ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

LOS ANGELES

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SLAPPING COBRAS

Hon. Brian M. Hoffstadt

These days, the percentage of civil lawyers unfamiliar with anti-SLAPP litigation is about the same as the percentage of airline passengers who need a video on how to buckle a seatbelt—that is to say, very small.

That is because anti-SLAPP litigation is ubiquitous. Since our Legislature enacted our anti-SLAPP statute in 1992, the anti-SLAPP statute and its close cousin, the SLAPPback statute, have generated no fewer than 20 California Supreme Court decisions, 480 published Court of Appeal decisions, and 2,500 unpublished Court of Appeal decisions. And the pace of this litigation shows no signs of slowing; right now, there are four anti-SLAPP cases pending before the California Supreme Court. *See Baral v. Schnitt*, review granted May 13, 2015, No. S225090; *Barry v. State Bar of California*, review granted Nov.

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— INSIDE —

APPEALS IN MULTI-PARTY CASES: ARE THE FEDERAL AND STATE SYSTEMS REALLY SO DIFFERENT?

Laura W. Brill

Common wisdom has it that one of the most significant differences between state court and federal court appellate practice in California relates to the types of orders that are sufficiently final to be immediately appealable.

In the federal system, under 28 U.S.C. § 1291, the appellate courts have jurisdiction over "all final decisions of the district courts of the United States." Under Federal Rule of Civil Procedure 54(b), the default rule is that a district court judge may not direct entry of judgment as to fewer than all claims or all parties.

Leading state court appellate treatises report, in contrast, that a civil action is final and immediately appealable when it is final as between some, but not all, parties. The CEB Guide, for example, states: "In California, a ruling resolving all issues between any one set of adverse parties is immediately appealable." Elliot L. Bien & Jocelyn S. Sperling, *Is the Order or Judgment Appealable?*, in California Civil Appellate Practice, vol. 1, § 3.51, p. 3-29 (3d ed. May 2015).

A closer look shows that the difference between state and federal court procedure on this point may not be so stark after all.

On the federal side, district courts retain discretion under Rule 54(b) to direct entry of judgment as to fewer than all claims or all parties if the judge "expressly determines that there is no just reason for delay." A district court also has the power to certify, under 28 U.S.C. § 1292(b), that the case involves "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The party desiring an immediate appeal may then petition the Court of Appeals to accept the appeal.

The basic point is that federal district courts do have

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PRESIDENT'S REPORT

Bryan A. Merryman

Our editors have put together another interesting issue of the ABTL Report with the help of a number of esteemed contributors. I want to thank them for their continued excellent work on behalf of the organization. We have a lot to look forward to over the next few months, and I will cover some of those events here. First, however, I want to thank our panelists and highlight our recent successful programs.

On January 12, 2016, Judge Philip Gutierrez moderated a lunch program featuring Chief Judge George King and Kiry Gray, the Clerk of the U.S. District Court for the Central District of California, and Presiding Judge Carolyn Kuhl and Sherri Carter, the Clerk of the L.A. Superior Court, on helpful tips and lessons for all practitioners. The program was interesting and helpful to practitioners at all levels.

On February 9, 2016, Judge Suzanne Segal moderated a program introducing four of our recently appointed magistrate judges in the Central District – Judge Alexander F. MacKinnon, Judge Douglas F. McCormick, Judge Rozella A. Oliver, and Judge Karen L. Stevenson. The program provided the large crowd with a lot of specific information regarding their backgrounds and helpful tips and also more general information regarding the direct assignment program. We have quite an impressive group of magistrate judges in the Central District and several options available to better utilize their talents in your cases.

On March 22, 2016, Judge Mary Strobel moderated a panel titled "Anti-SLAPP: Public Participation, the First Amendment and You." The panel featured prominent practitioners in this area – Keri Borders, Thomas Burke, and Matt Kline. Thank you to our panel for updating us on this area of the law and for providing practical tips on how to use the law to our advantage and avoid its use against our clients.

We are planning topical programs covering high profile issues for our final dinner program in April and our final lunch program in May. I hope to be able to announce our exciting plans soon. We will conclude the year with our annual judicial reception on June 14, 2016. The reception is always one of our more popular events as it allows our members an opportunity to catch up with friends before the ABTL takes its summer vacation.

The ABTL is committed to our community and public service. In addition to speaking engagements at local schools, our annual toy drive, assisting with court funding efforts, etc., each year the ABTL offers a $2,000 scholarship to a student at each of the five accredited law schools in Los Angeles County. At the dinner program on February 9, 2016, the ABTL presented scholarships to deserving students who have demonstrated both academic success and a commitment to public

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ASSOCIATION OF BUSINESS TRIAL LAWYERS
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8502 E. Chapman Avenue, Suite 443
Orange, California 92869
(323) 988-3428 · Fax: (714) 602-2505
Email: abtl@abtl.org · www.abtl.org

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service. The recipients of the 2016 ABTL scholarships were Arlene Elyasi of Loyola Law School, Mark Montgomery of Pepperdine Law School, Vira Samouhi of Southwestern Law School, Daniel Leneck of UCLA School of Law, and Alexander Brown of USC Gould Law School.

