ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

Volume XXVII No. 3 Summer 2005

Rule 11: Returning the Teeth to the Tiger

A jury awards millions to a plaintiff who was burned by hot coffee. Plaintiffs sue companies for misusing products or failing to properly read directions. Stories such as these have raised the public consciousness of "litigation abuse." As a result of the outcry of small businesses and many industries, the House of Representatives has taken the lead in proposing the "Lawsuit Abuse Reduction Act." The essence of this Act substantially revises Rule 11 of the Federal Rules of Civil Procedure ("F.R.C.P.") and proponents claim that the Act would put teeth back into Rule 11.

Stephen M. Levine

Historical Perspective of Rule 11

Sanctions against lawyers were initially codified in Rule 11 of the F.R.C.P. in 1938. However, many observers felt that there were two key problems with Rule 11 as originally enacted in 1938. First, Rule 11's certification provisions were "not read enough, not demanding enough, and not honored enough." (Arthur R. Miller & Diana G. Culp, *Federal Practice: Litigation Costs, Delay Prompted the New Rule of Civil Procedure*, Nat'l. L. J., Nov. 28, 1983, at 24.)

(Continued on page 4)

INSIDE

The Sarbanes-Oxley Act: Civil Litigation Implications for Non-U.S. Issuers

The Sarbanes-Oxley Act (SOXA) was enacted by the U.S. Congress in 2002 in response to the corporate scandals surrounding Enron and other well-known U.S. companies. While the primary impetus for the enactment of SOXA was concern about public disclosure and corporate governance in respect to domestic companies, SOXA's requirements also extend to certain non-U.S. companies, including those that have their securities listed on a U.S. securities exchange or traded in Nasdaq.

Peter S. Selvin

Much attention has been paid to the new reporting and auditor independence requirements mandated by SOXA. However, an important emerging issue is whether SOXA will generate additional civil litigation, including shareholder derivative suits, securities litigation based on SOXA, and potential claims that "borrow" from a SOXA violation.

Because of its recent enactment, there have been very few reported judicial decisions interpreting SOXA. There is thus little guidance from the U.S. courts as to the litigation implications of SOXA, much less the extent to which non-U.S. companies may be exposed to litigation risks arising under this statute.

This article explores the application of SOXA to foreign issuers and addresses the civil litigation risks which may be inherent in the statute in respect to companies, foreign or domestic, which are subject to it. As more fully discussed below, SOXA offers a number of opportunities for private litigants to invoke the U.S. courts for the purpose of shareholder litigation. Such a prospect raises the stakes for foreign companies attempting to access the U.S. capital markets.

Application of SOXA to Foreign Issuers

Non-U.S. companies which are subject to SOXA. By its terms, SOXA applies to an "issuer" whose securities are registered under Section 12 of the Securities Exchange Act of 1934 (Exchange Act), or that is required to file reports under Section 15 of the Exchange Act, or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933. SOXA at § 2(a)(7). This definition is sufficiently broad to encompass all non-U.S. companies having securities list-

(Continued on page 2)

Continued from page 1

ed on a U.S. exchange or traded in Nasdaq. This definition would also include non-U.S. companies which have filed registration statements in connection with a pending initial public offering of debt or equity securities in the U.S.

Exemptions from coverage. Those non-U.S. companies that have obtained an exemption from registration pursuant to Rule 12g3-2(b) of the Exchange Act may avoid the requirements of SOXA because they do not fall within the definition of "issuer". In this regard, the company must not have been an SEC-reporting company within eighteen months and must agree to submit various shareholder and other reports to the SEC following their distribution outside the U.S. 17 CFR § 240.12g3-2.

Alternatives to compliance. Some commentators have cited the administrative costs associated with compliance with SOXA (and potential conflicts with local corporate governance regulations) as the motivation prompting certain foreign issuers, notably Porsche, to announce plans to delist from the NYSE. As an alternative to compliance, foreign companies whose securities are already listed on U.S. exchanges, but who have not perfected an exemption, might be able to avoid application of some of SOXA's requirements by delisting their securities and completing the process of SEC deregistration. Companies that choose to remain listed only need to include the 302 certifications (discussed below) on their annual and quarterly forms, and not on Form 6-K. *See* Certification of Disclosure in Companies' Quarterly and Annual Reports, SEC Release Nos. 33-8124, 34-46427, IC-25722; File No. S7-21-02 (August 28, 2002).

Overview of Key Provisions

While a complete description of SOXA's provisions is beyond the scope of this article, the key substantive provisions fall into the following broad categories:

Public disclosure of financial information. SOXA requires certifications by a company's CEO and CFO as to the accuracy of the company's financial reporting, as well as management's responsibility for the company's internal controls. Sections 302 and 906. In addition, SOXA requires disclosure of certain material off-balance sheet arrangements having or likely to have an effect on reported results. Section 401(a). The statute also requires that non-GAAP figures must be accompanied by the comparable GAAP measure and a reconciliation. Section 401(b).

Elimination of insider conflicts. SOXA provides for expedited reporting of changes in beneficial ownership of company securities held by insiders or holders of more than 10% of a class of company equity security. § 403. The statute also prohibits insider trading during pension blackout periods (§ 306), loans to directors and executive officers (§ 402), and improper influence by officers and directors upon the auditor in the performance of its engagement (§ 303).

Audit committees. SOXA enacts a variety of provisions relating to audit committee authority and responsibility, including the committee's composition; auditor independence; disclosure of the audit committee financial expert; and the establishment of a system for the submission of complaints regarding accounting, internal accounting controls or questionable accounting or auditing matters. §§ 301, 407.

Regulation of auditors. SOXA also establishes new rules for regulating auditors. § 201 defines what services are outside the scope of auditors; § 202 requires audit committee preapproval for all auditing services (with exceptions for *de minimus* services); and § 203 requires rotation of auditor partners. In addition, § 206 spells out prohibited conflicts of interest between an auditor and an issuer, while § 303 prohibits any officer or director from improperly influencing, manipulating or coercing an auditor.

New rules for attorneys. SOXA requires both in-house lawyers and outside counsel who "appear and practice" before the SEC to report "up the ladder" within the issuer evidence of any material violation of U.S. law by the issuer or its employees or agents (§ 307).

Civil Liability Risks

Although SOXA does not on its face expressly create any new private rights of action on behalf of investors or other private parties seeking to enforce its provisions, there are provisions in SOXA which will likely be invoked as grounds for civil litigation against companies and their executive officers. At the threshold, there are provisions expanding existing civil remedies. In addition, private litigants might be able to "bootstrap" violations of SOXA as a basis for asserting claims under federal and state securities statutes and other grounds. Finally, and if history is a guide, plaintiffs will seek to have courts find that the statute contains an implied right of action.

