ASSOCIATION OF BUSINESS TRIAL LAWYERS

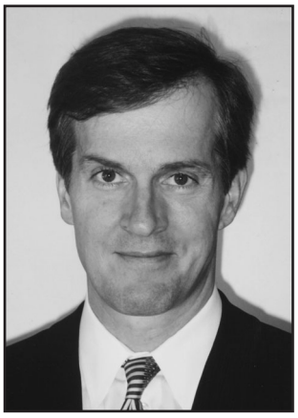
abtl REPORT

Volume XXVIII No. 2 *Spring 2006*

REVISITING PROP. 64 — THE CURRENT DEBATE:

Bulwark Against Class Certification or Godsend for Plaintiffs

***Editor's Note**: In November 2004, California voters passed Proposition 64, a statewide ballot initiative entitled, "Limits on Private Enforcement of Unfair Business Competition Laws" ("Prop. 64"). Since its enactment, Prop. 64 has been subject to conflicting interpretations. In this article,* abtl *Report presents a spirited exchange between two experienced business trial lawyers with particular expertise in UCL cases. Presenting the plaintiffs' perspective is Henry Rossbacher, who specializes in class action litigation and has tried a UCL/CLRA case. He is a former Assistant United States Attorney in Los Angeles and a former Adjunct Professor of Law at UCLA Law School. The defense perspective is presented by Laurence Jackson . Mr. Jackson has defended numerous 17200 class actions including representation of the defendants in* Corbett v. Hayward Dodge, *119 Cal. App. 4th 915 (2004), a leading precedent on the propriety and limits of 17200 class actions.*



Laurence Jackson

Henry Rossbacher

Authors' Introduction: Your client wants to know if Prop. 64 will prevent class certification. Will it do more than force plaintiffs' counsel to find a single named plaintiff with standing? Will defendants' exposure be limited?

You face even more questions. Do new approaches to class certification based on Prop 64 affect your discovery and preparation? Does it provide additional arguments on commonality, typicality, or superiority?

The need for practitioners to evaluate Prop. 64 is heightened by the absence of appellate authority and conflicting trial court decisions. In this article, we present arguments by both plaintiffs' counsel and defense counsel. The authors also welcome your comments.

Standing for Absent Class Members

Does Prop. 64 Change 17200 Law to Require Absent Class Members to Meet the New Standing Requirements of Injury in Fact Resulting from Unfair Competition?

Mr. Rossbacher: The changes to § 17203 and § 17535 of the Business and Professions Code in relation to standing clearly apply only to the "person" who is pursuing "representative claims or relief on behalf of others" (§ 17203 and § 17535). The language of Prop. 64 resolves the issue.

Mr. Jackson: I disagree. Prop 64 expressly imposes new standing requirements on the named plaintiff. The text is silent as to absent class members. Even trial court decisions may provide slim guidance. *In re Tobacco Cases*, 2005 WL 579720 (San Diego Sup. Ct., 7 March 2005) (contrast imposing standing requirements on absent class members). If absent members must prove causation and resulting injury in fact, proof requirements for fraudulent conduct claims under 17200 will be identical in many cases to typical common law or statute-based claims. This would likely preclude certification unless the plaintiff alleged a single, class-wide representation. *Contrast In re Currency Conversion Fee Antitrust Lit.* (SDNY, 2004) 224 FRD 555, 568 (South Dakota statute requiring damages "as a result of" a deceptive practice required individualized proof of actual reliance; common issues did not predominate for certification) with *Mass. Mut. Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1291 (2002) (17200 class certified for consumer fraud because "relief under the UCL, including restitution, is available without proof of individual deception, reliance and injury.").

Is Reliance Required?

Does Prop. 64 Require Plaintiff to Prove Reliance and Causation in 17200 Cases Alleging Defendant Representations?

Prop 64 amended Bus. & Prof. Code § 17204 to impose new standing requirements:

(Continued on page 2)

INSIDE

Prop. 64: The Current Debate

Continued from page 1

"Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by…any person who has suffered injury in fact and has lost money or property as a result of such unfair competition."

Mr. Jackson: Requiring "injury in fact" of "lost money or property as a result…" must require proof of actual, justifiable reliance and causation in 17200 claims based on defendant representations, including unfair or unlawful conduct claims that arise from representations. No reported case has not expressly required reliance and causation proof. Nonetheless, "as a result" would seem to admit of no reasonable meaning other than "caused." Requiring reliance proof should follow as it would appear to be impossible for any person to have been caused to act by a representation on which the person did not rely. The California Supreme Court recognized this in *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1092 (1993) ("It may be true, as plaintiffs assert, that reliance can be thought of as the mechanism of causation in an action for deceit.")

Mr. Rossbacher: United States District Judge James V. Selna has dealt with this issue succinctly in *Anunziato v. eMachines, Inc*., 2005 U.S. Dist. Lexis 28213 (C.D. Cal. 2005). Noting that Prop. 64 does not mention "reliance," he holds that reliance and an injury "as a result of" defendant's conduct are not the same thing:

> The goal of both the UCL and the FAL is the protection of consumers. However, the Court can envision numerous situations in which the addition of a reliance requirement would foreclose the opportunity of many consumers to sue under the UCL and the FAL. One common form of UCL or FAL claim is a "short weight" or "short count" claim. For example, a box of cookies may indicate that it weighs sixteen ounces and contains twenty-four cookies, but actually be short. Even in this day of increased consumer awareness, not every consumer reads every label. If actual reliance were required, a consumer who did not read the label and rely on the count and weight representations would be barred from proceeding under the UCL or the FAL because he or she could not claim reliance on the representation in making his or her purchase. Yet the consumer would be harmed as a result of the falsity of the representation.
>
> * * *
>
> [The Court went on to note that the UCL is inconsistent with a reliance requirement where "twenty-four percent of adults in California are at the lowest literacy level," "two million native English speakers are functionally illiterate," and "thirty-nine percent [of Californians] speak a language other than English at home" resulting in a high proportion of Californians who "have minimal or no English proficiency."]
>
> * * *
>
> The goal of consumer protection is not advanced by eliminating large segments of the public from coverage under the UCL or the FAL where they suffer actual harm merely because they were inattentive or for one reason or another lacked the language skills to appreciate the particular unfair or false representation in issue. A construction of these statutes that reduced them to common law fraud would not only be redundant, but would eviscerate any purpose that the UCL and the FAL have independent of common law fraud.
>
> The Court need not torture the language of the UCL and the FAL statutes to conclude that harm in fact will meet the "as a result of" requirement. Where the manufacturer of a product makes a false representation as to weight or count, to continue the above example, the consumer is unquestionably harmed as a result of the falsity because he was shortchanged.
>
> The Court finds that the remedial purposes of Proposition 64 are fully met without imposing requirements which go beyond actual injury. Significantly, none of the ballot materials which accompanied Proposition 64 — the California Attorney General's summary, the commentary prepared by the California Legislative Analyst's Office, or the arguments for and against the Proposition — mention reliance. They do stress injury in fact.
>
> The intent of Proposition 64 was to eliminate the filing of frivolous lawsuits brought to recover attorney's fees without a corresponding public benefit and the filing of lawsuits on behalf of the public welfare without any accountability to the public. (Prop 64, § 1 (b).) The California voters identified the gateway for these abuses as the "unaffected plaintiff," which was often the sham creation of attorneys, and expressed their intent "to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution. "(Prop. 64, § 1(e).) *See Molski v. Mandarin Touch Restaurant*, 347 F. Supp. 2d 860, 867 (C.D. Cal. 2004); *People ex rel. Lockyer v. Brar*, 115 Cal. App. 4th 1315, 1316-17, 9 Cal. Rptr. 3d 844 (2004) (observing that the Trevor Law Group has achieved infamy in California for carrying out shakedown schemes under Section 17200 et seq.) An injury in fact requirement achieves these goals.

