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abtl REPORT

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The Anti-Slapp Statute: Cure or Curse?

The California Legislature enacted the "Anti-SLAPP Statute" (California *Code of Civil Procedure* Section 425.16) in 1992 in response to its finding that "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Section 425.16(a). The Legislature amended it in 1997 to provide that it "shall be construed broadly." *Id.* Now, only a decade after its enactment, California's trial and appellate courts are inundated with special motions to strike SLAPP suits and the resulting appeals.

Kent A. Halkett

Appellate decisions, published and unpublished, addressing SLAPP issues are issued every month. The volume and diversity of those decisions dramatically illustrate the ingenuity and efforts by trial lawyers to test the boundaries of the Anti-SLAPP Statute, as well as the courts' equally impressive efforts to apply and define the law.

The California Supreme Court entered the fray by issuing decisions in a trilogy of SLAPP cases in August 2002: *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53 (2002), *City of Cotati v. Cashman*, 29 Cal. 4th 69 (2002), and *Navellier v. Sletten*, 29 Cal. 4th 82 (2002). Associate Justice Werdegar, who wrote the majority opinions in all three decisions, explained:

> "We granted review in this trio of cases in order to maximize the clarity and guidance respecting application of the anti-SLAPP statute the full group of decisions may provide to bench and bar."

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Defining and Transforming Arbitration Amid the Uncertainties of Public Policy

In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the United States Supreme Court concluded that the Federal Arbitration Act ("FAA") preempted all state statutory and decisional law prohibiting or inhibiting arbitration of claims within the scope of the federal statute. New York had previously enacted a state statute authorizing arbitration and the California Supreme Court subsequently endorsed arbitration unequivocally. Although designed to eliminate civil discovery, reduce costs of dispute resolution and expedite disposition of claims, the promise of arbitration has come under siege. Initial legislative attempts to offer an alternative to litigation have eroded under decisional law, and arbitration increasingly resembles litigation as courts invoke legal analysis of arbitral issues in terms of substantive and procedural civil law.

Hon. L. Waddington

Aside from philosophic objections to arbitration in general, and its elimination of jury trials in particular, federal and state arbitration statutes invite judicial interpretation in the language of litigation. The FAA authorizes courts to invalidate or deny enforcement of arbitration clauses in contracts on grounds of "law and equity", two words importing substantial historical content for interpretation of contract law. The California statute similarly authorizes arbitration…"[unless] grounds exist for the revocation of any contract."

The Supreme Court and the California Supreme Court have held that the language of these two statutes authorizes the court to determine whether an arbitration clause in a contract exists, the scope of claims subject to arbitration and the parties signatory to, or bound by, the contract. Exercise of this judicial power, characterized as the role of "arbitrability," decides the fate of a petition requesting the court to order arbitration.

Determining 'Arbitrability'

Superficially, determining "arbitrability" is a mundane task for the court but complications have arisen. A state trial judge in California confronted with a petition to compel arbitration labors under the appellate court description of the proceeding as a "suit in equity to compel specific performance." This familiar litigation rhetoric immediately transforms analysis of a petition into the familiar landscape of civil law. Accordingly, under the rubric of "substantive" arbitrability the court incorporates the world of

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*City of Cotat*i, 29 Cal. 4th at 72, n. 2; *Navellier*, 29 Cal. 4th at 85, n. 2 (same). In addition, less than a month before this trilogy, Justice Werdegar also wrote the majority opinion in another case discussing the Anti-SLAPP Statute: *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811 (2002).

Predictably, the appellate courts have continued to issue published and unpublished decisions in SLAPP cases at a furious pace. Given that less than a year has passed since the California Supreme Court's *Equilon/City of Cotati/Navellier* trilogy, it is premature to judge definitively whether the lower courts and practitioners will find clarity and guidance from those decisions. Crucial issues are unsettled and still subject to robust debate. Indeed, as expressed by Associate Justice Brown in her dissent in *Navellier*, the California Supreme Court's "presumptive application of [the Anti-SLAPP Statute] will burden parties with meritorious claims and chill parties with nonfrivolous ones" such that *"[t]he cure has become the disease — SLAPP motions are now just the latest form of abusive litigation." Navellier*, 29 Cal. 4th at 96 (J. Brown, dissenting opinion)(emphasis added).

The Statute's Background — Most civil litigation, win or lose, is time consuming and expensive. In the 1980s, various commentators observed that financially able plaintiffs were filing frivolous actions against their detractors or opponents in an attempt to use the inherent burdens of litigation as economic leverage to advance their own business or social agendas. Simply stated, unscrupulous plaintiffs were using meritless litigation as a tool to intimidate or bludgeon other individuals or entities into silence or inaction.