SOXA Expands Various Existing Civil Remedies. Section 804 lengthens the statute of limitations for private securities fraud actions (that do not have a statutorily defined statute of limitations) to the earlier of five years after the alleged violation or two years after its discovery. This provision amends 28 U.S.C. § 1658, which had provided one application of a four-year statute of limitations in respect to civil actions arising from federal statutes. According to the legislative history, this provision was enacted to rectify the 1991 U.S. Supreme Court decision *Lampf v. Gilbertson*, 501 U.S. 350 (1991), upholding the short statute of limitations in securities fraud cases. See Senate Committee on the Judiciary, The Corporate and Criminal Fraud Accountability Act of 2002, S. Rep. No. 107-146 (May 6, 2002). It can be expected that the lengthened statute of limitations will increase the number of securities lawsuits that are filed and will also expand the size of the plaintiff class in those cases where class certification is obtained.

Section 803 amends Bankruptcy Code § 523(a) (11 U.S.C. § 523(a)) to prevent discharge debts of individuals resulting from judgments, orders or settlements relating to the violation of federal or state securities law. According to the legislative history, this provision was enacted to prevent wrongdoers from using the bankruptcy laws as a shield and to allow defrauded investors to recover as much as possible. 148 Cong. Rec. S7418 (daily ed. July 26, 2002) (statement of Senator Leahy).

Plaintiffs Will Invoke The Certification Requirements Of SOXA To "Bootstrap" Claims Under Exchange Act § 10(b) And Rule 10b-5. The officer certifications mandated under §§ 302 and 906 of SOXA will likely be invoked by plaintiffs seeking to bring claims under Exchange Act § 10(b) and Rule 10b-5. As noted above, under § 302 the company's principal executive and financial officers are required to certify the truthfulness of the company's quarterly and annual reports. This certification must identify the officer's basis for making the certification and must further certify that the company's officers are responsible for establishing and maintaining disclosure controls and procedures.

SOXA does not expressly provide for a private right of action on behalf of investors or others in the event that the company's officers violate the certification requirement. Nevertheless, a false certification under SOXA can serve as an actionable misrepresentation for purposes of establishing a claim under Exchange Act § 10(b) and Exchange Act Rule 10b-5. In this regard, the SEC has implemented rules pursuant to SOXA § 302 which specifically provide that false certifications could subject the certifying officers to private causes of action under Exchange Act § 10(b) and Rule 10b-5.

But whether the certifications now mandated by SOXA will actually play a significant role in future securities litigation

(Continued on Page 3)

remains unclear. This is because the source of a securities plaintiff's underlying loss will ordinarily be the false quarterly or annual report – not the certification itself. And, as noted below, a company's principal officers are already responsible as signatories to the company's periodic disclosures under the Exchange Act. Thus, from a plaintiff's perspective, establishing a causal relationship between the false certification (as distinguished from the false financial report itself) and a plaintiff's financial loss would seem problematic.

The more likely impact of the certification requirements will be to enable plaintiffs to meet the heightened pleading requirements contained in the Private Securities Litigation Reform Act of 1995 (PSLRA), particularly the requirement that a plaintiff allege "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). As one commentator has noted,

> Certification requirements may enable an easier passage for private litigants to meet the enhanced pleading requirements of the PSLRA in that the Act, literally unchanged by SOX, mandates pleadings which create a strong inference that the defendant acted with the requisite state of mind. The scienter standard for securities fraud claims requires a showing of the defendant's knowledge or, at bare minimum, reckless disregard of the alleged misrepresentations. As a result, a cause of action for securities fraud cannot withstand containing allegations of merely negligent, or even grossly negligent, misrepresentations on the part of the defendants.
>
> Prior to the enactment of Sarbanes-Oxley, courts contemplating the PSLRA's pleading standards found boilerplate allegations in reference to a given defendant's knowledge of misrepresentations or omissions unconvincing. However, SOX certification provisions requiring the establishment and maintenance of internal control systems may persuade courts that a strong inference the defendant acted with the requisite scienter exists and once past the PSLRA pleading requirements, discovery will reveal the existence of internal reports effectively resolving the issue of an individual defendant's knowledge or lack thereof.

K. Cowart, the Sarbanes-Oxley Act: How a Current Model in the Law of Unintended Consequences May Affect Securities Litigation, 42 Duq. L. Rev. 293, 311-12 (2004).

In the event that one of the company's financial reports is materially inaccurate, the certification requirements of SOXA will put corporate officers named as defendants in private securities suits in the following "Catch-22". SOXA mandates corporate officers to have, and to certify that they have, personal knowledge of the truthfulness of the company's periodic reports. Sections 302, 906. In the event that such a periodic report contains a material inaccuracy, the choices for the certifying officer seem to be these: either he was aware of the material inaccuracy — in which case he knowingly provided a false certification; or he was unaware of the material inaccuracy — in which case he recklessly provided a false certification. In either case, a securities plaintiff — whose claim might otherwise founder against the strict requirements for pleading scienter under PSLRA — will be significantly assisted.

SOXA Will Provide Additional Bases For The Filing Of Derivative Claims. SOXA will fuel derivative litigation in which shareholders will assert claims against corporate officers and directors on behalf of the company. Put simply, plaintiffs suing on behalf of the company will assert claims against officers and directors based on their purported failure to discharge the enhanced obligations imposed on them pursuant to SOXA. The following are some likely scenarios:

• SOXA gives the corporation additional rights against corpo-

(Continued on page 10)

California Supreme Court Expands the Scope of Malicious Prosecution

Zamos v. Stroud's Extension of Malicious Prosecution

The California Supreme Court has broadened the scope of liability for malicious prosecution and thereby placed all attorneys on notice of their obligation to assess and reassess continually the merits of claims they prosecute. In *Zamos v. Stroud*, 32 Cal. 4th 958 (2004), the Court addressed the issue of whether an attorney may be held liable for malicious prosecution when he *commences* a lawsuit properly but then *continues* to prosecute it after learning it is not supported by probable cause. The Court unanimously concluded that, assuming all elements of the tort are met, an attorney may be held liable for continuing to prosecute a lawsuit discovered to lack probable cause.

Eve Coddon

In *Zamos*, the plaintiff — attorney (Zamos) brought a lawsuit for malicious prosecution against his former client (Brookes) and the lawyers (collectively, "Stroud") who had represented Brookes in an unsuccessful fraud lawsuit against Zamos. The fraud lawsuit arose out of contentions by Brookes and Stroud that Zamos had made misrepresentations to Brookes in connection with the settlement of an earlier lawsuit in which Zamos had been counsel for Brookes. After Stroud, on behalf of Brookes, commenced the fraud lawsuit against Zamos, Zamos provided Stroud with hearing transcripts from the first action that refuted the fraud allegations. Stroud refused to dismiss the lawsuit, and successfully opposed a motion for summary judgment. The fraud case proceeded to trial, and judgment was entered in favor of Zamos following a non-suit. *Id.* at 962-963.

Zamos then brought a malicious prosecution action against Stroud and Brookes. Stroud filed an anti-SLAPP motion under Section 425.16 of the California Code of Civil Procedure that the trial court granted and the Court of Appeal reversed. The California Supreme Court granted Stroud's Petition for Review.

The California Supreme Court noted that the issue presented — whether an attorney can be liable for continuing to prosecute a lawsuit discovered to lack probable cause — constituted a question of first impression in California. *Id.* at 966. Nonetheless, the Court noted that a substantial number of courts in other states, as well as the drafters of the Restatement Second of Torts, recognize liability in such circumstances. *Id.* at 967.