Mr. Jackson: Plaintiff's perspective attempts to extend Judge Selna's opinion beyond his example of an underweight cookie box. In his example materiality seems obvious; who wouldn't want more cookies? But more weight is not always material. One consumer might want a heavier winter coat for more protection while another wants less weight or is indifferent. Moreover products can be sold with a myriad of representations about shape, materials, color, sound etc. Decades of experience and precedent have established that determining whether particular representations were material and relied on are questions of fact unique to each case. Judge Selna's examples of misrepresentations so obviously material that reliance might be presumed should not be a sound reason to decide that reliance should not be necessary to prove that the plaintiff's injury occurred "as a result of" a misrepresentation.

Mr. Rossbacher: Defendants and their counsel overreach when they conflate causation with reliance. Prop. 64 did not repeal the UCL *sub silentio.*

Impact of Amended Section 17203

Does Amended Section 17203 Change the Proof Requirements for Absent Class Members?

Prop 64 amended section 17203 to provide: "Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure…."

Mr. Jackson: "Claimant" is not defined in Prop. 64 to be the class representative. If claimant had been intended to be so limited, the text should have read "Any person may pursue representative claims or relief on behalf of others only if that person meets the standing requirements…."

"Claimant" in a class action should apply to all class members. California courts have long held that absent class members are "plaintiffs" subject to discovery obligations. *See Southern Cal. Edison Co. v. Sup. Ct.*, 7 Cal. 3d 832, 840 (1972). Each class

(Continued on Page 3)

Proposition 64: The Current Debate

Continued from page 2

member, even the absent members, is obviously making a claim for recovery.

"Claimant" should not be limited to the class representative by the reference to compliance with CCP 382. Both class representatives and absent class members have obligations in a class action to provide discovery and proof of eligibility for or entitlement to relief. Section 382, by its terms, does not impose requirements that apply solely to a class representative.

Moreover, CCP section 382 imposes standing requirements on each absent class member. *Collins v. Safeway Stores, Inc.*, 187 Cal. App. 3d 62, 73 (1986) (relied on in *In re Tobacco Cases*, 2005 WL 579720 based on holding: "Each class member must have standing to bring a suit in his own right."); *Feitelberg v. Credit Suisse First Boston*, 134 Cal. App. 4th 997, 1018 (2005). ("If a specific form of relief is foreclosed to claimants as individuals, it remains unavailable to them even if they congregate into a class.") In referencing section 382, the drafters and voters must be presumed to have intended to apply existing caselaw under section 382.

Section 382 also requires commonality and typicality. If the class representative must proof causation and injury in fact, but absent class members need not, then these are not common questions and the representative will not be proving questions typical of the class. No case has ever approved certification when the representative's claim has proof elements different from those of the class.

Mr. Rossbacher: There is no provision in Prop. 64 changing class members' proof or requiring proof of class members' reliance in UCL and FAL cases. The nature of a UCL action is well established by an unbroken line of appellate authorities. *See, e.g., Committee on Children's Television, Inc., v. General Foods Corp*. 35 Cal. 3d 197, 211 (1983) [under Section 17200 and Section 17500, "[allegations of actual deception, reasonable reliance, and damage are unnecessary."]; *Corbett v. The Superior Court of Alameda County*, 101 Cal. App. 4th 649, 672 (2002) ["Relief under [Section 17200] is available without individualized proof of deception, reliance, and injury."] [citing, *inter alia, Fletcher v. Security Pac. Nat'l Bank*, 23 Cal. 3d 442, 452-53 (1979); *Massachusetts Mut. Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1286 (2002)] ["In order to establish liability for a nondisclosure under either [Section 17200] or the CLRA, plaintiffs need not provide individual proof that each class member relied on particular representations made by Mass Mutual or its agents."]

Where defendants make uniform misrepresentations a class wide presumption or inference of reliance or causation is available from proof on a class wide basis. Judge DeAlba's recent opinion in *Bridgestone/Firestone Tire Cases I & II* (Sup. Ct. Sacramento, Feb. 8, 2005) dealt with similar causation and reliance arguments by a defendant who made uniform misrepresentations:

> Finally, defendant's contentions regarding causation and damages are unavailing. Contrary to defendant's contentions, plaintiffs do not have to show each member of the represented class saw a misleading advertisement. (*See e.g., Mass Mutual*, 97 Cal. App. 4th 1282, 1286 (2002). An inference of reliance arises if a material false representation was made to persons whose acts thereafter were consistent with reliance upon the representation. (*Occidental Land, Inc. v. Superior Court of Orange County*, 18 Cal. 3d 355, 363 (1976).) Plaintiffs allege the ability to show concealment and false representation in advertising on a class-wide basis.

An identical conclusion was reached by Judge Chaney in

(Continued on page 8)

A New Defense For Insurers In "Bad Faith" Insurance Coverage Actions

Twenty-years ago, the California Supreme Court held for the first time that insurers could be charged with bad faith for conduct occurring after the commencement of litigation *between them*. *White v. Western Title Insurance Company*, 40 Cal. 3d 870 (1985).

Since that 1985 decision, policyholders in lawsuits against their insurers have gleefully argued, increasingly and more stridently of late, that the conduct of coverage litigation, from the way depositions are defended to the way interrogatory responses are provided, to the entire manner of defending a coverage suit (or, even, to bringing a declaratory relief action) constitutes bad faith under the *White* standard. Insurance coverage litigants now routinely obtain a "*White* waiver" in the course of mediation or settlement discussions to prevent allegations that conduct in the discussions could constitute "bad faith." Under a recent California state Court of Appeal decision, such policyholder arguments may run afoul of the anti-SLAPP statute in California. (*See* Code of Civ. Pro. § 425.16; *but see* Code of Civ. Pro. § 425.17.)

Patrick Cathcart

White v. Western Title

In *White*, the facts are simple. See *White v. Western Title, supra*, 40 Cal. 3d 870, 877-879. In 1975, William and Virginia Longhurst owned 84 acres of land on the Russian River in Mendocino County. The land was divided into two lots, one unimproved, the other improved with a ranchhouse, a barn and adjacent buildings. It contained substantial subsurface water. On December 29, 1975, the Longhursts executed and delivered an "Easement Deed for Waterline and Well Sites," conveying to River Estates Mutual Water Corporation an "easement for a right-of-way for the construction and maintenance of a water pipeline and for the drilling of a well or wells within a defined area and an easement to take water, up to 150 [gallons per minute], from any wells within said defined area." The deed was recorded the following day.

In 1978, the Whites agreed to purchase the property from the Longhursts. Mr. and Mrs. White, who were unaware of the water easement, requested preliminary title reports from Western Title. Each report purported to list all easements, liens and encumbrances of record, but neither mentioned the recorded water easement. The Whites and the Longhursts opened two escrows, one for each lot. Upon close of escrow, Western Title issued to the Whites two standard CLTA title insurance policies, for which the Whites paid $1,467.55. Neither policy mentioned the water easement.

About six months after the close of escrow, River Estates Mutual Water Corporation notified the Whites of its intention to enter their property to implement the easement. The Whites protested, and River Estates filed an action to quiet title to the easement. The Whites notified Western Title, who agreed to defend that suit. The Whites, however, declined Western Title's

(Continued on page 4)

offer, preferring to retain an attorney who was then representing them in an unrelated action. River Estates eventually decided not to enforce its easement and dismissed the suit.

The Whites' appraiser estimated the loss in value of their lots resulting from the potential loss of groundwater due to the easement at $62,947. The Whites then made a demand on Western Title for that sum. Western Title acknowledged its responsibility for loss of value due to the easement, but argued that the loss was limited to the loss attributable to the occupation of plaintiffs' land by wells and pipes and to the water company's right to enter the property for construction and maintenance. Western Title maintained, however, that any loss in value attributable to loss of groundwater was excluded by the policy, and since plaintiffs' claim of loss was based entirely on diminution of groundwater, it declined to pay their claim.

