

# ASSOCIATION OF BUSINESS TRIAL LAWYERS

# abtl

# REPORT

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## Letter from the President

**T**he number of lawyers admitted to practice continues to increase, but for years membership in bar associations has been decreasing or, at best, flat. Even at bar functions that ordinarily do not require bar association membership, ticket sales are down. Large law firms, with dozens of litigators, have trouble filling tables for bar events that are unquestionably helpful to advancing one's law practice.



**Seth Aronson**

Although there are many forces at play here, some visible and some not, I fear that the common culprit is the new coin of the realm: the billable hour. All law firms, large and small, in varying degrees have placed an enormous emphasis on increasing billable hours. We used to measure litigation by certain milestones; now we think in .10 hour increments. But whatever measuring stick one uses, it all comes down to incredible pressure on our time.

How to cope with all this pressure? Take some time off and attend an ABTL lunch or dinner program. In addition to MCLE credit, you will socialize with judges and other lawyers in a non-adversarial setting, and enhance your visibility in the community. Getting to know members of the judiciary — especially off the bench — provides valuable insights into the judge's demeanor and perspective, and at the very least will make you feel much more comfortable the next time you answer ready in that judge's courtroom. After a while, other lawyers not only recognize you but also know your areas of practice.

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## Does the Group-Pleading Doctrine Remain Vital Post-Reform Act?

**E**nacted in December 1995, the Private Securities Reform Act of 1995 ("PSLRA" or the "Act") was intended "to establish uniform and stringent pleading requirements for securities fraud actions." *In re Dura Pharmaceuticals, Inc. Sec. Litig.*, [2000-01 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,245 at 95,299 (S.D. Cal. July 11, 2000). In particular, the Act requires that a plaintiff state with particularity "facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b) (2). To what extent the Act has achieved that objective remains an open question, and the answer often depends on the jurisdiction in which a securities class action has been filed. While that by itself may provide some answer, at least with respect to uniformity, certain trends are beginning to emerge. The continued validity of the group-publication or group-pleading doctrine may be one such area.



**Eric S. Waxman**

The group-publication doctrine was developed by courts in the 1980s to deal with the issue of "particularity" and Federal Rule of Civil Procedure 9(b) when trying to determine whether a plaintiff had stated a claim against an individual defendant for allegedly false statements issued in a corporation's name when the statements on their face could not be attributed to a particular corporate spokesperson. Christian J. Mixer, *Individual Civil Liability Under the Federal Securities Laws For Misstatements In Corporate SEC Filings*, 56 Bus. Law. 967, 979 (2001). Utilizing the group-pleading doctrine, courts found that a plaintiff may satisfy the pleading requirements "through reliance upon a presumption that the allegedly false and misleading 'group published information' complained of is the collective action of officers and directors." *In re Glenfed, Inc. Sec. Litig.*, 60 F.3d 591, 593 (9th Cir. 1995). As explained by the Ninth Circuit:

In cases of corporate fraud where the false and misleading information is conveyed in prospectuses, registration statements, annual reports, press releases, or other "group-published information," *it is reasonable to presume* that these are the collective actions of the officers. Under such circumstances, a plaintiff fulfills the particularity requirement of Rule 9(b) by pleading the misrepresentations with particularity and where possible the roles of the individual defendants in the misrepresentations.

*Id.* (quoting *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433,

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## Vitality of the Group-Pleading Doctrine

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1440 (9th Cir. 1987)) (emphasis added). “The rationale for group pleading is that facts about fraud flowing from the internal operation of a corporation are peculiarly, and often exclusively, within the control of the corporate insiders who manage the parts of the corporation involved in the fraud.” *In re Ross Sys. Sec. Litig.*, [1994 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,363 (N.D. Cal. July 21, 1994) (quoting *Smith v. Network Equip. Tech.*, [1990-91 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,659 at 98,093-94 (N.D. Cal. Oct. 19, 1990)). “Requiring specific pleading in this context would create a substantial barrier for plaintiffs seeking to allege certain types of corporate securities fraud.” *Id.*

Prior to the Reform Act, most circuits accepted the group-pleading doctrine as an exception to the particularity requirements of Rule 9(b). *See, e.g., Wool*, 818 F.2d at 1440; *Serabian v. Amoskeag Bank Shares, Inc.*, 24 F.3d 357, 368 (1st Cir. 1994) (citing *Wool*, 818 F.2d at 1440); *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987). The primary issue confronting courts prior to the Reform Act was whether the doctrine could be applied to outside directors as well as to senior corporate officers. Thus, the issue of contention was not whether the doctrine applied but rather how far it went. *C.f., Strassman v. Fresh Choice, Inc.*, 1995 WL 743 728,



Stacey M. Tidball

\*13 (N.D. Cal. Dec. 7, 1995) (“By definition outside directors do not participate in the corporation’s day-to-day affairs. Thus, the [group-pleading] doctrine does not hold them liable unless they are ‘involved in the day-to-day management of those parts of the corporation involved in the [alleged] fraud.’”); with *Robbins v. Hometown Buffet, Inc.*, No. 94-1655-J, 1995 WL 908194, at \*5 (S.D. Cal. Mar. 16, 1995) (“[T]he group publishing doctrine may apply to defendant officers and directors merely by virtue of their status in the corporation, so long as the complaint also makes an effort to allege, where possible, how the defendants’ status as officers or directors make them responsible for group published information.”); *see generally* Fisher, 56 Bus. Law at 995-1006 & notes 16-20.

### Developments Since the Reform Act

Following the PSLRA’s enactment, a number of defendants have argued that the group-pleading doctrine cannot be reconciled with the Act’s stringent pleading requirements. *See* Christian J. Mixter, *Individual Civil Liability Under the Federal Securities Laws For Misstatements In Corporate SEC Filings*, 56 Bus. Law 967, 981 (2001). In particular, defendants have argued that the group-publication doctrine cannot be reconciled with the Act’s requirement for a plaintiff to state with particularity “facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2).

Currently, no circuit court has ruled directly on this issue and the district courts have varied widely. As indicated below, however, a trend seems to be emerging that the group-publication doctrine retains some vitality post-PSLRA. *See In re Raytheon Sec. Litig.* \_\_\_ F. Supp. 2d \_\_\_ No. Civ. A. 98-12142PBS, 2001 WL 1012027, \* 17 (Aug. 29, 2001) (“Thus far, a majority of courts facing the issue have determined that the group-pleading doctrine does in fact survive the passage of the PSLRA”).

### First Circuit

The District Court of Massachusetts recently addressed the

issue and determined that the group-pleading doctrine survived the enactment of the PSLRA. *See In re Raytheon Sec. Litig.*, 2001 WL 1012027, \*17 (Aug. 29, 2001) (“the rationale behind the group pleading doctrine remains sound in the wake of the passage of the PSLRA.”). In an earlier decision, the Maine District Court similarly found the doctrine alive and well post-PSLRA. *See Giarraputo v. Unumprovident Corp.*, [2000-01 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,296 at 95,680 (D. Me. Nov. 8, 2000) (stating that “pursuant to the ‘group published’ doctrine, the pleading requirements of Rule 9 and the PSLRA can be met without specifically pleading the fraudulent intent of corporate officers, other than outside directors”) (emphasis added).

### Second Circuit

Not surprisingly, given its recent pro-plaintiff bent, the Second Circuit has come the closest to holding that the group-publication doctrine survived the Act. While not citing to the doctrine by name, the Second Circuit has found group pleading type allegations sufficient to survive a motion to dismiss with respect to an officer who had both access to and the ability to influence the release of certain corporate information. *In re Scholastic Corp. Sec. Litig.*, 252 F. 3d 63, 75-76 (2d Cir. 2001) (holding that the complaint sufficiently alleged that misleading statements were attributable to defendant Marchuk stating that “[t]he complaint alleges that Marchuk was vice president for finance and investor relations, and therefore in a position both to access confidential information and to control the extent to which it was released to the public”).

Numerous district courts within the Second Circuit have directly held that the doctrine remains applicable post-PSLRA. For example, the Southern District of New York has repeatedly applied the group-publication doctrine after the PSLRA’s enactment. *See In re Independent Energy Holdings, PLC Sec. Litig.*, 154 F. Supp. 2d 741, 786 (S.D.N.Y. 2001); *Elliott Assocs., L.P. v. Hayes*, 141 F. Supp. 2d 344 (S.D.N.Y. 2000); *Polar Int’l Brokerage Corp. v. Reeve*, 108 F. Supp. 2d 225 (S.D.N.Y. 2000); *In re Solucorp Indus. Ltd. Sec. Litig.*, [2000-01 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,265 (S.D.N.Y. Nov. 15, 2000); *In re Oxford Health Plans, Inc.*, 187 F.R.D. 133 (S.D.N.Y. 1999).

