ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

LOS ANGELES

SPRING 2018

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We're excited to announce some author-focused improvements to the abtl Report's online presence.

When you visit the Report's landing page on the abtl website (http://www.abtl.org/la_report.htm), beginning with the Summer 2017 issue you'll see a listing of each issue's substantive articles. These will appear below the issue title for the current issue and by way of a drop-down arrow next to the title for past issues. Clicking on an article's title will bring up a PDF of the individual article, suitable for downloading or linking.

Beyond the benefits to authors of posting articles as separate items, we hope this approach will improve the website's search engine optimization—making it more likely that general searches will find our authors' articles, drawing more people to the website, and ultimately increasing awareness of the abtl in the legal community.

Please feel free to contact us with any comments, questions or suggestions:

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— INSIDE —

U.S. SUPREME COURT UPDATE: PENDING CASES OF INTEREST IN OCTOBER TERM 2017 (PART 2)

John F. Querio

Melissa B. Edelson

This is the second part of a two-part article summarizing cases on the United States Supreme Court's October Term 2017 docket that involve the most prominent issues of interest to civil litigators before the Court this Term.

ANTITRUST LAW

Under the "rule of reason," did the Government's showing that American Express's anti-steering provisions stifled price competition on the merchant side of the credit card platform suffice to prove anticompetitive effects and thereby shift to American Express the burden of establishing any procompetitive benefits from the provisions?

United States v. American Express Co., 838 F.3d 179 (2d Cir. 2016)*, cert. granted sub nom. Ohio v. American Express Co.,* No. 16-1454 (Oct. 16, 2017)

In Sherman Act restraint-of-trade cases not encompassed by the per se rules prohibiting horizontal agreements among competitors to suppress competition, courts evaluate the lawfulness of a particular practice under the "rule of reason," which asks whether a restraint's procompetitive benefits outweigh its anticompetitive effects. In such cases, the

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PRESIDENT'S MESSAGE

Michael P. McNamara

It's amazing how quickly time goes by when you're having fun!

As my term as President comes to a close in July, I cannot help but reflect upon my eight years as a board member of ABTL. The best part has been the many friends I have made through ABTL. Working with all of the talented volunteers has truly been one of the highlights of my career.

The key to ABTL's success over its 45-year history has been the quality of the volunteer board members and judges. This past year the Los Angeles Chapter has been blessed with a dedicated 60-member Board, including a diverse mix of plaintiff and defense lawyers and state and federal judicial officers, as well as an active 12-member Judicial Advisory Council. Of this group, special thanks to the many Chairs and Vice Chairs for their hard work this past term, including:

Dinner Programs: Manuel Cachan and Erin Ranahan (Co-Chairs) and Kevin Boyle and Kahn Scolnick (Co-Vice Chairs).

Lunch Programs: Allen Lanstra and Michael Mallow (Co-Chairs) and Emilo Gonzalez and John Fitzgibbons (Co-Vice Chairs).

Membership: Lorenzo Gasparetti and Rob Del Angelo (Co-Chairs).

abtl Report: John Querio and Robin Meadow (Co-Editors) and Dylan Ruga (Assistant Editor).

Public Service: Hernán Vera and Jason Wright (Co-Chairs).

Annual Seminar: Jeanne Fugate and Tami Smason (Co-Chairs).

Courts: Jen Romano and Howard Alperin (Co-Chairs).

Technology: Aalok Sharma, Jordan McCrary and Christian Nickerson (Co-Chairs).

Young Lawyers Division: Jeff Atteberry (Chair) and Jen Cardelús (Vice Chair).

I would also like to give a very special shout-out to Linda Sampson, our Executive Director. Linda has served in this position for the last nine years. As ABTL's Board and JAC rotate every two years with new volunteers, Linda has played a critical role assuring continuity and consistency. Having been on the Board for eight of Linda's nine years, I can personally attest to the fact that Linda's efforts have helped the Los Angeles Chapter of ABTL become a more robust organization, with solid financials and increasing membership, all of which have helped ABTL to become one of the "must join" bar associations in our legal community.

As my term as President ends, I am confident that ABTL is well positioned to continue to thrive under the new leadership of Sabrina Strong (President-Elect), Valerie Goo (Treasurer) and Susan Leader (Secretary).

I look forward to seeing everyone at upcoming ABTL events. I will be the guy with the badge that says "Past President."

Michael P. McNamara
Jenner & Block LLP
ABTL President, 2017-2018

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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plaintiff bears the initial burden to demonstrate that the challenged restraint is anticompetitive. If the plaintiff makes that showing, the burden shifts to the defendant to establish a procompetitive justification. Here, the Supreme Court will decide whether retail merchants met their burden under the rule of reason by showing that American Express's anti-steering provisions—which bar merchants from steering customers to cards with lower fees at the point of sale—stifle price competition on the merchant side, but not on the cardholder side, of the credit card platform.

In 2010, the United States and seventeen states (collectively, the Government) sued Visa, MasterCard, and American Express, alleging that each company's anti-steering provisions violated section 1 of the Sherman Act, 15 U.S.C. § 1 (2006), because they stifled competition in the prices charged to merchants. Only American Express proceeded to trial. The district court held that the anti-steering provisions violated section 1 under the rule of reason. It began its analysis by defining the relevant market as the credit and charge card network services that American Express provides to merchants. The district court rejected American Express's position that the market definition should include services to cardholders as well as fees charged to merchants. Next, the court concluded that the Government had met its burden by establishing a prima facie case that the challenged restraint adversely affects competition. It found that American Express has market power because it controls 26.4% of the market for network services, and "cardholder insistence" makes it so that merchants cannot practically refuse to accept American Express cards without many of their customers choosing to shop elsewhere. Additionally, the district court found that American Express's anti-steering provisions caused actual harm to competition in the market for merchant services by ensuring that there is virtually no check on the networks' ability to charge higher prices to merchants. After concluding that the Government had met its burden, the district court determined that American Express had failed to prove procompetitive benefits and entered judgment in the Government's favor.

The Second Circuit reversed, holding that the district court erred by defining the relevant market to include only network services provided to merchants. The relevant market, it concluded, must also include the market for credit provided to cardholders. The Second Circuit then held that the Government had failed to carry its burden of proving anticompetitive effects because it did not establish that merchants and cardholders were worse off overall. The district court erred by focusing on harm to merchants without accounting for benefits to cardholders.

In the Supreme Court, the Government contends that it met its burden under the rule of reason when it provided *direct* evidence that American Express's anti-steering provisions caused industrywide increases in merchant prices above levels that would exist if there were greater competition among the four main credit card networks. The Government also argues that the Second Circuit erred by defining the relevant market to include both merchants and cardholders, as such a definition conflicts with the traditional market definition test, Court precedent, consumer protection goals, and administrative concerns. In response, American Express contends the Government failed to meet its burden of proving that American Express's anti-steering provisions harmed competition, as its proffered evidence related solely to prices charged to merchants, instead of showing reduced output or quality for merchants and cardholders.

