back as records are available. Pre-trial discovery must establish whether the purchaser attempted to obtain representations of any prior storage, use or release of hazardous substances or chemicals on or under the property and adjacent areas. This should include representations that:

- All applicable environmental regulations, ordinances, laws and permits have been complied with, both presently and in the past;
- There are no known or reasonably suspected releases or deposits of hazardous materials or chemicals on or under the property;
- The seller is unaware of any condition on or about the property that could give rise to a violation of any environmental law, regulation or ordinance;
- There are no past, pending or threatened proceedings contending that the seller or conditions on the property violate any environmental laws, regulations or ordinances;
- Any activities on the property are permitted and licensed properly, and the permits are assumable and assignable; and
- The seller's representations and warranties shall survive the closing of the property transaction.

Most of us have rarely seen such a set of representations in any sales/lease agreement. Often, the seller will refuse to provide such a comprehensive set of representations for a myriad of reasons, which may later provide the buyer's counsel with ammunition. Thus, the seller must establish that all necessary information was freely available, and if not, establish a legally justifiable reason for non-disclosure or attack the relevance of the information the buyer is claiming was unknown.

#### **Attacking the 'As-Is' Clause**

An 'as-is' clause does not relieve a seller from the requirement to disclose known or reasonably believed contamination on the property. California Health & Safety Code § 25359.7 requires a seller or lessor of property to disclose *in writing* any release of hazardous materials known or believed to exist on or beneath the property. Additionally, courts have recognized a buyer's claim of fraudulent non-disclosure where the seller knew property was contaminated, and intentionally failed to disclose the contamination to the buyer, and the buyer relied upon the seller's non-disclosure to his detriment. The doctrine of caveat emptor, although still in existence, is losing its viability in transactions between parties of relative sophistication and similar bargaining position and is ineffective as a defense

*(Continued on page 6)*

## Trends in D&O Claims and Related Legal Fees

In 1991, the Wyatt Survey found that costs associated with claims by shareholder averaged \$5 million—significantly higher than the average cost associated with all closed claims, which remained at about \$3 million per claim. Reviewing claims information accumulated over the past seventeen years, the Wyatt Survey determined that, as of 1991, smaller and medium-sized companies have experienced a leveling-out of D&O claim frequency. Large companies experienced increases in the number of D&O claims of approximately 15% per year. This increase may now be showing signs of reduced growth.

The Wyatt Survey found a strong correlation between corporate asset size and the incidence of D&O claims. Wyatt also found a strong correlation between a company's involvement in merger, acquisition or divestiture activity and a higher claim susceptibility and frequency. On average, three claims were reported for every four companies involved in such activities. In addition, in each of the years 1989 through 1991, these companies were responsible for almost three times as many D&O claims as companies not involved in such activity.

About one-third of the companies which experienced an after-tax loss during any of the past five years, reported one or more claims. This represented a decline from 1989 when companies which experienced an after-tax loss showed a 40% greater frequency of D&O claims than companies with no after-tax losses. In 1991, such companies reported claims with frequency that was 70% greater than companies with no after-tax losses. With regard to claim frequency, 362 of the 1,501 participants in the 1991 Wyatt Survey reported a total of 872 claims over the nine-year period between 1982 through 1990. Of these, 536 were closed when the survey form was completed.

The Wyatt Survey found that shareholder claims (stock offers, financial reporting and the like) accounted for 46.6% of all claims. This figure was similar to those reported in prior years. Financial performance or bankruptcy was cited as the single most important issue in 4% of claims, up from 2.8% a year earlier. Additionally, inadequate or inaccurate disclosure was named as the single most important issue in 7.7%, an increase of 1.7% from the year before. The second most frequently reported category was employee claims (wrongful termination, discrimination and the like), reported in at 23.9%. A close runner-up was customer claims (ranging from quality of product and extension of credit to deceptive trade practices) at 19.4%.

The 1991 Wyatt Survey is based on responses in July and August, 1991 by 1,501 participants, including 569 corporations with over \$1 billion in assets. More than 56% of the participants were publicly traded corporations and two-thirds of the participants experienced merger, acquisition or divestiture activity in the past five years. One-third reported after-tax loss in one or more of the last five years.

