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Message from the President

Take this *ABTL Report* and give it away.

That's right. Give it to a lawyer who needs it. Look at the articles and think of some lawyer you know who could benefit from one of these fine articles.

We want to get the word out. We want to reach out to the overworked, stressed out younger lawyers who are trying to learn all they need to know to be the leaders of the business trial lawyer bar of the future. We want to make their lives a little easier by giving them the insights found in these articles written by experts in their fields.

Barbara Reeves

And then there is the fun part. Invite that lawyer to join you at our next lunch or dinner program. We plan to experiment with different formats for our programs, in an effort to find the right mix of education and fraternizing, socializing and mentoring. Lunch time on the Westside, with a how-to program for young lawyers? Wine tasting after work followed by presentations on a hot topic? Meeting and talking with leading trial lawyers and jurists? The ABTL has it all and we're proud of the high quality of our programs and the unique opportunity to meet with our trial and appellate court judges, the arbitrators and mediators who preside over the private dispute resolution world, and the lawyers whose names are on those pleadings that keep you busy.

So start the ball rolling by giving away this *ABTL Report* to your favorite deserving colleague, and we'll see you both at our next meeting.

— Barbara Reeves

The Profound Influence of *Bily v. Arthur Young*

In its life span of nearly ten years, the California Supreme Court's decision in *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370 (1992), has had a profound impact on professional liability litigation. *Bily's* discussion of the role of the auditor in the financial reporting process was more realistic and sophisticated than prior judicial decisions. Many judicial decisions prior to Bily reflected a naïve view of the role of the auditor. There has been a well recognized "expectations gap" between auditors' own understanding of their role and the expectations that clients, third parties, judges and juries often have. Courts, clients and third parties often seemed to expect auditors to be able to detect any type of financial statement misstatement, and assumed that if the auditor's report did not disclose a misstatement it must be a result of fraud or negligence. *Bily* has helped narrow the gap by recognizing the inherent limitations of a financial statement audit and the policy reasons for reducing the scope of an auditor's liability.

Michael Cypers

Bily has elevated the level of discussion of subsequent accountant liability cases. Recent judicial decisions confirm *Bily's* influence in the following areas: (1) in California, *Bily* has narrowed the scope of accountant liability; (2) outside California, the *Bily* rationale has been cited as the "majority" rule of auditor liability and been adopted by numerous federal and state courts; and (3) *Bily* has helped define accountant liability in significant federal decisions.

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California Law

Mariani v. Price Waterhouse, 70 Cal.App.4th 685 (1999), applied the essential teachings of *Bily*, and it demonstrates that *Bily* changed the landscape of auditor liability litigation in California. The *Mariani* court affirmed the trial court's rulings which dismissed all of the plaintiffs' claims on demurrer and summary judgment. This result would have been different under the pre-*Bily* rule of *International Mortgage v. John Butler Accountancy Corporation*, 177 Cal. App.3d 806 (1986). ("*International Mortgage*".)

In *Mariani*, plaintiffs were individuals including Mr. Mariani, the chairman of the board of directors of a corporate audit client of PriceWaterhouse ("PW"). This individual was also a guarantor of some of the corporation's debt obligations.

Plaintiff sued PW for negligence, negligent misrepresentation, intentional misrepresentation and breach of contract. The *Mariani* court held that the trial court properly eliminated each of the claims on motion.

Gwyn Quillen

On the negligence claim, the *Mariani* court applied the *Bily* rule that claims for auditor negligence can be asserted by the auditor's client only, and not by third parties. Even though Mr. Mariani was the addressee of the audit engagement letter and a proposal letter regarding the audit from PW, since he received them in his capacity as corporate board member, the *Mariani* court held he was not PW's client or "client equivalent" within the meaning of *Bily*, and his negligence claim was properly dismissed on demurrer.

On the negligent misrepresentation claim, *Mariani* applied the *Bily* rule derived from Restatement of Torts (Second) Section 552 that an auditor may have liability to a third party for negligent misrepresentation if the auditor "'intends to supply the information for the benefit of one or more third parties in a specific transaction or type of transaction' identified to the auditor." *Id*. at 695, quoting *Bily* at 392, 408. The court concluded that PW did not know of or intend to influence any specific transactions between plaintiffs and PW's audit client and that plaintiffs did not in fact rely on the PW audit reports in transacting business with PW's client. Accordingly, *Mariani* affirmed dismissal by summary adjudication of the negligent misrepresentation claim.

Under the *International Mortgage* rule in effect in California before *Bily*, the plaintiffs in *Mariani* would likely have been able to present both the negligence and negligent misrepresentation claims to the trier of fact. In *Mariani*, plaintiffs' breach of contract and fraud claims were both dismissed, but the result would likely have been the same even without the *Bily* decision. *International Mortgage* represented the "all reasonably foreseeable plaintiffs rule." *Arthur Andersen v. Superior Court*, 67 Cal. App. 4th 1481, 1501 (1998). *International Mortgage* permitted a plaintiff to sue a financial statement auditor if, in hindsight at the time of litigation, it was foreseeable that the plaintiff would read and rely on the audited financial statements.

Accordingly, under *International Mortgage*, Mr. Mariani, as the chairman of the board and guarantor of the debt of PW's audit client, would likely have qualified as a foreseeable user of the audited financial statements. PW might have been able to present defenses on the issues of reliance and causation, but it is likely that either or both the *Mariani* plaintiffs' negligence and negligent misrepresentation claims would have survived summary judgment.

In *Arthur Andersen v. Superior Court,* 67 Cal. App.4th 1481 (1998), the defendant issued an audit report on the financial statements of an insurance company, which filed the audited financial statements with the California Insurance Commissioner (the "Commissioner") as required by statute. After the insurance company became insolvent, the Commissioner sued the auditor as liquidator and on behalf of the liquidation estate for the benefit of policyholders and others on theories of negligence and negligent misrepresentation. The trial court denied the auditor's motion for summary judgment, and the Court of Appeal granted the auditor's writ petition to consider whether *Bily* required dismissal of the Commissioner's claims.

The *Arthur Andersen* Court held that the trial court properly denied summary judgment. The Court applied the *Bily* rule that only the audit client may sue for negligence, and said the issue of whether the Commissioner was the audit client was not fully developed in the trial court. The Court observed that on the negligence claim, the Commissioner was not required to prove reliance on the audit report, and the element of causation could be proven by "many possible methods." *Id*., at 1487.

On the negligent representation claim, the Court applied Restatement Section 552, adopted by *Bily*. That section includes as parties with standing to sue the auditor: (1) persons for whose benefit and guidance the auditor intends to supply the information; (2) persons to whom the auditor knows the client intends to supply the audit report; or (3) persons who rely in a transaction the auditor intends to influence or knows the audit client intends to use the audit report to influence.

The *Arthur Andersen* Court held that *Bily* left the Commissioner within the universe of parties with standing to sue the auditor. The Court held that if the insurance company client obtains the audit report to satisfy statutory filing requirements with the Commissioner, or if the auditor knows the client intends to file the audit report with the Commissioner, the auditor had a duty of care not to make negligent misrepresentations to the Commissioner in his capacity as representative of policyholders and creditors. To prevail on the negligent misrepresentation claim, the court said that the Commissioner would need to prove reliance and damage as a result of misrepresentations of the auditor. The court concluded:

> If the Insurance Commissioner relies on negligent misrepresentations in such an audit report, and if the claims-paying ability of the insurance company is damaged as a consequence, an award of damages may be made to the Insurance Commissioner and against the auditor on behalf of the policyholders and to other creditors as was done in *Bohniver* (citation omitted.) *Id*. at 1507.