Indeed, the Southern District has characterized the group-pleading doctrine as an “exception to the particularity requirement contained in Rule 9(b) and the PSLRA.” *Rich v. Maidstone Financial, Inc.*, [2000-01 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,357 at 96,076 (S.D.N.Y. March 23, 2001) (holding, however, that the allegations in that case were not sufficient for group pleading because plaintiff made only “scant references” to the individual defendants). The Northern District of New York has also applied the doctrine following the PSLRA’s enactment. *See Isanaka v. Spectrum Tech. USA Inc.*, 131 F. Supp. 2d 353, 360-61 (N.D.N.Y. 2001) (applying group-pleading standards but determining that plaintiff’s allegations were insufficient).

### Third Circuit

Two district courts in this circuit have explicitly rejected the use of the group-pleading doctrine after the PSLRA’s enactment. *See Marra v. Tel-Save Holdings, Inc.*, [2000-01 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 90,480 (E.D. Pa. May 18, 1999); *P. Schoenfeld Asset Management LLC v. Cendant Corp.*, 142 F. Supp. 2d 589, 620 (D. N.J. 2001). In *Marra*, the court concluded that the presumption inherent in group pleading is inconsistent with the PSLRA’s purpose and that the doctrine is unnecessary given a plaintiff’s ability to plead on information and belief. *Marra*, [1999 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 90,480 at 92,288 (quoting *Allison v. Brooktree Corp.*, 999 F. Supp. 1342, 1350 (S.D. Cal. 1998)). The Delaware District Court recently declined to address whether group pleading is still available on the basis that the complaint independently alleged scienter

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against each individual defendant. *See Sheehan v. Little Switzerland*, 136 F. Supp. 2d 301, 313 (D. Del. 2001).

#### Fourth Circuit

While the Fourth Circuit has not yet ruled on whether the group-pleading doctrine applies after the enactment of the PSLRA, it is likely to rule that the doctrine did not survive. *See In re Crimi Mae, Inc. Sec. Litig.*, 94 F. Supp. 2d 652, 657 (D. Md. 2000) (declining to address the issue). This prediction is rather easy to make since the Fourth Circuit expressed some hostility to the doctrine even prior to the PSLRA. *Id.*; *see also In re The First Union Corp. Sec. Litig.*, 128 F. Supp. 2d 871, 888 (W.D.N.C. 2001) (stating that the doctrine is contrary to even pre-Reform Act law).

#### Fifth Circuit

Of all the courts rejecting the use of group pleading, the District Court of the Northern District of Texas has perhaps gone the farthest in concluding that “[T]he PSLRA codifies a ban against group pleading.” *Coates v. Heartland Wireless Communications, Inc.*, 26 F. Supp. 2d 910, 916 (N.D. Tex. 1998) (explaining that plaintiffs need not rely on the doctrine because plaintiffs can plead on the basis of information and belief and that the group-pleading doctrine is inconsistent with the Act’s particularity requirement). *Accord Lemmer v. Nu-Kote Holding, Inc.*, No. Civ. A. 398CV0161L, 2001 WL 1112577 (N.D. Tex. Sept. 6, 2001); *Branca v. Paymentech, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 90,911 (N.D. Tex. Feb. 8, 2000). The Eastern District of Louisiana followed suit in *Thompson v. Avondale Indus., Inc.*, No. Civ. A. 99-3439, 2000 WL 310382 (E.D. La. March 24, 2000).

However, the issue is not free from doubt because the Fifth Circuit Court of Appeals recently relied in part on defendant’s position as an officer in finding plaintiffs’ allegations sufficiently particular. *See Nathenson v. Zonagen Inc.*, No. 99-20449, 2001 U.S. App. Lexis 20902, \*62-63 (5th Cir. Sept. 25, 2001) (stating that “we conclude that the necessary strong inference of scienter is pled as to Podolski, who was, and had been since July 1992, President and Chief Executive Officer, as well as a director, of the corporation. We recognize that normally an officer’s position with a company does not suffice to create an inference of scienter. However, there are a number of special circumstances here which, taken together, suffice to support a different result in the present case.”) (footnote and citations omitted).

#### Sixth Circuit

The Sixth Circuit also has not addressed whether the group-pleading doctrine is viable after the PSLRA’s enactment. *In re SCB Computer Tech., Inc., Sec. Litig.*, 149 F. Supp. 2d 334 (W.D. Tenn. Feb. 15, 2001) (declining to reach issue). The trend among the district courts appears to be in favor of upholding the doctrine’s continued validity. *See In re Smartalk Teleservices Inc. Sec. Litig.*, 124 F. Supp. 2d 527, 546 (S.D. Ohio 2000) (holding that the plaintiff’s allegations that defendants were high-level officers and directors with access to relevant non-public information and were “hands on” managers were sufficient); *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, No. Civ. A. 1:98-CV-99-M, 1999 WL 33295037, \*5 n.4 (W.D. Ky. Aug. 16, 1999).

#### Seventh Circuit

The Seventh Circuit has also yet to rule on this question. *See Sutton v. Bernard*, [2001 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,519 (N.D. Ill. Aug. 6, 2001) (stating that it would not hold, absent guidance from the Seventh Circuit, that the PSLRA abolished the group-pleading doctrine); *In re Anicom, Inc. Sec. Litig.*, [2001 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,458 (N.D. Ill. May 18, 2001) (noting that the Seventh Circuit had not

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## The ‘I’m Unique’ Defense to Class Certification

It is common for the plaintiffs to sue multiple defendants in a class action case. At the critical stage of class certification, a defendant may have the ability to successfully raise the “I’m Unique” defense. Using this defense, a defendant argues that there are specific reasons why the case cannot be certified as a class action as to that particular defendant, regardless of whether the court certifies a class action as to other defendants.

The California Supreme Court and Courts of Appeal have published at least twenty opinions in the last three years on class certification. In several important recent California and federal opinions, certification was denied, or the trial court’s order granting certification was reversed and remanded for further proceedings. *See, e.g., Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906 (2001), *Berger v. Compaq Computer Corporation*, 257 F.3d 475 (5th Cir. 2001). In this setting, it pays for each defendant to evaluate whether certification is appropriate as to that defendant.



Michael Cypers

Class action defendants tend to view themselves as a group defending against the claims of the plaintiff class. But there is a series of federal and California cases in which certification has been denied as to one defendant and granted as to others. And, in some cases, a creative defense to certification, referred to in this article as the “I’m Unique” defense, exists by which a single defendant asserts a defense to certification that applies solely to that particular defendant.

This article discusses the authorities that support the “I’m Unique” defense. It then discusses a recent class action case in which one defendant asserted the “I’m Unique” defense to certification, which helped that defendant settle the case favorably, while a class was certified as to the remaining defendants and some of them paid substantially more to settle the case.

#### Source of the “I’m Unique” Defense

Under both federal and California law, a court may certify a class as to some defendants and deny certification as to other defendants in the same action. *Newberg on Class Actions* states:

Questions concerning the ability of a plaintiff to sue multiple defendants when he or she has had business or other contacts or dealings with only some of them can be analyzed from both a standing level and a Rule 23 typicality perspective. 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 3.18, 3-103 (3d. ed. 1992).

The named class plaintiffs must generally demonstrate standing to sue each defendant and that their claims are typical of the claims of all class members. Exceptions to these requirements include where defendants are engaged in a conspiracy, are joint tortfeasors or where a “juridical link” exists between defendants.

#### Federal Cases

A frequently cited federal case denying class certification as to some defendants is *La Mar v. H. & B. Novelty & Loan Co*, 489 F.2d 461 (9th Cir. 1973). In *La Mar*, the Ninth Circuit consolidat-

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ed two cases that contained a common issue. The issue was whether a plaintiff, having a cause of action against a single defendant, can institute a class action against that defendant and an unrelated group of defendants who have engaged in conduct similar to that of the single defendant. *Id.* at 462.