—Joan M. Dolinsky

## Recent Developments in Directors and Officers Liability Insurance

Insurers that issue directors and officers liability insurance continue to be the deep pockets that finance business litigation. They also pay hefty judgments and settlements that are continuing to soar in amount. The average cost per claim has increased more than two-fold from prior years to just over \$3 million according to the latest Wyatt Survey. Smaller and medium size companies have recently experienced a leveling-out of claim frequency, and large companies are experiencing some reduced growth in the frequency of claims, following a period during which the frequency of such claims grew by 15% per year.

The most frequently reported claims continue to be shareholder suits. There is, however, a somewhat ominous trend of increasing claims for wrongful termination and discrimination as well as claims by customers. (See adjacent box.)

One of the most fundamental issues near and dear to the heart of any defendant in a directors and officers ("D&O") liability lawsuit is the question of when the D&O insurer must pay the enormous defense fees incurred. The most recent Wyatt Survey indicates that defense expenditures continue to rise with the average approaching \$536,000 in defense fees alone. This average includes closed matters where no payment was made to a claimant. The average cost of a payment to claimants increased to over \$3 million, a substantial increase over prior years.

D&O insurers often take the position that their policies only cover the costs of indemnity following a "loss" and they have no duty to defend, that is, to pay defense costs as they are incurred. However, at least in California, unless there is specific policy language to the contrary, arguably the carrier should have an obligation to pay defense fees under an interim funding agreement during the pendency of the litigation.

The posture taken by D&O insurers rises from the unique nature of D&O policies. They differ from the typical comprehensive general liability (CGL) policy, which provides for a duty to defend. The CGL insurer can generally select the attorney and control the strategy of the litigation. In contrast, the typical D&O policy provides that the attorney is selected by the directors and officers who are insured under the policy, not the insurer. The insurer does not control the defense although it may have a right to consent to selection of counsel. These policies often disclaim any obligation to defend. Where there is such a disclaimer, the courts will not impose a duty to defend. (See, for example, *Kenai Corporation v. National Union Fire Insurance Company*, 136 B.R. 59 (1992); *Gon v. First State Insurance Company*, 871 F.2d 863 (9th Cir. 1989).)

D&O liability policies, although not imposing an obligation to defend on the carrier, still may require the insurer to advance legal fees contemporaneously as they are incurred.

Historically, D&O insurers took the position that they were not obligated to pay defense costs until the conclusion of the underlying litigation. In the face of enormous legal fees incurred in actions against directors and officers, the courts have reached divergent



Joan M. Dolinsky

(Continued on page 4)

opinions on the question of whether the insurers must pay defense fees as they are incurred. (Compare *Gon v. First State Ins. Co.*, 871 F.2d 863 (9th Cir. 1989) (contemporaneous reimbursement required) and *Zaborac v. American Cas. Co.*, 663 F.Supp. 330 (C.D. Ill. 1987) (contemporaneous reimbursement not required).)

In *Gon v. First State Insurance Company*, *supra*, 871 F.2d 863, the court held that there was a duty to provide interim funding of defense costs under a policy that did not expressly disclaim any duty to defend. The policy required the insurer to pay costs that the insureds became legally obligated to pay. The court ruled that the obligation to reimburse the directors and officers arose as they were incurred because that was when the insureds were legally obligated to pay them. (See also *Okada v. MGIC Indemnity Corporation*, 823 F.2d 276 (9th Cir. 1986).)

In *Pepsico, Inc. v. Continental Casualty*, 640 F.Supp. 656 (S.D. N.Y. 1986), the court held that the insurer was required to pay defense costs contemporaneously. The Continental policy at issue did not require the entry of final judgment as a prerequisite for payment of defense costs. Indeed, the policy definition of "loss" embraced *any amount for which the directors and officers were legally obligated to pay* including such amounts as the company may be required or permitted by law to pay as indemnity to the directors and officers.

Reasoning that such amounts included defense fees, Judge Brieant concluded that once "loss" or "attorneys' fees" were incurred by the directors and officers, the insurer's responsibility to reimburse the directors and officers attached.