Out of State Applications of *Bily*

Bily has been described as the "majority" rule by several recent out of state cases and has been applied in several recent out of state cases.

NyCal Corp. v. KPMG Peat Marwick LLP, 426 Mass. 491 (1998). The Massachusetts Supreme Judicial Court endorsed *Bily* and denied a third party's attempt to recover from the accountant. The Court wrote:

> We concur with the California Supreme Court's conclusion [in Bily].... that the Restatement test properly balances the

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> indeterminate liability of the [*International Mortgage*] foreseeability test and the restrictiveness of the near-privity rule.

NyCal at 498.

The *NyCal* Court decided that *Bily* "recognizes commercial realities by avoiding both unlimited and uncertain liability for economic losses in cases of professional mistake and exoneration of the auditor in situations where it clearly intended to undertake the responsibility of influencing particular business transactions involving third persons." *NyCal* at 497-8, citing *Bily* at 408. *See also, Walpert, Smullian & Blumenthal v. Katz,* 361 Md. 645, 677-78 (2000), in which the Maryland Supreme Court cites *Bily* as an example of the "majority" rule: "Adopted by the majority of courts which have faced the issue, this approach has been determined by some of those courts to be most consistent with the policy foundations, *i.e.*, restriction of the person or class of persons entitled to rely on the misrepresentation to those to whom or for whom the misrepresentations were made, underlying the tort of negligent misrepresentation."

The *NyCal* Court held that because the facts did not show that the defendant knew (or intended) that the plaintiff, or any limited group of which the plaintiff was a member, would rely on the audit report in connection with its investment, the plaintiff was not a member of any "limited group of persons" for whose benefit the report was created. Accordingly, the Massachusetts Supreme Court affirmed summary judgment of plaintiff's case.

Scottish Heritable Trust, PLC v. Peat Marwick Main & Co., 81 F. 3d 606 (5th Cir., 1996) (Texas law). The Fifth Circuit applied *Bily* to an issue of first impression under Texas law. The court held that the plaintiff was not a member of the "limited group" contemplated by the Restatement for whose benefit the defendant either intended to supply the information or knew that its audit client intended to supply it. Accordingly, the Court reversed an $8.5 million jury verdict for plaintiff against a Big 5 accounting firm and rendered a "take nothing" verdict in favor of the accountant. In *Forcier v. Cardello*, 173 B.R. 973 (D.C. RI 1994), (Rhode Island law), the federal district court concluded that the Rhode Island Supreme Court would adopt the Restatement approach, citing *Bily*, but stated that the case was not yet ready for a ruling on summary judgment.

Standard Chartered Bank PLC v. Price Waterhouse, 945 P.2d 317 (Az. 1996). This case is notable for its acceptance of the *Bily* policy analysis, which was used in part to reverse a $338 million jury verdict against a large accounting firm. The *Standard Chartered* case held that the plaintiff could not assert claims for both negligence and negligent misrepresentation, and that what was potentially viable was a single negligent misrepresentation claim within the limits of Restatement Section 552. The *Standard Chartered* court stated:

> The policy reasons for confining auditor negligence within the liability range set forth in Section 552 are stated at length in *Bily* [citation omitted] and we will not reiterate them here.

Id., at 341-342 and fn. 11.

Federal Decisions

Bily was also applied in at least three significant federal decisions in the last year, one decided under the federal securities laws, and two in Securities and Exchange Commission ("SEC") enforcement proceedings against auditors.

Reiger v. PriceWaterhouseCoopers LLP, 117 F. Supp. 2d. 1003 (S.D. Cal. 2000) ("Reiger"), is a significant decision apply-

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Compelling the Reluctant Respondent to Arbitrate

In a dispute involving an agreement with an arbitration provision, a plaintiff may unknowingly (or perhaps intentionally) file a court action in contravention of the agreement to arbitrate. The defendant, wishing to invoke the arbitration clause, typically moves to stay the action and compel arbitration. Obviously, under such a scenario, the plaintiff will participate in the arbitration because he is the one seeking some form of relief. But what about the situation where a claimant demands arbitration, with the respondent refusing to participate? What can a claimant do to compel a respondent to participate in arbitration?

Matthew J. Hafey

The threshold issue is whether the arbitration agreement designates the Alternative Dispute Resolution ("ADR") provider in the event of a dispute. Unfortunately, some do not. Where the arbitration agreement does not designate the ADR provider, or at least prescribe a procedure for selecting a neutral, it will not be deemed "self-executing," and a court order (upon a Petition to Compel Arbitration) will be required before a default for failure to appear may be rendered by an arbitrator selected by the claimant. The standard California Association of Realtors Residential Purchase Agreement, for example, provides, "The arbitrator shall be a retired judge or justice, or an attorney with at least 5 years of residential real estate law experience." This provision fails to adequately designate a particular ADR provider. *See America Home Assurance Co. v. Benowitz* (1991) 234 Cal.App.3d 192, 201 (arbitration clause providing that a dispute be determined by "a single neutral arbitrator" not self-executing; arbitration award void where claimant selected arbitrator and respondent refused to appear).

A "self-executing" arbitration agreement, on the other hand, may authorize an arbitrator to render a valid arbitration award by default, even without a court order, in the event of a non-responding party's failure to appear in the arbitration proceedings. *See Brink v. Allegro Builders, Inc.* (1962) 58 Cal.2d 577, 579 (arbitration agreement explicitly authorized arbitrator to enter award upon default after notice). The rules of the selected ADR provider may also authorize such an award. *See e.g.* AAA Commercial Dispute Resolution Procedures ("AAA Rule") Rule R-31 ("Arbitration may proceed in absence of any party who, after due notice, fails to be present"); Judicial Arbitration and Mediation Services ("JAMS") Rule ("Arbitrator may proceed with the Hearing in the absence of a Party who…having reasonable notice of the Hearing…fails to attend").

In sum, a self-executing arbitration provision may give the claimant the ability to secure an award by default against a respondent that refuses to participate. The absence of such a provision means that the claimant must first go to court for an order compelling arbitration and designating the ADR provider.

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Compelling the Reluctant Respondent

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Even when the respondent makes an initial appearance in the arbitration, the claimant is not out of the woods. Sometimes a recalcitrant respondent will resist arbitration proceedings simply by refusing to pay the arbitrator's fees and costs after the arbitration is already under way. Code of Civil Procedure § 1284.2 provides that, "[u]nless the arbitration agreement otherwise provides, …each party to the arbitration shall pay his *pro rata* share of the expenses and fees of the neutral arbitrator." *See also* AAA Rule R-52 (expenses of arbitration to be shared by the parties). Section 1284.2 represents "the legislative policy of this state…that, absent an agreement to the contrary, arbitration costs are to be borne by the party incurring them." *Turner v. Superior Court* (1998) 67 Cal.App.4th 1432, 1438. With the exception of certain limited situations (most notably the employment context, where an arbitration agreement will not be enforced if it limits an employee's statutory right to access a forum to vindicate his or her claims), this rule will apply to most arbitration proceedings. *See Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 102 (arbitration clause in employment agreement not enforceable if payment of arbitrator's fees is a prerequisite to access arbitral forum). Under many arbitration systems, such as the American Arbitration Association, if sums sufficient to cover the arbitrator's fees are not deposited by the parties before the arbitration hearing, the proceedings may be suspended or terminated. *See* AAA Rule R-56. Thus, a refusal by the respondent to pay his share of the arbitrator's fees may thwart the claim.