The Supreme Court heard oral argument on February 26, 2018. Both sides received tough questions, with many of the Justices focusing on the relevant market definition. Justices Kennedy and Gorsuch seemed to favor American Express's proffered market definition of "credit card transactions" including both consumers and merchants, with Justice Gorsuch challenging the Government's representative—"I don't believe you have" "any evidence that, on a net basis, consumers pay more"—and Justice Kennedy questioning the wisdom of looking at only the merchants' side in "this two-sided market." On the other hand, Justices Breyer, Sotomayor, and Kagan seemed skeptical of American Express's repeated assertions—in response to their questions focusing on anticompetitive effects—that when the market is defined broadly to include "credit card transactions," the Government failed

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to produce any evidence of harm to consumers in addition to showing harm to merchants. "It seems to me obvious," said Justice Breyer, that "[w]hen you tell the dealer that he can't tell the customer that he's charging a lower price, that's anticompetitive right then and there."

While the Supreme Court has decided a number of important antitrust cases in recent years, they have mostly involved the limits and operation of the various per se prohibitions on horizontal and vertical agreements in restraint of trade. By contrast, this case will give the Supreme Court its first opportunity in a number of years to examine the application of the rule of reason analysis and explain how it operates in one of the most important markets of the 21st century economy.

APPELLATE PROCEDURE

The entry of a final decision in an action consolidated with other actions for pretrial proceedings within a single judicial district is immediately appealable.

Hall v. Hall, __ U.S. __, 138 S. Ct. 1118 (2018)

The Supreme Court granted certiorari in this case to resolve a four-way circuit split concerning whether the rule announced in *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015)—that entry of a final decision in one of several consolidated cases in multidistrict litigation is immediately appealable—extends to consolidated cases within a single judicial district.

The case arose out of a family dispute over property in the U.S. Virgin Islands. Ethlyn Hall sued her son and his law firm for conversion, malpractice, fraud, and related torts. Mrs. Hall died before trial, and her daughter was substituted as plaintiff. The son and his law firm answered the amended complaint, asserting various defenses and a counterclaim against the daughter in her representative capacity. The son also filed a separate action against the daughter individually, and the district court consolidated the actions and tried them together. The jury returned a verdict against the daughter in both cases, and the district court entered separate final judgments in each case. However, the daughter then moved for a new trial in the action against her individually and filed a notice of appeal in her representative capacity in the action originally brought by Mrs. Hall. The son and his law firm moved to dismiss the appeal, arguing that the judgment in Mrs. Hall's case was not appealable because a final judgment had not yet been entered in the son's action against the daughter. A year later, the district court granted the daughter's motion for new trial in the action against her in her individual capacity. The Third Circuit dismissed the daughter's appeal for lack of appellate jurisdiction because that action had been consolidated with the son's action against the daughter for all purposes, and that latter action was not yet final.

In a unanimous opinion by Chief Justice Roberts, the Supreme Court reversed. It held that when one of several cases consolidated under Federal Rule of Civil Procedure 42(a) is finally decided, that decision confers the immediate right to appeal, regardless of whether other consolidated cases remain pending. The opinion focused on the meaning of "consolidation" as used in Rule 42(a), explaining that for "[o]ver 125 years, this Court, along with the courts of appeals and leading treatises, interpreted [consolidation] to mean the joining together—but not the complete merger—of constituent cases." *Hall*, 138 S. Ct. at 1125. Rule 42, which was expressly modeled on its statutory predecessor (enacted by Congress in 1813), would not have "silently and abruptly reimagine[d]" consolidation "into something sharply contrary to what it had been" for more than a century. *Id.* at 1129-30. Thus, a losing party in one of several consolidated cases—whether the consolidation was for discovery, for trial, or for all purposes—is free to immediately appeal once his or her case is finally decided.

CLASS ACTIONS

Whether the rule of *American Pipe & Construction Co. v. Utah* tolls the statute of limitations to permit a previously absent class member to bring a subsequent class action outside the applicable limitations period.

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Resh v. China Agritech, Inc., 857 F.3d 994 (9th Cir. 2017), *cert. granted*, No. 17-432 (Dec. 8, 2017)

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), the Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." Thus, under *American Pipe*, the statute of limitations is tolled during the pendency of a putative class action, allowing absent class members to bring individual claims if the class fails. At issue before the Supreme Court in this case is whether *American Pipe* tolling applies only to subsequent actions brought by previously absent class members on an individual basis, or instead extends to subsequent class actions filed by previously absent class members.

In February 2011, Theodore Dean and other shareholders filed a class action (the "*Dean* action") against China Agritech, Inc., a holding company whose subsidiaries manufactured and sold organic fertilizers in China. The *Dean* plaintiffs brought securities fraud claims against China Agritech and sought class certification. After class certification was denied, the *Dean* plaintiffs settled their individual claims, and their action was dismissed. Three weeks later, in October 2012, another set of plaintiffs—represented by the same counsel that had filed the *Dean* action—filed an almost identical class action on behalf of the same putative class against China Agritech (the "*Smyth* action"). Class certification was subsequently denied in the *Smyth* action because the named plaintiffs were found to be inadequate and atypical class representatives, and the *Smyth* plaintiffs settled their individual claims against China Agritech.

Michael Resh filed the instant class action in June 2014 asserting claims nearly identical to those alleged in *Dean* and *Smyth* on behalf of the same putative class at issue in the *Dean* and *Smyth* actions. China Agritech moved to dismiss the action as time-barred. The district court agreed and dismissed the action in its entirety, concluding that *American Pipe* tolling permitted the *Resh* plaintiffs to bring their individual claims despite the running of the limitations period but not to bring another class action. The Ninth Circuit reversed, holding that three recent Supreme Court decisions—*Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010); *Smith v. Bayer Corp.*, 564 U.S. 299 (2011); and *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016)—compelled its conclusion that the *Resh* plaintiffs could assert their tolled claims on behalf of the class under Federal Rule of Civil Procedure 23.

In the Supreme Court, China Agritech contends that *American Pipe* tolls the statute of limitations for absent class members during the pendency of a putative class action only with respect to subsequent individual, rather than class, claims. *Shady Grove*, *Smith*, and *Tyson Foods*, it argues, do not support the Ninth Circuit's ruling, as nothing in those cases requires or even permits extending *American Pipe* tolling to subsequent class actions. Nor can the Ninth Circuit's decision be reconciled with fundamental principles of equitable tolling, class action procedure, and the separation of powers. The Ninth Circuit's rule, China Agritech asserts, eviscerates the requirements of plaintiff diligence and extraordinary circumstances that justified tolling in *American Pipe*. In response, the *Resh* plaintiffs contend that Supreme Court precedent confirms that a timely class action suspends the limitations period for all class members, whether they subsequently assert their claims individually or on a class basis. To hold otherwise would violate Rule 23 and the Rules Enabling Act.