The Whites filed suit against Western Title in October of 1979, alleging causes of action for breach of the insurance contract and negligence in the preparation of the preliminary title reports. Western Title moved for summary judgment; after briefing and argument the motion was denied. Western Title then retained an appraiser, who estimated the Whites' loss at $2,000. Assertedly based on this estimate, Western Title offered to settle the case for $3,000. Western Title did not furnish plaintiffs with a copy of the appraisal, and the Whites rejected the offer. In June Western Title served a written offer to compromise for $5,000 pursuant to Code of Civil Procedure section 998. The Whites, having already incurred litigation expenses exceeding this figure, rejected the offer. Plaintiffs then obtained leave of court to amend their complaint to state a cause of action for breach of the covenant of good faith and fair dealing.

The claim for breach of the covenant of good faith and fair dealing, then, viewed in the context of the facts of the relationship, was not based upon a refusal to defend the suit to enforce the easement or for the loss in value from any easement that a third party enforced. That claim was based solely upon Western Title's conduct in the litigation with the Whites, after the action to enforce the easement had been dismissed.

Breach of Covenant of Good Faith and Fair Dealing in *White*

The Supreme Court, in *White*, reviewed the development of the law relating to the covenant of good faith and fair dealing implied in every insurance contract including title insurance contracts. *Gruenberg v. Aetna Ins. Co.*, 9 Cal 3d 566, 575; *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. 3d 917, 940 (1975). Writing for the majority, Justice Broussard held that the contractual relationship between the insurer and the insured does not end with commencement of litigation. *White, supra*, 40 Cal. 3d at 885. The jury in the coverage action found that Western Title had breached the covenant, and awarded damages, based in part on the settlement negotiations and other matters. *Id*. The Court then disposed of the inadmissibility of settlement offers (the offers were not admitted to establish liability for the original loss, but to prove bad faith in the handling of the claim), and disposed of the litigation privilege claim (liability cannot be founded upon a judicial communication, but somehow "bad faith" can be proved by such a communication). *Id*. at 887. *White* affirmed a jury's determination of breach of the covenant of good faith and fair dealing based upon Western Title's conduct of the litigation — its defense of the action brought by the policyholders:

> When plaintiffs filed suit, defendant responded with a motion for summary judgment. After losing that motion, defendant was faced with both a ruling of the trial court rejecting its narrow reading of the policy and a unanimous body of case law establishing liability for negligence. Defendant nevertheless offered only nuisance-value settlements, and made no attempt to appraise plaintiffs' loss until the issue of liability had been tried and decided in plaintiffs' favor.

Id. at 889.

California's Anti-SLAPP Statute

California's Anti-SLAPP statute, enacted in 1992 and subsequently amended variously, permits a motion to strike a cause of action against any person arising from "any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue…unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Code of Civ. Pro. § 425.16. If the opposition to a motion to strike under § 425,16 prevails, the successful demonstration of a probability that the plaintiff will prevail cannot be used in evidence later in the case and does not operate to alter the burden of proof on any issue.

The statute defines "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" broadly. Such an act "includes (1) any written or oral statement or writing made before a…judicial proceeding, or any other proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by…judicial body…." Code Civ. Pro. § 425.16(c).

A claim by a policyholder seeking a determination that an insurer is liable for breach of the duty of good faith and fair dealing because of the insurer's conduct in the course of defending, or prosecuting, a declaratory relief action relating to coverage, and in particular to conduct *after the commencement of the litigation*, should on its face be subject to a motion to strike under the Anti-SLAPP statute. To date, there are no cases that have so held. Justice Broussard's cavalier dismissal of any claim that there is a "litigation privilege," on the basis that no cases applied such a privilege to the context before him, underscores rather than diminishes the fact that the conduct is in the course of the litigation. *See White, supra*, 40 Cal. 3d at 518.

Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP

In a decision certified for publication, the California Court of Appeal for the First Appellate District addressed in a different context the confluence of the "*White* problem" and the protection afforded to a party's right to defend an action in court. *See Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton, LLP*, 133 Cal. App. 4th 658 (2005). While the issues in *Peregrine Funding* involve the conduct of a law firm in connection with representation of perpetrators of an investment fraud, the analysis and holding are applicable to allegations of bad faith in the *White* context.

The law firm defendant in *Peregrine Funding* handled several aspects of the creation of what the court describes as a "successful mortgage lending business." The principals of Peregrine Funding, Inc. managed several funding entities. The Sheppard Mullin firm prepared opinion letters, allegedly knew that advice it gave was wrong and would be used solely for the purpose of soliciting investors. The firm represented the principals in connection with a subsequent SEC investigation, represented the funding entities and Peregrine as well, and acted to their detriment in serving the needs of the principal. The firm opposed provisional relief sought in litigation, fought the appointment of a receiver, consulted bankruptcy counsel in connection with the funding entities and, after withdrawing as counsel to the funding entities, continued to represent the principals. The investors sued the law firm, and alleged among other things that the firm's representation of the principals in the SEC action damaged the investors.

The appellate court reversed a denial of a motion to strike

(Continued on page 5)

A New Defense For Insurers

Continued from page 4

under section 425.16 on two grounds. First, the claims asserted were based in significant part on the law firm's protected "petitioning activity" in the SEC action — although not entirely on that activity, 133 Cal. App. 4th at 675. Second, that the plaintiffs failed to show that they would probably prevail on the claims. *Id*. at 687.

Where the Insurer's Conduct Is A Mix of Litigation Conduct and Pre-Litigation Handling of the "Claim"

Most claims of what can be called "*White* bad faith" involve conduct of the insurers prior to and during litigation, or conduct within and without the confines of the litigation. Under *Peregrine Funding*, the conduct there included conduct prior to the litigation (representing the principals and funding entities in creating the vehicles ultimately involved in the fraudulent scheme), and in advice concerning how to set up the various transactions that followed. *Id*. at 12510. However, as the opinion found, other activity alleged to have injured the plaintiffs constituted conduct of the litigation in which the law firm represented the principals of the funding entities. *Id*. at 12513. The court found that the cause of action targeted by the Anti-SLAPP motion alleged damage by protected activity, and, consistent with the broad interpretation the Legislature commanded be accorded to the statute, the statute could not be ignored simply because plaintiffs could have established injury from unprotected activity. *Id*. A "mix" of protected activity and unprotected activity at the heart of a cause of action or claim renders the claim subject to a motion to strike under section 425.16.

Proving Probability of Success

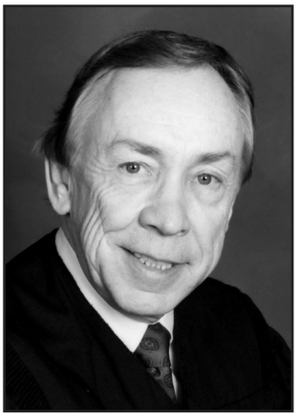
Peregrine Funding notes that the "burden" on plaintiff (the policyholder in a coverage action) of proving the probability of success necessary to defeat a motion to strike under section 425.16 falls within what the Supreme Court has termed a "minimal merit" standard. *Peregrine*, 133 Cal. App. 4th at 675. That standard is akin to the level of proof required in opposing a motion for non-suit or summary judgment. *I-800 Contacts, Inc., v. Steinberg*, 107 Cal. App. 4th 568, 584-585 (2003), but without the initial burden on the defendant under § 437c, *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist*., 106 Cal. App. 4th 1219, 1239 (2003). Since *Peregrine* does not address the issue of what showing of probability of success must be made in defense of a motion to strike where the only issue relates to the merits of the claim that the tactics employed constituted bad faith. The cases noted in *Peregrine* that considered validity of defenses to the claims seem to attack the procedure posture of the action being attacked by the Anti-SLAPP motion. *Peregrine*, *supra*, at 12514 n. 11. The opinion, and the case law citing section 425.16, do not address the issue of the level of sufficiency needed to establish the probability of success where the only defense to the action relates directly to the substance of the very claims raised in the lawsuit at issue. The success of using an Anti-SLAPP motion against claims of "*White* bad faith" will depend upon what showing a policyholder is required to make under section 425.16. That "standard" will undoubtedly be the subject of other opinions, and remains, today, undetermined.