A simple, but not necessarily enviable, solution for the claimant is to advance the respondent's share of the arbitrator's fees in hopes of eventually recouping them as part of the award. Alternatively, the claimant can file a Petition to Compel Arbitration on the ground that the refusal to pay the fees amounts to a failure to comply with the arbitration agreement. If the claim involves a written contract involving interstate or foreign commerce, the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*., will apply regardless of whether the matter is brought in state or federal court. Otherwise, the California Arbitration Act, Code of Civil Procedure § 1280 *et seq*., will apply.

A Petition to Compel Arbitration under the California Arbitration Act must be filed within four years of the date the party refuses to participate in the arbitration (here, when the party refuses to pay the arbitrator's fees). *See Spear v. California State Auto. Ass'n* (1992) 2 Cal.4th 1035, 1041-42. The Petition should be filed in the county where the agreement was made or was to be performed or, if the agreement was entered into outside the state, where any party resides or does business. Code of Civil Procedure § 1292. If there is already a lawsuit pending, the Petition should be filed as a Motion to Compel Arbitration in that lawsuit. Code of Civil Procedure § 1292.4. Factual issues should be presented in the form of declarations, not verified pleadings. *See Strauch v. Eyring* (1994) 30 Cal. App.4th 181, 186 (error to deny petition on ground of fraud raised in responsive pleadings rather than declarations under oath). The Petition should also set forth the arbitration clause verbatim, or it should be attached and incorporated by reference. California Rule of Court 371.

Under the California Arbitration Act, a court has no discretion to deny the Petition unless it finds that the claims are not arbitrable, no written agreement to arbitrate exists, the right to compel arbitration has been waived, grounds exist for the revocation of the agreement, or litigation is already pending that may render the arbitration unnecessary or create conflicting rulings on common issues. Code of Civil Procedure § 1281.2. Presumably, a party who initially submitted to arbitration but refused to pay the arbitrator's fees would be estopped to deny the existence of the arbitration clause or the agreement, that the right to compel arbitration has been waived, or that grounds exist for revocation of the agreement.

Accordingly, it would seem that, under such circumstances, a Petition to Compel Arbitration (essentially, a petition to force the non-participating party to pay his share of the arbitrator's fees) should be routinely granted by the Court, leaving only the question of how to enforce the order. A Petition to Compel Arbitration is essentially a suit in equity to compel specific performance of the arbitration agreement. *Freeman v. State Farm Mutual Automobile Insurance Co.* (1975) 14 Cal.3d 473, 479. It therefore follows that a failure to comply with an order compelling arbitration should be enforceable through the court's powers of contempt. *See Addiego v. Hill* (1971) 17 Cal.App.3d 453, 460 (court may enforce judgment granting specific performance by contempt proceedings). However, in order to successfully invoke the court's contempt powers, the party seeking to compel arbitration will have to establish (a) the rendition of a valid order; (b) the respondent's actual knowledge of the order; (c) the respondent's ability to comply with the order; and (d) the respondent's willful disobedience of the order. *Conn v. Superior Court* (1987) 196 Cal.App.3d 774, 784. Alternatively, if the respondent fails to comply with the order to pay arbitration fees, the claimant might now seek to have the arbitrator proceed with the matter on a default basis. There is no known case authority in California, however, indicating whether or not an arbitration award by default against a non-paying respondent will be upheld in court.

— Roy G. Rifkin and Matthew J. Hafey

(Photo unavailable for Mr. Rifkin at press time.)

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ing to a claim against an auditor the Ninth Circuit's opinion in *In Re Silicon Graphics, Inc. Securities Litigation*, 183 F.3d 970 (9th Cir. 1999). ("*Silicon Graphics*"). *Silicon Graphics* interpreted the Private Securities Litigation Reform Act of 1995, which provides that in order for a complaint to allege violations of Section 10b of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, it must "state with particularity facts giving rise to a strong inference that the defendant acted with scienter." In *Silicon Graphics*, the Ninth Circuit applied a high standard for pleading scienter, by which the plaintiff must "plead, in great detail, facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct." *Silicon Graphics*, 183 F.3d at 974.

The plaintiffs in *Reiger* alleged that the defendant ("PW") violated Section 10b and Rule 10b-5 in a case in which PW's audit client restated financial numbers which had been previously reported on by PW. The *Reiger* court ruled that plaintiffs failed to allege scienter on the part of PW, and granted PW's motion to dismiss without leave to amend. *Reiger* cited several federal cases

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stating that auditors will rarely, if ever, have a rational motive for participating in a client's fraud. In addition, the *Reiger* court cited *Bily* as follows:

> Second, because an independent accountant often depends on its client to provide the information base for the audit, it is almost always more difficult to establish scienter on the part of the accountant than on the part of its client. *Bily v. Arthur Young & Co.* [citation omitted.] ("An auditor is a watchdog, not a bloodhound. As a matter of commercial reality, audits are performed in a client-controlled environment.)

Reiger, 117 F.Supp.2d at 1007-1008.

This same quotation from *Bily* appears in opinions authored by Administrative Law Judge James Kelly in recent SEC Enforcement Proceedings against financial statement auditors. *In the Matter of Carol Wallace*, Admin. Law Initial Release, (http://www.sec.gov/litigation/aljdec/id178tjk-htm, 2000) ("*Wallace*") and in the Matter of Darry C. Scutillo and Mark F. Jensen, Admin. Law Initial Release, (http://www.sec.gov./litigation/aljdec/id183tjk-htm, 2001) ("*Scutillo*").

In *Wallace*, the SEC charged an audit engagement partner of a Big 5 firm with violation of Rule 102(e) of the SEC's rules of practice. That rule has been interpreted to require recklessness on the part of an auditor performing work in connection with an SEC filing in order for that auditor to be disciplined. The *Wallace* opinion analyzed the recklessness requirement in a manner similar to the scienter requirement under Section 10b and Rule 10b-5. Judge Kelly quoted *Bily* in the *Wallace* case as follows: "The contours of auditing recklessness are particularly troublesome because an audit by nature involves considerable estimation and judgment exercised against materials prepared by others." The administrative law judge then cited the identical "watchdog/bloodhound" quotation which appears in *Reiger*. The administrative law judge in *Wallace* decided that not all of the SEC's allegations of recklessness were proven and that: "The level of scienter established on this record is low to moderate…" Accordingly, the judge denied the SEC's request that the auditor be permanently suspended from SEC practice with the ability to reapply in three years. The judge ruled that the appropriate level of discipline was a one-year suspension.