Judge Brieant said that the insurer could be excused from a duty to provide contemporaneous reimbursement of defense costs only if it could establish as a matter of law that there was no possibility that it might be obligated to indemnify the directors and officers. Under the facts of that case, the court held that the insurer was required to pay defense costs as they were incurred.

Judge Brieant reached a different conclusion, in *Board of Education v. CNA Ins. Cos.*, 657 F. Supp. 495 (S.D.N.Y. 1986). There the court held that the insurer did not have a duty to pay defense costs during the pendency of the underlying lawsuit. This was because the CNA policy expressly provided that the insurer's obligation to pay defense costs arose only upon final disposition of the claim against the insured or the date of determination of the insurer's liability under the insurance contract, whichever occurred first. The policy at issue in *Board of Education v. CNA Ins. Cos.* further provided that the insurer could, at its option, and upon request, advance defense costs prior to final disposition. Judge Brieant upheld the validity of the policy provisions.

In *Ambassador Group, Inc. v. National Union*, 738 F.Supp. 57 (E.D.N.Y. 1990), Judge Dierie determined that, under New York law, D&O insurers have no duty to defend. The court construed a National Union policy containing an endorsement which set a priority for payments. It provided that payments with respect to a settlement or judgment were to be made first, and then defense costs, up to the liability limits available under the policy.

National Union argued, and the court agreed, that under this endorsement, the claims of third parties for injuries caused by the acts or omissions of the insured were superior to the insured's claims for legal fees. Interim reimbursement of defense fees could deplete the proceeds available to satisfy third party claims, in contravention of the plain meaning of the policy. Thus, the court held that interim funding would not be required.

In the most recent New York decision, *Kenai Corporation v.*

*National Union*, 136 B.R. 59 (1992), New York District Court Judge Kimba Wood determined that, absent a specific provision requiring contemporaneous payment of defense fees, National Union had no obligation to pay defense fees as they were incurred and could await the outcome of the case to make a coverage determination. In coming to this conclusion, Judge Wood ignored language in *Ambassador Group Inc.*, *supra*, which appeared to require contemporaneous reimbursement unless there was specific policy language contravening such a requirement. Judge Wood reasoned that if the court required insurers to advance defense costs before resolution of the underlying action, insurers would be prejudiced since they would inevitably pay some losses that were not covered under the policies.

In the final analysis, courts have reached divergent positions on the question of the payment of defense fees based on their construction of varying policy provisions. It is important for the insureds' counsel to examine policy language and be aware of the varying decisions interpreting that language.

— Joan M. Dolinsky

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## Discovery

Ruling on an issue of first impression in California, the First District Court of Appeal held in *Liberty Mutual Ins. Co. v. Superior Court of San Mateo*, 92 Daily Journal D.A.R. 15075 (Nov. 10, 1992), that the head of a defendant corporation could not be deposed unless the party seeking the deposition could demonstrate that (a) the corporate head had knowledge relevant to or was involved in the litigation; and (b) the party had exhausted all less intrusive means of discovery.

In *Liberty Mutual*, the plaintiff noticed the deposition of the president and CEO of an insurance company which allegedly denied her claim. The president moved for a protective order to prohibit the deposition, submitting evidence that he had no involvement in the handling of plaintiff's claim. He was merely named as the intended recipient of carbon copies of two letters. The trial court denied the protective order, and Liberty Mutual petitioned for a writ of mandate.

In granting the writ and ordering entry of the requested protective order, the Court of Appeal noted that, in most cases, the head of an insurance company will have little, if any, knowledge about the handling of particular claims. In such cases, it makes little sense to allow a plaintiff to begin discovery at that level. The court held that, when a plaintiff seeks to depose a corporate president or other high ranking official and the official moves for a protective order, the trial court must first determine whether the plaintiff has demonstrated that the official has "unique or superior personal knowledge of discoverable information." If not, the trial court should issue the protective order and require the plaintiff to seek information through the less intrusive means. The court acknowledged, however, that the protective order later could be lifted if such avenues were exhausted and the plaintiff could make a "colorable" showing that the official possessed information necessary to the case.