California, and other states, enacted legislation to curb such abuses. The California Legislature emphasized its intent by including the following admonition in the text of the Anti-SLAPP Statute:

> "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. *To this end, this section shall be construed broadly*."

Section 425.16(a)(emphasis added). Significantly, the Legislature added the last sentence by amendment in 1997 — *after* it observed the relatively limited use of the Anti-SLAPP Statute by practitioners and the courts. *See City of Cotati v. Cashman*, 90 Cal. App. 4th 796, 804 (2001).

In 1999, the California Supreme Court addressed the scope of the Anti-SLAPP Statute in *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106 (1999). The majority adopted a broad interpretation of the Anti-SLAPP Statute, holding that it does not impose an additional requirement on the moving party to prove separately that the underlying constitutional speech or rights concerned "an issue of public significance." *Id*. at 1123. That ruling was consistent with, and based in part on, the Legislature's 1997 amendment providing unequivocally that the Anti-SLAPP Statute "shall be construed broadly." The California Supreme Court, acknowledging the likely ramification of its decision on civil litigation in California, stated that "[i]f we today mistake the Legislature's intention, the Legislature may easily amend the statute." *Id*.

The Legislature demonstrated its approval of the California Supreme Court's broad interpretation of the Anti-SLAPP Statute by not amending it following *Briggs*.

The Statute's Unusual Procedural Aspects — The Anti-SLAPP Statute contains procedural aspects that are not generally available in traditional civil litigation, including:

- Summary procedure authorizing prompt dismissal of an improper pleading or action
- Automatic suspension of all discovery while an anti-SLAPP motion is pending
- Mandatory award of attorneys' fees and costs to a successful movant
- Immediate appeal of the trial court's ruling on the anti-SLAPP motion

These broad remedial provisions are unusual, and they have caused some to opine that "[t]he special motion to strike a SLAPP suit is *a drastic and extraordinary remedy*." *See Briggs*, 19 Cal. 4th at 1129 (J. Baxter, concurring and dissenting opinion)(emphasis added).

An anti-SLAPP motion involves a relatively simple two-step procedure: (i) the movant must make a *prima facie* showing that the offensive pleading or action is covered by the Anti-SLAPP Statute; and (ii) if so, the pleader must demonstrate that there is "a probability of prevailing on the claim." *See Equilon Enterprises, LLC*, 29 Cal. 4th at 67 (explaining the two-step procedure). The movant has the burden of proof on the initial step, and the pleader has the burden of proof (by clear and convincing evidence) on the second step. *See Wilson*, 28 Cal. 4th at 821 (explaining the pleader's burden and the trial court's guidelines). If the anti-SLAPP motion is granted, the trial court should deny leave to amend the improper pleading or action since that would defeat the purpose of the Anti-SLAPP Statute. *See Simmons v. Allstate Ins. Co*., 92 Cal. App. 4th 1068, 1073-1074 (2001); *Navellier v. Sletten*, 106 Cal. App. 4th 763, 772 (2003). The attorneys' fees and costs incurred in connection with the motion must be awarded to every successful movant, and against an unsuccessful movant only if the trial court determines that the anti-SLAPP motion was frivolous or filed solely to cause unnecessary delay. Section 425.16(c); *see also Ketchum v. Moses*, 24 Cal. 4th 1122, 1141-1142 (2001). Those monetary awards can be substantial. *See, e.g., Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist*., 106 Cal. App. 4th 1219, 1248 (2003) (affirming award of $55,900).

The unusual procedural remedies available under the Anti-SLAPP Statute provide a strong incentive for potential plaintiffs to forego frivolous litigation and a potent pretrial device for practitioners defending their clients from plaintiffs who file meritless actions. Conversely, given the automatic discovery stay and potential for a monetary award, the Anti-SLAPP Statute may be intentionally or mistakenly misused by overly zealous defendants and their counsel.

The Proliferation of Anti-SLAPP Motions — An anti-SLAPP motion is essentially a "procedural screening mechanism" against SLAPP suits. *See Roberts v. Rodriguez*, 36 Cal. App. 4th 347, 356-357 (1995). The underlying problem is simple and compelling:

> "SLAPP suits are typically characterized as suits brought not to vindicate a legal right but to interfere with the defendant's ability to pursue his or her interest. *SLAPP plaintiffs do not care so much about winning their lawsuits as they care about delaying and distracting the defendant from his or her objective*, which is generally economically adverse to those of the SLAPP plaintiff. *SLAPP plaintiffs achieve their goal if their suits deplete the defendant's resources and energy*. The legislative history of section 425.16 plainly implies that its purpose was to prevent the harm caused by such plaintiffs."