In the *Scutillo* case, Judge Kelly heard charges of alleged violations of Rule 102(e) asserted against an audit partner and a concurring partner. The *Scutillo* decision includes the same quotation of *Bily* as in *Wallace*. Again, Judge Kelly ruled that the SEC did not prove all of its allegations of recklessness against the audit partner, but concluded that the partner was reckless in at least one area in which his conduct was "egregious." Accordingly, the administrative law judge denied the audit partner the privilege to practice before the SEC for three years, as opposed to the permanent bar requested by the SEC. The administrative law judge suspended a ruling with respect to the concurring partner in light of that individual's post hearing settlement offer.

Conclusion

The decisions discussed above demonstrate that *Bily* has had a profound impact on cases involving accountants in California decisions, out of state decisions and in the decisions of federal tribunals. Because *Bily* is a well reasoned decision which takes into account the realities of the environment in which financial statement audits are performed, and because the disputes involving financial statement audits are complex, *Bily* is likely to have a significant impact on cases in this area for many years in the future.

— Michael Cypers and Gwyn Quillen

The Appellate Limitations on *Trope v. Katz*

When the Supreme Court held that attorneys who represented themselves in *propria persona* could not recover attorney fees under Civil Code Section 1717, many lawyers and jurists were extremely critical. In an ABTL article published back in February, 1996, I not only criticized the logic of the Supreme Court's decision in *Trope v. Katz*, but predicted that exceptions to the Court's ruling would inevitably follow. For those of us who have waited patiently for several years, we finally have two cases that chip away at the Court's ruling.

Larry C. Russ

In *Gilbert v Master Washer and Stamping Co.*, 2001 Cal App Lexis 117, the Court of Appeal held that a lawyer represented by other members of his law firm is entitled to recover reasonable attorney fees where the representation involved the lawyer's personal interests and not those of the law firm. The dispute in *Gilbert* involved the breach of a lease agreement. For some reason, the plaintiff decided to sue the defendant *and its attorney*. Summary adjudication was granted in favor of the lawyer defendant, David Gernsbacher, who was represented in the action by lawyers in his law firm.

The trial court refused to award attorney fees pursuant to CC Section 1717 because of the Supreme Court's ruling in *Trope v. Katz*. The Court of Appeal reversed and remanded, narrowly limiting the decision in *Trope* to its particular facts. In *Trope*, the party litigants were the individual lawyers Sorrell and Eugene Trope. The law firm Trope & Trope was not a party to the action and there was no indication that it had any independent legal existence. While the Supreme Court seemed to treat the Tropes and their law firm interchangeably, the Court of Appeal in *Gilbert* chose to make a legal distinction between the Tropes as individual attorneys and the firm Trope & Trope.

In its holding, the *Gilbert* court noted that the Gernsbacher law firm had an independent existence, and that other lawyers in that law firm represented the individual attorney defendant, not the attorney himself in *propria persona*. The *Gilbert* Court appears to have obtained its courage from the Supreme Court's own retreat from its prior harsh ruling in *Trope v. Katz*.

In *PLCM Group, Inc., v Drexler*, the California Supreme Court revisited the attorney fee issue and held that a corporate litigant was entitled to recover attorney fees for work performed by in-house counsel, even though such counsel were employees of the corporate litigant. In *PLCM*, the Supreme Court limited its ruling in *Trope* to situations where there was no attorney-client relationship between the litigant and his or her attorney. The Court noted that by definition the term "attorney fees" implies the existence of an attorney-client relationship.

In the case of in-house counsel, the Supreme Court had little trouble recognizing the existence of an agency relationship and thus an attorney-client relationship. Why the individual lawyers of Trope & Trope did not have the same type of agency relation-

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FROM: www.abtl.org

To: *abtl Report* Readers

Subject: Legal Websites

Date: June 1, 2001

This edition introduces a new *abtl Report* feature —- Wandering the Web —- a column of noteworthy legal websites selected by our readers.

The idea is for practicing attorneys to write and e-mail us brief descriptions of their favorite websites.

Below are a baker's dozen sites chosen by Denise Parga and Robin Meadow of *abtl Report's* Editorial Board. Perhaps these sites are already familiar, perhaps not. In any case, they're all out there waiting for your attention.

Please join our web wandering enterprise. E-mail your favorite sites to www.abtl.org. Your site descriptions will be forwarded to the *abtl Report* editorial staff for possible inclusion in the next edition. Thank you.

Strictly Legal

The most comprehensive legal resource website is http://findlaw.com. This website is linked to a number of useful federal and state sites. For example, there are links to sites which provide access to the U.S. Code (http://uscode. house.gov/usc.htm) (searchable by title, section or keyword), the Code of Federal Regulations (http://www. access.gpo.gov/nara/cfr-table-search.html), the Federal Register (www.access.gpo.gov/su_docs/aces/ aces140.html), opinions of the U.S. Supreme Court (decisions available from 1893 and searchable by party, cite or text) and Court of Appeals. The Central District is featured at http://www.casd.uscourts.gov/, providing local rules and judges' calendars, which can be accessed through findlaw.com.

With respect to California, there are links to websites providing free state Supreme Court and Appellate decisions from 1934 to the present. There are links to http://www.leginfo.ca.gov/, which tracks assembly and senate bills and provides the text of municipal ordinances and county codes. There is also a link to http://www.calregs.com/, the site for the California Code of Regulations. If you cannot remember the name of any other legal website, it is likely you can access it through http://findlaw.com. Also on this website is a link to http://lasuperiorcourt.org/, which gives you access to 14 days of its civil calendars, tentative rulings, free judicial council forms and permits you to arrange for court appearances by telephone.

For those attorneys who specialize in appellate practice, http://appellatecases.courtinfo.ca.gov/ provides complete access to the dockets of all districts of the Court of Appeal. It is searchable by Superior Court or Court of Appeal case number, party, attorney and caption. A particularly useful feature is the sign up for e-mail notification of key events, such as the filing of the record, the filing of a brief, a calendar notice, or disposition of the case. A related page is http://www.courtinfo.ca.gov/courts. This site offers published opinions, usually within several hours of their filing in both PDF and Word format. The opinions are maintained on the site for 60 days. The site also includes 24-hours notice of forthcoming California Supreme Court filings, as wells a list of the Supreme Court's actions at its Thursday conferences.

Factual Inquiries

Often it is incumbent upon attorneys to conduct investigative research regarding the parties to a lawsuit or expert or percipient witnesses. Corporate records searches can be conducted at no charge at the California Secretary of State's official site, http://www.ss.ca.gov/. With respect to medical experts, their credentials, including medical school, residency programs and achievement awards, can be verified through the official site of the American Medical Association located at http://www.ama-assn.org/. The official site of the California Board of Accountancy, located at http://www.dca.ca.gov/cba will verify licensing information of Certified Public Accountants as well as provide details of disciplinary actions. The license history of architects practicing in California can be verified at http://cab.ca.gov/, the official site of the California Architects Board, which is responsible for the regulation of architects in California. The site also provides an e-mail address for queries concerning the complaint history of architects. The official site for the California Board for Professional Engineers and Land Surveyors, http://www.dca.ca.gov/pels/, verifies licenses and provides information regarding disciplinary actions. The status of a contractor's license and disciplinary action may be verified at http://www.cslb.ca.gov/, the official site of the California Contractors License Board.