## Civil Procedure

Addressing what it termed "two arcane issues of subject matter jurisdiction," the Ninth Circuit held, in a case of first impression, that (1) alien corporations are subject to the provisions of 28 U.S.C. 1332(c) (which states that, for purposes of determining diversity jurisdiction, a corporation is a citizen of both the state in which it was incorporated and the "state" of its principal place of business); and (2) a subsidiary's activities should not be considered for purposes of determining the parent corporation's "principal place of business" absent a showing that the subsidiary is merely an alter ego of its parent. *Danaq, S.A. v. Pathe Communications*, 92 Daily Journal D.A.R. 15253 (Nov. 13, 1992).

The Ninth Circuit affirmed a trial court's dismissal of a diversity action initiated by a Swiss corporation against a California defendant. In dismissing the case, the court found that, although the plaintiff's "state" of incorporation was Switzerland, it performed substantial business activities in California, and therefore maintained its "principal place of business" in that state. The court rejected the plaintiff's argument that the court should consider the activities of its subsidiary, based in London, England, for purposes of determining the plaintiff's principal place of business. As the court noted, "Danaq's principal place of business is where its own activities, not [its subsidiaries], are centered."

The California Supreme Court held in *Kowis v. Howard*, 92 Daily Journal D.A.R. 15009 (Nov. 9, 1992), that a Court of Appeal's summary denial of a petition for writ of mandate or a petition for writ of prohibition *cannot*, without issuance of a written opinion and the opportunity for oral argument, establish law of the case. In *Kowis*, the California Supreme Court found that the Fourth District

(Continued on page 8)

Depositions and Discovery:  
Overkill Practices

One of the hottest topics on the trial seminar circuit these days is the question of whether attorneys spend too much time and money on depositions and other discovery. Overkill discovery practices not only harm our reputations but artificially inflate litigations costs and deny legal representation to many who simply do not think they can afford it.

Regrettably, even the best intentioned attorneys engage in overkill discovery practices because of a commonly-held belief that you can't get hurt by obtaining more discovery than you need. After all, nobody has ever heard of an attorney being sued for negligently taking too many depositions! Perhaps, but in today's competitive legal market, sophisticated clients are demanding more bang for their legal buck.

There is little dispute that the discovery process devours legal time and resources and is therefore typically the most expensive part of prosecuting a case through trial. A fortiori, if lawyers are going to meet the challenge of providing efficient representation without compromising the quality of such representation, a new approach to discovery must emerge.



Larry C. Russ

It is almost ironic that depositions (the most expensive discovery tool) are the most abused and misunderstood discovery device. It is not unusual for attorneys to give little thought to noticing a plethora of depositions at the beginning of a case without devising a detailed discovery plan or thinking about the impact of the depositions on litigation strategy. More often than not, however, noticing multiple depositions at the beginning of a case is a bad way to begin.

Other than pure discovery depositions (those used to identify the types of documents available, recordkeeping practices, corporate organization and structure, etc.), it is rarely a good idea to take the depositions of potentially key witnesses at the beginning of a case. To begin with, almost every case goes through an evolution process during which the legal theories and facts evolve and become clarified over time. It is not unusual for legal theories to change dramatically from the beginning to the end of a matter. Consequently, if one takes key witness depositions too early there will inevitably be essential issues which will not have been adequately explored. There may be no legal justification to recall a witness for another deposition. Consequently, an attorney may be forced into the precarious position of going into trial blind to significant facts and issues.

Economical discovery tools such as interrogatories, requests for documents and requests for admissions should be utilized early in a case, not only as a method of obtaining important information, but also as a means to test the accuracy of your pleadings. If, on the basis of these discovery vehicles, you have managed to assemble the foundation of your case, think very carefully about the pros and cons of taking key witness depositions.

On occasion, taking fewer depositions or limiting the scope of depositions effectively denies your adversary exposure to your legal theories early in the case or ever. As a general rule, we do not sufficiently consider the impact of depositions on educating the

(Continued on page 7)

to an owner attempting to escape responsibility for environmental conditions arising during or prior to his ownership. Rescission of the underlying contract is an option to consider in the event a seller has breached representations concerning environmental conditions or unexpected pre-existing contamination is discovered. Miller, *Current Law of California Real Estate*, vol. 9, 29:51 (1990); New Jersey's Environmental Clean-Up Act (purchaser has the option to rescind purchase contract when seller fails to comply with laws requiring testing and certification requirements).