See People v. Health Laboratories of North America, Inc., 87 Cal. App. 4th 442, 450 (2001)(internal citations omitted)(emphasis added). In addition, as the law has developed and expanded, an appellate court has concluded that "[t]he courts are…required to apply the statute without regard to the financial motivations or resources of the parties." *See Chavez v. Mendoza*, 94 Cal. App. 4th 1083, 1090 (2001).

The use of anti-SLAPP motions proliferated dramatically fol-

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lowing the statutory amendment in 1997 and the *Briggs* decision in 1999. That was not surprising. Indeed, in his concurring and dissenting opinion in *Briggs*, California Supreme Court Associate Justice Baxter noted that:

> "The anti-SLAPP legislation is a powerful tool to be broadly construed to promote the open expression of ideas, opinions and the disclosure of information. It is not, however, generally available to the parties to any civil action, but is instead expressly limited to those lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances in connection with a public issue. *The majority's holding in this case* belies that carefully delineated legislative purpose and *will authorize use of the extraordinary anti-SLAPP remedy in a great number of cases to which it was never intended to apply*."

Briggs, 19 Cal. 4th at 1124 (emphasis added). He also predicted:

> "The majority's holding expands the definition of a SLAPP suit to include a potentially huge number of cases, *thereby making the special motion to strike available in an untold number of legal actions* that will bear no resemblance to the paradigm retaliatory SLAPP suit to which the remedial legislation was specifically addressed."

Id. at 1129 (emphasis added). Less than three years later, an appellate court accurately observed that "*courts have continued the expansion of [the] SLAPP doctrine into unexplored factual terrain.* The feverish pace with which appellate courts are dispatching issues under this statute is decidedly not subsiding and may, in reality, be accelerating." *City of Cotati*, 90 Cal. App. 4th at 804-805 (citations omitted)(emphasis added). Justice Baxter's prediction in *Briggs* came true.

The California Superior Court's Trilogy of SLAPP Decisions — In *Equilon*, an oil company brought an action against a consumer group seeking declaratory and injunctive relief to prevent the group from going forward with its stated intent to sue the oil company under California's Safe Drinking Water and Toxic Enforcement Act. The trial court dismissed the action after granting the consumer group's anti-SLAPP motion, and the Court of Appeal affirmed. The Court of Appeal rejected the oil company's argument that the case was not a SLAPP suit because its motives in commencing the case were "pure," holding instead that it would not "impose a burden on the party seeking protection from the SLAPP statute of proving that the plaintiff was motivated by an improper purpose." *Equilon Enterprises, LLC v. Consumer Cause, Inc*., 84 Cal. App. 4th 654, 661 (2000). The California Supreme Court affirmed (holding that the Anti-SLAPP Statute does not impose an additional requirement on the moving party to prove the pleader's "subjective intent" in filing the challenged action or claim and that the pleader's "pure intentions" are irrelevant). *Equilon Enterprise, LLC*, 29 Cal. 4th at 67-68; *see also City of Cotati*, 29 Cal. 4th at 74 (under *Equilon*, "the question of subjective intent is not relevant"); *Navellier*, 29 Cal. 4th at 88 (under *Equilon*, "[w]hen moving to strike a cause of action under the anti-SLAPP statute, a defendant that satisfies its initial burden of demonstrating the target action is one arising from protected activity faces no additional requirement of proving the plaintiff's subjective intent").

In *City of Cotati*, the City adopted an ordinance establishing a rent stabilization program for the mobilehome parks located within its boundaries. The owners of the affected mobilehome parks challenged the constitutionality of the ordinance in federal court, and the City responded by bringing an action for declaratory relief against the owners in state court seeking to establish the constitutionality and validity of the ordinance. The trial court in the state action dismissed it after granting the owners' anti-SLAPP motion, but the Court of Appeal reversed and remanded

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Measure of Damages for Interference with a Shareholder's Ability to Sell Stock — Part 2

As set forth in Part I of this article published in the last issue, courts have long struggled with the appropriate method for calculating damages for the interference with one's ability to freely trade his stock. While the varying rules for valuation each seem to have their own benefits and drawbacks, the Delaware Supreme Court recently issued a decision which arguably addresses many of those drawbacks, and provides a novel approach for calculating damages.

In *Duncan v. Theratx Inc*. 775 A.2d 1019 (2001), the court was presented with a factual situation where shareholders of restricted unregistered stock were prevented from trading due to an improper suspension of shelf registration by the defendant corporation. Although *Duncan* was based on a cause of action for breach of contract, the court determined that the damage calculation for the restriction of the shareholders' ability to trade their stock should be made utilizing theories derived from conversion actions since "By preventing the stockholders from trading their shares, the issuers breach at least in some sense is a temporary 'conversion' of the shares." Id at 1023 footnote 9.