Our 2016 Annual Seminar will be held October 5-9, 2016, at The Ritz Carlton, Kapalua in Maui. The theme for the 2016 program will focus on technical evidence – how to find it, put it into the record, and present it in a way that the jury understands it. As always, you will hear from the state's leading trial lawyers and judges. This will be the ABTL's return to Maui after several seminars on other islands. We have secured a great room rate, and you will not be disappointed with the hotel and its beautiful surroundings. Make sure to sign up for the seminar and reserve your room early, as we have had space constraints in recent years for the seminar due to its popularity. This year will be no different. You can sign up at abtl.org. I hope you will be able to join us.

Finally, if you are reading this ABTL Report, you are probably already a member of the ABTL. This excellent publication is one of the many members-only benefits of our organization. If you have not yet renewed your membership for 2016, you can do so on our website at abtl.org.

See you at the Biltmore!

Bryan A. Merryman
White & Case LLP
ABTL President, 2015-2016

YLD UPDATE

Aaron Bloom

Rachel Feldman

Ben Williams

The Young Lawyers Division of the ABTL is off to an exciting start in 2016. The Hon. André Birotte Jr. hosted an interesting, well-attended judicial brown-bag in January 2016 concerning tips and tricks for oral advocacy. Approximately 30 young lawyers attended the informative and enjoyable event, which led to an engaging Q&A.

The YLD also hosted a happy hour at Border Grill in February 2016 for all young lawyers in the ABTL with less than 10 years of experience. The event brought together more than 40 lawyers to network, socialize, and learn more about the ABTL. The young lawyers who attended stated that they appreciated the opportunity to meet in a casual, social setting with other young lawyers. "I think that YLD happy hours are a fantastic opportunity to both catch up with classmates, co-counsel, and opposing counsel and make new connections," said Aaron Bloom, co-chair of the YLD.

The YLD is looking forward to hosting its annual judicial mixer in April 2016. "The specific date and location are still TBA, but we guarantee the event will be another great opportunity for the judiciary and the ABTL's newer members to come together for an evening of networking and fun," said Rachel Feldman, co-chair of the YLD. "The mixer allows conversations between distinguished members of the judiciary and young lawyers in an intimate setting, exactly what we aim to achieve."

The YLD also looks forward to hosting a panel and additional brown bag lunches this spring/summer. "Keep an eye out for more email invitations coming from the YLD. We have some great events in the works," said Ben Williams, co-chair of the YLD.

For any questions about the YLD, please feel free to reach out to Aaron, Rachel, or Ben.

***Aaron Bloom** is an associate at Gibson, Dunn & Crutcher LLP in Los Angeles and Co-Chair of the Los Angeles ABTL YLD.*

***Rachel Feldman** is a partner at White & Case LLP in Los Angeles and Co-Chair of the Los Angeles ABTL YLD.*

***Ben Williams** is an associate at Morrison & Foerster LLP in Los Angeles and Co-Chair of the Los Angeles ABTL YLD.*

THE INSIGHT INTERVIEW

Craig Gatarz

The Insight Interview features interviews with leading jurists, lawyers and business executives. The series focuses specifically on practical, real-world advice for lawyers in their first 10 years of practice.

This installment features Craig Gatarz, Executive Vice President and General Counsel of The Honest Company, the Santa Monica-based startup dedicated to creating eco-friendly, effective and affordable products for babies and their homes. The company, founded in 2011 by Jessica Alba, Christopher Gavigan, Brian Lee and Sean Kane, is currently valued at approximately $1.7 billion, according to the Wall Street Journal.

Steven Feldman

After law school, you spent about 10 years in private practice focusing on corporate finance work before taking an in-house job at a startup. What made you decide to make the move in-house?

One of the reasons was that I did not want to be a full-time lawyer anymore. My goal moving in-house was to focus on the business side, which is more fun for me, and to expand my portfolio to operational matters.

Was it difficult to obtain a business role, in addition to your role as general counsel, once you moved in-house?

For startups in Silicon Valley, Silicon Beach or Silicon Alley, it is more likely than not that making the move to the business side is largely a matter of demonstrating your worth and business acumen to the founder and/or CEO. You have to show that, in addition to being a trusted legal advisor, you will also be a strategic contributor to the business.

As the General Counsel of The Honest Company, what is your typical day like?

There is no typical day. But even though every day is different, there are certain buckets you deal with more than others. I currently oversee legal, compliance, human resources, and facilities, as well as Honest's "Social Goodness" programs, where we focus on partnering with institutions and programs that foster health and safety for families and children around the world. On the legal front, we're a fairly small legal group, with three in-house attorneys in our Santa Monica offices. We tend to focus most of our time on commercial matters, compliance issues and product development, as well as protecting the company's intellectual property.