Other Interesting Sites

The "Zaplets" site, http://zaplet.zaplet.com/index.jsp, arranges multi-party meetings. An e-mail, directed through this site, allows users to choose among a selection of dates and times, with each user being updated as others make choices.

— Denise M. Parga and Robin Meadow

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ship which would allow them to represent the Trope partners in a malpractice action is beyond me. If one trusts the logic of the *Gilbert* Court, the result would have been different in *Trope* if Trope & Trope were a professional corporation and other employees of the firm performed work in connection with the collection action as well as the malpractice action. This is because the *Gilbert* Court held that an attorney represented by members of his or her law firm does constitute an attorney-client relationship and as well such an attorney "incurs" attorney fees for purposes of CC Section 1717.

What remains a little odd is the fact that the *Gilbert* Court seems to indicate that its decision may have been different if the law firm which employed Mr. Gernsbacher was also named as a party to the lawsuit. However, such a different result would be inconsistent with the Supreme Court's ruling in the *PLCM Group* case in that the corporate defendant represented by its own in-house counsel was a party litigant. Why should a professional law corporation be treated any differently than any other corporate entity for purposes of entitlement to recovery of attorney fees under CC Section 1717?

The bottom line is that sole practitioner attorneys who represent themselves in litigation with clients or others are not going to be able to recover attorney fees because *Trope v. Katz* would still circumvent such a recovery. On the other hand, law firms with a separate legal existence, *i.e.* a corporation or LLP ought to be able to recover attorney fees under CC Section 1717 if only individual attorneys, as opposed to the law firm, are parties to the litigation. If the law firm is also a party defendant, your guess is as good as mine!

— Larry C. Russ

Significant Decisions from the Federal Courts Committee

Three recent Ninth Circuit decisions in the field of intellectual property law have answered several important open questions and, at the same time, created traps for the unwary.

In *Chance v. Pac-Tec Teletrac Inc.* (9th Cir. Mar. 20, 2001), the Court addressed the issue of what constitutes "first use" of a service mark under the Lanham Act. The first use date of a mark is used to determine the priority of one user over another. The mark "Tele Trak" was claimed by plaintiff for a lost and found tag service and by defendant for tracking lost or stolen vehicles. In October 1989, plaintiff sent out 35,000 postcards announcing the Tele Trak service. They received 128 responses but made no sales at that time. There was some evidence of a February 1990 sale to "a longtime friend" and a summer 1990 gift to a friend, but these sales were found not to be *bona fide*. Actual, arm's length sales began after February 1991. Defendant started using the mark in June 1989, introduced its new service using the mark in July 1989, provided the service for free in April 1990 and launched the service publicly in December 1990, when defendant made its first sale.

The Court held that trademark priority is not simply choosing the earliest sale date but rather should be determined based on the "totality of the circumstances test." Specifically, a party's actions *prior to any sale* can be sufficient to show (1) adoption of a mark and (2) display of the mark in a sufficiently public manner to identify the goods in the public mind. Because defendant conducted a public relations campaign, was interviewed by major newspapers nationwide about the branded service, and developed a slide show months before the free service began, the court found that the totality of the circumstances required the conclusion that defendant's first use date "was significantly earlier" than April 1990, the date of the launch of the free service and the date of first use found by the court below. In short, "trademark rights can vest even before any goods or services are actually sold if 'the totality of [one's] prior actions, taken together, [can] establish a right to use the trademark' [citations and internal quotes omitted]."

In *Click Billiards Inc. v. SixShooters Inc.*, (9th Cir. June 4, 2001), the court reversed an order granting summary judgment in a trade dress infringement case involving competing pool halls and eased the burden of presenting a trade dress infringement case. Plaintiff complained that defendant had copied plaintiff's style of doing business, including the use of large floral print carpet pattern and style, dark mahogany wood finishes, ceiling and wall covers, similar woodwork, layout and arrangement of pool tables, drink rails, and even the color, shape and location of the ceiling fans, among other things. Defendant argued that each of these items was functional and hence unprotectable under trademark law.

The court confirmed the rule developed in *Fuddruckers* and confirmed by the Supreme Court in *Two Pesos Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992), that "restaurants and similar establishments may have a total visual appearance that constitutes protectable trade dress." Plaintiff must prove that the trade dress is "nonfunctional," serves a "source-identifying role," and that defendant creates a likelihood of consumer confusion. To the court, the focus is not on the individual elements but on the "overall visual impression that the combination and arrangement of those elements create." Whether trade dress is functional and thus unprotectable depends on whether the *overall* design (not its individual components) has a utilitarian advantage, whether alternate designs are available, and whether the design choices were made for functional — cost or efficiency — reasons or for aesthetics. Where a plaintiff's design choices can be made "without unduly hindering his competitors' ability to compete," the design is not likely to be functional.

The court reviewed a trade dress survey that indicated that 80 percent of a group of pool hall patrons linked the defendant's trade dress to the plaintiff. Without addressing the merits of the survey, the court found that the survey, which the lower court had admitted into evidence and then disregarded, stating, "Put bluntly, the survey is of little or no value," did raise questions of material fact regarding the source identifying qualities of the trade dress. It was error to disregard the survey in granting summary judgment.

Michael K. Grace

Especially significant to the appellate court was evidence of intentional copying, aided by one of plaintiff's employees who admitted defendant into one of plaintiff's pool halls before opening time in order to take measurements and compare materials used on countertops, tables, walls and bar stools. Even though controverted by defendant, the court viewed the evidence as precluding summary judgment. The court warned, "[T]rial courts disfavor deciding trademark cases in summary judgment because the ultimate issue is so inherently factual. [citations omitted]. Clicks has presented evidence sufficient to clear the summary judgment hurdle."

In an interesting side note, the lower court judge was criticized for having conducted a site visit of the pool halls without informing counsel when and how he would do so. "[T]he court's site visit improperly exposed him to factual evidence not part of the record." The court wisely did not speculate about the nature of that evidence.

In *Breed v. Hughes Aircraft Co.*, (9th Cir. June 14, 2001), the court dismissed an appeal for lack of jurisdiction, even though neither party raised the issue. Plaintiff's alleged 14 separate claims for breach of an alleged oral agreement regarding rights to magnetics technology, including one solitary claim for an order directing that plaintiff's name be added to the patent as a co-inventor. The case began in Texas state court, was removed to U.S. District Court for the Western District of Texas and then transferred to the Central District of California, where a motion for summary judgment was granted. Plaintiff appealed to the 9th Circuit.

In reviewing jurisdiction, the court determined that the Federal Circuit has exclusive jurisdiction of all cases arising under the patent laws of the United States. The test is not at the time of appeal or at the time of oral argument before the court of appeals, but at the time of the initial filing of the civil action: Was a claim arising under the patent laws alleged at that time? If so, then the Federal Circuit has exclusive appellate jurisdiction, even if the patent claims are not the subject of the appeal. One exception to the jurisdiction rule is where the plaintiff dismisses the patent claim without opposition "early in the litigation," in which case the Federal Circuit would lose its jurisdiction over an appeal.