In the first case, a plaintiff conducted business with a pawnbroker, and sought to be the representative of a class action suing all licensed pawnbrokers conducting business in Oregon for violations of the Truth-in-Lending Act. In the second case, a plaintiff purchased a round-trip ticket from an airline he believed overcharged him in violation of the Federal Aviation Act. The plaintiff sued that airline and six other airlines on behalf of a class of ticket purchasers who claimed to be overcharged.

The *LaMar* court bypassed the issue of standing, stating: "...under a proper application of Rule 23 of the Federal Rules of Civil Procedure, the plaintiffs here are not entitled to bring a class action against defendants with whom they had no dealing." *Id.* at 464. The Court then asked whether the claims of the plaintiff representatives were typical of the class and concluded that "...typicality is lacking when the representative plaintiff's cause of action is against a defendant unrelated to the defendants against whom the cause of action of the members of the class lies." *Id.* at 465. The Ninth Circuit held: "Under proper circumstances, the plaintiff may represent all those suffering injuries similar to his own inflicted by the defendant responsible for the plaintiff's injury. *But in our view he cannot represent those having causes of action against other defendants against whom the plaintiff has no cause of action and from whose hands he suffered no injury.*" *Id.* (Emphasis added.)

In *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3rd Cir. 1970), the plaintiff was a shareholder of four mutual funds and sought class certification against those four funds, as well as against 61 other mutual funds in which he did not own shares. The Court held that, "[a] plaintiff who is unable to secure standing for himself is certainly not in a position to fairly insure the adequate representation of those alleged to be similarly situated." *Id.* at 734.

In *In Re Endotronics*, Civ. No. 4-87-130, 1988 U.S. Dist. WESTLAW 9250 (D. Minn. Jan. 28, 1988), plaintiffs sought to certify a class action for securities fraud against a number of defendants, and assert a common law negligence claim against the accounting firm of Peat Marwick Main & Company. The Court held that since the accounting firm's report was not directly circulated to the plaintiff investors, there was a genuine question as to whether the firm would be liable due to the many different state law approaches to accountant liability. *Id.* at \*9. Since Minnesota's conflict of law rules required each plaintiff to use the accountant liability rules from his or her state of residence, the Court held that "widely disparate legal theories abound and there is no single law governing the entire class, [so] the Court finds the plaintiffs, as to this claim, have not met the commonality requirement of Rule 23(a)(2). The Court determines that this lack of commonality precludes class action treatment of the common law negligence action." *Id.* As a result, class certification of the securities fraud claims were approved against the other defendants to the action, but the class was not certified as to the claim against Peat Marwick. *Id.* See also, *Angel Music, Inc. v. ABC Sports, Inc.*, 112 F.R.D. 70 (S.D.N.Y. 1986) (collecting cases rejecting class treatment where plaintiff does not allege injury by the defendant, including *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 n.20 (1976)).

#### California Cases

In *Baltimore Football Club v. Superior Court*, 171 Cal. App.3d 352, 365 (1985), the California Court of Appeal held that

the trial court could grant class certification only as to specific defendants with whom that plaintiff conducted business. In *Baltimore Football Club*, plaintiff Ramco, Inc. ("Ramco") brought a motion for class certification on behalf of plaintiffs, who were National Football League ("NFL") season ticket holders, seeking damages arising out of a players' strike from each of the twenty-eight teams in the NFL. Ramco purchased season tickets for the San Francisco Forty-Niners. However, as a result of the players' strike against the NFL, a number of the season's home games were cancelled and the defendants did not offer the season ticket holders their money back with interest. As in the Ninth Circuit's *La Mar* case, the California Court of Appeal ruled that the community of interest or typicality requirement was not met as to defendants with whom the plaintiff did not do business. *Id.* at 359. The court stated:

In the absence of a conspiracy between all of the defendants, California has adopted the rule that a class action may only be maintained against the defendants as to whom the class representative has a cause of action. Without such a personal cause of action, the prerequisite that the claims of the representative party be typical of the class cannot be met. If the plaintiff class representative only has a personal cause of action against one defendant and never had any claim of any kind against the remaining defendants, his claim is not typical of the class.

*Id.* The court held that even if the named plaintiff's claims were typical of all class members, the requirement of common questions of law and fact would still be lacking. *Id.* at 359. Thus, the Court held that *Baltimore Football Club* was essentially twenty-eight separate cases with twenty-eight separate defendants rather than one action. *Id.*

Another case in which the Court certified a class against only some defendants but not others is *Petherbridge v. Altadena Fed. Sav. & Loan Association*, 37 Cal. App.3d 193 (1974). In *Petherbridge*, plaintiff borrowed from one lending institution and sought to maintain a class action against 38 separate lending institutions concerning alleged irregularities in the treatment of impound accounts. *Id.* at 195. The Court of Appeal affirmed the dismissal of all lending institutions except the one from whom the plaintiff borrowed money.

#### The Conspiracy, Joint Tortfeasor and Juridical Link Exceptions

There are several categories of cases where a class may sue a defendant even where the plaintiffs did not have direct contact with the defendant. These are cases involving alleged conspiracies (*Roberts v. Heim*, 670 F. Supp. 1466 (N.D. Cal. 1987)), conduct by joint tortfeasors (*Washington v. American Pipe & Construction Co.*, 280 F. Supp. 802 (W.D. Wash. 1968)) and what courts sometimes call a "juridical link." In a "juridical link" case, a plaintiff may sue a defendant with whom he has had no direct contact if the plaintiff can show some specific link or relationship which is more than simple parallel action or commonality between the defendant's challenged conduct and the plaintiff's claim of injury. *In Re Activision Securities Litigation*, 621 F. Supp. 415 (N.D. Cal. 1985); *Ragsdale v. Turnock*, 615 F. Supp. 1212 (N.D. Ill. 1985).

The "juridical link" was applied in *In Re Activision Securities Litigation*, 621 F. Supp. 415 (N.D. Cal. 1998). Plaintiffs shareholders sued a company, its officers, directors, underwriters, accountant, and a venture capitalist for alleged violations of federal and state securities laws and common law claims. The defendants filed motions to dismiss and plaintiffs filed a motion for class certification. The court granted the plaintiffs' motion for class certification as to the defendant underwriters because the court held that a "juridical link" existed.

The Court stated: "Defendants correctly cite *La Mar v. H & B Novelty & Loan Company*, 489 F.2d 461 (9th Cir. 1973) for the

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proposition that a class representative cannot litigate a claim against the defendant he or she cannot sue individually. However, *La Mar* sets forth various exceptions to this rule including one — the ‘juridical’ link — relevant to this case.” 489 F.2d at 466. The Court explained that the defendants “in this action have entered into an Agreement Among Underwriters. The Court finds this agreement sufficient to provide the ‘juridical’ link to take this case out of the *La Mar* situation. By the terms of this Agreement defendant underwriters are bound together in a common course of conduct for purposes of the Activision offering. Thus, a single resolution of the dispute would be expeditious.” *Id.*, at 432. See also, *Ragsdale v. Turnock*, 625 F. Supp.1212 (N.D. Ill. 1985). But see the following cases rejecting the application of the “juridical link”: *Thompson v. Board of Educ. Of Romeo Schools*, 709 F.2d. 1200 (6th Cir. 1983); *Angel Music, supra*, at 75-77.

### Application of the ‘I’m Unique’ Defense

The “I’m Unique” defense contributed to the recent successful settlement by one defendant in a multi-party class action case. In this case filed in state court in southern California, plaintiffs were investors in an investment fund who sued the principals of the fund, as well as a number of professional firms who provided services to the fund over a period of approximately ten years. Some of the defendants allegedly participated in drafting offering circulars that were sent to the plaintiffs. Other defendants allegedly participated in drafting written requests that the investors make supplemental investments. One defendant, an accounting firm, was engaged to help the principals “restructure” the investment vehicle. The accounting firm signed an audit report on the entity’s financial statements, which was included in a draft offering document filed with the Securities and Exchange Commission (“SEC”). However, the filing was never approved by the SEC, no securities were issued or sold as a result of the offering document, and all of the named plaintiffs admitted in their depositions they did not receive or rely upon any information authored by this accounting firm.

After a few causes of action against this accounting firm survived demurrer, the firm asserted the “I’m Unique” defense to class certification. That defense was one of several factors that resulted in a settlement between the plaintiffs and the firm that was reached one day before the class certification hearing. When counsel announced the settlement at the outset of the class certification hearing, the judge indicated that the arguments of the accounting firm in opposition to class certification were the arguments he planned to focus on at the hearing. The settlement was consummated, approved by the court, and that accounting firm obtained a favorable resolution of the case. The class was then certified as to all other defendants, and one defendant paid five times, and another defendant paid ten times, the settlement amount of the accounting firm that asserted the “I’m Unique” defense.