The Court further disapproved California appellate court decisions that had failed to recognize viable claims for malicious prosecution based upon continuing a lawsuit without probable cause. *Swat-Fame, Inc. v. Goldstein*, 101 Cal. App. 4th 613 (2002); *Vanzant v. Daimler Chrysler Corp.*, 96 Cal. App. 4th 1283 (2002). Thus, the Court concluded that an attorney may be liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause. *Id.* at 970.

In reaching its holding, the Court addressed the duties of attorneys to avoid liability for malicious prosecution. The Court noted that "[b]ecause an attorney will be liable only for the damages incurred from the time the attorney reasonably should have caused the dismissal of the lawsuit after learning it has no merit,

(Continued on page 4)

Court Expands Scope of Malicious Prosecution
Continued from page 3

an attorney can avoid liability by promptly causing the dismissal of, or withdrawing as attorney in, the lawsuit. *Id*. at 970. The Court further rejected the notion that it would be difficult to assess when a reasonable attorney would agree that an action is without merit, as the same standard that applies to initiation of a suit will apply to the decision to continue a suit. *Id*. By example, the Court noted, "Counsel who receives interrogatory answers appearing to present a complete defense might act reasonably by going forward with the defendant's deposition in light of the possibility that the defense will, on testimonial examination, prove less than solid. *Id*. fn. 9.

What Are the Ethical Implications of *Zamos v. Stroud*?

The holding in *Zamos v. Stroud* requires attorneys in California to use heightened diligence throughout the course of litigation to avoid liability for malicious prosecution. Indeed, the Court's opinion makes clear that every step of the litigation process, from pre-litigation strategy, to written and oral discovery, to testimony at trial, can implicate the standards for malicious prosecution and expose an attorney to liability. At each step, the attorney must evaluate the merits of the case and even consider whether withdrawal is justified.

Despite the common sense rationale of the holding in *Stroud v. Zamos*, and the Court's assurance that its rule is workable, one can easily imagine situations that might place a lawyer in an ethical quandary. For example, Rule 3-700 provides that an attorney "shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules." What if the lawyer concludes late in discovery, or on the eve of trial, that the action has no merit? What if testimony or evidence during trial defeats the claim? Does the lawyer seek to withdraw then, and can he or she do so without prejudicing the rights of the client? And if he or she seeks to withdraw at that time, has the lawyer placed his own interests above the client's interests and exposed the lawyer to a claim for breach of fiduciary duty?

Of course, the California Supreme Court did not and could not answer these hypothetical questions. However, pursuant to the ethical obligations to which attorneys are bound, lawyers must be vigilant to ensure that they properly navigate their duties to clients, third parties and the courts. The holding in *Zamos v. Stroud* constitutes an additional layer of analysis that every lawyer must consider.

— Eve Coddon

Rule 11: Returning the Teeth to the Tiger
Continued from page 1

Second, the sanctions provision was rarely invoked, and the kind of sanction that could be imposed was open to question. (*See* Fed. R. Civ. P. 11 Advisory Committee's Note to 1983 Amendment, reprinted in 97 F.R.D. 165, 199 (1983).)

Thus, in 1983, the Rule 11 certification provision was substantially revised in an attempt to clarify what an attorney must do before filing a litigation document, and the sanctions provision was amended to provide mandatory sanctions, which may include reasonable attorney's fees. (*Id*. at 200.) The purpose of the 1983 Rule 11 was to streamline the litigation process by lessening frivolous claims or defenses.

The Advisory Committee notes to the 1983 amendments states that "the new language is intended to reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions." 97 F.R.D. 198. The amended rule attempts to deal with the alleged problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. "Greater attention by the district courts to pleading and motion abuses and the imposition of motion sanctions, when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." *Id*. This "new language stressed the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule." *Id*.

The 1993 version of the Rule attempted to clarify these ethical requirements, such as the "later advocating" provision while changing the procedures under the rule, and providing that sanctions are no longer mandatory. The Advisory Committee notes to the 1993 amendments indicate that the revision places greater restraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. Further, the 1993 amendments removed subdivision (d) from Rule 11 which related to all discovery requests, responses, objections and motions subject to the provisions of F.R.C.P. Rules 26 through 37. The 1993 changes also allowed judge's discretion in whether to sanction the filing party, and provided for a 21 day "safe harbor." Under this safe harbor, a motion for Rule 11 sanctions must be served on opposing counsel, but not filed with the court unless the party accused of the violation has not withdrawn or appropriately corrected the challenged paper or position within 21 days. Therefore, as the law currently stands, a party who files a frivolous lawsuit or pleading can withdraw the lawsuit or pleading free from the threat of sanctions.

However, these 1993 changes to Rule 11 were not all well received and many legal scholars and judges felt that the 1993 revisions took away the bite from Rule 11. When the 1993 Amendment to Rule 11 was transmitted by the Supreme Court to Congress for its consideration, Chief Justice Rehnquist stated "while the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these Amendments in the form submitted." (146 F.R.D. 401 (1993).) Justices Scalia and Thomas criticized the proposed amendment as "render[ing] the Rule toothless by allowing judges to dispense with sanctions, by disfavoring compensation for litigation expenses and by providing a 21-day 'safe harbor' [entitling] the party accused of a frivolous filing "to escape with no sanction at all." *Id*. at 507-508. Justice Scalia further stated that "In my view those who file frivolous suits and pleadings, should have no 'safe harbor.' The rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser under the revised Rule [11], parties will be able to file thoughtless, reckless and harassing pleadings, secure in the knowledge that they have nothing to lose. If objection is raised, they can retreat without penalty." *Id*. at 508.

House Proposes Amending Rule 11

Thus, on September 15, 2004, the U.S. House of Representatives in the 108th Congress, along essentially party lines, passed H.R. 4571 known as the "Lawsuit Abuse Reduction Act of 2004." H.R. 4571 passed by a 229 to 174 vote with 16 Democrats supporting the Bill and 3 Republicans opposing it. Because the Bill was not acted upon in the Senate, an amended version of this legislation was reintroduced on January 25, 2005 in the 109th Con-

(Continued on page 5)

Continued from page 4

gress by Representative Lamar Smith as H.R. 420. The Bill was co-sponsored by over 55 Representatives and was referred to the House Judiciary Committee which referred it to its Subcommittee on Courts, the Internet and Intellectual Propery. When Representative Smith introduced the "Lawsuit Abuse Reduction Act of 2005" he stated that "the filing of frivolous suits by attorneys across the nation has made a mockery of our legal system. Instead of concentrating on real cases that need timely rulings, our courts are forced to wade knee-deep in a pool of false claims and unscrupulous plaintiffs. These suits have increased insurance premiums and raised health care costs.... This measure holds accountable those who abuse our judicial system. It reinstates trust in our legal system."