For those attorneys who want to go in-house and play a role on the business side, are there specific skills you would advise them to develop while at a law firm to best position themselves?

There is always going to be culture shock when you leave a firm where your life is fairly well compartmentalized. At a firm, you may have five matters, but when you go in-house at a startup you need to be able to do 50 things at once – and you need to be able to do them efficiently and well. You also need to be able to make decisions quickly and then move on, without second-guessing and looking back. It is all about moving the business forward, and ensuring that – as a lawyer – you do not become a block to things the business side wants to do. Being a self-starter is also very important.

There is a common belief that if you're a lawyer who eventually wants to go in-house, you should practice corporate law over litigation while working at a law firm. Do you agree?

Generally, I would say it is better to spend time as a corporate lawyer. When in-house at a startup, on a day-to-day basis you are typically the only person in the legal department. The business side relies on you to get deals done, and corporate lawyers are generally better

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equipped to handle such situations because they've seen and worked on more corporate deals and agreements than litigators. Also, broadly speaking, corporate lawyers are trained to find solutions while litigators are trained to resolve disputes. Those are quite different skills, and on the business side, you are trying to get deals done quickly.

That said, there are caveats. For example, if you want to work in-house at a large corporation with major litigation needs or if you are interested in focusing on intellectual property and patent work, then being a litigator is an advantage.

What do you look for when hiring in-house counsel?

You have to be a really smart lawyer with a good head on your shoulders. You also cannot be someone who over-lawyers things – which is my biggest pet peeve about certain law firm lawyers. All the client needs is the answer – we don't need it wrapped in a Tiffany's box in the form of a long memo. That said, I do believe that law firm training is a strong basis for people to use as a jumping-off point. Still, it's not a prerequisite – I have seen successful general counsels who have been in-house their entire careers.

What do you look for when hiring outside counsel?

They need to be super smart and experts in their field. I have had close relationships with a number of lawyers at a number of law firms, and I rely on their counsel not just for legal advice, but for practical advice as well. A good lawyer does both, and can help me assess real-world risk. It is therefore critical that a lawyer understand the client's business.

How would you advise lawyers in their first ten years of practice who want to generate business, but don't know where to start?

The old paradigm was that you generate business by going to networking events. In this day and age, networks are digital and interconnected, and you have the ability to be connected to organizations you may have never known about. So, I think it is incredibly useful to pay attention to what is going on in your own digital network. If you're a junior lawyer, follow what your college and law school roommates are doing. If they are working at interesting companies, that's as useful a connection as anything. When I get pinged from someone who graduated from my law school or college, I always pay attention to see if there's a way I can engage them.

At the end of the day, though, there is no substitute for the good, old-fashioned connections you develop when you meet someone in person, have a conversation and discover he or she just started a new company and needs a lawyer.

Steven Feldman *is a senior associate with Hueston Hennigan LLP in Los Angeles.*

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discretion to promote immediate appealability in appropriate cases even when the action is not final as to all claims and all parties.

Similarly, on the state court side, the issue of appealability in a multi-party case that is not concluded as to all parties may also be a matter of discretion.

California Code of Civil Procedure section 904.1 states that an appeal may be taken from "a judgment." Code of Civil Procedure section 577 defines a judgment as "the final determination of the rights of the parties in an action or proceeding." But section 577 does not specify whether it is talking about the rights of all parties or merely some of them.

Code of Civil Procedure section 578 provides that in a multi-party case, "[j]udgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

Code of Civil Procedure section 579 elaborates on this point, stating: "In an action against several defendants, the Court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

There are two aspects of sections 578 and 579 that may be useful in trying to prevent an immediate appeal in a multi-party case that is not complete as to all parties.

First, both sections 578 and 579 use the word "may," which is a term typically associated with discretion, and section 579 expressly refers to the court's "discretion." *See*, *e.g., Oakland Raiders v. Nat'l Football League*, 93 Cal. App. 4th 572, 578 (2001), *as modified on denial of reh'g* (Nov. 15, 2001) ("Thus, there is ample authority for the proposition that the trial court, ***in its discretion***, may enter judgment in favor of one or more defendants when all issues between those defendants and the plaintiff have been adjudicated…") (emphasis added).

Second, section 578 refers to actions involving "several plaintiffs" and "several defendants," and section 579 addresses actions involving "several defendants." These statutory provisions do not define the term "several." Does it mean more than one? Or does it refer to the concept of severability, as in several liability, as opposed to joint liability. The annotated notes of decision concerning these provisions suggest the latter. In *Mirabile v. Smith*, 119 Cal. App. 2d 685 (1953), for example, the Court of Appeal held that under section 579, entry of judgment against one partner on a joint partnership obligation was improper where liability was joint, and not several.

On the other hand, other decisions include broad language that parties seeking immediate appealability in multi-party actions will cite to suggest that discretion is not available and that there is consequently an absolute right to an immediate appeal.