The Supreme Court heard oral argument on March 26, 2018 and appeared divided on whether to limit *American Pipe* tolling to subsequent individual claims or extend it to subsequent class actions. Right from the start, China Agritech faced challenging questions from Justices Sotomayor and Kagan, who voiced concerns about China Agritech's proposed rule: "[Y]our regime [would] encourag[e] the very thing that *American Pipe* was trying to avoid, which is to have a multiplicity of suits being filed and encouraging every class member to come forth and file their own suit," said Justice Sotomayor. "[W]e don't want to have a million individual suits but instead want to encourage a class," suggested Justice Kagan.

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Chief Justice Roberts also expressed concern on this front: "[S]o what they all have to do is . . . file individual claims, . . . every member of the class?" On the other hand, Chief Justice Roberts seemed equally uneasy with the notion that class actions might stack indefinitely: "[I]f you allow the second [class action], you've got to allow the third and then the fourth and the fifth. And there's no end in sight." Justice Gorsuch echoed this point, asking "[C]an you stack them forever?"

The Court's decision in this case will provide further clues to whether the Roberts Court's perceived hostility to class actions is more illusory than real.

INTERSTATE COMMERCE & SALES TAX

Whether the Supreme Court should abrogate *Quill Corp. v. North Dakota*'s physical presence requirement for states to impose sales tax on sales by out-of-state companies to in-state residents.

State v. Wayfair, Inc., 901 N.W.2d 754 (S.D. 2017), *cert. granted*, No. 17-494 (Jan. 12, 2018)

In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Supreme Court reaffirmed its decision in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), which prohibited a state from imposing sales tax on vendors with no physical presence in the state. In the twenty-six years since *Quill* was decided, several members of the Court have called for its reexamination, including Justices Kennedy, Thomas, and Gorsuch. *See Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring); *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1811 (2015) (Thomas, J., dissenting); *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring). Indeed, Justice Kennedy wrote separately in *Direct Marketing Ass'n* specifically to call for a reexamination of *Quill* and *Bellas Hess*. Given the "dramatic technological and social changes that ha[ve] taken place in our increasingly interconnected economy," he wrote, "it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*." *Direct Mktg. Ass'n*, 135 S. Ct. at 1134-35.

South Dakota responded to Justice Kennedy's invitation by enacting a law aimed at challenging *Quill*'s physical presence requirement. In early 2016, South Dakota enacted S.B. 106, 2016 Leg., 91st Sess. (S.D. 2016), which requires out-of-state sellers to collect and remit sales tax based not on their physical presence in South Dakota but on their economic connection to the State. The law provides a cause of action for the State to sue out-of-state retailers who fail to comply, and South Dakota subsequently sued four retailers that had failed to comply with the new law, seeking a declaratory judgment confirming the law's validity. The state trial court granted the retailers' summary judgment motion after South Dakota conceded that it could prevail only by convincing the United States Supreme Court to abrogate *Quill*'s physical presence requirement, and the South Dakota Supreme Court affirmed.

In the United States Supreme Court, South Dakota contends that the physical presence rule is incorrect under the governing test—articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)—for determining the constitutionality of state taxes on out-of-state entities challenged under the Dormant Commerce Clause. Were this test applied to the law at issue here, South Dakota claims, the law would pass with flying colors. Moreover, the justifications *Quill* articulated for upholding the *Bellas Hess* physical presence rule—stare decisis, the value of leaving a bright-line rule undisturbed, and the practical difficulties of collection—no longer outweigh the rule's harms in the digital age where e-commerce is ubiquitous. The physical presence requirement, South Dakota argues, is causing serious harm by depriving states of critical revenue and brick-and-mortar stores of a level playing field. On the other hand, the retailer respondents assert that Congress, not the Supreme Court, is the appropriate institution to address this issue and that principles of stare decisis strongly weigh against abrogating the physical presence requirement. The state sales and use tax systems, they contend, remain just as complex and burdensome as when the Court decided *Quill* and thus continue to justify the retention of the physical presence rule.

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The Supreme Court heard oral argument on April 17, 2018. The Court appeared divided, with many of the Justices focusing on which branch—Congress or the judiciary—should be determining whether to impose a sales tax collection scheme on internet retailers. "[I]f there are two options…option A is to eliminate *Quill*…[and] Option B is a congressional scheme that deals with all of these problems…which is preferable?" questioned Justice Alito. "Is there anything we can do to give Congress a signal that it should act more affirmatively in this area?" asked Justice Sotomayor. "This is a very prominent issue which Congress has been aware of for a very long time and has chosen not to do something about," added Justice Kagan. Justice Kennedy spoke only briefly to suggest that the Court should act now because if the issue were left to Congress, Congress would be acting "against the background in which this Court has made an incorrect resolution of the law." "[W]hy shouldn't the Court take responsibility to keep our case law in tune with the current commercial arrangements . . . [instead of asking] Congress to overturn our obsolete precedent?" added Justice Ginsburg.

How the Court decides this case will determine the fate of billions of dollars in potential sales tax revenue and will affect the bottom line of remote retail giants nationwide—including Amazon, which charges sales tax when selling its own inventory but does not do the same for sales by third-party vendors, which represent roughly half of Amazon's business.

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In *Jesner v. Arab Bank, PLC*, No. 16-499, 2018 WL S.Q. 1386 (2018), the Supreme Court held, in a 5-4 decision written by Justice Kennedy, that foreign corporations are not subject to liability under the Alien Tort Statute.

In *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365 (2018), the Supreme Court held, in a 7-2 decision written by Justice Thomas, that the decision to grant or review a patent is a matter involving public rights, and thus *inter partes* review by the Patent Trial and Appeal Board does not violate Article III or the Seventh Amendment.

In *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018), the Supreme Court held, in a unanimous opinion written by Justice Ginsburg, that the Dodd Frank Act's anti-retaliation provision does not apply to an individual who has reported a violation of the securities laws internally but not to the SEC.

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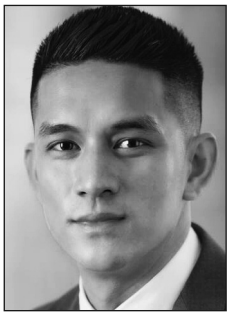
ASCERTAINABILITY IN CALIFORNIA CLASS ACTIONS: A SPLIT IN FEDERAL AND STATE COURTS



Christian Adriatico

Federal Rule of Civil Procedure 23(a) and California Code of Civil Procedure section 382 set out the requirements for class certification in federal and state courts. Both rules require numerosity, commonality, typicality, and adequacy. However, state and federal courts in California disagree about an implicit factor in the class certification analysis: ascertainability.