Key Provisions of H.R. 420

This Bill would (1) reinstate mandatory sanctions for lawyers who file frivolous lawsuits under Rule 11 of the Federal Rules of Civil Procedure; (2) eliminate the current "safe harbor" that gives lawyers 21 days to withdraw suit after a motion for sanctions has been filed; (3) make the new Rule 11 applicable to cases filed in state courts if such cases affect interstate commerce; and (4) make changes relating to jurisdictional and venue for personal injury cases filed in state and federal cases. There is one significant difference between the 2004 legislation and the reintroduced 2005 legislation. The 2004 legislation would have created a "three strikes" for lawyers. Lawyers who have had sanctions three times in the same federal district during the attorney's career would be suspended from practicing for one year after the third time in that court, and the court has discretion to extend the suspension. This provision was extremely controversial and was deleted from the 2005 legislation. This proposed legislation revives the 1983 Rule 11 version. The Bill would also require the courts to award parties prevailing on Rule 11 motions reasonable expenses and attorneys' fees, if warranted. The principal provisions of this Bill are as follows:

• Restore mandatory sanctions for filing frivolous lawsuits in violation of Rule 11 of the Federal Rules of Civil Procedure;

• Restore the opportunity for monetary sanctions, including attorneys' fees and compensatory costs, against any party making a frivolous claim;

• Abolish Rule 11's current safe harbor provision which allows lawyers to avoid sanctions for making frivolous claims by simply withdrawing frivolous claims within 21 days after a motion for sanctions has been filed;

• Restore the opportunity for sanctions for abuses of the discovery process;

• For state cases in all civil proceedings, to conduct an inquiry to determine whether the case may affect interstate commerce; and

• Prevents forum shopping by requiring that personal injury cases be brought only where the plaintiff resides, where the plaintiff was allegedly injured, or where the defendant's principal place of business is located.

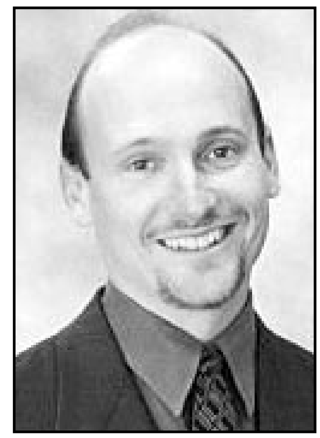
The current Rule 11 provision excluding sanctions for discovery violations would be eliminated by this Act. If this Act is passed, practitioners should be aware that sanctions for discovery violations could be sought under both Rule 37 and Rule 11 of the F.R.C.P.

Moreover, for the first time, this new Rule 11 would apply to state cases that the court determines affects interstate com-

(Continued on page 6)

Not So Fast — A Stipulated Reversal of Judgment Belies Its Name

Your client has lost a contentious trial and been hit with a $1.5 million judgment. The case is now on appeal, and before you spend the money on filing an opening brief, you take advantage of the Court of Appeal's mediation program and settle the case. Because one of your client's key requirements was that the judgment be vacated, the settlement is contingent on a stipulated reversal of the judgment. No problem, right? A simple, joint request to the Court of Appeal will secure the stipulated reversal and finally end this unfortunate litigation. Not so fast.



Jens B. Koepke

A recent appellate decision shows how daunting it can be to obtain a stipulated reversal of a judgment, even when all sides want it and when it will remove a case from the appellate court's docket. Parties and their counsel should wisely choose only those types of case well-suited for a stipulated reversal and should take great care to satisfy the statutory prerequisites in seeking the reversal.

Until recently the appellate courts had a laissez-faire attitude toward stipulated reversals. The Supreme Court held that there was a "presumption" that "the parties should be entitled to a stipulated reversal to effectuate settlement absent a showing of extraordinary circumstances that warrant an exception to this general rule." *Neary v. Regents of University of California,* 3 Cal. 4th 273, 277 (1992). But the Legislature disagreed. A 1999 amendment to Section 128 of the Code of Civil Procedure now enshrines essentially a presumption *against* stipulated reversals:

> "An appellate court shall not reverse or vacate a duly entered judgment upon an agreement or stipulation of the parties unless the court finds both of the following:
>
> (A) There is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal.
>
> (B) The reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement." (Code Civ. Proc., § 128, subd. (a)(8).)

Recently, in an attorneys' fees dispute between previous and successor attorneys, a court denied the parties' joint motion to reverse a judgment because it did not "affirmatively demonstrate a basis for each of the three findings required to be made by the statute." *Hardisty v. Hinton & Alfert*, 124 Cal. App. 4th 999, 1007 (2004). The court ruled that a nullification of the judgment could adversely affect the public interest and erode the public trust, particularly given the potentially illegal or unethical conduct of the attorney parties: The trial court had found that the successor attorney had falsely represented that he had a written fee agreement, and that one previous attorney was not entitled to attorneys' fees because he had an unwaived conflict of interest.

(Continued on page 6)

Not So Fast — A Stipulated Reversal of Judgment

Continued from page 5

(*Id.* at 1003-04.) In addition, the parties failed to describe the extent of pre-trial settlement efforts and whether any unexpected post-trial event only made settlement possible then, and thus parties could not establish that a stipulated reversal would not reduce the incentive for pretrial settlement. (*Id.* at 1012.) The court summed up its concerns this way: The parties "are in effect asking us to ignore the possibility that their purpose is to protect some of them from professional discipline or legal claims." (*Id.*)

The parties' attempt to avoid collateral estoppel and the potential damage to the public interest also underlay the court's rejection of a stipulated reversal in *Muccianti v. Willow Creek Care Center,* 108 Cal. App. 4th 13 (2003). After a jury returned a verdict over $5 million against a nursing home in a wrongful death case, the parties reached a settlement during the appeal and sought a stipulated reversal. (*Id.* at 15.) The court held that the judgment's verification of the nursing home's negligent treatment was "relevant to the public in deciding future placement for its citizens," could be important "in future licensing and/or disciplinary proceedings against the facility," and would impact "the availability and cost of insurance" for the facility — all of which showed that nullifying the judgment would adversely affect the public interest. (*Id.* at 21-22.) In fact, parties should be cautioned that even if they can obtain a stipulated reversal, it may not avoid the possible collateral estoppel effects of the judgment. (*See* Meadow & Olson, *Is It Too Late To Settle? Problems With Settlement After Adjudication, ABTL Report* (Feb. 1996).)

By contrast, in *In re Rashad H.,* 78 Cal. App. 4th 376 (2000), the lack of notice to a father of a hearing terminating his parental rights was acknowledged by both sides to be reversible error, which contributed heavily to the court's decision to approve a stipulated reversal. (*Id.* at 381.) Given this "actual judicial error," the public trust would actually be buoyed because the matter could be returned expeditiously (without unnecessary appellate briefing) to the juvenile court for a properly-noticed decision on the merits, and would benefit affected non-parties, namely potential adoptive parents, because it "advance[d] the pace of the decisionmaking process." (*Id.* at 380-381.)