Scott H. Carr

After considering and rejecting other methods of calculation utilized previously, the *Duncan* court determined that the value for the interference with the right to freely trade stock should be the difference between the highest intermediate price of the shares during a reasonable time at the beginning of the restricted period and the average market price of the shares during a reasonable period after the restrictions were lifted. *Id*. at 1029. (emphasis added). Importantly, this rule applies regardless of whether the shareholder sells or retains any or all of his stock upon the conclusion of the interference. Rather, the measure is designed to compensate the stockholder for his lost expectation interest during the period of the delay, without placing upon the defendant the risk of subsequent share price changes if the shareholder elects to retain his shares of stock after the interference has been eliminated.

The *Duncan* Approach

Furthermore, the *Duncan* approach has the added feature of allowing the trier of fact to determine what constitutes a "reasonable time" and a "reasonable period" so that damage calculations can be made on a case by case basis based upon the particular fact pattern involved, as opposed to the application of a mathematical formula without regard to either aggravating or mitigating factors which may affect both the shareholder's ability to trade, and his decision regarding the disposition of his stock once he regains his trading rights.

To illustrate the *Duncan* rule and its application in this context, I will apply it to the case scenario as set forth above. Initially, it is important to remember that two different calculations should be determined: (1) the highest intermediate price of the shares during a reasonable time at the beginning of the restricted period and (2) the average market price of the shares during a reasonable period after the restrictions were lifted. It is the differ-

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Measure of Damages

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ence between these two figures which provides the damage calculation.

Under our factual scenario above, the beginning of the restricted period would be the time, as determined by the trier of fact, when the plaintiff should have, without interference, received his stock certificates and had the free ability to trade his shares. The trier of fact would then determine a reasonable time from that period forward, and take the highest share price during that period. Thus, if the transfer agent had all of the documents necessary to effectuate the transfer as of February 21, 2000, and the transfer of shares occurred within three days thereafter, and the trier of fact determined a reasonable time to be anywhere from one to ten days, the highest share price during that time would have been $243.50 per share on February 25, 2000. In *Duncan*, the trier of fact determined ten days to be a reasonable time.

Shareholders Can Recover Some Increases in Share Price

It is important to note that the *Duncan* analysis utilizes the highest intermediate price during this reasonable time, as it provides a rough approximation of what the stockholders would have received absent the restrictions. It accomplishes this by allowing the shareholders to recover some of the increases in the share price during the restricted period without assuming that the stockholders would have sold at the highest possible share price during that same restricted period.

The second or "offset" number would be the average market price of the shares during a reasonable period after the interference concludes. This figure is to reasonably approximate the value of the shares after the interference ends, while allowing the shareholder time to make a reasonable investment decision thereafter. In the example set forth above, plaintiff received his shares on March 9, 2000. Thus, once the trier of fact determines a reasonable period of time thereafter that the plaintiff should have made the decision to either retain or sell his shares, a calculation would be made to determine the average price of the stock during that time period. Once again, if a ten day period is utilized to determine a "reasonable time", the average market price was approximately $145. Thus, pursuant to the *Duncan* analysis, and making certain assumptions as to reasonable time periods, plaintiff's total loss would be approximately $4.6 million. Once again, this is without regard to the fact that plaintiff sold one-half of his shares and still retains the other one-half.

As the *Duncan* court explained:

> "The intuition behind this rule is that the issuer defendant should bear the risk of uncertainty in the share price because the defendant's acts prevent the court from determining with any degree of certainty what the plaintiff would have done with his securities had they been freely alienable. But the issuer should not bear the risk of all subsequent share price increases because it is impossible to know whether and when the stockholders actually would have sold their shares during the restricted period." *Id*. at 1023.

Thus, the method of calculating damages set forth in *Duncan* provides the value of the opportunity lost as a result of the wrongful interference.

Clearly, California courts have failed to address, in large measure, an appropriate method of calculating damages for the lost opportunity to trade stock when a wrongful withholding or interference occurs. The *Wong* decision clearly did not envision the rapid fluctuation in market price which is prevalent in today's fast paced global markets. Some of the other methods set forth above may provide some guidance in wrestling with this issue in the future.

— Scott H. Carr

Defining and Transforming Arbitration

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substantive contract law, and "procedural" arbitrability embraces civil procedure.

Aside from the staples of substantive contract interpretation; *i.e*., ambiguous arbitration clauses multiple clauses, expired contracts, counterclaims, unconscionable contracts, third party beneficiaries, collateral estoppel and *res judicata*, the courts resolve procedural issues of statutes of limitation, laches, conditions precedent, forum selection, consolidation and severance of claims. "Arbitrability " includes resolution of sensitive jurisdictional disputes between federal and state courts confronting the doctrine of abstention, the role of the Anti-Injunction Act, and the All Writs Act. The paradox: litigation language applied to the alternative to litigation.