That defense was based upon the authorities discussed in this article. If anyone would like to obtain the briefing on this issue, please contact the author at [mcypers@agsk.com](mailto:mcypers@agsk.com).

— Michael Cypers

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### Letter from the President

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Not only will your participation enhance your personal professional growth, it will also benefit our local legal community. We need to come together and rise above the billable hour mentality in a setting where a collective purpose and a shared vision of what is best for our local profession predominates.

So take the time to come to an ABTL dinner or lunch. Meet new friends, get to know a judge and other lawyers, and capture a taste of the best of our profession.

— Seth Aronson

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## Close the Deal with Enforceable Offers and Settlements — Part 1

**Y**ou have been there before. The last court hearing before trial, and the judge asks one final time if there is any chance of settling the case. Ever the optimist, you cautiously enter the judge’s chambers with opposing counsel to give settlement one last try. A deal is miraculously struck, blessed by the judge, and maybe even put on the record.

The problem, however, is that no parties are present at this informal settlement discussion, even though the lawyers have the consent of their clients to settle the case, and the parties may even be notified that settlement is imminent.

In all likelihood, the case will remain settled. Indeed, almost 95% of all civil cases are terminated before trial and judgment, primarily via settlement. (See Bruce Winick, “Symposium: Creative Problem Solving Conference: Therapeutic Jurisprudence and the Role of Counsel in Litigation,” 37 California Western Law Review 105, 112, 112 n.24 (2000)). However, the purported settlement can be successfully attacked by either side before a written settlement agreement is executed, because no party ever personally approved the settlement that was brokered between counsel and the judge, only.



Craig A. Roeb

Thus, the role of settlement in litigation is critical, and a thorough understanding of how to create enforceable offers and settlements is essential for the successful litigator. This article will provide a foundation and explanation of the general requirements for creating enforceable offers and settlements.

### Statutory Offers to Compromise

California *Code of Civil Procedure* § 998 provides a method for forcing parties to realistically and meaningfully evaluate the economic value of their cases, and it is an effective tool for persuading settlement. Essentially, if an offer is not accepted and the offeree fails to obtain “a more favorable judgment,” the offeror is entitled to a host of costs. See § 998(d), (e). Because of this potential monetary penalty, an offeree must seriously consider the terms of the offer.

### Procedural Requirements

A § 998 offer to compromise must be in writing (*Saba v. Crater* (1998) 62 Cal. App. 4th 150, 153), and it need not be filed with the court unless it is accepted by the offeree. *California Rules of Court* rule 201.5(a)(16). To be enforceable, an offer should explicitly reference *Code of Civil Procedure* § 998 so that the recipient of the offer will be on notice that the offer is made with potential statutory penalties if it is not accepted. See *Stell v. Jay Hales Develop. Co.* (1992) 11 Cal. App. 4th 1214, 1232. The offer must include terms and conditions that contain value or are able to be valued, so that the court will be able to determine whether any recovery is “more favorable” than the offer. See *Valentino v. Elliott Saw-On Gas, Inc.* (1988) 201 Cal. App. 3d 692, 700-01.

The offer must be made in good faith, with a reasonable

*(Continued on page 6)*

expectation that it will be accepted. *See Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal. App. 4th 102, 116. Nominal or unreasonable offers are not legitimate under § 998. *See id.* The offer need not provide for entry of judgment, but may instead include a requirement that the offeree execute a dismissal with prejudice and a general release. *See Goodstein v. Bank of San Pedro* (1994) 27 Cal. App. 4th 899, 906.

### **Timing of the Offer**

At the beginning of a lawsuit, an offer is ineffective if served on a defendant that has not yet been served with a summons and complaint or appeared in the action, and a plaintiff cannot substitute service on a future or actual defendant's liability insurer for purposes of § 998. *See Moffett v. Barclay* (1995) 32 Cal. App. 4th 980, 982-82. During the litigation, the offer to compromise must be made via normal service on the opposing party not less than 10 days before commencement of trial or arbitration. *See* § 998(a).



**James C. Chow**

### **Offers by Multiple Plaintiffs**

An offer to compromise cannot be made by several plaintiffs jointly, unless it is possible for a court to discern the apportionment of each plaintiff's eventual recovery. *See Hurlbut v. Sonora Community Hosp.* (1989) 207 Cal. App. 3d 388, 410; *see also Gilman v. Beverly Calif. Corp.* (1991) 231 Cal. App. 3d 121, 124-25 (holding that joint demand by heirs not permitted). However, if plaintiffs make a settlement demand jointly and it is absolutely clear that any or all of them have recovered more at trial than under the § 998 offer, they may be able to have penalties declared against defendants who did not accept the offer. *See Fortman v. Hemco, Inc.* (1989) 211 Cal. App. 3d 241, 263.

### **Offers by Multiple Defendants**

If defendants are joint and severally liable, they can make a joint offer which will be treated as an offer from each defendant, and penalties will be assessed against a plaintiff if the plaintiff rejects the offer and recovers less against a defendant at trial. *See Brown v. Nolan* (1979) 98 Cal. App. 3d 445, 451. Therefore, if multiple defendants are jointly and severally liable, and they make a joint offer of \$100,000, where the single plaintiff recovers \$90,000 from Defendant A and \$110,000 from Defendant B, the plaintiff is liable to Defendant A because the recovery is less than the \$100,000 offer, but not from Defendant B. If the offer is apportioned and a joint verdict is returned, only the total amount of the joint verdict is considered for § 998 penalties. *See id.* If the offer is apportioned and the judgment is apportioned, then the amount offered by each offering party can be considered when assessing § 998 penalties. *See id.* However, note that, following Proposition 51, it is "questionable" whether offers which are not apportioned are valid under § 998. *See Taing v. Johnson Scaffolding Co.* (1992) 9 Cal. App. 4th 579, 584.

For example, in *Brown*, defendants made a joint pretrial compromise offer of \$12,500. Plaintiff rejected the offer. A jury found that both defendants had been negligent, but that only defendant Nolan's negligence was a proximate cause of plaintiff's damages. The jury fixed damages at \$3,000, and the trial court signed an order that awarded defendant Orgel costs against plaintiff. Defendant Nolan appealed from the court order awarding plain-

tiff costs against Nolan and providing that Nolan was not to recover any costs. On appeal, the appellate court found that the offer of \$12,500 was properly interpreted as an offer by each defendant to plaintiff, and that judgment in the amount of \$12,500 could be taken against each one of them, jointly and severally.

### **Offers to Multiple Plaintiffs**

An offer to compromise cannot be made to multiple plaintiffs, only a single plaintiff. *See Meissner v. Paulson* (1989) 212 Cal. App. 3d 785, 791. "A single, lump sum offer to multiple plaintiffs which requires them to agree to apportionment among themselves is not valid." *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal. App. 4th 102, 112. Also, an offer to several plaintiffs conditioned on all of them accepting is invalid. *See Hutchins v. Waters* (1975) 51 Cal. App. 3d 69, 73.

### **Offers to Multiple Defendants**

"[A] section 998 offer made to multiple parties is valid only if it is expressly apportioned among them and not conditioned on acceptance by all of them." *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal. App. 4th 102, 112. However, if a plaintiff makes a single offer to multiple joint and severally liable defendants, it need not be apportioned. *See Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1996) 50 Cal. App. 4th 1542, 1549. This is especially true under the respondeat superior theory. *See Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal. App. 4th 976, 999-1000, *disapproved of on other grounds by Lakin v. Watkins Associated, Ind.* (1993) 6 Cal. 4th 644, 657. The respondeat superior principle would probably relate to indemnification as well, so plaintiff making a § 998 settlement offer to insured and insurer or some other indemnity situation should probably not have to specify which party is responsible for which portion of the settlement offer. *See* Hon. Robert Weil & Hon. Ira Brown, Jr., *California Practice Guide: Civil Procedure Before Trial* ¶ 12:610 (1999).

Where a case involves multiple defendants, an offer is not valid if it is conditioned on acceptance by all defendants. *See Santantonio v. Westinghouse Broadcasting Co., Inc.* (1994) 25 Cal. App. 4th 102, 112-13. There is a split of authority on whether an offer is conditioned on the acceptance by all defendants solely because it is addressed to defendants jointly. However, according to the Second Appellate District, an offer is not considered conditional unless it explicitly states that it is conditional. *See id.* According to the Fourth Appellate District, an offer is invalid even where it attempts to place all parties together, even solely in its wording. *See Wickware v. Tanner* (1997) 53 Cal. App. 4th 570, 577.