Three cases make the ascertainability requirement in California class actions particularly bewildering. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), holds that the ascertainability requirement does not apply in the Ninth Circuit. *Aguirre v. Amscan Holdings, Inc.*, 234 Cal. App. 4th 1290 (2015), and *Noel v. Thrifty Payless, Inc.*, 17 Cal. App. 5th 1315 (2017), review granted Feb. 28, 2018, agree that the requirement applies in state court, but they disagree on its application. Because the California and United States Supreme Courts have not spoken fully on ascertainability, litigants are left in the dark when entering class certification battles in California.

This article analyzes the different approaches to ascertainability in these cases and offers possible strategies for litigants awaiting guidance from the U.S. and California Supreme Courts on ascertainability.

Ascertainability Defined

Ascertainability is a requirement that a class plaintiff propose an administratively feasible method to objectively identify and notify potential class members. Ascertainability is not expressed in either federal or state class action rules, but some courts consider it an implicit requirement for class certification.

Courts that require ascertainability use it to evaluate the explicit requirements of Rule 23. As the Third Circuit puts it, "independent ascertainability inquiry ensures that a proposed class will actually function as a class." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 162 (3d Cir. 2015). To determine ascertainability, a court will ask whether "(1) the class is defined with reference to objective criteria; and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Id*. at 163 (internal quotations omitted). Ascertainability seeks to serve the due process rights of both plaintiffs and defendants. It gives notice to the former of a pending litigation in which the judgment will bind them. *Aguirre*, 234 Cal. App. 4th at 1300. To the latter, it allows defendants to test the reliability of the evidence submitted to prove class membership. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013).

Briseno – No Ascertainability Requirement in the Ninth Circuit

Plaintiffs in *Briseno* argued that a Wesson-brand cooking oil labeled "100% Natural" misled consumers because the oil contained bioengineered ingredients. Plaintiffs defined the class as "[a]ll persons who reside in the State[] of California . . . who have purchased Wesson Oils within the applicable statute of limitations . . . ." *Id*. at 1124. ConAgra argued that plaintiffs failed to show ascertainability because they could not point to an "administratively feasible" method to identify members of the proposed class: Consumers generally do not save grocery receipts and are unlikely to remember details about low-cost purchases like cooking oil. *Id*. at 1125. In other words, defendants would require plaintiffs to present a method that would ascertain who purchased the cooking oil.

The Ninth Circuit refused to adopt an ascertainability standard that would require plaintiffs to show an administratively feasible method to identify class members. The panel relied on a plain reading of Rule 23(a), which does not express any requirement of ascertainability or administrative feasibility. *Id*. The panel concluded that plaintiffs met their burden under Rule 23(a) simply because "the class was defined by an objective criterion: whether class members purchased Wesson oil during the class period." *Id*. at 1124. Therefore, plaintiffs seeking class certification should not face additional

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Ascertainability in California Class Actions…continued from Page 8

administrative burdens in identifying their class under Rule 23. *Id*. at 1128. Also, courts should not "impose a free-standing" ascertainability prerequisite to the Rule 23 certification analysis. *Id*. at 1126.

Certiorari seemed likely in *Briseno* given a clear circuit split. The Sixth, Seventh, Eighth, and Ninth Circuits have rejected the ascertainability requirement, while the First, Second, Third, and Eleventh Circuits have adopted some form of an ascertainability standard. But the Supreme Court denied certiorari without comment—maintaining the split among federal circuits. *ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313 (2017).

Past cases may signal how some justices will approach the issue of ascertainability when it debuts in the Supreme Court. For example, as a judge on the Second Circuit, Justice Sonia Sotomayor wrote that a refusal to certify a class "on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (internal quotations omitted). Justice Neil Gorsuch, on the other hand, may favor an ascertainability requirement for 23(b)(2) classes seeking injunctive relief. Writing for the Tenth Circuit in *Shook v. Board of County Commissioners of County of El Paso*, he stated, "the factual and legal concerns leading the court to consider problems of identifying the class could be relevant to, among other things, whether final injunctive relief was appropriate within the meaning of Rule 23(b)(2)." 543 F.3d 597, 611 (10th Cir. 2008) (internal quotations omitted).

Aguirre and *Noel* – Ascertainability Required In State Court, But Courts Vary In Application

Unlike the Ninth Circuit, the California state courts impose an ascertainability requirement. *See Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012). But how to apply the requirement is far from settled. This difficulty has caught the California Supreme Court's attention.

In *Aguirre v. Amscan Holdings, Inc.*, plaintiffs alleged that defendant Party America violated plaintiffs' privacy by collecting ZIP codes from customers who used credit cards. 234 Cal. App. 4th at 1294. Plaintiff Aguirre defined the class as "'[a]ll persons in California from whom Defendant requested and recorded a ZIP code in conjunction with a credit card purchase transaction from June 2, 2007 through October 13, 2010 . . . .'" *Id*. at 1293. Defendants argued that plaintiffs "failed to establish that 'there exists a "means for identifying class members."'" *Id*. at 1297 (emphasis in original). The Third District Court of Appeal disagreed: Plaintiff's "inability to clearly identify, locate and notify class members through a reasonable expenditure of time and money" is not a reason to deny class certification. *Id*. at 1301. It was sufficient that she "'defin[ed] the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary.'" *Id*. at 1300. Requiring plaintiff to establish the means of identifying class members at class certification would "conflict with the liberal notice provisions contained in California Rules of Court, rule 3.766(f)." *Id*. at 1301.

But in *Noel v. Thrifty Payless, Inc.*, Division 4 of California's First Appellate District applied a more stringent ascertainability requirement. In *Noel*, plaintiff claimed that defendants engaged in false advertising when an inflatable pool that plaintiff purchased from Rite Aid did not fit two adults and three children as pictured on the box. 17 Cal. App. 5th at 1322. Plaintiff defined the class as "[a]ll persons who purchased the Ready Set Pool at a Rite Aid store located in California within the four years preceding the date of the filing of this action." *Id*. at 1326. Here, the court denied certification because plaintiff "failed to articulate and support with evidence any means of identifying potential class members." *Id*. (emphasis in original). The *Noel* court required plaintiff to offer evidence or a method to clearly identify, locate, and notify who purchased the pools. *Id*. at 1328-29.