The Litigation Doctrine of 'Public Policy'

In California, the latest judicial inroad to enforceability of an arbitration clause revocable on "grounds existing for any contract", is the litigation doctrine of "public policy." This concept, neither substantively or procedurally sufficient to statutorily qualify as "grounds for the revocation of a contract" under state law (Cal. Code Civ. Proc. § 1281.2) , nor disqualification of an arbitration clause as a matter of "law and equity" in federal law (9 U.S.C. § 2), is now "arbitrable" in California; *Little v. Auto Stiegler, Inc*., 29 Cal. 4th 1064 (2003). Although the plaintiff in *Little* had alleged a common law cause of action, as distinct from statutory, the court drew no distinction and applied the judicially invented "public policy" litigation ground to deny enforcement of arbitration clause.

In its seminal decision of *Armendariz v. Foundation Health Psychcare Services, Inc*., 24 Cal.4th 83 (2000), the Justices concluded the Fair Employment and Housing Act ("FEHA") imposes an unwaivable right to litigation necessary to vindicate the purposes of the statute in the context of a wrongful termination cause of action alleging violation of "public policy." Despite the venerable California rule of at-will employment, the court based its decision on *Tameny v. Atlantic Richfield Co*., 27 Cal.3d 167 (1980), a non-statutory judicially declared tort doctrine authorizing a damages award to employees discharged for reporting illegal employer conduct.

Although arguably judicial legislation, *Tameny* deflects criticism of its holding. Employees ought not suffer employment loss based upon legitimate complaints of employer wrongdoing. The court opinion is moral reasoning clothed in the language of the law under the rubric of "public policy".

Armendariz cites *Tameny* in identifying FEHA as a legislative expression of public policy. But the California court also warns that "public policy is not a surrogate for judicial opinions based on general welfare: it is a doctrine." carefully tethered to funda-

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for further proceedings. The Court of Appeal concluded that the owners had failed to make a *prima facie* showing that the City's declaratory relief action was a SLAPP suit since it did not "chill[ ] their First Amendment rights, as required by statute." *City of Cotati*, 90 Cal. App. 4th at 806. Rather, the Court of Appeal concluded that the case's "only vice, if any, was to seek to have [the constitutionality of its rent stabilization ordinance] issue determined in a different venue." *Id*. Indeed, the City readily conceded that "the sole purpose in filing the state court action was to enable it to gain a more favorable state court forum in which to litigate the constitutionality" of its ordinance. *Id*. at 801. Most significantly, and obviously mindful of the proliferation of anti-SLAPP motions, the Court of Appeals explained that it "would be encouraging and approving the use of SLAPP in virtually all disputes over jurisdiction and venue" if it held that the City's action was a SLAPP suit and "[t]his we will not do." *Id*. at 806. The California Supreme Court affirmed (holding that the action was not subject to the Anti-SLAPP Statute), but stated that the Anti-SLAPP Statute does not impose an additional requirement on the moving party to prove that the challenged action or claim "has had, or will have, the actual effect of chilling the defendant's exercise of speech or petition rights." *City of Cotati,* 29 Cal. 4th at 75; *see also Navellier*, 29 Cal. 4th at 88 (under *City of Cotati*, the moving party does not have to "demonstrate that the action actually has had a chilling effect on the exercise of [the moving party's protected speech or petitioning] rights").

In *Navellier,* the organizer of an investment company, who was a trustee of the company and who provided investment advice and administrative services to it pursuant to contract, brought an action against the company's other trustees in federal court seeking to prevent them from removing him as a trustee. The parties then entered into an agreement that allowed the ousted trustee to become the company's portfolio manager, but one of the other trustees subsequently filed various counterclaims in the federal action despite a broad general release contained in their agreement. The federal action resulted in a decision by the Ninth Circuit. *See Navellier v. Sletten*, 262 F.3d 923 (9th Cir. 2001). The former trustee/portfolio manager responded by bringing an action against the counter-claiming trustee in state court alleging that the release provision of their agreement had been breached and that he had incurred various litigation costs in the federal action that would not have arisen if the release had been honored. The trial court in the state action denied the defendant trustee's anti-SLAPP motion, and the Court of Appeal affirmed based upon its conclusion that the action was outside of the scope of the Anti-SLAPP Statute since "it was not brought primarily to chill the exercise of constitutional free speech or petition rights and [it was] not an abuse of the judicial process." *See Navellier*, 29 Cal. 4th at 87. The California Supreme Court reversed (holding that the action was subject to the Anti-SLAPP Statute), and stated that the Anti-SLAPP Statute does not impose an additional requirement on the moving party to prove the "validity" of the underlying constitutional speech or petition rights. *Id*. at 94-95. The case was remanded to the Court of Appeal for reconsideration in light of the opinion. *See Navellier, supra*, 106 Cal. App. 4th 763 (determining, on remand, that the anti-SLAPP motion should be granted).