An 'as-is' clause generally does not transfer liability imposed by the government under the Comprehensive Environmental Recovery Compensation and Liability Act, commonly known as CERCLA or federal Superfund law. That is the case, even if the purchaser has agreed contractually to indemnify the seller against such liability. See CERCLA § 107(e)(1), 42 U.S.C. § 9607(e)(1) (1988). That statute contains seemingly conflicting language regarding indemnification, but it has generally been construed as allowing a person charged with responsibility for clean-up under CERCLA to allocate the costs of liability among others. The 'as-is' clause will not bar the purchaser from suing the seller for contribution to the extent the purchaser is obligated to pay remediation costs.

Generally speaking, an 'as-is' provision is merely a warranty disclaimer and as such precludes only claims based upon breach of warranty. It does not act to shift liability from one party to an agreement to another and is inapplicable to a cause of action which is not based on breach of warranty. *Southland Corporation v. Ashland Oil, Inc.*, 696 F.Supp. 994, 1001 (D.N.J. 1988).

Some courts have relied upon the contract law concepts of mutual mistake and rescission to hold that the 'as-is' language fails to allocate conspicuously and precisely the burden of environmental liability. The doctrine of rescission due to mutual mistake provides a way for courts to reject the common meaning of the 'as-is' clause and hold the vendor liable for environmental problems.

#### Other Causes of Action May Still Be Available

The Ninth Circuit has held that a simple 'as-is' clause is only a disclaimer of warranties, and may only serve to bar actions based upon a breach of warranty. Other causes of action, such as actions under CERCLA, RCRA, state statutory liability under environmental laws, tort, nuisance, trespass, fraudulent non-disclosure, contract misrepresentation, and deceptive trade practice actions may still be pursued, notwithstanding the 'as-is' clause. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986); See also *Wiegmann and Rose International Corp. v. N.L. Industries*, 735 F.Supp. 957 (N.D. Cal. 1990) (as-is clause is merely a disclaimer of warranty).

In contrast, a document incorporating language releasing a party from "all claims arising out of or in any way relating to the Purchase Agreement" or language to that effect, can act as a complete and broad general release for state and federal causes of action. *Mardan, supra*, at 1461 (interpreting a lease under New York law).

As discussed above, CERCLA does not relieve a potentially responsible party (PRP) of liability from the government despite the existence of an express indemnification or a hold harmless agreement between the buyer and seller of property.

Section 107(e)(1) has been held to allow contractual indemnity releases between private parties. *Southland Corporation, Inc., supra*. To be effective, an indemnity clause or release must be clear and explicit. General language has often been struck down as

insufficient. In *Southland*, the court held that, for indemnification to be effective there must be some clear transfer or release of future "CERCLA-like" liabilities. The language must be clear and unambiguous. See also *Mardan v. C.G.C. Music, Ltd., supra*, 804 F.2d 1454.

As the impact of CERCLA and other environmental laws has become more widely understood, 'as-is' clauses, hold harmless provisions, and indemnification agreements have become increasingly important in determining the parties' respective liabilities. While decisions in different jurisdictions have varied, generally they suggest that it is important to consider the parties' pre-closure understanding of the intent of the 'as-is' provisions. In *Mardan*, the court emphasized the importance of the parties' prior knowledge of the existence of contamination, the fact that the parties specifically addressed the possibility that corrective action would be required, and the fact that CERCLA had been in existence for over a year at the time the settlement agreement was executed. Other courts have placed considerable weight on the buyer's opportunity to perform a pre-sale inspection. No court has relieved a party of its duty to fully disclose all known defects. These factors should be considered by an attorney representing a client in a cost recovery action.

California courts have recognized that Congress intended former owners of contaminated properties to be liable to current owners for any contamination that occurred during the time they owned the property (42 U.S.C. Section 9607(a)(2)); and that the statute provided that liability under Section 107(a) is strict, subject only to certain enumerated defenses (Section 9607(b)). No general hold harmless agreement or conveyance is effective to transfer liability under Section 107(a) away from a responsible party.