Similarly, a public benefit supported the approval of a stipulated reversal in *Union Bank of California v. Braille Inst. of America, Inc.,* 92 Cal. App. 4th 1324 (2001). The comprehensive settlement of two probate orders on appeal and one pending in the superior court in a dispute between a trustee and the charitable organizations that were the beneficiaries under the trust would benefit the public because it would direct use of charitable moneys away from litigation and into the charities' missions. (*Id.* at 1329.) Also, the fact the agreement also resolved a pending probate petition showed it did not reduce the incentive for pretrial settlement. (*Id.* at 1330.) The court noted that there was no showing of reversible error, but held its absence "is not a bar to the acceptance of a stipulated reversal so long as the appellate court makes the three findings listed in section 128." (*Id.*)

Hence, the type of case where a stipulated reversal will be approved is limited. On one end of the spectrum is a case that only affects the parties, involves clear reversible error and whose early resolution provides a public benefit. This is a prime candidate for stipulated reversal. On the other end of the spectrum is a case whose stipulated reversal would adversely impact the public interest or a specific third party. Indeed, any stipulated reversal that will "cover up" illegal or unethical acts by a party, particularly in a regulated industry, will make a stipulated reversal almost impossible. Since most industries and professions are regulated, this eliminates many cases from qualifying for a stipulated reversal. Your case will likely not fall on the extremes of this spectrum, so careful analysis must be undertaken to decide whether a stipulated reversal is realistically attainable.

In addition, even in an appropriate case, the parties must make a comprehensive showing aimed at establishing that a stipulated reversal satisfies all three conditions in section 128. As *Hardisty* admonishes, "[t]he parties must now submit memoranda of points and authorities and declarations and other documentary evidence persuasively demonstrating that reversal of the judgment in question will not adversely affect nonparties or the public, erode public trust, or reduce the incentive for pretrial settlement." *Hardisty v. Hinton & Alfert, supra,* at 1007. This showing will be much easier if it can be established that the trial court committed clear reversible error.

In fact, the First Appellate District has issued a Local Rule requiring that parties seeking a stipulated reversal submit a joint declaration of counsel that describes the parties and factual and legal issues involved, that indicates what public interests could be affected and what collateral estoppel effects a reversal could have, and if third parties might be prejudiced, that even mandates that they receive notice of the motion. (1st App. Dist., Local Rule 8.) The failure to comply with Rule 8 was another ground for the rejection of a stipulated reversal in *Hardisty v. Hinton & Alfert, supra*, and in another recent First District case, *In re Estate of Regli*, 121 Cal. App. 4th 878 (2004). Even in cases not pending before the First District, Local Rule 8 provides a helpful starting block for counsel to leap over the high hurdles placed before approval of a stipulated reversal.

A stipulated reversal may seem like a convenient and simple way to end unfortunate litigation. But parties and counsel should not be lulled into thinking it will be easy to get the Court of Appeal to sign off on it.

— Jens B. Koepke

Rule 11: Returning the Teeth to the Tiger

Continued from page 5

merce. State judges would be required to make the interstate commerce determination within 30 days after a motion for sanctions has been filed. The Act also contains new venue provisions which would allow a plaintiff to sue only where he or she lives or was injured, or where the defendant's principal place of business is located. This is an attempt to eliminate what the Bill's supporters call "judicial hell holes" favoring plaintiffs. Practitioners should note that this provision now eliminates the personal injury plaintiff's ability to choose any United States forum in some cases involving foreign defendants.

Section 5 of this Bill, which provides the Rules of Construction, expressly states that "nothing in" the changes made to Rule 11 "shall be construed to bar and impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law." Civil rights claims are arguably exempted from the Bill's Rule 11 provisions.

Interestingly, this Bill circumvents the Rules Enabling Act (28 U.S.C. §§ 2072-74); by which Congress prescribes the procedure for the formulation and adoption of rules of evidence, practice and procedure for federal courts. This specified procedure contemplates a four step process. First, that initially evidentiary and procedural rules will be considered and drafted by committees of the United States Judicial Conference. Second, that the proposed rules will be subject to thorough public comment and reconsideration. Third, that the proposed changes will then be submitted to the U.S. Supreme Court for consideration and promulgation and fourth, that the proposed changes will finally be submitted to

(Continued on page 12)

Second in a Series

Judicial Advice…

from The Hon. Victoria G. Chaney

This article is the second in a series of articles being published by *ABTL Report* to provide members with information about the courtroom procedures of federal and state judges in Southern California. This articles focuses on the Honorable Victoria Gerrard Chaney of the Los Angeles County Superior Court, Central Civil West Courthouse.

Hon. Victoria G. Chaney

General Protocol and Technology

• Judge Chaney does not conduct trials on Mondays, which is Judge Chaney's law and motion day. When not engaged in trial, law and motion matters are handled daily as her schedule permits.

• During jury trials, the standard courtroom day for the jury is 9:00 a.m. to 12:00 p.m. and 1:30 p.m. to 4:00 p.m. Counsel are required to also be present in court for matters handled outside the presence of the jury from 8:30 a.m. to 9:00 a.m. and 4:00 p.m. to 4:15 p.m., as needed.

• During non-jury trials, the standard courtroom day is 8:30 a.m. to 12:00 p.m. and 1:30 p.m. to 4:30 p.m.

• Judge Chaney limits the number of hours for each trial. Limitations on the number of trial hours are negotiated by the Court and counsel at the Trial Readiness Conference.

• When not engaged in trial, the standard courtroom day is 8:30 a.m. to 12:00 p.m. and 1:30 p.m. to 4:30 p.m. However, Mandatory Settlement Conferences handled by the Court may continue later than 4:30 p.m. to reach resolution.

• Judge Chaney does not require that counsel stand while speaking or use the lectern while speaking.

• Counsel may bring audiovisual equipment for use at trial, but must first coordinate with Judge Chaney's staff to avoid disruption of court proceedings. Judge Chaney permits the presentation of digitized exhibits through audiovisual displays and the playing of video portions of depositions during trial.

Pre-Trial

• Judge Chaney does not require counsel to follow any additional procedures with respect to the submission of motions *in limine*, exhibit lists, and witness lists other than those found in the court rules. However, Judge Chaney will discuss individualized procedures which may be required to accommodate the needs of a specific case.

• Judge Chaney conducts a hearing at the Trial Readiness Conference on the admissibility of certain documents to avoid foundational questions. Bifurcation of trial is also discussed with counsel at the Trial Readiness Conference.

• Judge Chaney does not require trial briefs, but finds that they assist in framing the issues.

• Counsel may inspect the jury room before the commencement of trial, if requested.

Jury Selection

• Judge Chaney determines the allocation of peremptory challenges in multiple plaintiff/multiple defendant cases in accordance with the Code, with consultation with counsel.

• Judge Chaney conducts *voir dire* by calling 24 prospective jurors and questioning them together as a group. Challenges for cause are as to all 24 prospective jurors. Peremptory challenges are as to the "twelve in the box."

• Judge Chaney permits the use of juror questionnaires upon the request of counsel. The specific content of jury questionnaires is discussed at the Trial Readiness Conference.

Opening Statements

• Judge Chaney allows opening statements during bench trials if counsel wish to present opening statements.

• Judge Chaney does not strictly limit the length of opening statements, but the time used for opening statements is part of the overall time allotted for trial.

• Counsel must exchange copies of all exhibits, timelines, or other material to be used during opening statements.

Presentation of Evidence

• Judge Chaney allows for jurors to be provided with binders containing pre-marked, pre-admitted exhibits.