Noel also criticized the reasoning in *Aguirre*. Finding *Aguirre*'s language too "absolute," the court stated, "[w]e do not endorse the view that individual members of the class must be identified by name at the time of a class certification motion, but we do not think it violates class action doctrine or public policy to require some showing of a means of identifying them and a description of how

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Ascertainability in California Class Actions…continued from Page 9

notice might be given." *Id*. at 1332 (emphasis in original). *Noel* went on to explain that *Aguirre*'s approach of allowing trial courts to ignore the issue of identifying classes at the certification stage would sacrifice due process concerns of facilitating notice to the class. *Id*.

The California Supreme Court granted review in *Noel* on February 28, 2018. *Noel v. Thrifty Payless*, 229 Cal. Rptr. 3d 344 (Cal. 2018). Briefing is under way. The issue on review is: "Must a plaintiff seeking class certification under Code of Civil Procedure section 382 or the Consumers Legal Remedies Act (CLRA) demonstrate that records exist permitting the identification of class members?" It seems likely that the Supreme Court will take a close look at ascertainability. The Court will likely look at the plain meaning and possibly the legislative history of section 382 and the CLRA. Ultimately, the Court will have to decide exactly when it will require a plaintiff to objectively state the means of identifying class members. Will the Court raise the ascertainability hurdle at the certification stage or kick the can down the road as *Aguirre* suggests?

Takeaways for California Litigants

Until the California Supreme Court provides guidance, hopefully in *Noel*, it is unclear what state-court plaintiffs must prove at the class certification stage. It is not clear if an objective class definition is sufficient to meet ascertainability. In light of *Noel*—which pending the Supreme Court's decision "has no binding or precedential effect, and may be cited for potentially persuasive value only," *see* Cal. Rules of Ct., rule 8.1115(e)(1)—plaintiffs should still present the most objective means of identifying class members in the form of receipts, affidavits, photographs, purchase records, or other forms of business or personal records. Moreover, the most obvious takeaway for a California plaintiff desiring to avoid the ascertainability requirement at the class certification stage is to file in federal court where *Briseno* will control.

For defendants, *Noel* provides a playbook for large consumer class actions involving low-price items—where ascertainability battles are most likely to take place. Defendants should highlight plaintiff's difficulty in presenting an objective method that reveals who bought defendant's product because consumers rarely keep their receipts for low-price purchases and there is no product registration for these products. It is unclear if other methods such as rewards programs or store memberships record the products a consumer purchases.

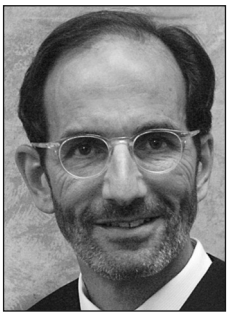
Defendants opposing class certification in any California trial court should also think carefully about removal. A defendant served with a class action complaint in Superior Court may choose not to remove to federal court because of *Briseno*. If defendants stay in Superior Court, they can push the court to require plaintiff to submit evidence on the means of identifying potential class members. But a court that follows *Aguirre* may apply a loose ascertainability requirement.

Moreover, the subject matter of the class action may further complicate the analysis of whether to remove to federal court. For instance, defendants facing securities class actions in state court often immediately remove to federal court, where the Private Securities Litigation Reform Act (PSLRA) offers protection from frivolous suits. Defendants in this position should carefully consider whether they want to give up having some kind of ascertainability requirement in exchange for PSLRA protections such as heightened pleading standards or discovery stays.

Yet, until the high courts of the United States and California weigh in, California class action litigants are left with *Briseno*, *Aguirre*, and *Noel* to figure out how to argue the ascertainability requirement for their clients.

Christian Adriatico is an associate at Skadden Arps Slate Meagher & Flom LLP in Los Angeles.

HEY, JUDGE, DID YOU HAPPEN TO NOTICE . . . ?



Judge Lawrence Riff

Most lawyers remember one thing about judicial notice from law school: Abraham Lincoln, as a lawyer in 1858, asked a judge in a murder trial to take notice of the accuracy of information in an almanac that identified the phases and timing of the moon's rising and setting. A prosecution witness had testified he saw Lincoln's client commit the murder from 150 feet away by the bright light of the full moon. The judge took judicial notice of the accuracy of the almanac's moon data. It showed the crescent moon was very low on the horizon at the exact time of the murder. The witness was thoroughly impeached, and Lincoln's client walked. In case you remember little else about judicial notice, here is, in Q&A, a brief refresher and some free advice.

Q: What exactly is the status of the proposition of which the court has taken judicial notice? Is it evidence or something else? **A:** Judicial notice is universally described as a substitute for formal proof. Some things are so indisputable that it makes no sense to require them to be proved at trial. For example, that Venice Beach is in Los Angeles County. Or the "true significance" of English words and phrases. Thus a judge properly takes judicial notice that "half a dozen" means "six." Or a mathematical proposition such as Distance = Rate x Time. Or that the plaintiff in this case in Los Angeles had earlier filed a declaration in a different case in the Tulare County Superior Court. The key concept is that once judicial notice is taken of the proposition, it is established for that proceeding. The fact finder is so directed, and no party may introduce evidence to dispute the proposition. Some cases and commentators refer to the proposition so noticed as evidence; some say it is a substitute for evidence. I say it doesn't much matter: The proposition is established. Period.

Q: Well, do the rules of evidence apply to judicial notice? **A:** Some do; some don't—and it is easy to make a mistake. In Lincoln's day, judicial notice existed as judge-made common law. Nowadays in the California state courts it is a creature of the Evidence Code (Code) at sections 450-460. (Further statutory citations are to that code.) So those rules of evidence apply by definition, and before you utter the words "judicial notice" out loud in a courtroom, you should have recently read those sections. Also the Code's rules on relevance, sections 350 and 352, apply. Thus while a judge could properly take judicial notice of an official government proclamation declaring a county a federal disaster area after a flood, the judge could refuse to do so on relevance grounds when the proclamation did not refer specifically to the area where plaintiff's property was located. (*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578.) The Code's rules of privilege apply to exclude a source of information presented to the court to determine the propriety of the court's taking judicial notice of a matter. (§ 454.) And sometimes the hearsay rules apply and sometimes they don't. For example, under section 454, when a court consults reliable sources of information for the purpose of revealing the matter that is the subject of judicial notice, such as a calendar to determine a day of the week of a long past event, the hearsay rule plays no role. (*Ibid*. ["any source of pertinent information . . . may be consulted or used"].)

Q: Let's talk merits. What is the effect of the court's taking judicial notice of, say, a federal agency's big fat official report on the health effects of tobacco? **A:** Maybe less than you think. Here is the black-letter rule: Courts take judicial notice of the existence of the document but not the truth of the contents. This is emphasized because so many of us get it wrong. (*E.g., Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1064, overruled on other grounds by *In re Tobacco Cases II* (2007) 41 Cal.4th 1257.) Thus a trial court could properly take judicial notice of the existence of an official report of the U.S. Senate's investigation of a particular pharmaceutical, but it could not take notice of the truth of various senators' criticisms of the manufacturer. (*Love v. Wolf* (1964) 226 Cal.App.2d 378, 403.)