The case of *Justus v. Atchison*, 19 Cal. 3d 564 (1977), for example, involved claims by two married couples against a hospital and doctors seeking damages arising from still-born births. One question in the case was whether a fetus is a "person" for purposes of a claim for wrongful death. The case was fully resolved against the husbands, but certain claims of their wives remained undecided. The California Supreme Court, without addressing whether the claims of the husbands and wives were joint or several, broadly stated: "It is settled that the rule requiring dismissal does not apply when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party." *Id*. at 568. The Supreme Court went on: "The judgments now before us disposed in each case of all the causes of action in which the husbands are plaintiffs. It is irrelevant that the wives joined with the husbands as plaintiffs in one of these causes of action." *Id*.

It is this broad language that appears to have prompted treatises generally to give short shrift to the issue of discretion and severability that the text of sections 578 and 579 appear to make relevant.

The issue of immediate appealability as to fewer than all parties in multi-party cases is important for numerous reasons. First, in the state court system, a party not appealing timely from an order or judgment later determined to be appealable may lose the chance to obtain appellate review entirely. Second, if an order or judgment in a multi-party action is immediately appealable, the possibility of a stay of further trial court proceedings may substantially shift the relative leverage among the parties in the action. Third, if an order is not immediately appealable, effective relief may be limited to petitioning the Court of Appeal for a writ, with the associated higher burdens. Fourth, if the issue is discretionary, it is important for each side to take steps to encourage the trial court to exercise discretion in the manner favoring its position.

Ultimately, the state and federal appealability rules in multi-party cases may prove not to be so different, after all. In high-stakes business cases, parties should be aware of the potential opportunities to try to have their appeals heard before a case is over as to other parties, or to prevent an adverse party from doing so.

***Laura W. Brill** is a founding partner at Kendall Brill & Kelly LLP, where her practice focuses on media law and appellate litigation. She writes frequently on legal issues. lbrill@kbkfirm.com*

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26, 2013, No. S214058; *City of Montebello v. Vasquez*, review granted Aug. 13, 2014, No. S219052; *Park v. Board of Trustees of California State University*, review granted Dec. 16, 2015, No. S229728.

This is somewhat unexpected because the whole point of the anti-SLAPP statute was to reduce litigation. When enacting the statute, the Legislature's stated goal was to cut down the number of so-called "SLAPP" suits—short for the un-snappy "Strategic Lawsuit Against Public Participation." SLAPP suits are claims or lawsuits brought against people exercising their right to "partake in public affairs" by people who are less concerned with winning and more concerned with using expensive and time-consuming litigation to "harass, intimidate, and punish" people engaged in public affairs. *Hewlett-Packard Co. v. Oracle Corp.*, 239 Cal. App. 4th 1174, 1192 (2015); *see also San Diegans for Open Government v. Har Constr., Inc.*, 240 Cal. App. 4th 611, 621-22 (2015). Our Legislature's means of achieving that goal was the "anti-SLAPP motion"—short for the similarly ungainly special motion to strike under Code of Civil Procedure section 425.16. By filing this motion, a defendant can seek early dismissal of any claim against it that qualifies as a "SLAPP" if the plaintiff cannot come forward with evidence that the claim has "minimal merit." *Navellier v. Sletten*, 29 Cal. 4th 82, 93 (2002); Cal. Civ. Proc. Code § 425.16(b) (West 2016). To encourage anti-SLAPP motions—and to discourage SLAPPs—the party whose anti-SLAPP motion is granted also gets her attorney's fees and costs in litigating the motion. Cal. Civ. Proc. Code § 425.16(c)(1). The party who prevails on an anti-SLAPP motion can also bring a "SLAPPback" lawsuit—that is, an entirely separate malicious prosecution lawsuit for damages. *Id.* § 425.18 (West 2016).

California may have been unacceptably "SLAPP happy" in the past, but it is undeniably "anti-SLAPP happy" today.

Indeed, California's effort to eradicate SLAPPs is a lot like the British government's efforts to eradicate venomous snakes in colonial India. The snakes were biting infants, so the British came up with a plan: Kill a snake, collect a reward. The plan worked fabulously until enterprising folks started breeding venomous snakes in secret in order to lop off their heads and cash them in. The British eventually caught on and stopped its reward program. This, of course, prompted the clandestine snake breeders to release their now-worthless snakes, which in turn caused the number of snakes, and the number of deadly snake bites, to skyrocket—the very result the British were trying to prevent. Whether this story is historically accurate or merely apocryphal is obscured by the mists of time, but it so beautifully describes one aspect of the Law of Unintended Consequences that economists to this day refer to it as "the Cobra effect."

The analogy is admittedly imperfect. Here, our Legislature's attempt to eradicate one type of litigation (SLAPP suits) ended up begetting a different type of litigation (anti-SLAPP motions and SLAPPback suits). But both are types of litigation, much as cobras and rattlers are both types of venomous snake. The analogy nevertheless drives home why it is important to critically examine the solution to a problem.