• Judge Chaney never examines witnesses during a jury trial. During a 402/403 hearing, Judge Chaney will ask questions to clarify information to permit her to make a reasoned and fair ruling.

• Judge Chaney rarely allows for sidebar conferences for objections during jury trials.

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

• Jurors are permitted to submit written questions to

(Continued on page 9)

In the Thicket of Appellate Jurisdiction

Appellate courts take their jurisdiction seriously: Without it, there can be no appellate review. As recent cases from the Ninth Circuit demonstrate, determining whether there is jurisdiction for an appeal can be a thorny issue in several different respects.

• A timely notice of appeal is essential to appellate jurisdiction, but calculating the deadline for filing an appeal requires attention to several interrelated rules about judgments and appeals. Compare the results in two cases.

Marc J. Poster

In the first case, *Ford v. MCI Communications Corp. Health and Welfare Plan and ITT Hartford Ins.*, 399 F.3d 1076 (9th Cir. 2005), the district court granted defendant's summary judgment motion by a November 18, 2002 minute order that concluded: "IT IS SO ORDERED." Ordinarily, notice of appeal must be filed within 30 days after entry of judgment. Fed. R. App. P. 4 (a)(1)(A). Plaintiff filed notice of appeal more than seventy days after entry of the order, on February 3, 2003.

Nevertheless, the Ninth Circuit held that this appeal was timely. For starters, the Court explained that while a final judgment is necessary for an appeal, the minute order was sufficiently final to permit an appeal. Although Fed. R. Civ. P. 58(a)(1) requires that a judgment be set forth in a separate document, the failure to file a separate document does not preclude an appeal where the order appealed from appears to dispose of the case and the parties believe a final judgment has been entered. *See Bankers Trust Co. v. Mallis,* 435 U.S. 381 (1978). In this case, because the minute order terminated the case and the parties treated it as the judgment, the order was appealable as a judgment.

Next, the Court determined that because there had been no judgment entered as a separate document, under Rule 58(b)(2)(B) the judgment was not deemed entered until 150 days after entry of the order in the district court's docket.

Finally, the Court found that plaintiff's February 3, 2003, notice of appeal actually was premature, because judgment was not deemed entered under Fed. R. Civ. P. 58(b) until April 17, 2003. Prematurity was not fatal to the appeal, however, because under Fed. R. App. P. 4(a)(2), the filing of a premature notice of appeal is deemed filed on the date entry of the judgment appealed from. The appeal was therefore timely.

In the second case, on the other hand, the same rules worked against the appellant. The plaintiff in *Casey v. Albertson's, Inc.*, 362 F.3d 1254 (9th Cir. 2004), also lost on summary judgment. The district court issued a seven-page minute order that disposed of plaintiff's claims and concluded "IT IS SO ORDERED." Again, the court never entered a separate judgment. A year later, the plaintiff filed a Fed. R. Civ. P. 60(b) motion for relief from the judgment. When the district court denied her motion, she appealed from that ruling.

On appeal, the plaintiff sought to challenge the summary judgment order on its merits. She reasoned that because Rule 58 required entry of a separate judgment, and it is the entry of a separate judgment that triggers the time for post-judgment review, Fed. R. App. P. 4(a)(7), there was still time for the Ninth Circuit to review the summary judgment ruling.

The Ninth Circuit disagreed with the plaintiff's argument and held that it had no jurisdiction to review the merits of the summary judgment because the time to appeal from the judgment had expired before the plaintiff filed her notice of appeal from the Rule 60(b) ruling. The Ninth Circuit again determined that even without entry of a separate judgment under Rule 58, the minute order was sufficiently final to permit an immediate appeal. The Ninth Circuit "found no cases that apply Rule 58…as a sword to reopen a case in which the parties and the judge all have indicated that they treat a district court entry as a final, separate judgment…. [T]he district court's failure to enter a separate judgment…does not create a loophole through which we can reach past [plaintiff's] Rule 60(b) motion to get to the merits of the district court's summary judgment ruling." *Casey*, 362 F.3d at 1259.

• For purposes of appeal, finality in substance is just as important as finality in procedure. *Dees v. Billy*, 394 F.3d 1290 (9th Cir. 2005), was a medical malpractice action in which the defendants petitioned to compel arbitration pursuant to an arbitration agreement with the plaintiff. The district court granted the motion and ordered: "The action is stayed pending completion of arbitration and shall be administratively closed." The plaintiff purported to appeal from that order.

The Ninth Circuit held that although the district court considered the case closed for procedural purposes, it was not closed for purposes of appeal. An order staying judicial proceedings and compelling the parties to arbitrate the dispute is not appealable as a final judgment because it does not end the litigation on its merits. An order compelling arbitration *and* dismissing the action is appealable as a final judgment because the order ends the litigation on the merits. Here, however, the Ninth Circuit held that the order that the case be "administratively closed" was not the equivalent of a dismissal on the merits. The closure was "a docket management tool that ha[d] no jurisdictional effect." *Id* at 1294. The plaintiff cited a Fifth Circuit decision in which an order compelling arbitration and closing the case was deemed an final, appealable order. The Ninth Circuit distinguished that decision on the ground that the lawsuit had been brought solely for purposes of compelling arbitration. Once arbitration was compelled, there was nothing left to decide. This lawsuit, on the other hand, was brought to recover damages for medical malpractice, and since there has been no decision on the merits, the appeal was dismissed.

• Appellate courts are liberal in interpreting the language of notices of appeal, both as to the parties who intend to appeal and as to the rulings which the parties seek to have reviewed. But liberality has its limits, as demonstrated by *D-Beam Ltd. P'ship v. Roller Derby Skates, Inc.*, 366 F.3d 972, 973 (9th Cir. 2004). Evans was the general partner of D-Beam, a limited liability partnership. He and D-Beam sued Roller Derby and others on claims arising out of a contract between D-Beam and Roller Derby and out of promissory notes given by Roller Derby to Evans. Judgment was entered for the defendants. Evans, who was not an attorney, filed a notice of appeal on his own behalf.

After initial briefing by Evans, the Ninth Circuit took the unusual step of appointing *pro bono* counsel who filed supplemental briefing on behalf of D-Beam challenging the judgment

(Continued on page 9)

In the Thicket of Appellate Jurisdiction

Continued from page 8

against D-Beam. In the end, however, the Ninth Circuit ruled: "Because Evans appealed *pro se*, we lack jurisdiction over D-Beam's claims and they are dismissed." *Id*.

The Ninth Circuit explained that a corporation or other association must appear through counsel. While a notice of appeal signed by a corporate officer may be valid, here Evans signed the notice of appeal for himself, not for D-Beam. That notice was inadequate to give notice of D-Beam's intent to appeal. Furthermore, after filing the appeal, D-Beam remained unrepresented by counsel. "Allowing Evans to advocate D-Beam's claims, when he clearly intended to proceed *pro se* and counsel was not retained prior to motions or briefing on appeal — and then subsequently only upon court appointment — would eviscerate the requirement that corporations and other entities be represented by counsel." *Id*. at p. 974.