White v. Western Title provided policyholders in coverage litigation with their insurers a strong weapon to argue that zealous advocacy in the course of litigation could constitute "bad faith." The recent *Peregrine Funding* decision of the California Court of Appeal in the first district raises a possible limitation on such a "bad faith" claim where the conduct charged occurs, in whole or in part, in the course of the coverage litigation itself.

— Patrick Cathcart

Arbitration in California Courts: The Year in Review

Congressional impatience with purported abuse of class actions resulted in enactment of the Class Action Fairness Act of 2005; 28 U.S.C. 1711 (a) (2). Federal legislation attempts to shift state class actions to federal court without fulfilling conventional requirements of diversity jurisdiction; 28 U.S.C. 1332. Conversely, the California Supreme Court not only reaffirmed its commitment to class action litigation but also endorsed classwide arbitration; *Discover Bank v. Sup.Ct.*, 36 Cal. 4th 148 (2005).



Hon. L.C. Waddington

In *Keating v. Sup.Ct.*, 31 Cal. 3d 584 (1982) [overruled on other grounds; *Southland Corp. v. Keating*, 465 U.S. 1 (1984)] the California Supreme Court had originally endorsed classwide arbitration, and two subsequent Court of Appeals decisions confirmed the doctrine against challenges of Federal Arbitration Act pre emption; (FAA); 9 U.S.C. 2; *Sanders v. Kinko's, Inc.*, 99 Cal. App. 4th 1106 (2002); *Blue Cross of California v. Sup.Ct.*, 67 Cal. App. 4th 42 (1998). The defendant in *Discover Bank*, presumably cognizant that California courts had confirmed classwide arbitration, required plaintiff to sign an arbitration clause waiving participation in classwide arbitration, consolidation of claims or representational arbitration.

Based upon its prior decisional law, the *Discover Bank* court held classwide waivers violated public policy, unconscionable and unenforceable in consumer claims alleging fraud; Civ. Code 1670.5. But the underlying transaction involved interstate commerce, compelling the court to confront the federal role of pre emption mandating state courts to enforce arbitration clauses unless the terms are subject to revocation on "grounds of law or equity;" 9 U.S.C. 2.

The United States Supreme Court, avoiding the classwide arbitration issue in the original 1984 case of *Southland Corp*., had held the FAA pre empts local anti arbitration substantive law, and invalidates any procedural artifice burdening or impairing the alternative dispute resolution process if the underlying transaction affects interstate commerce. Under *Southland*, state courts and Legislatures cannot single out arbitration for treatment differently than general contract law. In *Discover Bank*, judicial refusal to enforce a classwide waiver clause might collide with the FAA prohibition of procedural evasion to avoid arbitration.

Class actions, and classwide arbitration, are a species of procedural law statutorily identified as a form of consolidation in litigation or arbitration; CCP 1048; 1281.3. To avoid labeling classwide arbitration and its concomitant waiver in an arbitration clause as a procedural device, the *Discover Bank* court confirmed classwide arbitration as a mechanism to vindicate substantive rights recited in Civ. Code 1668. This statute provides that "all contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud or injury to the persons or property of another, or violation of law…are against the policy of the law."

In supporting its conclusion that waivers of classwide arbitration were unconscionable, the court wrote an extensive paean

(Continued on page 6)

Continued from page 5

extolling class actions and lauded its salutary effect in denying rapacious parties from extracting small amounts of money from consumers in a sum insufficient to warrant litigation By not singling out arbitration for disapproval, applying general substantive law to all contracts, and disabling the waiver clause as unconscionable on grounds of "law and equity," the court avoided pre emption. CCP 1668 enabled the court to apply universally applicable statutory substantive contract law to invalidate the classwide arbitration waiver.

Cronus Investments, Inc. v. Concierge Services, Inc., 35 Cal. 4th 376 (2005) exemplifies an additional attempt to divorce California courts from the pre emptive scope of the FAA; 9 U.S.C. 2. In California, CCP 1281.2 (c), authorizes the trial court to exercise several options when parties have signed contracts containing arbitrable and non arbitrable claims or who are already involved in arbitration or litigation with each other or with third parties. A quintessentially procedural statute, CCP 1281.2 (c) permits joinder of parties and issues, a stay of litigation, or a stay of arbitration if a dispute arises out of the same transaction and "there is a possibility of conflicting rules on a common issue of law or fact." State court authority to stay arbitration potentially interferes with Supreme Court pre emption doctrine disallowing a state to evade arbitration by procedural subterfuge.

Cronus involved multiple parties who not only signed non arbitrable and arbitrable contracts but had also filed cross complaints subject to litigation. The original parties to the arbitration had signed a California choice of law clause, and, according to general statutory rules, local procedural law would govern. But the parties had added a term that arbitration did not "…preclude application of the FAA if…applicable." The underlying transaction occurred in interstate commerce but the parties disagreed whether the California Arbitration Act (CAA)or the FAA and the doctrine of pre emption should apply to interpretation of this clause.

Conceding the FAA rule would not allow a stay of arbitration (*Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 [1985]), the *Cronus* court held CCP 1281.2 (c) would not contravene the substantive policy goals of the FAA to enforce arbitration clauses. According to the court, the California statute merely provides rules for the conduct of the arbitration process-despite staying arbitration-as approved by the United States Supreme Court in *Volt Information Sciences v. Bd. of Trustees of Leland Stanford University*, 489 U.S. 468 (1989).

Volt held that the procedural rule of CCP 1281.2 facilitated arbitration by avoiding conflicting rulings in arbitration and litigation, and simultaneously abided by the terms of the California statute. According to the Supreme Court, the California statute avoided pre emption by focusing on the process of arbitration rather then its prevention, inhibition or dilution.

Although the federal rule staying arbitration under *Dean Witter* differs, *Cronus* held FAA procedural rules (9 U.S.C. 4) applicable only in federal court and inapplicable in state court; *Rosenthal v. Great Western Fin. Securities Corp*. 14 Cal. 4th 394 (1996).

Having re-categorized classwide arbitration as a method for vindicating substantive rights in *Discover Bank*, and enforcing California procedural rules based on a choice of law clause to permit a stay of arbitration in *Cronus*, the California Supreme Court reviewed contractual unconscionability in *Boghos v. Certain Underwriters at Lloyds of London*, 36 Cal. 4th 495 (2005).

The plaintiff sought to bring his common law claims within the umbrella of statutory employment claims (FEHA; Gov. Code 12900) requiring employers to pay non litigation costs of arbitration mandated by *Armendariz v. Foundation Health Psychare Services, Inc*., 24 Cal. 4th 83 (2000). The *Boghos* court refused to extend unwaivable statutory claims, publicly beneficial, to include common law claims on grounds the Legislature had specifically allocated pro rata cost sharing to parties; CCP 1284.2. Although plaintiff alleged claims of wrongful non payment of insurance claims, the court held insurance regulation not sufficiently within the category of "public policy" to warrant cost sharing.

Nevertheless, the court remanded the case and ordered the trial court to determine another issue- whether requiring plaintiff to share arbitration costs, or his ability to pay arbitration costs, is relevant to the general law of unconscionability; Civ. Code 1670.5.

In *Discover Bank*, *Cronus* and *Boghos*, the parties had executed *written* contracts, a mandatory requirement to enforce arbitration under either the FAA (9 U.S.C. 2) or the CAA; CCP 1281.2. In *Alliance Title Co. v. Boucher*, 127 Cal. App. 4th 262 (2005) the Court of Appeal enforced the right of a non signatory to join an arbitration between signatories to a written contract.