In summary, given the enormous financial impact of contaminated property remediation costs, careful and thoughtful analysis of the sale documents is fundamental to trial preparation. The environmental risk allocation clauses in sales agreements are critical. Each transaction will be fact specific, and there is no single strategy that applies to every situation. The attorney representing a party in such a lawsuit needs to be familiar with the evolving law in the environmental area. The arguments of counsel in interpreting the sale agreement is the key to many cases and is limited only by the wings of the imagination of counsel, and the degree of knowledge and experience counsel brings to that argument.

We should all remember the words of Lewis Carroll from *Through the Looking Glass*; "When I use a word", Humpty-Dumpty said, "it means just what I choose it to mean—neither more nor less."

We should also remember what happened to Humpty-Dumpty.

— Craig J. de Recat

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which trial lawyers have spent so many (frequently unproductive!) hours. The move to individual calendaring is a natural outgrowth of the "fast track" system established by the Trial Delay Reduction Act. Recognizing that "fast track" was an idea whose time had come, ABTL has actively supported the Superior Court in its implementation of the Trial Delay Reduction Act. Peter Ostroff, Jeff Weinberger and John Dito have participated in a standing bench/bar Committee concerned with making the fast track system more effective.

I suspect that most business litigators favor an individual calendaring system, at least in the abstract, since it affords the trial judge the opportunity to become knowledgeable about the case well before trial while it discourages frivolous law and motion proceedings and other "game-playing" (since any negative fall-out directly impacts the trial judge's view of the case).

According to Superior Court statistics, individual calendaring also results in earlier trial dates. Attorneys seeking a favorable reception for summary judgment motions may find more receptive judges under an I/C system, where the trial judge is already familiar with the case and must try the case if the motion fails.

Although the real world of Superior Court I/C case administration achieves some of these advantages, problems remain, particularly when the case does not settle. To achieve quality in the trial of cases, judicial overload is Enemy Number One and, unfortunately, a prevailing enemy in our Superior Court. When courts are presented with an overwhelming volume of cases, the advantages of an I/C system can become outweighed by countervailing disadvantages: "firm" trial dates with last minute court-mandated continuances, strong pressures to siphon cases out of the system into "voluntary" (but client-financed) ADR procedures, stringent limits on the time for trial—or the time for specific tasks such as voir dire, argument and witness examination—and disjointed and inefficient trial schedules. Indeed, some of the "waiting time" previously spent in Department One, may now be spent waiting for the I/C judge to deal with the rest of the pressing caseload in order to "return" to the trial of case at hand.

Faced with these pressures, the performance of most Superior Court I/C judges is impressive, and in some cases truly amazing! These realities suggest that trial lawyers sharpen their advocacy skills—both written and oral—in compressing case presentations without losing their impact.

The downside of the I/C system in light of current caseloads and judicial personpower suggest, however, the pressing and increasing need for adequate financing of the system and additional judicial officers. Without that, I fear the quality of justice will suffer, despite even heroic efforts by our present judges.

### The Business Court

One proposal for achieving more effective trial of business cases is the "Business Court" idea, under which a separate court, or certain departments of an existing court, would be devoted *exclusively* to the adjudication of business cases. The rationale for this concept is that the assignment of judges with extensive business litigation backgrounds to the trial of only business cases will result in more consistent, fair and prompt adjudication of business cases. This concept has been studied in depth by the Business Court Committee of the State Bar Business Law and Litigation Sections, with the participation of ABTL past Presidents Peter Ostroff and Mark Neubauer, with surveys of experiments with the concept in other states, including New York and Pennsylvania. There is, of course, the model of the Delaware Chancery Court, with its deserved reputation for sophistication in the adjudication of corporate law cases.