Q: So the truth of matters contained in a judicially-noticed document is never established? **A:** Never say

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Hey Judge, Did You Happen to Notice?…continued from Page 11

never in the law. There are two major exceptions to this rule. First, judicial notice may be taken "'of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law and judgments.'" (*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914; *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 Cal.App.3d 39, 46 [facts recited in appellate decision concerning party's misconduct properly judicially noticed].) So in a family law contempt proceeding, the obligee spouse may establish that the obligor spouse in fact had the obligation of paying $550 per month in spousal support if the Court takes judicial notice of the underlying written court order. But what about an order from a prior proceeding that recites a judge's finding that the plaintiff is not worthy of belief because he is a serial liar? Can a court take judicial notice of that "fact"? Notwithstanding *Weiner* and *Day*, I'm going with "no." I am persuaded by the fine discussion of the point in *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1561-1569, which includes this insight: "Taking judicial notice of the truth of a judge's factual finding would appear to us to be tantamount to taking judicial notice that the judge's factual finding must necessarily have been correct and that the judge is therefore infallible. We resist the temptation to do so."

The second exception involves the hearsay exception for party admissions. The court properly takes notice of the existence of a prior declaration or answers to interrogatories or requests for admission in another proceeding, and if now offered against that party in this case, the court may take judicial notice of the truth of those assertions if "the admission cannot reasonably be controverted." (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 218, fn. 11, internal quotation marks omitted.) I'd suggest the caveat is important. The declarant's subsequent statement, "yeah, I see now I was wrong and I'd like to explain" is probably the end of taking judicial notice of the truth of earlier declared facts. Note the distinction: A court surely will permit the party's credibility to be attacked by confronting him with his prior declaration, but it may be reluctant to determine the matter conclusively established by judicial notice.

Q: So why is it useful to have a court take judicial notice of the existence of a document if its contents are not established? **A:** Think notice, claim preclusion and statutes of limitations.

Q: What if a lawyer does not ask that a proposition be judicially noticed during trial because she thought it wasn't even an issue and now she finds on appeal that her opponent says there is a hole in her case? **A:** No problem—ask the Court of Appeal to take judicial notice. Appellate courts can (and sometimes must) take judicial notice of a proposition for the first time on appeal. Speaking of appellate judicial notice, appellate courts are famous for taking judicial notice of "legislative facts" such as economic or social conditions. Thus, I think the Court of Appeal could take judicial notice with no party so requesting that there is a housing shortage in Los Angeles County in 2018.

Q: A court must take judicial notice as to some things but may as to others? Can the court take judicial notice without anybody asking? **A:** Yes and sometimes. Here's the point: there are rules and they are set out clearly in the Code. Again, read Sections 450-460. It will take you five minutes and might avert a catastrophe.

Q: It seems like a lot of demurrers and motions for judgment on the pleadings and for summary judgment have requests for judicial notice. How come? **A:** Because a proposition judicially noticed is established and a party may not subsequently seek to controvert it. Thus if the judicially-noticed proposition is case-dispositive, despite what's alleged (or not alleged) in the complaint or a declaration, game over. (*First English Evangelical Lutheran Church v. County of Los Angeles* (1989) 210 Cal.App.3d 1353, 1368 [appellate court reviewing judgment on the pleadings went outside the confines of the complaint to take judicial notice of interim flood control ordinance].) Likewise, a party may not avoid a demurrer by omitting facts that a court will judicially notice. (*Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 130.)

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Hey Judge, Did You Happen to Notice?…continued from Page 12

Q: On that point, we often see parties requesting the court to take judicial notice (an "RJN"—request for judicial notice) of previous filings from that same case and then filing and serving full copies of all of those documents. That seems wasteful. Any advice? **A:** It can be wasteful and is largely a problem of old technology. Once all courts permit or require electronic filing and service—and the Los Angeles Superior Court sees that as likely within 12 months for civil litigation—this issue should largely disappear. But in the meantime, I caution against shortcuts, because a judge may decide not to grant a request for judicial notice if he or she does not have ready access to the subject documents.

Q: There are a lot of things to have to remember. Any tips? **A:** It's useful to recognize the three different kinds of knowable facts that might be the subject of judicial notice (tip of the hat to Justice Bernard Jefferson's California Evidence Benchbook, 4th ed., for this insight):

1. *Universally known facts*—section 451(f). "Universal" means reasonably universal. A party opposing judicial notice by producing Rip Van Winkle to testify he wasn't aware that Facebook is in the social media business will not work. A real-life example: It is universally known that the number of eligible voters in any political subdivision of the state is just a fraction—less than half—of the eligible voters in the state. (*Preserve Shorecliff Homeowners v. City of San Clemente* (2008) 158 Cal.App.4th 1427, 1434.)

2. *Locally known common knowledge*—section 452(g). I believe a judge in Los Angeles could take judicial notice that Interstate 405 between Wilshire and Sunset is jam-packed with slow-moving traffic on a Friday at 5:15 p.m. during a rainstorm. There may be thousands of residents of rural Vermont and North Dakota who would not know this, but millions of Southern Californians would. A real-life example: An appointed attorney was at the time of a particular trial also the City Attorney for the City of Hanford. Universally known? Hardly. Commonly known in Los Angeles County? No. But in Kings County, of which Hanford is the County seat? Yes. (*People v. Rhodes* (1974) 12 Cal.3d 180.)

3. *Verifiable facts*—section 452(h). This includes the phases and timing of the moon's rising and setting on a particular night. Or that the plaintiff in this case already has a judgment entered against her on this very cause of action after a trial on the merits in another case. Something you can look up in a source of indisputable accuracy.

Once you have the category of fact in mind, identify the proposition with as much specificity as possible. The more narrow it is, the more likely the court will take judicial notice. Next, think through and anticipate why a court or the opposing party may resist your request. Especially as to verifiable facts, amass materials that you can place before the court for verification of the proposition. And give plenty of advance notice to the other side, which is entitled to try to show that the indisputable fact is in fact disputable. (§ 455.)

Q: This all sounds easy to mess up. Any bottom-line advice? **A:** My best advice about judicial notice is don't count on judicial notice. If the proposition is important to your case, don't wait until the midst of trial to learn how your judge may deal with these technical rules. Instead, long before trial, send a request for admission during discovery. Or better yet, long before trial, ask for a stipulation. Do not worry that doing so gives away a trial secret: As noted, a party must give reasonable notice in advance of seeking judicial notice anyway. Most important, have a plan to prove up the proposition the old-fashioned way: with evidence. It may be inconvenient, but after all, if it's really indisputable, how hard can it be to prove?