In *Alliance*, the plaintiff had originally executed a contract containing an arbitration clause with a business entity subsequently acquired by another entity. A dispute arose between the original parties, and plaintiff filed suit against the first entity. The second entity sought to join the arbitration, although never having executed an arbitration clause, relying on the terms of the original contract.

The *Alliance* court cited a substantial body of federal law, primarily *Thomson-CSF v. Chemrite Ltd*., 181 F.3d 435 (1999), discussing the right of non signatories to join an arbitration with signatories. The Second Circuit in *Thomson-CSF* identified five theories enabling a non signatory to enforce arbitration with a signatory to a contract: incorporation of documents by reference; assumption of debts, liabilities or assets; agency; veil-piercing alter ego; equitable estoppel. Except for estoppel, all these categories are usually established by a general form of derivative liability. The most difficult issue is "estoppel," an equitable doctrine imposed on grounds of fundamental fairness in a variety of litigation contexts and, under *Alliance*, in arbitration.

Although crafting a universal rule for equitable estoppel is difficult at best, the *Alliance* court held that a non signatory party may compel a signatory plaintiff to arbitrate when the causes of action are "intimately founded in and intertwined" with the underlying contract obligations; *Alliance* at 271. Equitable estoppel is fact specific but when the relevant causes of action, or claims, rely on and presume the existence of a contract clearly affecting the non signatory, or a party seeks benefits from a contract but denies any recourse to the non signatory, joinder is an option for the court.

The second entity in *Alliance* had acquired the assets of the first entity, and, arguably, entitled to joinder in the arbitration under a theory of derivative liability. The court in *Alliance* had to overcome the absence of a written agreement (9 U.S.C. 2) between the second entity and the plaintiff. The court found the legal relationship among all parties "founded in and intertwined" in the original contract and the doctrine of equitable estoppel trumped the FAA requirement of a written contract.

Class actions, consolidation, estoppel and other litigation doctrines have inevitably intruded into arbitration in determining whether courts should enforce arbitration clauses. Several years ago, the California Supreme Court decided *Vandenberg v. Sup. Ct*., 21 Cal. 4th 815 (1999), a decision refusing to assign collateral estoppel effect to an arbitration award in a subsequent proceeding between non mutual parties. But the *Vandenberg* court left open the res judicata effect of arbitration awards. Resolution of this issue involves interpreting a California statute authorizing courts to accord the same force and effect to an arbitration award as a civil judgment; CCP 1287.4.

Richard B. LeVine, Inc. v. Higashi, 131 Cal. App. 4th 566 (2005) addressed res judicata impact of a civil action filed against

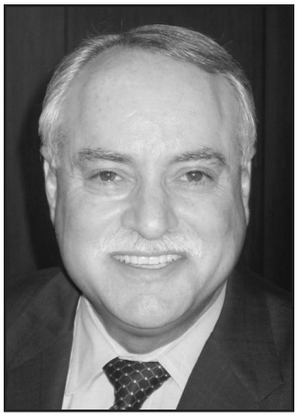
(Continued on page 8)

Fourth in a Series

Judicial Advice...

from The Hon. Michael L. Stern

Judge Michael L. Stern presides over Department 62 of the Los Angeles County Superior Court. Counsel who will be appearing for trial before Judge Stern should thoroughly familiarize themselves with the procedures set forth in Judge Stern's Final Trial Preparation handout. In that handout, Judge Stern provides counsel with suggestions on the short statement of the case, exhibits, motions *in limine*, jury instructions, verdict forms, witness lists, and *voir dire* questions.



Hon. Michael L. Stern

General Protocol and Technology

• Judge Stern typically conducts trial Monday through Friday of each week. Trial hours are from 8:30 a.m. to 4:30 p.m., with a 1-hour lunch break starting at noon. Judge Stern will work with counsel on changes in the timing of trial hours if needed on a case-by-case basis.

• Judge Stern does not require that counsel stand when speaking or use the lectern. However, he prefers that counsel do not put their hands in their pockets if they do stand or use the lectern.

• The first day of trial usually begins at 9:30 a.m. Thereafter, trial hours are normally from 9:00 a.m. to 5:30 p.m. with a lunch break.

• Counsel may use audio-visual equipment in the courtroom. Counsel should bring their own equipment if they plan on making such presentations.

• Judge Stern permits the playing of video portions of depositions during trial, so long as those portions are true impeachment. However, this may first require that the portions be previewed to the court outside the presence of the witness and jury.

Pre-Trial

• Judge Stern will conduct pretrial hearings to determine the admissibility of documents to avoid foundational questions if counsel brings an appropriate motion to do so.

• Although motions *in limine* must be filed at least five court days before the final status conference, Judge Stern hears those motions on the day of trial unless specially set. Judge Stern cautions that "[t]he memorandum of points and authorities in support of the motion *in limine* should avoid boilerplate verbiage and citations. Get right to the heart of the matter with appropriate and brief citations to supporting legal authorities and evidence." *See* Final Trial Preparation handout at p. 1-4. "An opposition to a motion *in limine* should be equally direct." *Id.*

• Trial briefs are not required, but may be submitted in both jury and bench trials.

• Judge Stern will bifurcate liability and damages phases of trial on a case-by-case basis upon motion.

Jury Selection

• Judge Stern ordinarily allows six peremptory challenges per side, but may vary that amount depending on the facts of the case.

• Judge Stern conducts the initial *voir dire* of the jury. To the extent counsel believes that there may be case-specific areas that require additional inquiry, counsel should file proposed *voir dire* questions before the pre-trial conference. Counsel will be allowed to conduct reasonable *voir dire* inquiry, but "this time should not be used to ingratiate yourself with jurors or argue the facts or law of the case." *See* Final Trial Preparation handout at p. 1-6.

• Judge Stern will consider the use of juror questionnaires in lengthy trials.

Opening Statements

• Judge Stern allows for opening statements in bench trials.

• Judge Stern sets limits on the length of opening statements on a case-by-case basis. Judge Stern requires counsel to exchange copies of all exhibits, timelines, or other materials that they intend to use during opening statements.

Presentation of Evidence

• Judge Stern will discuss with counsel whether witnesses are required to be present at the courthouse prior to their testimony. Judge Stern does not examine witnesses himself.

• Judge Stern does not allow for sidebar conferences for objections during trial.

• Jurors are allowed to take notes during all phases of trial.

• Judge Stern may allow jurors to submit written questions to be posed to trial witnesses. Judge Stern will discuss the advisability and mechanics of doing so with counsel prior to trial.

• Exhibits should be moved into evidence at the conclusion of trial.

• Judge Stern may allow for direct testimony to be submitted in writing upon the request of counsel.

• The Judge automatically provides a complete set of admitted exhibits to the jury for deliberations.

Closing Argument

• The Judge limits the length of closing arguments on a case-by-case basis.

• He cautions counsel not to reference in closing argument any exhibits or testimony that is not admitted.

Jury Instructions and Verdict Forms

• Judge Stern instructs the jury after closing arguments.

• He uses CACI jury instructions.

• Judge Stern notes that "[d]espite the critical role of jury instructions in 'making or breaking' cases at trial or on appeal, counsel too frequently give short shrift to this important aspect of trial preparation." *See* Final Trial Preparation handout at p. 1-5. Counsel are advised to review Judge Stern's detailed discussion of jury instructions set forth in his Final Trial Preparation handout

Post-Trial

• Judge Stern normally receives post-trial briefs in bench trials.

— Raymond B. Kim

Arbitration in California Courts: Year in Review

Continued from page 6

a third party uninvolved in a prior arbitration and not named in the award. The *Levine* court explained that third party liability, if any, was derivative of the party exonerated in the prior arbitration, and the award was entitled to res judicata effect in litigation. Absent the issue of derivative liability, the impact of *res judicata* on non mutual parties to a prior arbitration award remains unresolved.