As this assortment of recent decisions indicates, practitioners may not always be able to avoid the brier patch of appellate jurisdiction, but they can limit unnecessary entanglements by carefully reading and following the rules.

— Marc J. Poster

Judicial Advice

Continued from page 7

be posed to trial witnesses.

• Exhibits are marked for identification at the time of examination of the witness, but admitted at the end of each day or witness.

• Judge Chaney does not have a preference as to whether direct testimony may be submitted in writing.

• Judge Chaney discusses procedures regarding making exhibits available to jurors at the time of the Trial Readiness Conference.

Closing Argument

• Judge Chaney does not strictly limit the length of closing arguments. Like opening statements, the time used for closing arguments is part of the overall time allotted for trial.

• Judge Chaney finds to be objectionable closing argument that insults, belittles, or denigrates opposing counsel, parties, or witnesses. Judger Chaney believes that strong and effective arguments can be made without resorting to such conduct.

Jury Instruction

• Judge Chaney prefers to pre-instruct the jury, but procedures followed for jury instruction will depend upon the time available to avoid wasting a trial day.

• Judge Chaney uses CACI jury instructions, but will allow for the use of certain BAJI instructions where no CACI instruction is available.

Verdict

• Special verdict forms must be completed, submitted to the Court, and ruled upon before the commencement of trial.

Post-Trial

• Judge Chaney normally does not receive post-trial briefs in bench trials.

— Raymond B. Kim

Representing A Foreign Party at Trial

As the U.S. and Los Angeles economies ever increasingly become more international, the number of lawsuits involving foreign companies and/or non-English speaking witnesses will continue to grow. I recently represented a Hong Kong toy company in a federal court trade dress, trademark and unfair competition trial against Mattel, Inc. The case presented the unique challenge (for me) of representing a foreign company whose witnesses all testified through a translator. In this article I will discuss the lessons I learned which may assist others in representing a foreign entity at trial, especially when many or all of the entity's witnesses must testify through a translator.

Robert L. Meylan

Identify and Diffuse Possible Juror Prejudices

It is likely that many potential jurors will come into the trial with preconceived stereotypes and prejudices against a foreign party, and possibly, in favor of the opposing U.S. party. Mattel is a large well-known U.S. corporation with its headquarters in Los Angeles County. Predictably, throughout the trial Mattel sought to introduce its theme that our client, Realtoy International Limited, Inc., was a foreign corporation set on violating the laws of the United States. For example during its opening statement, Mattel's counsel stated:

> "In our country, it's against the law to steal intellectual property. This case is about a Chinese company from Hong Kong, the defendant Realtoy, that repeatedly stole Mattel's intellectual property." (Emphasis added.)

Going into the trial we were concerned that many jurors would be receptive to Mattel's theme of a Chinese company "knocking-off" the products and packaging of a large U.S. company. To rebut Mattel's assertion, it was important to emphasize, beginning with the opening statement, that Realtoy: (1) is a well-established company with a broad product line; (2) sells high-quality products with an excellent safety record; and (3) sells its products to major U.S.-based retailers such as Toys R Us and KayBee Toys. In short, Realtoy is not a Chinese "knock-off" company that would "steal" Mattel's property rights. As the jurors began to understand that Realtoy was a legitimate company they were much less receptive to (and ultimately rejected) Mattel's argument that Realtoy was "stealing" Mattel's intellectual property.

Similarly, we were concerned some jurors might be reluctant to believe the motives of Realtoy's Chinese executives. Thus, we decided it would be important to demonstrate that Realtoy had acted ethically and responsibly throughout its dealings with Mattel. In other words, we wanted to show that Realtoy acted in the same manner one would hope and expect a U.S. company to act.

The reverse of the preconceived stereotypes can also be true. A juror who works for foreign companies, or deals regularly with foreign companies, may well come into the case with high opinion of foreign executives.

(Continued on page 10)

Representing A Foreign Party at Trial

Continued from page 9

Emphasize That Your Client Shares Common "American Values"

Hopefully, every party has a story to tell. When representing a foreign company it is even more important to emphasize that story and demonstrate that the company and its executives have the same so-called "American values" as does the U.S.-based party.

In our case, Realtoy was started and built by a truly self-made man, Tony Lee. Briefly, Mr. Lee left school after the seventh grade and went to work as an apprentice tool and die worker in a Hong Kong factory in the early 1970s. Through hard work and saving, after several years he was able to buy a small shop about the size of a two-car garage with two lathes. Over the next twenty years he built Realtoy into a company with over 2,500 employees which manufactures and sells toys all over the world. Mr. Lee's story is the classic story of an entrepeneur whose values of hard work, thrift and honesty made it easy for an American jury to relate to him. We argued that Mr. Lee's life story is no different than the stories of millions of immigrants who came to this country and built businesses through hard work.

The Selection of A Good Translator Is Critical

As the person who actually speaks in English to the jury, the jurors will quickly begin to think of the translator almost as the witness. Accordingly, it is critical that the translator, in addition to being able to accurately translate testimony, conveys through his or her appearance and demeanor the same impression you want your witness to create. In our case, most of Realtoy's witnesses were senior executives of the company. It was therefore important for us to retain a translator who looked the part of an executive. We looked for someone who was the right age (early 50s), wore nice business suits and generally looked like an executive. Additionally, we wanted someone who spoke in a confident professional manner and thus conveyed the image of an executive.

Prepare the Witnesses for the Experience of Testifying

For most people, testifying in a trial is a unique and often difficult experience. There must be few things more difficult than testifying in a trial in a foreign country in which you do not speak the language. We retained a jury consultant to work with each of the witnesses to help them modify their mannerisms, eye contact and body language.

Our jury consultant also made an excellent suggestion. She recommended that we have the witnesses watch a trial in a different courthouse to help familiarize them with the trial proceedings. Watching a trial for a day or two can really help the witnesses – whose only knowledge of what goes on in a trial is based upon what they may have seen on an American television program – understand what will happen during trial.

Remind The Jurors That Fairness to Foreigners Is A Hallmark of Our Legal System

Challenging the jurors to be fair and impartial to your foreign client can also be effective. If you have laid the groundwork of your client's shared American values, the jurors will be more receptive to this type of challenge. Americans want to believe that they are fair and impartial. They want to believe that our legal system is a great system and that being a juror is an important civic duty. In short, they want to feel that through their verdict they have made a difference. They will be responsive to the idea that they can make a difference by ensuring that a foreign company is treated fairly in an American courtroom even though the other party is a well-known American company.

The Good News

Many Los Angeles jurors work for or with foreign companies and will understand how important international commerce is to Los Angeles. They will be receptive to a trial presentation which humanizes foreign witnesses and parties. Moreover, they may also see through attempts by a U.S. party to take advantage of stereotypes and prejudices.

— Robert L. Meylan

The Sarbanes-Oxley Act

Continued from page 3

rate insiders. For example, § 304 requires that an officer or director forfeit his or her bonus, incentive or equity-based compensation if an issuer is required to prepare an accounting restatement due to material noncompliance with any financial reporting requirement under the securities laws. In the event that the company fails to assert such a claim directly against the malfeasant officer or director, a shareholder could assert a derivative claim on this basis.