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The Power of the Unclean Hands Defense: Putting the Plaintiff on Trial

Every lawsuit involves storytelling. The plaintiff wants to tell a compelling story as to why the plaintiff is entitled to recover damages or some other relief from the defendant. The defendant wants to tell a story showing the opposite. This is precisely why the unclean hands affirmative defense can be so potent. An unclean hands story is easy to articulate: the plaintiff engaged in unsavory conduct related to the claims asserted in the lawsuit and is therefore barred from relief. More importantly, a story of unclean hands can be easier to understand than a story about causation, damages, the statute of frauds, or the like. This article describes the unclean hands defense as well as important factors that counsel should consider before asserting the defense, or before asserting a claim subject to the defense.

Scott Vick

The Unclean Hands Defense Can Be Based on Any Unconscientious Conduct Related to the Subject Matter of the Lawsuit, Not Just Actionable Conduct

The unclean hands defense sweeps broadly. The unclean hands defense need not be based on fraud or an actionable tort. Time and again, courts have held that any unconscientious conduct related to the subject matter of the plaintiff's claims will bar the plaintiff from recovering on that claim.

> The equitable principles underlying the clean hands doctrine do not require a finding that [the plaintiff] was guilty of perjury, concealment or other illegal conduct, for it is *not only fraud or illegality,* which will prevent a suitor from obtaining equitable relief. *Any unconscientious conduct* upon his part, which is connected with the controversy, will repel him from the forum whose very foundation is in good conscience.

Pond v. Ins. Co. of North Am., 151 Cal. App. 3d 282, 291-92 (1989) (emphasis added); *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal. App. 4th 970 (1999) ("[T]he misconduct need not be a crime or an actionable tort. *Any* conduct that violates conscience, good faith, or other equitable standards of conduct is sufficient cause to invoke the doctrine.") (emphasis added).

Given the ambiguity and malleability in the phrase "any unconscientious conduct," the outer-most contours of the unclean hands defense are far from clear. Whether challenged conduct amounts to unclean hands in any given case will likely turn on the nature of the challenged conduct, the perpetrator's state of mind in committing the wrongful conduct, how directly the challenged conduct relates to the subject matter of the lawsuit, and the injury that the wrongful conduct caused to party asserting the defense.

Kendall-Jackson Winery, Ltd. v. Superior Court, 76 Cal. App. 4th 970 (1999), illustrates just how broadly courts will construe the phrase "any unconscientious conduct." There, Kendall-Jackson sued the E&J Gallo Winery for its role in causing Gallo's Turning Leaf wines to be placed adjacent to Kendall-Jackson Vintner's more popular Vintner's Reserve wines. *Id.* 981-83. Kendall-Jackson's did not prevail in that lawsuit. Gallo subsequently sued Kendall-Jackson for malicious prosecution. Although Gallo's challenged conduct in the first lawsuit did not amount to actionable "unfair competition," the Court of Appeal nonetheless held that Gallo's conduct could amount to unclean hands, barring Gallo from recovering on its malicious prosecution lawsuit. *Id.*; *see also Hall v. Wright*, 240 F.2d 787, 795 (9th Cir. 1957) (holding that unclean hands need not constitute unfair competition under California law).

The unclean hands defense likewise bars a plaintiff from suing upon a right he or she wrongfully obtained. This was the case in *Unilogic, Inc. v. Burroughs Corp.*, 10 Cal. App. 4th 612 (1993) and *DeRosa v. Transamerica Title Ins. Co.*, 213 Cal. App. 3d 1390 (1989). In those cases, the plaintiffs asserted claims based on rights they acquired by making materially false misrepresentations or omissions. In both cases, the plaintiffs' conduct amounted to unclean hands, and their claims failed for that reason.

Strong policy reasons favor the use of the unclean hands defense. The unclean hands doctrine is designed to protect the integrity of the court as much as it is to protect the party asserting the defense. *See e.g., Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal. App. 4th 970 (1999) ("The unclean hands doctrine protects judicial integrity and promotes justice. It protects judicial integrity because allowing a plaintiff with unclean hands to recover in an action creates doubts as to the justice provided by the judicial system. Thus, precluding recovery to the unclean plaintiff protects the courts rather than the opposing party's interests…. It prevents a wrongdoer from enjoying the fruits of his transgression.").

The Unclean Hands Defense Can Be Asserted Against Equitable and Legal Claims

To be sure, the unclean hands defense has deep roots in the law of equity. The defense arises from the maxim that "[h]e who comes into Equity must come with clean hands." *Blain v. Doctor's Co.*, 222 Cal. App. 3d 1048, 1059 (1990). But for almost the past thirty years, courts have allowed parties to assert the unclean hands defense against equitable *and* most legal claims. *See e.g., Kendall-Jackson Winery, Ltd. v. Superior Court*, 76

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Book Review

Bowling Alone

Robert D. Putman, S*imon & Schuster 2000, 541 pp.;*

Every lawyer, even one fresh out of law school, knows that civility and professionalism have declined since the good old days. For some lawyers, the present state of affairs is simply a fact of life, more or less unpleasant depending on one's sensibilities. For others, the very soul of the profession is at risk.

But few of us have much opportunity to think about how these things came to pass. To be sure, the usual demons are always close at hand — The American Lawyer, ever-more-demanding clients, bottom-line mentality, and so on. But are they causes or effects? And if they are causes, what caused *them*?

It turns out that the answer may be far more complex, and more profoundly disturbing, than anyone realized. If one accepts the research outlined in Robert D. Putnam's *Bowling Alone* — and it would hard for anyone without multiple advanced degrees to challenge this magisterial, heavily annotated treatise — it seems that the legal profession is experiencing its own version of a long-term, society-wide disintegration of what Putnam calls "social connectedness" or "social capital." The book marshals data from an astonishingly wide array of social surveys and other collections of information ranging from individual diaries to union membership rolls. The whimsical title hints at a sobering conclusion: Although "more Americans are bowling than ever before, *league* bowling has plummeted" (p. 112) — along with active participation in virtually every other kind of group, from bridge clubs and neighborhood church groups to the vast majority of local and national civic and professional organizations.

Of the many types of social capital Putnam measures — including political, civic and religious participation, workplace connections, social connections and volunteerism — the ones that seem to concern law practice most directly are "Reciprocity, Honesty and Trust," discussed in Chapter 8. "[P]ollsters have been asking Americans standard questions about social trust and honesty for many decades" (p. 137), and survey archives show a significant decrease in the number of us who believe that others are trustworthy. The timing of this trend closely coincides with the other declines in social capital that Putnam traces — as well as with an explosion in the number of lawyers and with another trend in which "[t]hroughout the American society and economy, beginning around 1970, informal understandings no longer seemed adequate or prudent….[and] all of us abruptly began to demand to 'get it in writing.'" (P. 147.) Putnam observes:

> Almost imperceptibly, the treasure that we spend on getting it in writing has steadily expanded since 1970, as has the amount that we spend on getting lawyers to anticipate and manage our disputes. In some respects, this development may be one of the most revealing indicators of the fraying of our social fabric. For better or worse, we rely increasingly — we are forced to rely increasingly — on formal institutions, and above all on the law, to accomplish what we used to accomplish through informal networks reinforced by generalized reciprocity — that is, through social capital. (*Ibid.*)

Robin Meadow

What does all this have to do with civility and professionalism among lawyers? "[A]s the stability of social networks has declined and the number of one-time-only encounters among lawyers has increased, lawyers worry less about their own reputation for honesty, and knowing this, they too trust one another less and cooperate less." (*Ibid.*)

So if you want to know "why," start here.