For example, in *Taing v. Johnson Scaffolding Co.* (1992) 9 Cal. App. 4th 579, the plaintiff made a § 998 offer to settle. Plaintiffs contended that all three defendants were liable, although he did not advise them of his position as to their individual percentage of liability. The court noted that the burden of assuring that the offer complies with § 998 falls on the offeror, and held: "[I]f a plaintiff elects to submit a section 998 offer in cases involving multiple defendants, the offer to any defendant against whom the plaintiff seeks to extract penalties for nonacceptance must be sufficiently specific to permit that individual defendant to determine the exact amount plaintiff is seeking from him or her." The court found that the plaintiff's offer failed to meet this standard. *See id., distinguished by Bihun v. AT&T Information Sys., Inc.* (1993) 13 Cal. App. 4th 976, 1001 (finding that *Taing* dealt with unapportioned offer to defendants who were not jointly liable for the full amount of plaintiff's damages).

When the defendants are jointly and severally liable, then a lump-sum offer is valid. *See Steinfeld v. Foote-Goldman Proc-*

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*tologic Medical Group, Inc.* (1996) 50 Cal. App. 4th 1542, 1550. The *Steinfeld* court distinguished *Taing*. The defendants were sued as joint tort-feasors for a single act of negligence causing a single injury. In this case, which preceded the adoption of Proposition 51, they faced joint and several liability for plaintiff's economic and non-economic damages. "[T]he fact that the settlement offer was unapportioned did not place [defendants] in an untenable position, since if they were liable at all, they were jointly and severally liable." The court held: "Where, as here, there is a singular theory of liability alleged against two defendants for a single injury, and where as joint tort-feasors they would be jointly and severally liable, an unapportioned section 998 settlement offer made to both is valid."

#### **Lien On Plaintiff's Claim**

If there is a lien on a plaintiff's claim, the defendant's § 998 offer should specify whether it includes the amount of the lien. See *Manthey v. San Luis Rey Don Enterprises, Inc.* (1993) 16 Cal. App. 4th 782, 789. Liens are not deducted from the verdict when assessing whether plaintiff's future judgment is "more favorable" than the § 998 offer. See *id.* The fact that the offer is less than the lien claim will not exempt a non-accepting plaintiff from having to pay fees and costs. See *Culbertson v. R.D. Werner Co., Inc.* (1987) 190 Cal. App. 3d 704, 708.

#### **Withdrawal Of Offer**

If the offer is not accepted within thirty days, it is deemed withdrawn by operation of law. See § 998(b)(2). *California Code of Civil Procedure* § 1013 extends this period by five days when the offer is served by mail. See § 1013(a). The commencement of trial — defined by § 998 as commencement of opening arguments, or where there are no opening arguments, swearing in of the first witness — terminates the offer even if the trial commences less than thirty days after the offer is made. See § 998(b)(3). However, the commencement of judicial arbitration does not terminate the offer, and the offer may be accepted after judicial arbitration has commenced. See *Weil & Brown, supra*, ¶¶ 12:621 - 624.

Pursuant to contract principles, the offeror may withdraw the offer by a simple letter notifying the offeree of revocation prior to acceptance of offer. See *T.M. Cobb Co., Inc. v. Superior Court* (1984) 36 Cal. 3d 273, 276. Also pursuant to contract principles, the death of either the offeror or the offeree terminates the offer unless the offer is made to both the deceased "and/or his executor or administrator." See *Watts v. Dickerson* (1984) 162 Cal. App. 3d 1160, 1162. However, unlike contract principles, a counteroffer, which does not have to take the form of a competing § 998 offer, does not act as a rejection. See *Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal. 3d 266, 270. The counter-offeror can still accept the offer of the original offeror.

If an offer, which has been accepted, contained a ministerial or clerical mistake, relief may be sought under *California Code of Civil Procedure* § 473. See § 473(b) (governing relief for mistake, inadvertence, surprise, or excusable neglect); *Zamora v. Clayborn Contracting Group, Inc.* (2001) 90 Cal. App. 4th 1088, 1093. In *Zamora*, the plaintiff presented and the defendant accepted an offer to compromise which allowed judgment to be taken against the plaintiff instead of against the defendant. See *id.* at 1090. Based on the plaintiff's motion for relief under § 473, the court vacated the judgment, nullifying the offer to settle and the acceptance. See *id.* at 1091, 1093.

— Craig A. Roeb and James C. Chow

## **Four Judges' Perspectives on Motions In Limine**

Motions in limine play a critical, and in some instances dispositive, role in the outcome of a trial. However, many attorneys file generalized, boilerplate motions in limine that seem to be aimed more toward keeping one's opponent busy than assessing the admissibility of material evidentiary issues. Yet to approach motions in limine as simply routine, last minute trial preparation would be a mistake. According to the federal and state judges interviewed for this article, thoughtful and creative motions in limine are one of the hallmarks of the effective courtroom advocate and among the most potent tools for shaping and ultimately deciding your case.

A recent case highlighting the impact a well reasoned motion in limine can have is *Lee v. Pfizer*, Case No CV007619, which was scheduled to begin jury trial earlier this summer in the San Joaquin County Superior Court. In *Lee*, the plaintiff had asserted claims against Pfizer, the manufacturer of Viagra®, based on a heart attack he believed was caused by his use of the ubiquitous erectile dysfunction drug. ABTL members John Shaeffer and Pierce O'Donnell of O'Donnell & Shaeffer LLP, who represented Pfizer, made a motion in limine to exclude plaintiff's key medical expert from offering his opinion that Viagra® can cause heart attacks and did in fact cause plaintiff's heart attack. This motion was made based on the expert's deposition admission that his opinion was an untested hypothesis unsupported by the type of scientific evidence accepted among the expert's medical peers. After hearing extensive oral argument on the motion, Judge Bobby McNatt granted the motion in limine and excluded the plaintiff's key medical expert. Shortly afterwards, the plaintiff dismissed his case.



**Raymond B. Kim**

#### **Consider Bringing Early Motions In Limine In Appropriate Cases**

District Court Judge Stephen Wilson believes that motions in limine are "an effective and overlooked part of the lawyer's arsenal" and that attorneys don't use motions in limine often enough because they "generally do not identify motions in limine as part of the main pretrial apparatus." While motions in limine are typically brought on the eve of trial, Judge Wilson suggests that attorneys strongly consider filing early motions for rulings on evidence (whether filed as a motion in limine, motion for partial summary judgment, motion for bifurcation of trial, or some other motion) where circumstances warrant. Through early motions, attorneys can receive determinations on the admissibility of testimony or evidence weeks or perhaps even months before trial begins. Not only can such early rulings facilitate more efficient discovery, they can also increase settlement opportunities by educating parties about the strengths or weaknesses of their case at an earlier stage of proceedings than the eve of trial.

Los Angeles County Superior Court Judge Judith Chirlin also recommends that attorneys think about their motions in limine well before the time of trial. Motions in limine that help focus cases on the main issues in dispute can significantly streamline

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trial preparation efforts and thereby help counsel devote more time and energy to the key issues of a case. Judge Chirlin believes that many judges welcome focused early motions to decide discrete evidentiary issues, particularly when the party making the motion explains the reasons why an early determination is being sought.

### **Draft Clear and Concise Motions In Limine That Have a Specific Purpose**

According to Los Angeles County Superior Court Judge Richard Fruin, bad motions in limine are often not motions in limine at all. Instead, they are motions brought primarily to burden the other side or seek rulings that have nothing to do with the admissibility of evidence.

Judge Fruin notes that an excellent discussion of the uses and abuses of motions in limine can be found in Justice Gary Hastings's opinion in *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659. In *Kelly*, the trial court granted a motion in limine that prevented a personal injury plaintiff from presenting trial testimony that appeared to conflict with her pretrial deposition testimony. The Court of Appeal found that "[i]t is a misuse of a motion in limine to attempt to compel a witness or a party to conform his or her trial testimony to a preconceived factual scenario based on testimony given during pretrial discovery." 49 Cal.App.4th at 672. Based upon this and other errors, the Court of Appeal reversed the judgment and remanded the case for trial.