The most controversial litigation doctrine in the context of arbitration emerges in the law of unconscionable contracts; CCP 1670.5. California courts have transferred contractual unconscionability to arbitration clauses, refusing to enforce terms on the same grounds as in litigation; *Armendariz*. "Unconscionability" of contract was originally conceived judicially *Graham v. Scissor-Tail,* 28 Cal. 3d 807 (1981) and ratified subsequently by the Legislature; Civ. Code 1670.5. The statute provides no definition of the term, consequently the courts must supply content. The California Supreme Court initially undertook the task in *Armendariz*, an employment case, and the Courts of Appeal have applied the decision in numerous other contexts; *Aral v. Earthlink, Inc*., 2005 WL 3164648) [forum selection clause].

The California Supreme Court has divided the term "unconscionability" into "procedural" and "substantive" components. The former includes an arbitration term generating "oppression or surprise" attributable to unequal bargaining power of one party; the latter evidences "harsh or one-sided results;" *Armendariz; Woodside Homes of Cal., Inc. v. Sup.Ct.*, 107 Cal. App. 4th 723 (2003). The terms identify execution and process of arbitration respectively.

Although relegated by the courts to subjective perception, the unconscionability doctrine essentially reflects an equitable judicial interpretation of economic reality. Employment and consumer contracts are the most common examples of arbitration terms unilaterally imposed without negotiation between the parties and are denominated contracts of "adhesion." The courts equate an adhesive arbitration clause to procedural unconscionability but not unenforceable absent substantive unconscionability.

Courts acknowledge adhesive contracts as imperative in modern society but judges monitor the terms closely and scrutinize the underlying nature of the transaction. The Court of Appeal recently added franchise contracts within the umbrella of unconscionable arbitration clauses, citing the inferior bargaining power of franchisees; *Independent Ass'n. of Mailbox Center Owners, Inc. v. Sup.Ct.*, 133 Cal. App. 4th 396 (2005).

Employment contracts are unique in the sense that few applicants for employment negotiate the terms and are at a severe economic disadvantage. Conversely, consumers may lack the ability or power to negociate but presumably can either select among a variety of products, simply refuse to purchase, or shop elsewhere. The California Supreme Court acknowledged this economic reality in *Boghos* by declining to expand *Armendariz* and its cost shifting rule to consumer transactions although acknowledging the potential for exceptions; *Gutierrez v. Autowest, Inc*., 114 Cal. App. 4th 77 (2003).

California and federal courts continue to confirm arbitration as an alternative to litigation, but judicial review of the process insures an oversight in attempting to balance the intersection between the two dispute resolution processes. The increasing use of litigation language by appellate courts suggests a "litigazation" of arbitration.

The judicial balancing act is further compounded by the preemptive role of the FAA and its impact on state law. The year 2006 portends more decisional law on arbitration by state and federal courts.

— Hon. L.C. Waddington

Prop. 64: The Current Debate

Continued from page 3

Weissman v. SCAT Enterprises, Inc., (Sup. Ct. L.A., May 10, 2005).

No changes of the magnitude argued for by the defense bar are either presented by the statutory language or, of course, announced in the proposition itself or the explanatory materials accompanying the ballot measure. There is simply no basis for the claim other than wishful thinking and a desire to see Prop. 64 turn the UCL into common law fraud.

Effect of New Section 17204

Does Amended Section 17204 Change the Proof Requirements for Absent Class Members?

Mr. Rossbacher: Nothing in Prop. 64 changes the requirements for absent class members. The Proposition does not address the topic.

Mr. Jackson: Absent class members are "prosecuting" an action in a class action based on the decisions holding absent class members to be plaintiffs. *See Southern Cal. Edison Co. v. Sup. Ct.*, 7 Cal. 3d 832, 840 (1972). This legal rationale is what imposes duties on class counsel that run to absent class members, prohibits defense counsel from direct communications with absent class members, and gives rise to collateral estoppel. In addition, the voters' removal of "general public" from section 17204 could be effectively negated if the standing requirements did not apply to absent class members.

Practical Effects on Class Certification

Do Practical and Policy Considerations Suggest that Prop. 64 Changed Proof Requirements?

Mr. Rossbacher: Prop.64 makes no changes from California law as it has been established. Contrary to the defense assertion, Prop. 64 encourages class actions, ending the spurious defense argument that class actions are not "superior" to representative actions. The California Supreme Court has repeatedly made clear not only the reach of the UCL and its important place in protecting Californians from the predators in the business community in the cases cited above, but also has reiterated as recently as June of last year the important role that class actions play in consumer protection. *Discover Bank v. Superior Court*, 36 Cal. 4th 48 (2005). That important role is now reemphasized by Prop. 64's requirement that UCL actions be brought under CCP § 382.

Mr. Jackson: Permitting lessened proof for absent class members would preclude collateral estoppel and destroy any even-handedness in class litigation. Under plaintiff's interpretation, a finding against the class representative on causation or injury in fact would logically fail to provide collateral estoppel against absent class members who would not need to prove causation or injury in fact. *United States Golf Ass'n v. Arroyo Software Corp*., 69 Cal. App. 4th 607, 619 (1999) (no collateral estoppel attached from prior adjudication with differing proof elements). Even expensive class notice would not change this. Notice would be largely pointless because collateral estoppel against the defendant could arise without it.

Under plaintiff's interpretation, even a losing class representative could still recover as an absent class member. In a case with multiple class representatives, a losing representative could join the absent class members and still recover.

Permitting lessened proof for absent class members could encourage 17200 class actions, contrary to the voters' obvious intent. If absent members need not prove causation or injury in fact, absence of commonality on these would not defeat certification. While this was true before Prop 64, defendants then could

(Continued on page 9)

Proposition 64: The Current Debate

Continued from page 8

defeat certification because a class action was not superior to an uncertified representative action. *Caro v. Proctor & Gamble Co.*, 18 Cal. App. 4th 644, 661 (1993). Prop 64 eliminated this defense when it eliminated uncertified representative actions under 17200.

Permitting lessened proof for absent class members could also effectively eliminate the stated purpose of Prop. 64 to eliminate claims by persons who were not injured. The plaintiff's construction would allow one person to be the Trojan Horse for thousands of claims without injury in fact.

Does Discovery Strategy Change?

Does Prop 64 Change Class Certification Discovery and Tactics?

Mr. Jackson: Consider discovery on commonality and typicality before the Court decides whether Prop. 64 imposes standing requirements on absent class members. A ruling may preclude discovery. Use discovery to bring to life examples of the impracticalities of individualized class member proof of either eligibility for or entitlement to recovery: (1) Did class members receive representations in addition to or different from those of the named representative? (2) Did class members have unique circumstances or knowledge that affected the reasonableness of their reliance and proximate cause? (3) Did class members receive differing actual representations that could be material and overcome alleged commonality of any concealed matters?

Mr. Rossbacher: Nothing in Prop. 64 changes the laws of discovery under the California Rules of Court, Rule 1858. The principles announced by the Supreme Court in *Southern California Edison Co. v. Superior Court*, 7 Cal. 3d 832 (1972) and implemented in *National Solar Equipment Owners' Association, Inc. v. Grumman Corporation*, 253 Cal. App. 3d 1273 (4th Dist. 1991) still apply. As the Court of Appeal makes clear in *Prata v. Superior Court*, 91 Cal. App. 4th 1128, 1148, (2nd Dept. 2001), making arguments focused "on individual matters of proof irrelevant to liability under the UCL" is not appropriate. Discovery aimed at irrelevancies is still inappropriate.

— Laurence Jackson and Henry Rossbacher

Contributors to this Issue

Patrick Cathcart, President of the Los Angeles chapter of the ABTL for the 2005-2006 year, is a partner in the firm of Cathcart, Collins & Kneafsey LLP, a business litigation firm in Los Angeles.