Robert D. Putnam, Bowling Alone, Simon & Schuster 2000, 541 pp.; see also http://www.bowlingalone.com

—Robin Meadow

The Power of the Unclean Hands Defense

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Cal. App. 4th 970 (1999); *Camp v. Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 620, 638 (1995); *Fibreboard Papers Prods. Corp. v. East Bay Union of Machinists*, 227 Cal. App. 2d 675, 728 64 (1964); *Pond v. Ins. Co. of North Am*., 151 Cal. App. 3d 282, 292 (1989) (holding that "[t]he defense of unclean hands, if proven, will bar prosecution of a malicious prosecution action.").

Unclean Hands Is a Resonant Theme to Nurture As a Defendant and to Avoid As a Plaintiff

Every case should have a theme or themes. While it might be challenging to build a case theme around a difficult concept such as proximate cause, it is generally much easier to build a resonant case theme around unclean hands. Not only is the name of the defense — unclean hands — anchored in visual imagery, the subject matter of the defense tends to be interesting. For this reason, defense counsel is well advised fully to develop the affirmative defense where the facts permit it.

Likewise plaintiff's counsel would be well advised to consider whether some or all of the plaintiff's claims are subject to the unclean hands defense. If some, but not all, of the plaintiff's claims are subject to the unclean hands defense, the plaintiff should consider the risk that evidence of the plaintiff's unclean hands with respect to one claim will sully the plaintiff's case with respect to other claims not otherwise subject to the unclean hands defense. In such a case, it might be more prudent to drop a claim subject to the unclean hands defense than to assert that claim.

— Scott Vick

Federal Courts Committee

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Another exception is to ask the district court to enter a final decision pursuant to FRCP Rule 54 (b) as to the nonpatent claims only. According to the court, "The pleading pitfall occasioned by the Federal Circuit's jurisdiction statute is surely a trap for the unwary and one which calls for particular care and a conscious decision with respect to patent claims while drafting a complaint."

— Michael K. Grace

Discovery in Contractual Arbitration

Most contracts containing an arbitration provision include a variant of the following standard provision:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the [arbitration provider] and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

While this provision is generally sufficient, once arbitration is commenced, the parties quickly realize that they have no mechanism for engaging in discovery in order to prepare for arbitration. In a business context where the dispute does not involve personal injury or wrongful death, the parties may only engage in discovery if the arbitration agreement provides for such discovery or if the parties subsequently agree to engage in discovery. Code of Civil Procedure § 1283.1 (b) provides that "Only if the parties by their agreement so provide, may the provisions of Section 1283.05 be incorporated into, made a part of, or made applicable to, any other arbitration agreement." Section 1283.05 sets forth the scope of discovery and enforcement of discovery in arbitration. Under section 1283.05, the parties can engage in the same discovery that is permitted in a civil action other than a limited civil case with the exception that leave of the arbitrator is required to take depositions for discovery. Section 1283.05 authorizes the arbitrator to enforce discovery in the same manner as if the discovery were propounded in a civil action, except that an arbitrator cannot order the arrest or imprisonment of a person.

Denise M. Parga

The agreement to engage in discovery must be expressed and cannot be inferred from other provisions in the contract containing the arbitration provision. For example, some insurance companies have attempted to infer a discovery agreement in the cooperation clause in insurance policies in order to conduct discovery for a contractually mandated insurance appraisal proceeding. Code of Civil Procedure § 1280(a) provides that an agreement to arbitrate includes "agreements providing for valuations, appraisals and similar proceedings…" Appraisals are therefore governed by the detailed statutory scheme governing arbitrations

The policy's cooperation provision cannot be interpreted as satisfying the requisite "agreement" for discovery required by Code of Civil Procedure §1283.1. Unless there is express language in an insurance policy that states that the parties have agreed that Section 1283.05 applies in the event of an appraisal or otherwise expressly provides for discovery, there can be no discovery in an appraisal proceeding.

Both the American Arbitration Association ("AAA") and Judicial Arbitration Mediation Services ("JAMS") recommend that the arbitration provision expressly incorporate their rules. Rule R-23 of the AAA Commercial Rules provides that the arbitrator may direct the production of documents and other information and the identification of witnesses to be called. The AAA's Optional Procedures for Large, Complex Commercial Disputes permit the arbitrator to establish the scope of document discovery, order depositions and the propounding of interrogatories in the event the parties cannot agree on the scope of discovery.

Similarly, Rule 13 of the JAMS Streamlined Rules provide that the arbitrator may order the exchange of documents or information , such as the names of individuals with knowledge of the dispute or the identity of expert witnesses. Rule 15 of the JAMS Comprehensive Rules provides that in addition to the foregoing, each party may take one deposition of an opposing party.

Therefore, in order to avoid a stalemate concerning discovery, the wiser course of action is to anticipate the need for discovery and expressly provide for both the extent of discovery (number of and duration of depositions, document discovery, etc.) and the enforcement of discovery in the arbitration agreement or, alternatively, incorporate the rules of the arbitration provider in the arbitration agreement.

— Denise M. Parga

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Cases of Note

Arbitration

In *Carole Ring & Associates v. Nicastro*, 2001 DJDAR 2029 (Court of Appeal February 27, 2001), 87 Cal. App. 4th 253 (2001), the Second Appellate District held that a prevailing party on post-arbitration judicial proceedings may recover attorneys' fees and costs pursuant to a contractual attorneys' fee provision, even though the arbitrator directed the parties to bear their own costs and fees at the arbitration level.

In *Romo v. Y-3 Holdings, Inc.*, 2001 DJDAR 2867 (Court of Appeal March 20, 2001), 87 Cal. App. 4th 1153 (2001), the Second Appellate District held that an employer could not compel arbitration of a wrongful termination suit brought by its employee because the arbitration provision in the Employee Handbook was intended to be a "stand alone" agreement and it was not signed by the employee.

In *Circuit City Stores, Inc. v. Adams*, 2001 DJDAR 2849 (U.S. Supreme Court, March 21, 2001), the U.S. Supreme Court held that the Federal Arbitration Act applies to contracts of employment so that an employee who signed an application for employment which contained a binding arbitration provision was required to submit his discrimination lawsuit to arbitration.

In *Condee v. Longwood Management Corp.*, 2001 DJDAR 3321 (Court of Appeal, April 2, 2001), 88 Cal. App. 4th 215 (2001), the Fourth Appellate District held that a petition to compel arbitration need only allege the existence of an agreement to arbitrate. Thereafter, the burden shifts to the opposing party to prove the falsity of the purported arbitration agreement.

In *Brennan v. Tremco Inc.*, 2001 DJDAR 3669 (April 16, 2001 Cal. Supreme Court), 25 Cal. 4th 310 (2001), the California Supreme Court held that a person may not sue for malicious prosecution of an action that parties ultimately resolved through arbitration even though the action initiated in court.

In *Alexander v. Blue Cross of California*, 2001 DJDAR 4319 (Court of Appeal, May 3, 2001), 88 Cal. App. 4th 1082 (2001), the First Appellate District held that the arbitrator's refusal to impose discovery sanctions provides no ground to vacate the arbitration award even if the sanction is mandatory under the discovery statutes. The court held that Code of Civil Procedure §§ 1283.05 and 1283.1 give arbitrators the power to impose discovery sanctions but not the obligation to do so.