In all of these cases, the California Supreme Court continued the broad interpretation of the Anti-SLAPP Statute that it adopted in *Briggs*. In essence, it has held that the moving party on an anti-SLAPP motion does not need to prove any of the following to prevail: the movant's constitutional speech or rights concerned "an issue of public significance" [*Briggs*], the challenged action or claim was initiated with the intent of "chilling" the movant's exer-

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The Lessons Learned from *Korea Supply*

Liability under California's Unfair Competition Law (UCL) is incredibly broad. As a result, UCL claims are frequently tossed into complaints "as a secondary, back-up argument." (*See, e.g*., Blumberg, *Toxic Tort Plaintiff's Loss Contains a Big Win for the Future*, S.F. Daily Journal, March 4, 2003 at p. 5 [plaintiff's counsel concession in *Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134].)

The UCL, however, is not an all-purpose tort. While UCL liability is broad, the relief available is very limited. Although the California Supreme Court has said this on more than one occasion, UCL claims are still being alleged as knee-jerk causes of action in lawsuits where they do not belong or where they are not even needed.

Pamela E. Dunn

In *Korea Supply*, the California Supreme Court made its point in a more meaningful way. This time the Court offered trial courts and parties a roadmap for eliminating or narrowing a UCL claim at the demurrer/motion to strike stage of a lawsuit by focusing on the remedies alleged. The lessons learned from *Korea Supply* should be understood before alleging/attacking a UCL claim.

The Opinion

The battle in *Korea Supply* was more exciting than the average business dispute. Plaintiff Korea Supply Company (KSC) represented MacDonald Dettwiler in bids to manufacture military equipment for the Republic of Korea. (*Korea Supply v. Lockheed Martin, supra,* 29 Cal. 4th at p. 1140) KSC expected a $30 million dollar commission if the contract was awarded to MacDonald Dettwiler. (*Ibid*.)

Utlimately, another manufacturer, Loral (which is now Lockheed Martin Tactical Systems, Inc.), was awarded the contract. (*Korea Supply v. Lockheed Martin, supra*, 29 Cal. 4th at p. 1140.) KSC claimed that its client's equipment was superior and its bid lower, but that it did not get the contract because Lockheed Martin "offered bribes and sexual favors to key Korean officials." (*Id*. at p. 1137)

KSC sued Lockheed Martin for three claims: (1) conspiracy to interfere with prospective economic advantage, (2) intentional interference with prospective economic advantage, and (3) violations of California's Unfair Competition Law, Business and Professions Code, section17200 *et seq*. (UCL). (*Korea Supply v. Lockheed Martin, supra*, 29 Cal. 4th at p. 1140.) For its UCL claim, KSC sought disgorgement of Lockheed Martin's profits on the sale of the military equipment to Korea. (*Ibid.*)

The trial court sustained Lockheed's demurrer to plaintiff's complaint without leave to amend. But the Court of Appeal reversed, holding that "plaintiff can recover disgorgement of profits earned by defendants as a result of their allegedly unfair practices, even where the money sought to be disgorged was not taken from plaintiff and plaintiff did not have any ownership interest in the money." (*Korea Supply v. Lockheed Martin, supra*, 29 Cal. 4th at p. 1144.)

The California Supreme Court granted review to "address

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whether disgorgement of profits allegedly obtained by means of an unfair business practice is an authorized remedy under the UCL where these profits are neither money taken from a plaintiff nor funds in which the plaintiff has an ownership interest." (*Korea Supply v. Lockheed Martin, supra*, 29 Cal. 4th at p. 1140.) The Court began its analysis by pointing out that the UCL "covers a wide range of conduct," and that "[s]tanding to sue under the UCL is expansive as well." (*Id*. at p. 1143.) "While the scope of conduct covered by the UCL is broad, its remedies are limited." (*Id*. at p. 1144.)

The California Supreme Court reiterated that, in an individual representative action, the monetary remedies under the UCL are narrowly limited to restitution, the return of money wrongfully taken from the plaintiff by the defendant. (*Korea Supply v. Lockheed Martin, supra*, 29 Cal. 4th at p. 1144; see also id. at p. 1148 fn.6.) The disgorgement of profits "that are neither money taken from a plaintiff or funds in which the plaintiff has an ownership interest" is not "an authorized remedy in an individual action under the UCL." (*Id*. at p. 1140.) The Court defined this legally impermissible remedy as nonrestitutionary disgorgement of profits.