And if there is one thing that both our Legislature and our courts have been, it is critical of the anti-SLAPP statute. *E.g., Grewal v. Jammu*, 191 Cal. App. 4th 977, 1001 (2011) (noting how "so much . . . of the anti-SLAPP procedure [is] the subject of criticism"). Our Legislature found the anti-SLAPP statute to be subject to "disturbing abuse," Cal. Civ. Proc. Code § 425.17(a) (West 2016), and the courts have less charitably referred to the anti-SLAPP statute as a "cure worse than the disease," *Hewlett-Packard Co.*, 239 Cal. App. 4th at 1196.

So what are the anti-SLAPP statute's defects? Our Legislature and courts have identified several. Three of these identified defects stand out.

First, the anti-SLAPP statute is overbroad. The anti-SLAPP statute was designed to facilitate the dismissal of "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," Cal. Civ. Proc. Code § 425.16(a), but it reaches lawsuits brought without any intent to chill, *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 58 (2002). Instead, the statute extends to "*any* written or oral statement or writing" "made before" or "in connection with" any "legislative, executive, or judicial proceeding" or "*any* other official proceeding"; "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest"; and "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Civ. Proc. Code § 425.16(e) (emphasis added). This definition is so broad one court recently had no qualms assuming it reached the act of serving foie gras as an entrée. *Animal Legal Defense Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1277 (2015).

Second, the anti-SLAPP statute is sometimes ineffectual. Take, for example, the controversy currently brewing over so-called "mixed" claims. These are claims that rest partly on allegations involving activity protected by the anti-SLAPP statute and partly on allegations involving activity that is not. When a court is faced with an anti-SLAPP motion to strike a mixed claim, questions arise: What part of the claim is the court to assess for minimal merit? And if that part lacks

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merit, what is the court supposed to strike? The Court of Appeal has disagreed on how to answer these questions. Some cases hold that courts should focus on the claim as a whole; if any part of it has minimal merit, the court should allow the claim to proceed as alleged. *See, e.g., Mann v. Quality Old Time Service, Inc.*, 120 Cal. App. 4th 90, 100, 106 (2004). Other cases hold that courts should focus on whether the specific allegations regarding protected activity have minimal merit; if they do not, the court should strike those specific allegations but still allow the claim to go forward on the basis of the unstricken allegations involving unprotected activity. *See, e.g., Cho v. Chang*, 219 Cal. App. 4th 521, 527 (2013). The first rule gives plaintiffs a blueprint for insulating their claims from dismissal under the anti-SLAPP statute: Just make sure each claim is a mixed claim that includes non-frivolous allegations involving unprotected activity. *Wallace v. McCubbin*, 196 Cal. App. 4th 1169, 1202 (2011) (so noting). The second rule converts the anti-SLAPP motion from a means of dismissing claims into a tool for making line edits to them, something few litigants would bother to do were it not for the possibility of attorney's fees and costs. Our Supreme Court will likely have to determine which of these rules is the lesser evil when it decides *Baral v. Schnitt*, No. S225090.

Third, the anti-SLAPP statute enables mischief. A trial court's denial of an anti-SLAPP motion is immediately appealable, Cal. Civ. Proc. Code §§ 425.16(i), 904.1(a)(13) (West 2016), and the pendency of such an appeal stays all proceedings before the trial court, *Grewal*, 191 Cal. App. 4th at 1003; *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps*, 99 Cal. App. 4th 1179, 1190 (2002). These provisions make sense in conjunction with the general requirement that anti-SLAPP motions be filed within 60 days of the service of the complaint, Cal. Civ. Proc. Code § 425.16(f), because they operate to get a quick and final ruling before the litigation gets too far along (and too expensive). *San Diegans for Open Government*, 240 Cal. App. 4th at 624. But these provisions can also be used to "'delay meritorious litigation or for other purely strategic purposes.'" *People v. McGraw-Hill Cos., Inc.*, 228 Cal. App. 4th 1382, 1392 (2014) (quoting *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 195 (2005)). That is because the anti-SLAPP statute's appeal provision and the stay of trial court proceedings that comes with it can also operate to communicate the following perverse message: File an anti-SLAPP motion (meritorious or not), "get a free time-out in the trial court." *People ex rel. Lockyer v. Brar*, 115 Cal. App. 4th 1315, 1318 (2004); *see also Hewlett-Packard Co.*, 239 Cal. App. 4th at 1196. What is more, because the statute's 60-day rule has some wiggle room that empowers courts to permit late-filed motions, Cal. Civ. Proc. Code § 425.16(f) (allowing late filing when court "deems [it] proper"), parties can perpetuate this mischief, even on the eve of trial. *E.g., Grewal*, 191 Cal. App. 4th at 985 (motion filed five days before trial); *see also San Diegans for Open Government*, 240 Cal. App. 4th at 624-25 (motion filed 18 months after amended complaint filed).