Most recently, Superior Court Judges Robert Mallano and Robert O'Brien have cooperated with the State Bar committees in supporting a Pilot Project for a Business Court Department within the Los Angeles Superior Court. The Pilot Project would be governed by new Local Rules, drafted by Judge O'Brien, under which certain L.A. Central Civil Trial Departments would be designated as the "Business and Commercial Trials Department." Civil Cases could be designated by either party as a business and commercial, or "BC," case, and assigned by the Court to the Department. Cases classified as "Business or Commercial" would include those involving breach of contract or fraud in the purchase of sale of securities; purchase or sale of businesses; mergers; transactions involving commercial real or personal property; partnership, shareholder or joint venture agreements; franchise, distribution or licensing agreements; shareholder derivative actions; corporate dissolution or liquidation cases and actions involving liability and indemnity of corporate directors and officers (including breach of fiduciary duty actions). Such cases would also include those regarding the internal affairs of a corporation; commercial loans (including failures to make them); actions involving unfair competition and interference with business relations; as well as breach of contract or declaratory relief actions involving insurance in commercial related fields.

While the practical impact of such a Department could only be measured over time, it surely would meet one of the commonly-voiced complaints of business trial lawyers: that their cases are too often assigned to judges with little or no background in business or business law.

Both of these developments—the move to individual calendaring and the proposed Business and Commercial Trials Department—can be viewed as moves toward increased efficiency in the Court's effort to cope with its massive caseload and limited resources. While these efforts surely should be supported by the trial bar, it is difficult to avoid the unpleasant fact that the quality of justice administered by our court system will continue to suffer until the root problem is addressed: too many cases, too few judges.

—Richard R. Mainland

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### Depositions and Discovery

Continued from page 5

other side about legal theories and nuances adverse counsel may never have thought about. We are not talking about hiding the ball as far as complying with legitimate discovery requests. What we are talking about is not going out of our way to expose key defenses and or theories in the deposition process which may not, on clear reflection, meet a cost benefit test.

Accomplished plaintiffs' contingency lawyers usually develop keen intuitive skills about defining the scope of discovery consistent with the nature and complexity of a given case. Few would survive if they consistently misallocated costly legal resources to a case. Those of us who generally charge by the hour need to develop the same skills for the benefit of our respective clients' economic survival.

When mapping out your discovery strategy, try to piece your case together with the fewest possible witnesses and documents. Then proceed to add layers as absolutely necessary. Since your decisions will have an obvious impact on the cost of litigation as well as the likelihood of success, take every opportunity you can to involve your client in the decision-making process.

Clients should share responsibility with an attorney who elects to undertake an abbreviated discovery strategy in a given case. This sharing process has the dual effect of actively managing litigation costs and providing your client with budget choices that should not be made by you alone.

—Larry C. Russ

## Cases of Note

Continued from page 5

Court of Appeal had erred in refusing to consider on appeal a defendant's request to have certain admissions set aside on the ground that the defendant previously had petitioned for and been denied a writ of mandate. Although the Court of Appeal had found that the prior denial of the writ amounted to a denial based on the merits, thereby creating "law of the case" which was binding, the Supreme Court held to the contrary, noting that "important incidents" of the right to appeal a trial court's judgment are the right to a written opinion (in compliance with state constitutional requirements) and the right to oral argument. A summary denial of a writ petition, issued in the absence of such "incidents" simply cannot become binding law of the case.

### Service on a Japanese Corporation

The Sixth District Court of Appeal recently held that service of process by certified mail to a Japanese corporation is not valid under the Hague Convention. In *Honda Motor Co., Ltd. v. Superior Court*, 10 Cal. App.4th 1043 (1992), the Court of Appeal issued a writ of mandate ordering the trial court to issue an order quashing the plaintiff's service of a summons and complaint which had been delivered directly to Honda in Japan via certified mail. In issuing the writ, the court rejected the plaintiff's argument that the Hague Convention does not preempt California statutes authorizing service by mail on foreign nationals. Noting that the Hague Convention authorizes service only (1) through a central authority in the country; (2) through diplomatic channels; or (3) through any method permitted by internal law of the country in which service occurs, the court found direct service by private mail to be impermissible in Japan and thus impermissible under the controlling treaty. The court also acknowledged that service was defective because Japanese law requires documents served under the Hague Convention to be accompanied by a Japanese translation.