Gregg A. Farley is a partner and *Alex Spjute* is an associate in the Los Angeles office of Sidley Austin LLP.

Laurence Jackson is a partner with Christa & Jackson in Los Angeles.

Raymond B. Kim is a shareholder with Greenberg Traurig LLP in Los Angeles.

Henry Rossbacher is the senior partner of The Rossbacher Firm in Los Angeles.

Hon. Lawrence C. Waddington (Ret.) is an arbitrator/mediator associated with JAMS.

The Gun Industry Shield Law: Closes a Door But Opens a Window

Since gaining the Oval Office in 2000, President George W. Bush and the GOP have attempted to close the door on the plaintiffs' bar by pursuing wide-spread court reforms. The litany of these reforms include the overhaul of the bankruptcy system as well as the passage of new federal class action limitations. The most recent tort reform passed by Congress and signed into law by the President is the Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 109 Stat. 2005 ("PLCAA"), also known as the Gun Industry Shield Law.

Gregg A. Farley

The law's supporters hope it will shield the gun industry from burgeoning product liability litigation. The strength of this law, however, was recently tested in *City of New York v. Beretta U.S.A. Corp.*, 401 F. supp. 2d 244 (E.D.N.Y. 2005), and found wanting. While the U.S. District Court for the Eastern District of New York, Senior Judge Jack B. Weinstein presiding, upheld the PLCAA as constitutional, it found the law inapplicable to the City of New York's allegations that the firearm industry, through its marketing practices, had recklessly contributed to the creation of a public nuisance, a knowing violation of New York Penal Law (PL) § 240.45. While the intent of the PLCAA was to close the door on "creative" product liability claims against the gun industry, the interpretation of the PLCAA in *City of New York* may have opened a window for at least some portions of these claims to proceed in the future.

The Protection of Lawful Commerce in Arms Act

The PLCAA was enacted October 26, 2005, with the stated purpose "[t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." PLCAA § 2(b)(1). The plain intent articulated is to prevent the gun industry from being held liable for many of the violent crimes committed with the aid of a firearm.

Towards this end, the PLCAA states "[a] *qualified civil liability action* may not be brought in any Federal or State court." PLCAA § 3(a) (emphasis added). A "qualified civil liability action" is defined to be "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a *qualified product*, or a trade association, for damages…or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party…." PLCAA § 4(5) (emphasis added). The statute goes on to define "qualified product" as "a firearm…or ammunition…or a component part of a firearm or ammunition…." PLCAA § 4(4). The law also provides that a "qualified civil liability action that is pending on the date of enactment…shall be immediately dismissed." PLCAA § 3(b). When read together, these provisions and definitions prohibit most product liability actions in either state or federal court against the gun industry for harm derived from the use of a firearm, unless the firearm itself malfunctions.

(Continued on page 10)

The Gun Industry Shield Law

Continued from page 9

While the PLCAA blocks most product liability actions against the gun industry, it carves out six narrow exceptions for specific civil liability actions that are *not* considered "qualified civil liability action[s]" and are therefore not prohibited by the PLCAA. PLCAA § 4(5)(A)(i-vi). These exceptions are mostly limited to violations of existing gun laws or manufacturing or design defects. *Id*. The third exception, however, allows "an action in which a manufacturer or seller of a qualified product knowingly violate[s] a State or Federal statute applicable to the sale or marketing of the product, and the violation [i]s a proximate cause of the harm for which relief is sought…." PLCAA § 4(5)(A)(iii). It is this third exception that the court in *City of New York* applied to the City's cause of action, saving it from dismissal under the PLCAA.

Alex E. Spjute

City of New York v. Beretta U.S.A. Corp.

Back in June 2000, the City of New York brought suit against the main suppliers of handguns in the United States seeking the abatement of an alleged public nuisance caused by negligent and reckless merchandising. The City alleged that the negligent and reckless marketing of handguns created a public nuisance by flooding the streets with guns used to commit crimes. According to the City, the creation of this public nuisance was in violation of New York Penal Law (PL) section 240.45, which states one is guilty of criminal nuisance in the second degree if one "knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons."

Within hours of the passage of the PLCAA, the defendants sought to dismiss the pending action, arguing the PLCAA mandated an immediate dismissal. Plaintiff countered by asserting its cause of action was outside the statutory definition of a qualified civil liability action under section 4(5)(A)(iii). Judge Weinstein of the U.S. District Court issued an opinion adopting plaintiff's interpretation of section 4(5)(A)(iii), holding the public nuisance claim as outside of the claims prohibited by the PLCAA.

Judge Weinstein found that the alleged knowing violation of New York PL 240.45, creating a public nuisance, was "applicable to the sale or marketing" of firearms. The judge noted that "[w]hile New York PL 240.45 has not yet been applied to the sale or marketing of firearms, the common law doctrine of public nuisance from which it was derived has been so applied." *City of New York*, 401 F. Supp. 2d at 262. After tracing the "applicability" of the common law of public nuisance to the sale or marketing of legal but potentially harmful products, Judge Weinstein concluded that "[n]either the common law doctrine of public nuisance nor New York PL 240.45 are any less 'applicable to' the sale and marketing of firearms than they are to other legal but potentially dangerous products." *Id*. at 263.

The court also rejected defendants' argument to narrowly interpret section 4(5)(A)(iii) to refer only to statues specifically regulating firearms. In dismissing this interpretation, the court stated "[the PLCAA] does not admit of the distinction defendants ask the court to draw, between laws *specifically* regulating the sale or marketing of firearms and laws that, while 'applicable' to the sale or marketing of firearms, do not explicitly mention firearms in their text." *Id*. at 264. Judge Weinstein opined that plaintiff's claim was outside the scope of the PLCAA because plaintiff had successfully alleged a knowing violation of a state law, New York PL § 240.45, that this law was "applicable" to the sale of firearms, and that the conduct complained of, the gun industry's zealous marketing of firearms, was a proximate cause of the harm alleged.

After holding the PLCAA allowed a public nuisance action against gun manufacturers, the court in *City of New York* proceeded to uphold the constitutionality of the PLCAA. The court found the PLCAA to be a rational exercise of the commerce power reserved to Congress under the Commerce Clause, noting that "Congress expressly found that the possibility that members of the national Gun Industry would be held liable in legal actions of the type foreclosed by the [PLCAA] 'constitutes an unreasonable burden on interstate and foreign commerce of the United States.'" *Id*. at 287 (quoting PLCAA § 2(a)(6)). Judge Weinstein went on to state that "[a]lthough a court may have reservations about the likelihood of the predicted catastrophic collapse of the Gun Industry, there is a rational basis for Congress' determination that the [PLCAA] was necessary to protect that industry." *Id*.

Judge Weinstein, acknowledging that the interpretation of the PLCAA is an issue of first impression that raises possible constitutional questions and affects pending suits across the country, granted a stay to provide time for immediate appellate review.

Further Guidance From the Courts Pending

While the PLCAA is scarcely more than a few months old, its ability to protect the gun industry has significantly been limited by Judge Weinstein's ruling. Other courts are sure to weigh-in on the breadth of the exception found in section 4(5)(A)(iii) and what state or federal laws are truly "applicable" to the sale or marketing of firearms. Until more courts tackle the proper interpretation of the PLCAA, we can expect plaintiffs to continue to bring suits against the gun industry.

— Gregg A. Farley and Alex E. Spjute

L.A. County Thanks *ABTL* for Children's Xmas Gifts

The following letter, dated January 18, 2006, was sent to Rebecca Cien and ABTL *and signed by Janice Johnson, Program Director, Juvenile Court Shelter Care, L.A. Department of of Children and Family Services:*

Dear Ms. Cien/Association of Business Trial Lawyers,

On behalf of the children of the Los Angeles County Department of Children and Family Services and the Edelman Children's Court Shelter Care Program, I want to extend my sincere appreciation and gratitude for the donation of Christmas gifts that you provided to court children during December 2005!