These defects have not gone unnoticed or entirely unaddressed. In direct response to the anti-SLAPP statute's overbreadth, our Legislature in 2003 enacted two statutory exceptions to the anti-SLAPP statute—one for most lawsuits brought by plaintiffs acting "solely in the public interest or on behalf of the general public," Cal. Civ. Proc. Code § 425.17(b), and another for most lawsuits brought against the sellers of goods or providers of services for misrepresentations involving those goods or services, *id.* § 425.17(c). The courts have carved out a few exceptions themselves—one for lawsuits against lawyers for litigation-related malpractice, *Castleman v. Sagaser*, 216 Cal. App. 4th 481, 491 (2013), and one for lawsuits brought by persons whose conduct is concededly or conclusively illegal, *Flatley v. Mauro*, 39 Cal. 4th 299, 320 (2006). Whether it is appropriate for the courts to have recognized/fashioned such exceptions is the subject of some debate. *See Sprengel v. Zbylut*, 241 Cal. App. 4th 140, 160-63 (2015) (Perluss, P.J., dissenting) (questioning legitimacy of the malpractice exception). And more than one court has called for our Legislature to repeal the anti-SLAPP statute's appeal provision, which would eliminate the attendant automatic stay. *Grewal*, 191 Cal. App. 4th at 1002-03; *Hewlett-Packard Co.*, 239 Cal. App. 4th at 1196.

As this brief survey indicates, the consensus of our Legislature and courts is clear: The anti-SLAPP statute is broken.

What is less clear is what to do about it.

Repealing the anti-SLAPP statute entirely (like Canada did with its statute) is one option, but would repeal touch off a tsunami of SLAPP suits currently held at bay by the anti-SLAPP statute, just like repealing the venomous snake reward program unleashed a tidal wave of snakes over the countryside? Surgical amendments to the statute are also a possibility—and one that our Legislature has previously indicated a willingness to make.

Whichever options we explore, the sooner we start to examine them carefully, the less likely our inaction will come back to bite us.

***Brian M. Hoffstadt** is an Associate Justice of the California Court of Appeal, Second Appellate District, Division Two.*

ENSURING AN INDEPENDENT JUDICIARY

Margaret M. Grignon

As trial lawyers, we need an impartial and independent judiciary to achieve justice. In California, that independence and impartiality may be adversely affected by the fact that Superior Court judges must stand for election every six years and that incumbent judges may be challenged, required to participate in contested elections, and forced to raise campaign funds to ensure their re-election. In 2011, the California Judges Association (CJA) created the Judicial Excellence Together Political Action Committee (JETPAC) to try to ameliorate the negative impact of contested judicial elections on judicial independence and impartiality.

According to a CJA announcement issued when JETPAC was established: "Judges in California face a troubling dilemma: They must raise campaign funds while maintaining the appearance of impartiality required by the Code of Judicial Ethics. For example, whenever a judge receives a campaign contribution of $100 or more, he/she must disclose that contribution in open court every time the donor appears before him/her. If the contribution is $1500 or more, the judge is disqualified from hearing that person's case. While these rules help maintain California's high standards of judicial ethics, they also discourage those who know the judge's performance best--the litigants and lawyers who frequently appear before the judge--from contributing to the judge's campaign for fear the contribution will bar the judge from hearing the case."

The law allows a judge to accept campaign contributions from attorneys and litigants that appear before him or her, but if a contribution is more than $1500, the judge is disqualified from hearing any of the attorney's or litigant's future cases. (Code Civ. Proc., § 170.1, subd. (a)(9)(A).) Canon 3E(2)(b) of the California Code of Judicial Ethics further requires a judge who receives a contribution of $100 or more from an attorney or litigant appearing before him or her to disclose that contribution on the record whenever the litigant or attorney appears in court.

JETPAC is a committee dedicated to an impartial judiciary. It raises funds for judges in order to maintain the judges' impartiality. Contributions to JETPAC are independent of any specific judge's decision making and thus do not compromise any judge's impartiality. Rather than local attorneys, JETPAC supports sitting judges through donors who may never appear in their courts.

Judges are challenged in elections for a variety of reasons, few of which involve judicial competence. Judges are more apt to be challenged when newly appointed, particularly if they can be linked to a locally disfavored political party. Sometimes judges are challenged for making unpopular decisions. Unfortunately, bias may also play a role, resulting in challenges to diverse judges or those with foreign-sounding surnames. Finally, some judges are challenged by perennial opponents (attorneys who simply like to run for judicial office), attorneys who failed to survive the appointment process, and even attorneys facing disciplinary proceedings.

Defending a judicial seat is expensive. The actual cost depends on the county's population, but the average cost of judicial races in 2012 and 2014 was in the $85,000 to $90,000 range. That amount would be much higher in Los Angeles County, for example. Finance reports filed with the California Secretary of State indicate that the majority of campaign contributions come from lawyers--particularly those lawyers who appear in the challenged judge's court and know the judge.

Here's how JETPAC works in a nutshell. JETPAC is made up of a seven-member board. The board investigates each race and votes on whether to make a contribution to each challenged judge. JETPAC distributed campaign funds to 19 challenged judges in 2012 and to 16 challenged judges in 2014. The amounts were not large, ranging from $250 to $2,000 per judge, depending on the perceived need and the perceived strength of the judge's opponent. In 2016, JETPAC hopes to be able to distribute even more funds to challenged judges. But the anticipated 2016 distributions still will be only a small fraction of the campaign funds challenged judges will need.