### Intellectual Property

In *Sega Enterprises Ltd. v. Accolade, Inc.*, 92 Daily Journal D.A.R. 14275 (October 21, 1992), the Ninth Circuit addressed several questions of first impression regarding copyright and trademark laws. In reversing a district court's entry of a preliminary injunction which prevented Accolade, a manufacturer of computer "game" software, from "reverse engineering" Sega's game software to produce and distribute Sega-compatible software, the Ninth Circuit made two important rulings. First, it held that under the Copyright Act, companies which are neither copyright holders nor licensees may disassemble copyrighted computer programs to gain an understanding of unprotected functional aspects of the plan, provided that the disassembling company has a legitimate reason for doing so and that no other means of access to the unprotected elements exist.

In so holding, the court recognized that in such limited circumstances, disassembly is, as a matter of law, "fair use" of a copyrighted work. Second, the Court held that where a computer manufacturer restricts access to its computers to software which contains a security code which displays the manufacturer's trademark, the competitor does not violate the Lanham Act by manufacturing cartridges which display the manufacturer's trademark, even if the trademark misleads the public into believing that the manufacturer approved or produced the competitor's software, if, under the circumstances, there is no other method of access to the manufacturer's computer which is "known as readily available" to the competitor. In a lengthy opinion, the Court also considered the public policies underlying the Copyright Act and the Lanham Act, and discussed issues of fair use, intermediate copying and the distinction between ideas and expressions, and their respective

coverage (if any) under the Copyright Act. Although the *Sega* opinion is lengthy and must be reviewed in full to appreciate its significance, the practical effect of the Court's holding was to allow Accolade to continue its "reverse engineering" of Sega's software and its use of Sega's security code (which displays Sega's trademark) to manufacture Sega-compatible software during pendency of the litigation.

The Ninth Circuit Court of Appeals affirmed the existence in California of the tort of "voice misappropriation," holding that this state-based cause of action is not preempted by federal copyright law. In *Tom Waits v. Frito-Lay, Inc.*, 92 Daily Journal D.A.R. 13682, the Ninth Circuit was asked to examine the validity of a \$2.6 million judgment which singer Tom Waits had obtained in a jury trial against Frito-Lay and its advertising company for producing a snack food commercial with a Waits "sound alike" singing one of Waits' hits. In affirming the jury verdict, the Ninth Circuit rejected Frito-Lay's claims that federal copyright law preempted California's tort of "voice misappropriation" (a derivative of violation of the right to publicity), noting that the gravamen of Waits' claim was for infringement of voice, and not for holding, the Court affirmed its prior decision in *Midler v. Ford Motor Company*, 849 F.2d 460 (9th Cir. 1988) in which the Court first recognized the tort of voice misappropriation, and stated that the elements of the tort include the deliberate misappropriation for commercial purposes of (1) a voice that is (2) distinctive, and (3) widely known. The Court then went on to hold that Waits was entitled to recover damages for emotional distress, injury to future goodwill and publicity, and punitive damages, given the fact that he had satisfied his burden of proof on each of these issues.

The Court also recognized that Waits could recover against Frito-Lay under Section 43(a) of the Lanham Act, holding for the first time that false endorsement claims are cognizable under the Act.

### Privacy Rights

The First District Court of Appeal recently stressed an employee's right to maintain the privacy of his or her personnel file in *Harding Lawson Associates v. Superior Court*, 92 Daily Journal D.A.R. 13965. In *Harding*, a plaintiff seeking damages for her alleged wrongful discharge propounded 120 document production requests, including one for production of private personnel files of her former co-workers. Although the trial court initially approved the plaintiff's request and ordered production of the personnel files, the Court of Appeal found that the trial court had erred in ordering such production. In issuing a writ of mandate ordering the trial court to vacate its order, the Court of Appeal noted that in most circumstances, the public interest in preserving confidential information, such as a third-party's employment records, generally outweighs a private litigant's interest in obtaining confidential—albeit potentially relevant—information. As a result, the Court found that, on balance, courts will favor privacy for confidential information contained in third-party personnel files unless a litigant can show that there is: (a) a "compelling need" for the documents; and (b) that the information contained in the documents cannot reasonably be obtained through depositions or from non-confidential sources. The Court also noted that, even when disclosure is warranted, courts must take care to narrowly tailor the scope of disclosure.



Mary Lee Wegner

— Mary Lee Wegner