Once again, the Association of Business Trial Lawyers found time to warm the hearts of dependent children by sharing your beautiful resources. For children who could not be with their families during the holidays this message of caring and thoughtfulness was heartfelt. Your selfless act gave children experiencing the trauma of separation, and the uncertain dependency court process, very individualized and personal supportive encouragement.

It is my great pleasure to have the support of the Association of Business Trial Lawyers in my efforts to bring nonbiased support and normalization to court children. I thank you for your continued selection of the Edelman Children's Court Shelter Care Program as a place worthy of your donations. I look forward to continuing my partnership with you. Have a wonderful 2006!

Sincerely,
Janice Johnson

Letter from the President

As I write this letter, we are halfway through the year, and it is already a year of growth and change for the ABTL in Los Angeles. During the year 2004, we increased our membership to just under 1000. Our goal for 2006 is to hope that all of the members in 2005 will renew their memberships. If our 2005 members, and those members in 2004 who did not renew in 2005, all renew, we will reach our overall goal for 2006 of 1200 members, and also reach a ten-year high in membership. Your membership not only supports the ABTL, but it provides us with additional funds to permit great speakers at our programs, like Terry McCarthy, who will be speaking at our February 21 dinner program.

We had an extraordinary and timely dinner program last November on the operation of the U. S. Supreme Court. Six panelists, all of whom clerked for Supreme Court Justices, offered unique perspectives on the Supreme Court during their tenure. Judges Ray Fisher (who clerked for Justice Brennan), and Alex Kozinski (for Warren Burger), Professors Larry Simon of USC (Earl Warren), and Jonathan Varat of UCLA and former Dean of UCLA, and attorneys Brian Boyle and Daniel Collins (both for Antonin Scalia), provided anecdotal and fascinating insights into how the Court operates. Some of the comments could be applied to help understand the sometimes shifting positions on issues before the Court and differences in the way the Court approached the decision making process during and after the Warren years.

The ABTL, this year, has expanded our Courts Committee, and through its efforts have begun to investigate ways to work with the state and federal courts in the Los Angeles area to improve not only relations between business trial lawyers and the courts, but also ways to help promote the efficient administration of the courts' civil caseloads in all areas. As part of that effort, our committee, chaired this year by Robb Scoular of the Sonnenschein firm, has been attempting to help defuse the perennial congressional efforts by a few misguided legislators to split the Ninth Circuit. The ABTL does not take, as an organization, a position on whether the split of the circuit is appropriate, although virtually all of the members of the Board of Governors, on their own and independently, oppose such a split.

Our Courts Committee has attempted to gather as much information on the efforts to split the circuit as possible, including copies of correspondence that has been sent to various congressional advocates and opponents of the split, in order better to inform our members of the issues and to help them take an informed position, and also — if they so desire — to become involved in the debate on their own. Former President of both the ABTL and the State Bar, Harvey Saferstein, together with well-known attorneys including Terry Bird, who practice regularly in the federal courts, have been spearheading a lawyers' effort to provide congressional representatives with the facts and statistics necessary to recognize the ill-founded nature of the effort to split the circuit. If members, or readers of the ABTL Report wish to become involved, as I urge you to do, please contact Harvey, at Mintz Levin (310) 586-3203, or hsaferstein@mintz.com or Robb Scoular at Sonnenschein (213) 892-5003, or rscoular@sonnenschein.com for information and for copies of letters.

Speaking personally, and using this vehicle shamelessly to express my own views on the topic and *not the views of the ABTL*, the issues are clear. True, the Ninth Circuit is the largest circuit in the country. We have approximately 24 appellate judges and approximately 111 trial court judges without counting commissioners and justices of the peace (as of November, 2005.) The split, currently contemplated, creates a new Ninth Circuit of California, Hawaii, Guam and the Northern Marianas, which account for 71% of the caseload of the present Ninth. In order to even the caseload in the two new circuits, Congress would have to create some 13 new judges in the new Ninth Circuit. The estimates of the cost of the split of the current Ninth into two circuits (whether that involves the creation of a whole new administrative and support function for the new Twelfth or dividing the infrastructure of the Ninth and adding additional support to each of the new circuits) could reach $100 million, and some say even $120 million dollars and an additional $10 to $20 million in administrative costs each year. The current facilities in the proposed new Twelfth Circuit would be inadequate for the administrative component of a new circuit, while they are wholly adequate for their present function. As Robyn Spalter, President of the Federal Bar Association, has pointed out, even if you put aside the capital investment required, the transition costs alone would destroy the budgets of the old and new circuits for the next decade.

Patrick Cathcart

I understand that only three of the sitting jurists in the Ninth Circuit have voted in favor of dividing the circuit; all of the Chief Judges for the last 50 years, the time this issue has been floating, have opposed it; state bars and federal bars throughout the circuit oppose it; virtually all the specialty bars of the circuit, including the Los Angeles County Bar, the San Diego Bar, the Seattle Bar and the San Francisco Bar oppose it; and, the Fourth Estate (Los Angeles Times, New York Times, Sacramento Bee and the Seattle Post-Intelligence) opposes it. Even the White Commission, chaired by a Supreme Court Justice, said in 1998:

> The Ninth Circuit is in the vanguard of using technology, holding video conferences and televised hearings, and other means, that have eliminated the inefficiencies which proponents of a split raise as a pretext for their positions.

Then, why the fervor about splitting the circuit? If, as is evident and as commentators have pointed out, the goal is to attack the existing circuit as potentially too liberal in its decisions, or to prevent what some believe are decisions that are too "out there," the goal is as reprehensible as any could be. Our system of an independent judiciary is absolutely essential to the survival of our democracy, our economic institutions, and the freedoms that we consider unassailable. According to Roxanne Bacon, a Past President of the State Bar of Arizona, the Ninth Circuit took in 15,392 cases as of November 2005. In only 6.5% of those cases, the losing side sought Supreme Court review of the result; the Supreme Court granted review in only 1.9% of the cases. The Supreme Court only reversed the Ninth Circuit in 16 cases or in other words, in 1/10th of 1 percent of the Ninth Circuit's annual caseload. So, while it is fashionable to comment on what some say is a high reversal rate in the Ninth Circuit, and to throw in inaccurate claims of inefficiency, these arguments can be no justification for splitting the circuit. I would think that only political myopia or arrogance would assume that the split in the circuit, the creation of 13 new judgeships in the new Ninth Circuit, and the appointment and confirmation of those judges, could be accomplished within a short enough period of time to enable the present Republican controlled administration and Senate to radically change the present diverse range of judicial views and philosophy on the

(Continued on page 12)

Letter from the President

Continued from page 11

circuit. Further, as history demonstrates far better than rhetoric, American jurisprudence goes through normal periodic shifts and adjustments that would defy any ambition to create a lasting "conservative" or "liberal" doctrine.

As Edith Matthai, President of the Los Angeles County Bar Association, has pointed out, the proposed legislation "are solutions in search of a problem. The Ninth Circuit has been consistently and effectively serving the western United States for over 110 years. Dividing this venerable institution will yield no benefits, but will squander the significant economies of scale the circuit currently enjoys."

It is far better to maintain a fair, balanced, and above all impartial and independent judiciary. We have that now, and to attempt to "fix" what is not broken would be an expensive, unnecessary folly.

— Patrick Cathcart

Save the Date!

April 6, 2006

The California Supreme Court — A Justice's Perspective

What happens at the California Supreme Court when the Justices are not on the bench? Get a unique and unprecedented view of what happens behind the scenes at the California Supreme Court from the Justices themselves. Don't miss this special event!

Watch for more information
in the mail or check the abtl website.

abtl REPORT

P.O. Box 351649
Los Angeles, California 90035
(323) 939-1999 • FAX: (323) 935-6622
e-mail: abtl@abtl.org • www.abtl.org

abtl REPORT

P.O. Box 351649
Los Angeles, California 90035