As trial lawyers, we can play an important role in upholding an independent and impartial judiciary. By contributing to JETPAC, we can assist in the effort to allow judges to fund judicial campaigns other than by direct contributions from the attorneys and litigants appearing before them. Contributions to JETPAC also obviate the awkwardness of direct contributions to the campaign of a judge before whom an attorney is actively appearing. Finally, contributions to JETPAC do not require the judge to make disclosures on the record and do not result in mandatory disqualification of the judge. The approach of a new judicial election cycle is a great time to consider making a contribution to JETPAC.

Contribution forms may be found on the CJA website:
www.caljudges.org/JetPAC.asp

Contributions also may be sent to:
California Judges Association--JETPAC
2520 Venture Oaks Way, Suite 150
Sacramento, CA 95833

***Margaret M. Grignon** is a partner with Grignon Law Firm LLP, a firm specializing in appellate law. She is also a retired Court of Appeal justice and a member of the JETPAC Board. The views expressed here are her own.*

NEW LEGISLATION AIMED AT UNCLOGGING CALIFORNIA COURTS

Brian S. Kabateck

Levi Plesset

Several bills designed to facilitate settlement, streamline jury trials, and reduce inefficiency were recently chaptered and came into effect on January 1, 2016. AB 1141 (summary adjudication motions and offers to compromise) and SB 383 (meet and confer prior to demurrer) were sponsored by both the Consumer Attorneys of California ("CAOC") and California Defense Counsel, in an effort to unclog dockets and obviate the calendaring of trials several years away. CAOC also sponsored AB 555, which makes expedited jury trials mandatory for many limited jurisdiction cases and extends the sunset for voluntary expedited jury trials in all other cases.

AB 555 (Alejo, 2015-2016 Reg. Sess.) was signed by Governor Brown on September 28, 2015, and mandates expedited jury trials in many limited jurisdiction cases and provides an avenue for expedited jury trials in all other cases when both parties so desire. The author, Assembly Member Luis Alejo, explained that this bill expands the expedited jury trial ("EJT") option, which was implemented in 2011 to help courts deal with overloaded dockets resulting from major budget cuts and courtroom closures. (Assem. Floor Analysis of Assem. Bill No. 555 (2015-2016 Reg. Sess.) as amended Aug. 26, 2015, p. 4.) "EJTs are ideal for cases involving smaller dollar amounts that do not involve catastrophic injuries and cases that affect lower-income workers. These cases are prone to being lost in the system and leaving vulnerable Californians without compensation." (*Ibid.*)

Also chaptered on September 28th, and in furtherance of judicial expediency and economy, AB 1141 (Chau, 2015-2016 Reg. Sess.) authorizes state courts to summarily adjudicate portions of causes of action or affirmative defenses. Previously, summary adjudication was generally limited to rulings resolving an entire cause of action or affirmative defense. Until January 1, 2015, Code of Civil Procedure section 437c allowed for the parties to stipulate to resolve legal issues not expressly resolving a claim, cause of action or duty. That provision sunsetted on December 31, 2014. AB 1141 reactivated the right of parties to stipulate to resolve important legal issues by summary adjudication even if not expressly covered in section 437c.

AB 555 and AB 1141 present practical solutions to balance the competing priorities of (1) access to courtrooms and (2) expediency in the face of an overwhelmed docket. Adjudicating issues by way of motions for summary adjudication allows courts to dispose of legal issues prior to trial and to streamline trials by narrowly focusing on the disputed issues that the parties are unable to resolve. Expedited jury trials began in California in 2011 and were modeled after a Charleston, South Carolina procedure introducing EJTs with reduced jury size, flexible rules of procedure, and a goal of completing trial in one day. (See Assem. Floor Analysis of Assem. Bill No. 2284 (2009-2010 Reg. Sess.) as amended Aug. 18, 2010, p. 7.) Expanding EJTs by making them mandatory in smaller cases should both allow efficiency in smaller cases and give less experienced lawyers an opportunity to quickly try cases.

In addition to the summary adjudication amendment, AB 1141 revises the Code of Civil Procedure to create parity between plaintiffs and defendants by allowing a court to order either party to pay the opposing party's post-offer expert witness costs when the opposing party rejects a section 998 settlement offer and then receives a more favorable judgment or award at trial. This bill corrects a 2005 drafting oversight, allowing a defendant to recover both pre- and post-998 offer expert costs, but permitting a plaintiff to recover only post-998 offer costs. As explained by one court, the policy of section 998 is to encourage settlement by providing a severe penalty for failing to settle when the result after trial is less favorable than the pretrial offer. (See *Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804.) Both carrots and sticks encourage and facilitate settlement.