Lawrence Riff is a judge of the Los Angeles Superior Court.

TAKEAWAYS FROM THE NINTH CIRCUIT'S RECENT OPINION ON THE CORPORATE CITIZENSHIP OF A HOLDING COMPANY

Ashley Phillips

For purposes of establishing diversity jurisdiction, a corporation is deemed to be a citizen of the state in which it was incorporated and the one state where it has its principal place of business. 28 U.S.C. § 1332(c)(1) (2012). Courts have long grappled with the question of what constitutes a corporation's "principal place of business"—an inquiry governed by the "nerve center" test set out in *Hertz Corp. v. Friend*, 559 U.S. 77, 81 (2010). The Supreme Court in *Hertz* held that a corporation's principal place of business is "the place where the corporation's high level officers direct, control, and coordinate the corporation's activities"—typically the corporation's headquarters. *Id*. at 80-81.

The "nerve center" test is apt where a corporation actually engages in activities that the court can assess. But, as the Ninth Circuit recently asked, "[W]hat of a corporation that has few, if any, activities?" *3123 SMB LLC v. Horn*, 880 F.3d 461, 463 (9th Cir. 2018).

On January 17, 2018, the Ninth Circuit answered this question as to a holding company, an entity with minimal corporate activities beyond passively owning and supervising the management of other companies. Its answer: "[A] recently-formed holding company's principal place of business is the place where it has its board meetings, regardless of whether such meetings have already occurred, unless evidence shows that the corporation is directed from elsewhere." *Id*. at 468.

A court evaluating the existence of diversity jurisdiction looks at "the state of things" at the time a lawsuit is filed. *Id*. at 467 (citation omitted); *see also* 28 U.S.C. § 1332. The holding company at issue in *3123 SMB*, Lincoln One, was formed less than a month before litigation commenced. 880 F.3d at 471. Its only act during these twenty-five days was to incorporate in Missouri. *Id*. The entire business of Lincoln One was to own and direct the operations of its wholly-owned subsidiary, 3123 SMB LLC—a limited liability company that managed a Santa Monica property. *Id*. at 464. Lincoln One does this exclusively at annual board meetings that take place in Missouri, according to its owner, Anthony Kling. However, at the time the lawsuit was filed, Lincoln One had not yet held a board meeting. *Id*. Nevertheless, the Ninth Circuit held that Lincoln One's principal place of business was the place where it has its board meetings—i.e., Missouri—regardless of the fact that no such meeting had yet occurred when the lawsuit was filed. *Id*. at 463.

In reaching its conclusion, the Ninth Circuit relied on *Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337 (3d Cir. 2013), the only circuit case that has applied the "nerve center" test to a holding company. *3123 SMB*, 880 F.3d at 465. The Ninth Circuit noted that in *Johnson*, the Third Circuit held "the Supreme Court's dictum [in *Hertz*] that a corporation's nerve center is 'normally . . . not simply an office where the corporation holds its board meetings,' . . . inapplicable to holding companies." *Id*. at 466 (quoting *Hertz*, 559 U.S. at 93). The Third Circuit explained that "relatively short, quarterly board meetings may well be all that is required to direct and control [a holding company's] limited work." *Johnson*, 724 F.3d at 354. The business that takes place at a holding company's board meetings "is straightforward and takes little time, yet constitutes [the holding company's] primary activity: managing its assets." *Id*. Therefore, "[t]he location of board meetings is . . . a more significant jurisdictional fact here than it was in *Hertz*, and the meetings' brevity does not necessarily reflect an absence of substantive decision-making." *Id*.

As the Ninth Circuit noted, the district court determined that Lincoln One's principal place of business was in California based in part on the fact that "Lincoln One's sole officer, Mary Kling, resided in California," and that "it found 'no evidence that any of the operations of Lincoln One are directed, controlled, or coordinated from Missouri or anywhere else other than California' . . . because Lincoln One's single board meeting in Missouri 'occurred well after this case was filed.'" *3123 SMB*, 880 F.3d at 468-69.

The Ninth Circuit in *3123 SMB* pointed out several faulty assumptions on which the district court had based

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Corporate Citizenship of Holding Company…continued from Page 14

its decision. First, the assumption that a holding company's principal place of business is by default in the state where its officers live is untenable given a corporation's principal place of business is "a place within a [s]tate" rather than the state itself, and corporations often have multiple decision-makers residing in multiple states, which could become an issue considering a corporation's nerve center must be a "single place." *Id*. at 469. Second, the assumption that a holding company's principal place of business can shift over time—even without any change to the corporation's structure or operation—as the company holds a sufficient number of board meetings at its "true nerve center" is unworkable, given the anomalous results and gamesmanship that could result if, unlike here, the corporate subsidiary is the defendant rather than the plaintiff. *Id*. The Ninth Circuit also rejected the idea that a holding company's nerve center is where its subsidiary's management is based, noting that the district court had "conflated 3123 SMB's management of its lawsuit, which the court reasonably assumed would be directed from California, where the Klings reside, with Lincoln One's management of 3123 SMB at its annual meetings, which had not yet occurred and would take place in Missouri." *Id*. at 467.

Given the many advantages of litigating in federal court, some may be concerned that the majority's approach in *3123 SMB* creates an opportunity for parties to manufacture diversity jurisdiction by manipulating the ownership structure of entities before litigation commences. The dissent in *3123 SMB* articulated this concern, noting that "a newly formed corporation is entitled, in the absence of other activity, to a presumption that its state of incorporation is also its principal place of business." *Id*. at 473 (Hurwitz, J., dissenting). While the Ninth Circuit instructed courts to be "alert to the possibility of jurisdictional manipulation," it dismissed the dissent's criticism that the "decision gives rise to the very dangers of jurisdictional manipulation that *Hertz* eschews." *Id*. at 470, 471 n.8 (majority opinion); *id*. at 473 (Hurwitz, J., dissenting). Nevertheless, the Ninth Circuit remanded the case to the district court so that it could consider in the first instance the question of whether 3123 SMB and Lincoln One were alter egos, or whether Lincoln One's owners created Lincoln One for purposes of jurisdictional manipulation. *Id*. at 463, 471.

The Ninth Circuit's opinion illustrates the jurisdictional consequences of a holding company's decision on where to hold its board meetings. And although the Ninth Circuit's opinion narrowly addresses a recently-formed holding company, the court's reasoning can be applied when determining the citizenship of other passive or newly-formed corporate entities with minimal activities.