In *Major League Baseball Players Ass'n v. Garvey*, 2001 DJDAR 4697 (U.S. Supreme Court May 14, 2001), the U.S. Supreme Court held that the Ninth Circuit Court of Appeals erred in vacating an arbitrator's award because a reviewing court is not empowered to overturn an award because it disagrees with the arbitrator's factual findings.

Civil Procedure

In *Krantz v. BT Visual Images, L.L.C.*, 2001 DJDAR 4989 (Court of Appeal May 18, 2001), the First Appellate District held that moving party's pointing to the absence of evidence supporting the opposing party's position was not enough to obtain summary judgment. The Court held that in order to grant summary judgment there must be some affirmative showing by the moving party that the opposing party could not obtain such evidence. The court further held that, where the opposing party has been thwarted in the attempt to obtain evidence that might create an issue of material fact, a motion for summary judgment should not be granted.

In *Bahl v. Bank of America*, 2001 DJDAR 5105 (Court of Appeal May 23, 2001), the Fourth Appellate District held that, as a matter of public policy, continuances of motions for summary judgment are to be liberally granted upon a good faith showing by affidavit that such a continuance is needed to obtain facts essential to justify opposition to the motion. The Court of Appeal noted that disposition on the merits is preferred.

In *McLellan v. Northridge Park Townhomes Owners Association, Inc.*, 2001 DJDAR 5477 (Court of Appeal May 31, 2001), the Second Appellate District held that the trial court's amendment of a judgment to name a corporation as an additional judgment debtor was proper where the evidence established that the newly named corporation was a successor to the liabilities of the original judgment debtor corporation.

— Denise M. Parga

The Bottom Line: A Letter from the Founding Editor

Dear Vivian,

As the founding editor emeritus of the *ABTL Report*, I wanted to write and thank you for the outstanding job you have done these many years in editing this sheet Tom King and I started in 1976. You really have done a fabulous job, well beyond the call of duty, and you deserve all our thanks.

I also had an ulterior motive. I wanted to get something off my mind. Most of our editors, you, Mark Neubauer, Tom King and I were former journalists. Not that I can speak for them (or Bruce Alan Friedman, an excellent editor but not a former journalist), but I would imagine that money had something to do with our career reassessment. In other words, we were thinking about the bottom line.

Thomas J. McDermott, Jr.

What is the bottom line?

That resembles a question your five-year-old might ask. How high is up? How below is down?

If this were a P.G. Wodehouse novel, the bottom line might be the odds on whose derriere will look the largest in riding britches. The line on Mrs. Psymith is 12-1 for the largest bottom. Mrs. Longyear is 2-1. Certainly, this is a case where one would prefer one's line to be out of the money.

Money is what one usually associates with the phrase "the bottom line." The bottom line in a law firm, I suppose, is how much money remains after all expenses are paid, the money to go to the partners. This bottom line has become extremely important in the legal profession, together with its corollary, "this is a *business*, and don't ever forget it."

How money, certainly large amounts, ever became associated with the legal profession is a mystery, at least to those of us in generation G ("G" currently equals "geezer") "Profession," of course, identifies those who perform public service, not for money, but for, what else, public service. Public service and large amounts of money are usually linked only in third world countries that receive stipends from the United States, or "Uncle Sap" as he is sometimes referred to in those venues.

Indeed, when I started as an associate in one of Los Angeles' finest firms, at the rate of $400 per month, if I previously had nurtured the idea of wealth, I could have convincingly echoed Rick's line to Col. Renault: "I was misinformed."

If young people today become lawyers for the money, then they are just as misinformed as Rick's going to the desert for the waters, although not so disingenuously. What idiot would think that getting paid by the hour could ever amount to the big bottom line? If you billed $500 an hour (very high) for 10 hours a day at 6 days a week (dishonestly high) and you collected every penny with a 50% overhead (highly unlikely) your bottom line is $750,000. Admittedly, that's quite a sum, but a mere pittance to today's corporate elite. And the number of lawyers making that kind of money is directly proportional to those getting the press coverage. Fifty percent of the lawyers in the United States are sole practitioners. Senior partners at major firms are a very small minority, and those collecting the really big tort money all could file into the average federal courtroom (undoubtedly with a fee petition in hand).

This fascination with money has discounted the legal profession from its previously high esteem with the public to the equivalent of junk bonds. In polls of "most trusted," lawyers rank one notch above used-car salesman. (This is not hyperbole; it is true.) It has also brutalized the business in ways ranging from associates working 18 hours a day to partners failing to settle qualified cases in order to run up the fees, and everything in between. One can foresee future dramas in the style of Arthur Miller (the playwright, not the Federalist) where the kindly mother breaks down upon hearing her daughter has secretly graduated from law school. "Oh Lord, if only she'd been a whore, like her Mum." (sob)

It should be obvious that I'm not so sure that the bottom line of the legal profession should be money. We have three branches of government, the legislative, the executive and the judiciary. If we should ask a candidate what his goals will be if elected to Congress, and he were to say, "My goal is to make as much money for myself as I can," we might consider voting for another. If a president, in his inaugural address, were to say, "Ask not what your country can do for you, but ask instead what you can do for me," we would not be impressed. We want the officials that run our legislative and executive branches to fulfill an oath of public service, not private gain, and no matter what your political persuasion or cynical attitude, I believe you will agree that we are blessed in this country with, on the whole, just such officials.

Why should the judiciary branch, and lawyers are a vast part of the judiciary branch, be different. The judiciary branch is charged with enforcing the criminal law and resolving civil disputes in the just and fair way that allows our civilization to prosper. The whole judicial system does not have as its purpose the making of money. Indeed, the civil side is devoted to providing for the *litigants* to make money.

"Old-fashioned," you'll call me, and perhaps you'll write. Yvor Winters wrote to Allen Tate: "[T.S.] Elliot, my dear man, is something left over from your youth, a habit, a feeling that you have never understood clearly enough to eradicate, like a nostalgia for Santa Claus." Nostalgia for not making money does seem a little strange but I doubt that's it. The nostalgia is for the raft of things that money can't buy, and that now seem gone from the legal profession. Such things as collegiality, civility, even pleasure. Charles Foster Kane could explain it: "Rosebud."

Why can't the two go hand in hand; that is, why can't the judicial system function while lawyers get rich.

First, lawyers are not the whole system. What about the judges? How do we get them rich? Next, is justice to be only for the rich? Only the rich can make you rich. The poor won't be served. Then there's the problem of those hours. They are limited. It goes on and on. The bottom line is: the law is public service, no matter what part of it you play in. Public servants are not supposed to get rich.

As the judicial system was conceived and has developed, the bottom line is supposed to be something we generally call "Justice". That's not a very precise name for so vast a system, but it conveys the idea. "Justice is my name and money is my game," somehow sounds wrong.

I have no solution for this seeming dilemma. Free enterprise should allow everyone to prosper as they can, but if money is the only bottom line, then justice is not the bottom line. Perhaps we need to recalculate, adjust for more justice, attempt to recapture some good will and try for a bottom line that's more in balance.

Well, that's thirty – 30 – for now. Keep up the good work.

Sincerely,

Tom McDermott