Lastly, SB 383 (Wieckowski, 2015-2016 Reg. Sess.), signed into law on October 1, 2015, requires the parties to meet and confer prior to the filing of a demurrer in order to discuss its anticipated substance, similar to the Central District of California's Local

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Rule 7-3, "Conference of Counsel Prior to Filing Motions." The new law also permits a trial court to hold informal conferences with the parties before the filing of demurrers and allows the parties to ask the court for a conference on subsequent demurrers.

The drafters' intention in SB 383 was to influence the culture with regard to demurrers. CAOC and the California Defense Counsel recognized the inefficiencies arising from the demurrer process and the resulting docket congestion. Indeed, "[i]n 2013 and 2014, the Los Angeles Superior Court heard 24,300 demurrers" which made up 38 to 45 percent of the law and motion calendar. (Judge Kevin C. Brazile, Elizabeth Mann, Grant Miller, *Demurrer Practice Considerations in California Courts* (July/August 2015) Los Angeles Lawyer, at 16.)

Amanda M. Riley identifies one inefficiency inherent in the process: "[a]nother drawback [to the demurrer procedure] is the absolute right to amend one time," allowing the non-moving party to fix any deficiencies and wasting the parties' and court's time in analyzing and hearing the demurrer. (Amanda M. Riley, *Demurrers—The Complaint Demolisher* (June 2003) Orange County Lawyer, at 18-19.)

The first definition of "demur" in Webster's Dictionary is "delay, hesitate." (Merriam Webster's Collegiate Dict. (10th ed. 1993) p. 307.) Indeed, to delay or hesitate is a particularly apt description of the effect demurrers have on civil cases in California courts.

The Honorable Peter Lichtman (Ret.), a respected former Los Angeles Superior Court, Central Civil West ("CCW") judge, reported that he explained to attorneys practicing before him that demurrers were almost always a waste of time, due in part to the "guaranteed second demurrer" arising from the right to amend. As a result of this admonition, he reported hearing a total of approximately five demurrers during his ten years at CCW. He routinely suggested to counsel, in lieu of filing a demurrer, to approach the pleading deficiencies with a motion for summary adjudication filed in conjunction with a motion for judgment on the pleadings, which would allow the moving party to submit evidence to challenge the operative complaint while eliminating the right to amend.

CCW's overall litigation culture encourages informal conferences where the parties and the court discuss discovery and pleading disputes before time and resources are expended on drafting, filing, and hearing proposed motions. SB 383 moves all California courts in this direction—encouraging informal resolution of issues to avoid docket congestion. CAOC and the California Defense Counsel should continue discussing legislation furthering this cultural shift and support communication as opposed to time-consuming and inefficient motion practice.

The CCW Courthouse has been designated as the Los Angeles Superior Court branch where complex civil litigation cases are managed. While all of the practices at CCW may not entirely translate to non-complex courtrooms, our general civil courts can certainly learn from CCW's litigation culture and case management philosophy. CCW attempts to narrow the disputed issues to guide the parties to focus their time and resources on the critical issues while elevating practicality and substance over rigidity and form. Both plaintiffs and defense counsel need to work together with the courts to analyze and implement solutions to the ongoing realities of court congestion and limited resources.

Stakeholders at the state level should continue to brainstorm judicial efficiency ideas and concepts that give courts the opportunity to control their calendars and streamline some processes which have become arcane in the 21st Century.

Brian S. Kabateck *is a consumer rights attorney and founder of Kabateck Brown Kellner LLP in Los Angeles. He represents plaintiffs in personal injury lawsuits, mass torts litigation, class actions, insurance bad faith lawsuits, insurance litigation and commercial contingency litigation.*

Levi Plesset *is an associate at Kabateck Brown Kellner LLP. He handles various cases for the firm including the areas of insurance coverage and bad faith, class actions, fraud, employment law and personal injury law.*

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ORANGE, CA 92869

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CONTRIBUTORS TO THIS ISSUE:

Aaron Bloom *is an associate at Gibson, Dunn & Crutcher LLP in Los Angeles and Co-Chair of the Los Angeles ABTL YLD.*

Laura W. Brill *is a founding partner at Kendall Brill & Kelly LLP in Los Angeles.*

Rachel Feldman *is a partner in the Los Angeles office of White & Case LLP and Co-Chair of the Los Angeles ABTL YLD.*

Steven Feldman *is a senior associate with Hueston Hennigan LLP in Los Angeles.*

Margaret M. Grignon *is a partner with Grignon Law Firm LLP, a firm specializing in appellate law and a retired Court of Appeal justice.*

Brian M. Hoffstadt *is an Associate Justice of the California Court of Appeal, Second Appellate District, Division Two.*

Brian S. Kabateck *is a consumer rights attorney and founder of Kabateck Brown Kellner LLP in Los Angeles.*

Levi Plesset *is an associate at Kabateck Brown Kellner LLP.*

Ben Williams *is an associate in the Los Angeles office of Morrison & Foerster LLP and Co-Chair of the Los Angeles ABTL YLD.*