Judge Fruin observes that motions in limine that serve no specific evidentiary purpose are more than just a nuisance to the court; they are self-defeating to the party bringing the motions. Unnecessary motions in limine telegraph to the court that counsel has not thought through the issues of a case in a critical manner. They also prevent counsel from using the time wasted preparing such motions to carefully analyze their cases and focus on other tasks, such as preparing special verdict forms, that can have far greater impact on the outcome of trial.

Among the motions in limine that Judge Chirlin considers most ineffective are those that she calls "Push The Motion In Limine Button On The Computer Motions" that are nothing more than stock, canned motions often prepared by attorneys unfamiliar with the case but who are brought in to assist in last minute pretrial efforts. Judge Chirlin also does not find useful broad "Let's Apply The Evidence Code to This Case Motions" that seek highly generalized evidentiary rulings without adequately describing the underlying factual context in which the evidence is being presented. Such motions usually do not produce useful rulings and only serve to divert attention away from other more important motions in limine that deserve greater time and consideration.

According to District Court Judge Christina Snyder, the most effective motions in limine are those that seek rulings on specific, concrete evidentiary issues. Motions in limine that are not sufficiently focused or are too hypothetical do not provide a compelling basis to exclude evidence. Such questions generally must be deferred until the time of trial so that the actual evidence can be assessed in its proper context. Judge Snyder notes that for a motion in limine to be effective, it must "simply state what one wants to exclude and why it should be excluded."

While motions in limine can be brought for a wide variety of evidentiary issues, among the most common motions Judge Snyder sees are those challenging the admissibility of expert witness testimony, seeking the exclusion of cumulative witnesses, and limiting the evidence offered at trial to issues set forth in the pretrial conference order. Although dispositive motions disguised as motions in limine are usually strongly disfavored, Judge Snyder notes that motions in limine seeking the exclusion of expert testi-

mony based on alleged defects in their qualifications or methodology can be effective. Motions seeking to eliminate certain categories of damages from recovery also can have a major impact on a case.

Motions in limine are usually brought to exclude particular testimony or evidence from trial. However, Judge Wilson suggests that attorneys should also consider bringing motions in limine to include evidence as well. Such motions to admit evidence are most effective where the admissibility of evidence hinges on novel legal questions that do not depend on factual determinations. By obtaining such a ruling, the party making the motion can either gain greater certainty that the evidence will be allowed as part of their case or defense, or else focus its efforts on those areas that ultimately will actually reach the jury.

### **Policing the Motion After It Has Been Granted**

Once a motion in limine to exclude particular evidence is granted, counsel should be proactive in ensuring that such rulings are complied with by the other party and preventing the possibility of a mistrial. Judge Fruin reminds counsel that judges usually do not know many of the facts of a case before trial begins and are hearing these facts for the first time along with the jury. Thus, counsel is in a far better position to anticipate problems and take steps to prevent them from occurring.

To assist in policing the motion, Judge Snyder suggests that attorneys use the time periods before the jury returns to the courtroom after breaks to alert the court that upcoming testimony or evidence will be presented that may touch upon a previous ruling on a motion in limine. By reminding the court about these rulings, counsel can help the court refocus its attention on the proper boundaries of upcoming testimony and evidence, thereby facilitating more vigilant supervision over the testimony or evidence.

In long cause trials or trials in which a number of important motions in limine have been ruled upon, Judge Chirlin suggests that the parties consider preparing a written chart containing information about the motion made, evidence sought to be excluded, and the court's ruling on the motion. While such a document can be prepared solely for use by the party itself, counsel may find it useful to present it to the judge (perhaps as a joint document along with opposing counsel) for use by the court and all parties.

— **Raymond B. Kim**

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## “A smile on his face and in his heart”

Maybe the reason this is such a fitting epitaph for Judge Stephen E. O’Neil is that he wrote it himself.

It was a bittersweet irony. The day before his sudden, untimely death last July, Judge O’Neil had submitted his profile to the Los Angeles County Bar Association’s “Know Your Judge” project. For “overall advice,” he wrote: “Be prepared. Be on time. Have a smile on your face and in your heart. Be professional. Civility is a must.”

No one who appeared before Judge O’Neil or worked with him will be surprised by his advice. What he asked of lawyers in his courtroom and preached to everyone who would listen was no more than he demanded of himself. It showed in everything he did.



**Judge Stephen E. O’Neil  
1944-2001**

And he did a lot. Being in the courtroom was his first love, and he was a model trial judge. No matter who describes him, the adjectives are a judicial desiderata — thoughtful, prepared, intelligent, patient, firm, compassionate, witty, even-handed, fearless. As trial lawyer Brian Lysaght recently described him, “As far as I could see, he was a man without an agenda.”

But courtroom work was only part of what he did. In addition to countless committee memberships, a knack for judicial administration yielded tours of duty as the supervising judge of the Torrance court — where he was credited with rescuing the court from its reputation as an “old boys’ network” — and, in his last assignment, as the supervising judge of the Criminal Courts.

He had a knack for teaching, too. He taught judges, and, as the dean of the B.E. Witkin Judicial College, helped judges teach other judges. He taught lawyers at countless CLE programs. He taught law students at Loyola.

Running through all of this — what everyone remembers — was Judge O’Neil’s easy smile and warm humor. He was always that way. Twenty years ago, he did a stint as in-house counsel at Lloyds Bank California, during a brief hiatus from the U.S. Attorney’s office. The bank’s then general counsel, Brian McDonald, remembers him well — “a gentleman, a total professional, and one of the nicest, most sincere guys you’d ever want to meet.” According to McDonald, “He could find a way to tell you to go jump in a lake and make you feel good about it.”

Judge Paul Boland, calling him “a truly extraordinary jurist,” sums up his career this way: “He was an exemplary trial judge, a tireless judicial administrator, an inspirational judicial educator and a supportive colleague, who made an enduring contribution to the administration of justice.” Or, as Loyola Law Professor Laurie Levenson put it, “Judge O’Neil represented all that was good in the justice system.”

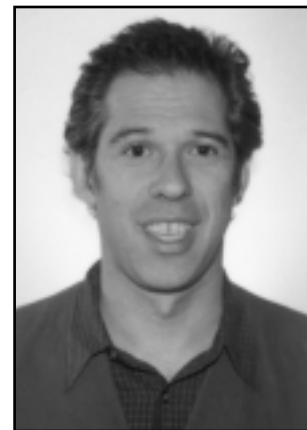
— Robin Meadow

## Tips on Litigating For and Against ‘Celebrities’

It is nearly impossible to be a litigator in Los Angeles — the entertainment capital of the world — without getting involved in a case representing or litigating against a “celebrity,” that is, a television, motion picture, or rock ‘n roll star. And the conventional wisdom is that *celebrities usually win*. But that is not always true and preparation in such a case becomes even more essential. The following are tips to use whether litigating for or against a celebrity.

- *Use Internet and Other Media Resources To Obtain Important Data About the Celebrity.*

More than the usual party, celebrities have massive amounts of information about them in magazines, newspaper articles, and websites. Don’t count on a Nexis search to provide all the useful information. Most celebrities have their own websites, their fans have websites about them, and, if they are musicians, their record company has a website for them. Often, the celebrities themselves post reports or participate in chat rooms on the websites with their fans.



**Allen B. Grodsky**

These websites often provide a wealth of information, including identification of witnesses and sources of documents, and, sometimes, even useful admissions by the celebrity.

- *Conduct A Focus Group To Find Out Juror’s Pre-Existing Beliefs About The Celebrity and Incorporate Those Beliefs Into Your Theme.*

We all know that jurors have preconceived notions that impact their decisions. But with a celebrity, jurors *think they actually know the celebrity and have formed detailed opinions about him or her*.

In a celebrity case, conduct a focus group early in the case to determine jurors’ knowledge and pre-existing beliefs about the celebrity. With unlimited funds, have a jury research company conduct the focus group. Or if money is an issue, hold a dinner for your office staff and their spouses and ask open-ended questions to determine their pre-existing beliefs about the celebrity.

Take what you learn and build your theme around it. If you are suing a rock star who your focus group believes has a drug problem and a history of trashing hotel rooms, consider building a theme such as: this is a man for whom the rule of law doesn’t apply. On the other hand, if you are suing a celebrity who your focus group believes is trustworthy, honest, and someone to admire, you have learned that you have your work cut out for you, and, perhaps it is time to consider settlement.