Daniel J. Koes

The California Supreme Court first explained that the Court of Appeal, like many attorneys, "misread our opinion in *Kraus* [*v. Trinity Management Services, Inc*. (2000) 23 Cal.4th 116.]" (*Korea Supply v. Lockheed Martin, supra*, 29 Cal. 4th at p. 1145.) In *Kraus*, the Court stated: "[a]n order for disgorgement 'may compel a defendant to surrender all money obtained through an unfair business practice'…'*regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice.*'" (*Ibid*., citing *Kraus v. Trinity Management*, (2000) 23 Cal.4th 116, 127, emphasis added.) The Court explained "this passage from *Kraus*, cited by the Court of Appeal as authorization for disgorgement under the UCL, merely *defined* the term 'disgorgement' in order to demonstrate that it was broader in scope than 'restitution.'" (*Id*. at p. 1145, emphasis original.)

Then the California Supreme Court analyzed, once again, the statutory language of the UCL, pointing out that "a remedy of nonrestitutionary disgorgement of profits is not expressly authorized" by the UCL. (*Korea Supply v. Lockheed Martin, supra*, 29 Cal. 4th at p. 1146.) As it did in *Kraus*, the Court explained "[h]ere, again, we find nothing to indicate that the Legislature intended to authorize a court to order a defendant to disgorge all profits to a plaintiff who does not have an ownership interest in those profits." (*Id*. at p. 1147.) The Court cleared up any confusion created by the passage from *Kraus* by explaining that a "court cannot, under the equitable powers of section 17203, award whatever form of monetary relief it believes might deter unfair practices." (*Id*. at p. 1148.)

The California Supreme Court's analysis did not end there. After it clarified the *Kraus* opinion, the Court considered KSC's attempt to disguise its claim for non-restitutionary disgorgement of profits as restitution. (*Korea Supply v. Lockheed Martin, supra*, 29 Cal. 4th at p. 1148.) Even though the allegations were before it on a demurrer, the Court had no difficulty concluding that the term restitution "does not accurately describe the relief sought by plaintiff." (*Id*. at 1149.) Because KSC did not give any money or property to Lockheed Martin, "plaintiff does not have an ownership interest in the money it seeks to recover from defendants." (*Ibid*.) Nor did KSC have any "vested interest in the money it seeks to recover." (*Ibid*.) To the contrary, KSC never expected any "payment directly from Lockheed Martin." (*Id*. at p. 1150.) Rather, KSC "expected the Republic of Korea to pay MacDonald Dettwiler, which would then pay a commission to KSC." (*Ibid.*) Thus, KSC had an "expectancy" in the "receipt of a commission" at best. (*Ibid*.)

After concluding that it was not really restitution which KSC was seeking, the California Supreme Court had no difficulty pointing out that the remedy plaintiff sought "closely resembles a claim for damages, something that is not permitted under the UCL." (*Korea Supply v. Lockheed Martin, supra*, 29 Cal. 4th at p. 1150-1151.) In fact, the Court concluded that the recovery proposed "would be in exactly the same amount that plaintiff is seeking to recover as damages for its traditional tort claim of interference with prospective economic advantage." (*Id*. at 1151.) Allowing these damages under the UCL would not only run counter to the streamlined purpose of the UCL, it would encourage plaintiffs "to recast claims under traditional tort theories as UCL violations." (*Ibid*.) "The result could be that the UCL would be used as an all-purpose substitute for a tort or contract action, something the Legislature never intended." (*Ibid*.)

The Lessons Learned

There are many lessons to learn from *Korea Supply*. First, from a procedural standpoint, the California Supreme Court agreed that the trial court properly sustained without leave to amend a demurrer to a UCL cause of action where the attack was based solely on the remedy sought. Accordingly, like courts, parties should focus on the monetary remedies alleged.

Second, in an individual action (not a class action) only restitution can be recovered. This means that no money can be recovered unless the facts alleged show that the defendant took something from the plaintiff which must be returned. Where the facts alleged do not support this narrow monetary remedy, plaintiff should not seek restitution. If plaintiff does, defendant should attack the remedy as unauthorized. (Prudent counsel will file a motion to strike concurrently with the demurrer. Under this approach, if the trial court decides plaintiff is seeking restitution and an impermissible remedy, then the court can overrule the demurrer and strike the impermissible remedy.) If what is alleged is not the return of money or property wrongfully taken from plaintiff, it is simply not restitution under the UCL. Period.