• The statute imposes additional duties on corporate insiders. For example, §§ 302 and 404 now obligate corporate insiders to manage the company's disclosure systems and internal controls. Losses sustained by the company as a consequence of the failure of corporate insiders to meet their new duties can be pursued by the company through derivative litigation.

• SOXA's new obligations will become the *de facto* standard of care for corporate insiders. SOXA, particularly §§ 302, 303, 406, and 906 thereof, imposes on officer and directors a variety of tasks, certifications and other obligations. By reason of the statute's imposition of these obligations, it is foreseeable that SOXA could become the standard by which U.S. courts come to determine whether a director or officer has met his or her duty of care.

State Statutes That "Borrow" Other Violations Of Law Could Provide A Vehicle For Private Litigation Under SOXA. Section 3(b)(1) provides that a violation of SOXA "shall be treated for all purposes in the same manner as a violation of the [Exchange Act of 1934]…and any [] person [who violates SOXA] shall be subject to the same penalties, and to the same extent, as for a violation of [the Exchange Act of 1934]…"

Although this section does not provide for a private right of action, the notion that a violation of SOXA is equivalent to a violation of the Exchange Act of 1934 has civil litigation implications, especially with regard to enabling claims under statutes which "borrow" violations of other pertinent law.

For example, California Bus. & Prof. Code § 17200 exemplifies the very broad state consumer protection statutes that prohibit unfair competition, including "any unlawful, unfair or fraudulent business act or practice" and false advertising. There are similar consumer protection statutes in other states. *See, e.g.*, N.Y. Gen. Bus. L. § 349(a) ("Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful").

The courts which have interpreted § 17200 have held that the statute "borrows" other violations of law — even if the other violations are of federal, and not state, law. *See, e.g., Citizens for a Better Environment — California v. Union Oil of Cal.*, 996 F.Supp. 934 (N. D. Cal. 1997) (liability under Bus. & Prof. Code § 17200 can be based on federal Clean Water Act). Thus, a claim under a federal statute which a party might otherwise not have the ability to directly assert — because the statute allows no pri-

(Continued on page 11)

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The Sarbanes-Oxley Act

Continued from page 10

vate right of action — can become actionable via a § 17200 action in state court.

Whether a SOXA violation could be "bootstrapped" into a claim under § 17200 or another state consumer protection statute remains an open question. In a decision earlier this year, California's intermediate appellate court held, in resolving what it characterized as a question of first impression, that § 17200 does not apply to securities transactions. *Bowen v. Ziason Technologies, Inc.*, 116 Cal. App. 4th 777 (2004). By contrast, two earlier California decisions have held otherwise (*Roskind v. Morgan Stanley Dean Witter & Company*, 165 F. Supp. 2d 1059 (N.D. Cal. 2001) and *Lippitt v. Raymond James Financial Services, Inc.* 340 F. 3d 1033 (9th Cir. 2003)). Although a minority of states support the use of consumer protection statutes to press federal securities law claims (*see Denison v. Kelly*, 759 F. Supp. 199 (M.D. Pa. 1991); *Onesti v. Thomson & McKinnon Securities, Inc.*, 619 F. Supp. 1262 (N.D. Ill. 1985); *State ex rel. Corbin v. Pickrell*, 667 P. 2d 1304 (Ariz. 1983)), the majority trend among states would disallow the use of consumer protection statutes to apply to securities transactions.

Plaintiffs Will Argue For An Implied Right Of Action Under SOXA. Section 10(b) and Rule 10b-5 had been on the books for more than ten years before the federal courts, in *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), determined that there was an implied right of action under § 10(b) and Rule 10b-5. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 728-731 (1975) (providing summary of enactment of 1933 and 1934 Acts and first court to find an implied right of action under § 10(b)). This determination was affirmed by the U.S. Supreme Court in *Superintendent of Insurance of New York v. Bankers Life & Casualty*, 404 U.S. 6, 13 n. 9 (1971).

Since that decision, the U.S. Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975), identified the criteria by which courts should assess whether a particular statute will be found to contain a private right of action. Those factors are: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) whether the cause of action is one traditionally relegated to state law and would it be inappropriate to infer a cause of action based solely on federal law. *Id.* at 78.

Whether the courts will imply a private right of action in SOXA is unclear. On the one hand, there are two sections of the statute which expressly provide that those sections do not create any private right of action — §§ 302 (SEC has exclusive authority to enforce prohibition against company's officers or directors fraudulently inducing or misleading auditors) and 804 (lengthening statute of limitations for securities fraud claims). On the other hand, and with the exception of these two provisions, there is nothing in the balance of SOXA specifically disclaiming the imputation of a private right of action.

Conclusion

It is still too early to tell whether SOXA will ignite a rush of civil litigation. Nevertheless, the enactment of SOXA and the concomitant slowing of the rate of dismissals of federal securities litigation seem to presage a sea-change in the attitude of the courts, the U.S. Congress and the SEC toward the protection of investor rights. Issuers of securities, including those based outside the U.S., would do well to implement risk management strategies to address this changing environment.

— Peter Selvin

Letter from the Editor

In this issue, we are pleased to publish two articles that illustrate the growing trend towards imposing greater accountability on the legal practitioner. In "Rule 11: Returning the Teeth to the Tiger," Stephen M. Levine monitors the progress of the "Lawsuit Abuse Reduction Act," which would substantially revise Fed.R.Civ.P. 11 by imposing stricter standards on attorneys. Similarly, Eve Coddon, in "California Supreme Court Expands the Scope of Malicious Prosecution," analyzes the ethical ramifications of a recent case which broadens the scope of liability for malicious prosecution to include liability for continuing prosecution of a lawsuit that lacks probable cause. Peter Selvin has written a comprehensive article regarding the civil litigation risks facing foreign companies attempting access to U.S. capital markets.

Denise M. Parga

Continuing the international theme, Robert L. Meylan explores the unique challenges facing the trial lawyer representing a foreign entity in a jury trial. In recognition that appeals have become increasingly more commonplace, this issue offers two useful articles regarding appellate procedure. Jens B. Koepke has authored an article examining the pitfalls of conditioning the settlement of a case on appeal on a stipulated reversal of the underlying judgment. Marc J. Poster focuses on issues of appellate jurisdiction. Finally, Raymond Kim has penned the second in a series of articles providing ABTL members with information concerning courtroom procedures of federal and state judges, this time focusing on the Hon. Victoria G. Chaney.

ABTL Report is sustained by the contributions of its members. We urge all of you to submit to the editor articles that you may deem of interest to the membership.

— Denise M. Parga

Rule 11: Returning the Teeth to the Tiger

Continued from page 6

Congress, which retains the ultimate power to veto any rule before it takes effect. Moreover, by passage of this Bill, the House is dictating venue rules for state courts which undermines basic federalism principles.

Status

H.R. 420 was ordered to be reported out of the Judiciary Committee's Subcommittee on Courts on May 25, 2005. It is anticipated that it will be passed by the House in quick measure.

The question now is whether the legislation will be passed in the Senate. There is no companion bill in the Senate as has been the case with similar tort measures passed by the House.

— Stephen M. Levine

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