- *Videotape The Celebrity.*

Celebrities are busy people and are notoriously unwilling to take the time necessary to prepare for deposition. If you are litigating against a celebrity, depose him or her as soon as you can and *videotape* it. Television and movie actors may be used to performing in front of a camera; but they are also used to getting several “takes” of a shot. Ask critical questions right off the bat and put the celebrity on the spot.

On the other hand, if you are representing the celebrity, start to prepare for the deposition immediately. Videotape the celebri-

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## Tips on Litigating For and Against 'Celebrities'

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ty and show her how bad she looks: that's usually a good incentive to spend the time to prepare. Finally, *never* allow an opposing party to videotape the celebrity's deposition without a protective order or you will end up watching the deposition on Hard Copy!

- *Let the Celebrity Know What's in Store.*

Celebrities are even more unrealistic than the usual client. They are used to getting them precisely what they want, when they want it. It is unlikely that their "handlers" have explained to them (1) the cost of litigation; (2) the time delays involved in litigation; (3) that they will be expected to sit through the entire trial; or (4) the uncertainty of jury trials. If you represent the celebrity, you must explain all of this to the celebrity early on in the case; you need to know on day one if this is a case that you are preparing to try, or setting up to settle.

On the other hand, if you are suing a celebrity, give the celebrity's lawyer the message that you are going to take this case all the way through trial. You can be sure that the message will find its way back to the celebrity and put pressure on him or her to settle early on.

- *Make friends with the press.*

You can bet on the fact that the press will pick up on a celebrity case. And you can also bet that the press will get it wrong. They will show up at hearings and not understand what's going on. They will misunderstand what you've alleged in your pleadings.

Accordingly, you have to use the press to your benefit (being sure, of course, to follow the Rules of Professional Conduct and any court orders about the press). If the press calls to ask about a celebrity case you just filed, and if you say "no comment," that means that the reporter is going to come up with his own inaccurate two sentence summary of your 30-page complaint. On the other hand, if you provide your own two-sentence summary for the reporter, he or she will appreciate your help and likely use your summary. You have then *controlled* what's in the paper.

- *Conclusion.*

Celebrity trials are not just like every other case. But if a lawyer takes the time to prepare and plan for a celebrity trial, that trial is certainly winnable.

— Allen B. Grodsky

sion that rejected an attack on the group-pleading doctrine on the basis of the PSLRA).

### Eighth Circuit

At least two districts in the Eighth Circuit continue to apply the group-pleading doctrine. The Eastern District of Missouri has specifically held that the group-publication doctrine survived the passage of the PSLRA. *In re Bankamerica Corp. Sec. Litig.*, 78 F. Supp. 2d 976, 988 (E.D. Mo. 1999). The court summarized the decisions of the courts that have rejected group pleading as basing their decisions on the PSLRA's particularity and scienter requirements. *Id.* Rejecting that line of cases, the court stated that the group-publication doctrine "has nothing to do with scienter" and instead is a "reasonable presumption that the contents of company-published documents and press releases are attributable to officers and directors with inside knowledge of and involvement in the day-to-day affairs of the company." *Id.* The Minnesota District Court has also applied the doctrine following the PSLRA's enactment. *See In re Digi Int'l, Inc. Sec. Litig.*, 6 F. Supp. 2d 1089, 1101 (D. Minn. 1998), *aff'd* Fed. Sec. L. Rep. ¶ 91,467 (8th Cir. Jul. 5, 2001).

### Ninth Circuit

Notwithstanding the Missouri court's reliance on *Glenfed*, the status of the group-pleading doctrine in the Ninth Circuit is questionable. In *Allison v. Brooktree Corp.*, 999 F. Supp. 1342 (S.D. Cal. 1998), for example, the court determined that:

the continued vitality of the judicially created group-published doctrine is suspect since the PSLRA specifically requires that the untrue statements or omissions be set forth with particularity as to 'the defendant' and that scienter be plead in regards to each act or omission sufficient to give "rise to a strong inference that the defendant acted with the required state of mind." To permit a judicial presumption as to particularity simply cannot be reconciled with the statutory mandate that plaintiffs must plead specific facts as to each act or omission by the defendant.

*Id.* at 1350 (quoting 15 U.S.C. § 78u-4(b)). *Powers v. Eichen*, 977 F. Supp. 1031 (S.D. Cal. 1997), decided by the same district court shortly before *Allison*, had applied the group-pleading doctrine.

On the other hand, three other districts in the circuit continue to use the doctrine. The United States District Court, Central District of California, stated that the doctrine did apply following the passage of the PSLRA. *Pegasus Holdings v. Veterinary Centers*, 38 F. Supp. 2d 1158, 1165 (C.D. Cal. 1998). *Accord Copperstone v. TCSI Corp.*, No. C97-3495 SBA, 1999 U.S. Dist. LEXIS 20978 at \*53 (N.D. Cal. Jan. 14, 1999) (rejecting defendants' argument that the Reform Act abolished group pleading but holding that plaintiffs' allegations were insufficient to invoke the group-pleading doctrine). The Northern District of California has also continued to rely on the doctrine. *See In re Secure Computing Corp. Sec. Litig.*, 120 F. Supp. 2d 810 (N.D. Cal. 2000); *In re Silicon Graphics*, 970 F. Supp. 746, 759 (N.D. Cal. 1997). The decision in *In re Silicon Graphics Sec. Litig.*, 970 F. Supp. 746 (N.D. Cal. 1997), to dismiss plaintiff's complaint and grant summary judgment to the individual officers was affirmed on appeal without comment on the group-pleading doctrine. *See In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970 (9th Cir. 1999); Christian J. Mixer, *Individual Civil Liability Under the Federal Securities Laws For Misstatements In Corporate SEC Filings*, 56 Bus. Law 967 at n.60. The District of Nevada similarly holds that group pleading is available in post-PSLRA actions. *In re AgriBioTech Sec. Litig.*, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 90,771 (D. Nev. March 2, 2000).

### Tenth Circuit

The Tenth Circuit applied the group-pleading doctrine in a  
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## Vitality of the Group-Pleading Doctrine

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ruled on the applicability of group pleading following the PSLRA and that it was unnecessary to determine the issue in the case at hand).

However, numerous district courts within the Seventh Circuit have noted that many courts have continued to rely on the doctrine after the PSLRA and then proceeded to uphold as sufficient plaintiffs' allegations against "top executives" that "directly participated in the management." *Sutton*, Fed. Sec. L. Rep. (CCH) ¶ 91,519. The Northern District of Illinois seems to be following this approach rather consistently. *See, e.g., Lindelow v. Hill*, [2001 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,483 (N.D. Ill. July 20, 2001) (concluding that "it is strongly inferential" that every officer or director had knowledge or that the lack of knowledge equated to reckless disregard); *In re System Software Assocs., Inc.*, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 90,910 at 93,847 (N.D. Ill. March 8, 2000) (declining to address issue of whether PSLRA overruled group pleading but relying on defendants' status as corporate insiders in holding that plaintiff's allegations were sufficient). *But see Chu v. Sabratek Corp.*, 100 F. Supp. 2d 827, 837 (N.D. Ill. 2000) (disagreeing with prior deci-

case after the PSLRA's enactment but did not address the PSLRA's effect on the doctrine. See *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1254 (10th Cir. 1997). The United States District Court, District of Colorado considered whether the PSLRA affected the group-pleading doctrine and rejected the argument of outside directors that the Act overruled the doctrine. See *In re Ribozyme Pharmaceuticals, Inc. Sec. Litig.*, 119 F. Supp. 2d 1156, 1165 (D. Colo. 2000); *Schaffer v. Evolving Systems, Inc.*, 29 F. Supp. 2d 1213, 1225 (D. Colo. 1998).

### Eleventh Circuit

The Eleventh Circuit has not explicitly ruled on the vitality of the group-pleading doctrine after the enactment of the Reform Act and the district court decisions in the circuit are conflicting. The Northern District of Georgia concluded that the PSLRA did not abolish group pleading in *In re Theragenics Corp. Sec. Litig.*, 105 F. Supp. 2d 1342, 1358 (N.D. Ga. 2000) (noting the weight of authority in favor of this position and concluding that because the doctrine merely establishes a rebuttable presumption, it is not inconsistent with the Reform Act). However, in a subsequent decision, the court held that the group pleading doctrine did not survive the enactment of the PSLRA. See *In re Premiere Tech. Inc.*, [2000-01 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,293 at 95,654 (N.D. Ga. Dec. 8, 2000) (stating that the doctrine is a judicial construct which cannot survive the PSLRA's enactment).