Thus, for those setting up a holding company or other passive corporate entities, decisions about where to incorporate, where to hold board meetings, and whether to designate the location of board meetings in its bylaws may have real jurisdictional consequences. In *3123 SMB*, although no board meeting had yet occurred at the time litigation commenced, Lincoln One was registered in Missouri, which, like many states, allows a corporation to specify in its bylaws the location of annual meetings and, if none is designated, provides that the meetings by default will be held at the corporation's registered office. *Id*. at 470. As Lincoln One had not specified a meeting location in its bylaws, the default rule under Missouri law applied and lent additional support to the expectation that Lincoln One would hold its annual meeting at its registered office in Missouri (along with Anthony Kling's uncontradicted testimony that they are in fact held in Missouri). *Id*. Thus, for newly-formed companies that have not yet held a board meeting, corporate documents can serve as important evidence in establishing the location of board meetings and thus the location of the entity's principal place of business. If permitted, it may be wise for those setting up holding companies to prescribe in the bylaws the place where board meetings will be held—especially for those who intend to hold meetings in a state other than the one in which the company is incorporated or registered.

Ashley Phillips is an associate at Skadden, Arps, Slate, Meagher & Flom LLP in Los Angeles.

YLD UPDATE

Jeffrey A. Atteberry

Jen Cardelús

On February 17, 2018, the Young Lawyers Division sponsored a community impact project at the Los Angeles Regional Food Bank. Members of the YLD volunteered their time on a Saturday morning and helped prepare food packages for delivery to individuals and families across Los Angeles County suffering from food insecurity. The event was a success and continues what we hope will soon become something of a "tradition" for the ABTL YLD.

The YLD also hosted an innovative and very engaging brown-bag lunch on March 1, 2018, at the Writs and Receivers Department of the Los Angeles Superior Court. The event was hosted by the complete panel of writs and receivers judges—Judges James Chalfant, Amy Hogue, and Mary Strobel. The panel provided a helpful overview of the work done in the Writs and Receivers Department, as well as tips for young lawyers handling ex parte petitions. The event was well attended, and everyone who attended found it very informative and entertaining.

The program of YLD events continues through the spring. On Thursday, April 26, 2018, the YLD sponsored another brown-bag lunch, this time at the California Court of Appeal. Graciously hosted by Justices John L. Segal and Brian M. Hoffstadt, the event was entitled "Appellate Tips for Business Trial Lawyers." The YLD members enjoyed hearing sage and helpful advice for young trial attorneys facing appellate briefing and argument.

Finally, on May 17, from 6:00 to 8:30, the YLD will be sponsoring its annual judicial mixer. This yearly event provides a unique opportunity for young trial lawyers to meet and socialize with judges from the local state and federal benches. This year's event will be hosted by Sidley Austin in their downtown office, and will include a wine tasting by Flask & Field. It promises to be an enjoyable evening, and we heartily encourage everyone to attend.

A flier has been circulated to the ABTL membership with the required registration information. However, anyone interested in participating who has not received the flier should feel free to contact the ABTL at abtl@abtl.org or Jeffrey Atteberry at jatteberry@jenner.com.

CALLING YOUNG LAWYERS

The ABTL Young Lawyers Division (YLD) is looking for

NEW MEMBERS

practicing 10 years or less to participate in the Planning of Young Lawyers Division Events.

If you are interested, please contact abtl@abtl.org.

ABTL'S 2018 SCHOLARSHIP RECIPIENTS

On April 24, hundreds of ABTL members and supporters gathered at the Millennium Biltmore to hear a superb legal retrospective on the state and federal prosecutions following the Rodney King beating. But before the traditional dinner program, attendees were invited to celebrate another longstanding ABTL tradition—the announcement of ABTL's law school scholarships.

Every year, ABTL partners with five local law schools—Loyola, Pepperdine, Southwestern, UCLA, and USC—to identify top law students based on their commitment to public service, academic performance, and overall achievement. ABTL then awards five scholarships, in the amount of $2,000 each, to a student from each of these law schools. As Co-Chairs of the Public Service Committee, Jason Wright and I had the privilege of interviewing the candidates nominated by their respective schools, and selecting the eventual winners.

Here are the incredibly talented 2018 ABTL Scholarship Recipients who attended and accepted their awards on stage.

First, from Pepperdine University School of Law: Brittany Porter. Ms. Porter is a Dean's Excellence Scholar, and a Minority Corporate Counsel Association Scholar. She externed with Judge Andre Birotte and the U.S Congress, and is the President of the Black Law Students Association at Pepperdine. Prior to law school, she was a highly-acclaimed high school teacher with Teach for America in Dallas. As her teachers and former students can attest, Brittany is a superstar in the courtroom as well as the classroom.

Next, we honored the winner from Loyola Law School: Bulmaro Huante. Mr. Huante grew up in Mexico before coming to the United States. He was named an Edison International Scholar by the Mexican American Bar Foundation and a Finalist in Loyola's Moot Court competition. Mr. Huante externed for Judge John Kronstadt, MALDEF, and the LA County District Attorney's Office. Bulmaro is a born trial lawyer, and we know he will go on to do great things.

The recipient from USC Gould School of Law was Kevonna Ahmad. Ms. Ahmad began her legal career at California Western School of Law where she had a full-ride scholarship. But after a year she found herself at the top of her class, and fell in love with USC. So she bravely gave up her scholarship and became a Trojan. Ms. Ahmad is the first in her family to go to college but always knew from an early age that she wanted to be a judge. There is no doubt we will be calling Kevonna, "Your Honor", in a few years.

From UCLA School of Law, we honored Karen Leung. Ms. Leung is the co-managing editor of the Asian Pacific American Law Journal at UCLA. She also somehow found time to co-direct the El Centro Legal Clinic as well as participate in UCLA's moot court team. She is an avid and skilled debater and will be joining Morrison & Foerster's San Francisco office in the fall. We know Karen will continue to make all Bruins proud, and we wish her the best of luck in the Bay Area.

And, finally, we honored Brigitte Malatjalian from Southwestern Law School. Ms. Malatjalian is the President of the Armenian Law Students Association. She has won a long list of public service awards for her work with the Southwestern Street Clinic and for a criminal expungement clinic that she founded from scratch. Ms. Malatjalian is a fierce and effective advocate who will be joining the Los Angeles County Public Defender's Office in the fall. Brigitte leaves an important legacy of service at Southwestern, and her leadership will be sorely missed.

Thank you again to all the ABTL board members, judges, and other supporters who make this wonderful scholarship program possible for our newest generation of legal talent.

Hernán D. Vera is a principal at Bird, Marella and Co-Chair of the ABTL's Public Service and Outreach Committee.

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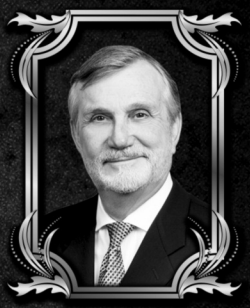

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