The United States District Court, Southern District of Florida rejected the argument that the PSLRA overruled the group-pleading doctrine. *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d 1326, 1341 (S.D. Fla. 1999) ("we find the rationale behind the group pleading doctrine [is] sound and will not disturb it absent direction from the Eleventh Circuit."). The opinion in *Sunbeam* is particularly interesting because the court specifically distinguished between the PSLRA's particularity and scienter requirements, holding that while the group-pleading doctrine may satisfy the particularity requirement, it does not apply to the scienter requirement. 89 F. Supp. 2d at 1341. Thus, while a complaint need not spell out the role of each defendant with respect to the particular item of group-published information, the court required plaintiffs to "state with particularity 'facts' giving rise to a 'strong inference' that each separate defendant acted with scienter 'with respect to each act or omission alleged.'" *Id.* at 1341 (emphasis added).

### D.C. Circuit

The D.C. District Court has explicitly considered the issue and held that the group-pleading doctrine is compatible with the PSLRA. *In re Baan Co. Sec. Litig.*, 103 F. Supp. 2d 1, 17-18 (D.D.C. 2000) (plaintiffs adequately alleged liability against three officers but not against two defendants who were merely members of the board of supervisory directors).

### Conclusion

While it is difficult to predict the effect of the PSLRA on the group-pleading doctrine with any certainty, it appears that the group-pleading doctrine will survive post-PSLRA, at least with respect to high-level executive officers. Citing to the Act's protection for forward-looking statements, as well as the requirement for plaintiffs to plead facts demonstrating that defendants knew their statements were false at the time made, plaintiffs will no doubt applaud this result, claiming the Act already offers adequate protection at the pleading stage. Eliminating the group publication doctrine would, in plaintiffs' view, set the bar insurmountably high by requiring them to plead the role of each

(Continued on page 12)

### Civil Procedure

In *Reed v. Superior Court*, 2001 DJDAR 10183 (Court of Appeal September 20, 2001), 111 Cal.Rptr.2d 842 (2001), the Second Circuit Court of Appeal held that an appeal from a pre-trial order denying a motion to disqualify opposing counsel for a conflict of interest does not automatically stay all trial proceedings. In order to obtain a stay pending appeal, the appellant must seek a writ of supersedeas or other discretionary stay from the appellate court.

In *Laborde v. Aronson*, 2001 DJDAR 10247 (Court of Appeal September 21, 2001), the Fourth Appellate District held that a self-representing attorney may recover sanctions under Code of Civil Procedure § 128.7. The court also held, contrary to prior decisions of the Court of Appeal, that a represented party could be sanctioned for violation of section 128.7(b)(1)[document presented for an improper purpose, etc.], (b)(3)[lack of evidentiary support for factual allegations], or (b)(4)[denials of factual allegations not warranted by the evidence].

### Insurance

In *20th Century Ins. Co. v. Superior Court*, 2001 DJDAR 7689 (Court of Appeal July 24, 2001), 90 Cal. App. 4th 1247 (2001), the Second Appellate District held that Code of Civil Procedure § 340.9, which under certain circumstances revives insurance claims arising out of the Northridge earthquake of 1994 that were previously barred by applicable statute of limitations, was constitutional. The court rejected the insurer's argument that the statute impermissibly impaired contract obligations in violation of U.S. Const., art. I, § 10, cl.1 and Cal. Const., art. I, § 9. The court also held that Section 340.9 applies to claims for breach of contract and breach of the implied covenant of good faith and fair dealing (insurance bad faith) but not to claims for fraud.

### Federal Procedure

In *Lee v. American National Ins. Co.*, 2001 DJDAR 8343 (9th Cir. August 8, 2001), 260 F.3d 997 (9th Cir. 2001), an action was removed to federal court on the basis of diversity. However, the claims against one of the defendants were not justiciable in federal court under Article III of the U.S. Constitution because the plaintiff was challenging that defendant's allegedly unfair business practices as a private attorney general even though he suffered no individualized injury. The plaintiff argued that the plaintiff's lack of standing to pursue the unfair business practice claim against that defendant destroyed complete diversity. The Ninth Circuit rejected the argument that statutory diversity jurisdiction under section 1332 fails if jurisdiction over one defendant fails for a reason other than lack of diverse citizenship. The plaintiff's lack of standing against one of the defendants merely rendered his claims against that defendant nonjusticiable in federal court but did not alter the presence of complete diversity.

### Arbitration

In *Ticknor v. Choice Hotels, International, Inc.*, 2001 DJDAR 9905 (Ninth Circuit September 12, 2001), the Ninth Circuit Court of Appeals held that the Federal Arbitration Act does not preempt state law defenses to enforceability of an arbitration provision governed by the Federal Arbitration Act so long as the state law defenses were not solely applicable to arbitration provisions but were applicable to all contracts.

### Expert Opinion

In *Jinro America, Inc. v. Secure Investments, Inc.*, 2001 DJDAR 10011 (Ninth Circuit September 14, 2001), the Ninth Circuit Court of Appeals reversed a jury verdict in a breach of contract action because the defendants' expert provided ethnically biased testimony in the guise of "cultural" testimony.

— Denise M. Parga

## Letter from the Editor

**O**ur heartfelt thanks to Vivian Bloomberg, the outgoing editor of ABTL Report.

For the past eleven years, Vivian Bloomberg has served as editor of the ABTL Report. She has now decided to relinquish her position in order to devote more time to her family and her career. We will greatly miss her and hope that she continues to contribute to the Report from time to time. I am proud to have worked with her on the ABTL Committee for the last nine years and will endeavor to live up to her standard of quality for the Report. A big thanks to Vivian for the fabulous job that she has done in maintaining professional excellence in the content of the Report and in getting the contributors to turn in their articles on time, especially for all those years before the widespread use of e-mail.



**Denise M. Parga**

The ABTL Report has served the legal community since founding editor Tom McDermott published the first issue in 1976. Since that time, the Report has tried to address legal issues that would best serve the interests of the ABTL members, the majority of whom are involved in some aspect of business litigation. We plan to continue the present format of the Report, including a mix of articles that focus on interesting developments in substantive areas of the law as well as litigation tips and strategies for practitioners. The Report is now distributed to all local state and federal judges as well as to the ABTL membership. Therefore, we hope that the Report can provide a voice to judges who wish to share with us their insights on the practice of law.

Finally, we want to encourage young lawyers to become members of ABTL and contribute their new ideas and perspective to the Report. When I first became a member of the ABTL editorial committee, I was the most junior member of the committee. We



**Vivian R. Bloomberg**

need the participation of younger lawyers so that the Report continues past our age of retirement. In order to make that happen, our senior ABTL members must acknowledge that a young lawyer's participation in volunteer organizations, such as ABTL, is as valuable as his or her billable hours. I've been told that Tom McDermott was discouraged after he put out the first five issues of ABTL Report because he believed that the membership lost interest in the publication. Thankfully, he resumed the publication after receiving inquiries from the membership wondering what had happened to the Report. Do not be silent. We encourage you to contact us with article ideas, submissions and comments on published articles. Let us know how we can best serve your needs. You can contact me at [dparga@wrslawyers.com](mailto:dparga@wrslawyers.com) or at (310) 478-4100. I look forward to hearing from you and hope to continue the fine tradition of excellence established by Tom McDermott and so well maintained by Vivian Bloomberg for the past eleven years.

— Denise M. Parga

## Vitality of the Group-Pleading Doctrine

Continued from page 11

defendant in group-published statements lacking any individual attribution.

Defendants will continue to argue that this approach ignores the express language in the Act and that, since most complaints challenge a series of statements at least one of which will have some direct attribution (*e.g.*, press releases quoting a company's CEO), plaintiffs should wait until discovery provides a basis for naming defendants for whom there is no direct attribution. Given the Act's stay on discovery, it is unlikely such arguments will garner widespread acceptance. Instead, defendants will meet with more success in asking courts to place strict limits on both the type of information to which the doctrine is applied and to whom the doctrine is applied. Defendants should also ask courts to follow the *Sunbeam* approach and require plaintiffs to plead with "particularity" facts showing that *each* defendant acted with the requisite state of mind with "respect to each act or omission." *Sunbeam*, 89 F. Supp. 2d at 1341.

— Eric S. Waxman and Stacey M. Tidball

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