Third, where the monetary remedy sought is essentially the same as that claimed as tort or contract damages, *Korea Supply* teaches us that plaintiff is probably not seeking restitution. As a result, where the UCL claim is not needed or is merely just a "secondary, back-up argument," it should not be included in the complaint. When it is included, the defendant should contemplate attacking the remedy sought on grounds that it is a disguised claim for impermissible damages under the UCL. Just as in *Korea Supply*, where the plaintiff seeks the same monetary recovery under the UCL claim as is sought under a tort or contract claim, it is highly likely plaintiff is seeking impermissible damages merely labeled as restitution.

Once again, the California Supreme Court's lessons are that, while liability is broad under the UCL, the remedies afforded are very limited and if broadly or improperly alleged can be attacked on demurrer. A plaintiff who does not need the UCL remedies to be made whole and who does not want to needlessly fight over the remedies sought can avoid a UCL challenge by alleging a tort or contract claim. A defendant who wants to challenge a UCL claim thrown in as an afterthought to a tort or contract dispute should focus on the remedies sought, ensuring that pure restitution is alleged, not disguised damages. Now is the time to put into practice the lessons learned from *Korea Supply*.

— Pamela E. Dunn and Daniel J. Koes

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cise of constitutional speech or rights [*Equilon*], the challenged action or claim had, or would have, an actual "chilling effect" on the movant's exercise of constitutional speech or rights [*City of Cotati*], or the movant "validly" exercised such constitutional speech or rights [*Navellier*]. The California Supreme Court's majority justified these rulings, in part, by stating that it has construed the Anti-SLAPP Statute "strictly by its terms." *Equilon Enterprises, LLC*, 29 Cal. 4th at 59.

Underscoring the breadth of the Anti-SLAPP Statute, the California Supreme Court noted that "contract and fraud claims are not categorically excluded from the operation of the anti-SLAPP statute" since "[n]othing in the statute itself categorically excludes any particular type of action from its operation." *Navellier*, 29 Cal. 4th at 92-93. Indeed, the "only thing the defendant needs to establish to invoke the potential protection of the SLAPP statute is that the challenged lawsuit arose from an act on the part of the defendant in furtherance of her right of petition or free speech." *Equilon Enterprises, LLC*, 29 Cal. 4th at 63 (internal citations omitted and punctuation omitted).

Recent and Upcoming Developments — In *Navellier*, Justice Brown opined that "[u]nder the majority's rule, suits are presumptively SLAPP's until the plaintiff affirmatively makes a requisite showing." *Navellier*, 29 Cal. 4th at 104 (J. Brown dissenting opinion). The recently published decisions support that view. Very few of those decisions turn on the first prong of the two-step procedure. *See, e.g., Rivero v. American Federation of State, County and Municipal Employees*, AFL-CIO, 105 Cal. App. 4th 913 (2003); G*allimore v. State Farm Fire & Casualty Ins. Co*., 102 Cal. App. 4th 1388 (2002). Rather, most of the current decisions focus on the second prong. *See, e.g., Kids Against Pollution v. California Dental Assn*., 2003 Cal. App. LEXIS 764 (May 21, 2003); *Tuchscher Development Enterprises, Inc., supra; Navellier, supra.*

In addition, the California Supreme Court has continued its active involvement in this developing area of the law by granting review in two SLAPP cases arising from malicious prosecution claims: *Jarrow Formulas, Inc. v. La Marche*, Cal. S. Ct., Case No. S106503; and *Strook & Strook & Lavan v. Tendler*, Cal. S. Ct., Case No. S111188. Oral argument in *Jarrow* was held on June 4th, and the briefing in *Tendler* has been deferred pending the consideration and disposition in *Jarrow*. Presumably, the California Supreme Court will take the opportunity to further explain or tweak its guidelines for applying the Anti-SLAPP Statute. In 2002, the California Legislature passed a bill (SB 789) that would have added exemptions to the Anti-SLAPP statute, but Governor Davis vetoed it. The Legislature is currently considering a similar bill.

Cure or Curse for Civil Litigation in California — In 1999, Justice Baxter astutely predicted that practitioners would use anti-SLAPP motions in a wide variety of civil cases. They have done so successfully and unsuccessfully, and will continue to do so unless the provisions of the Anti-SLAPP Statute are limited by legislative amendment or future judicial interpretation. Certainly, the holdings and language in the *Equilon/City of Cotati/ Navellier* trilogy have promoted the broad use of anti-SLAPP motions.

Justice Baxter's concern in *Briggs* was that the Anti-SLAPP Statute "not only allows an early summary dismissal of the plaintiff's complaint, it also cuts off all discovery upon its filing and authorizes an award of attorney fees to the prevailing defendant." *Briggs*, 19 Cal. 4th at 1129. Justice Brown in *Navellier*, joined by Justice Baxter and Associate Justice Chin, similarly found that the majority's ruling "amounts to a rewriting of California summary judgment law in a way that significantly disadvantages plain-

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Challenging a Jury Pool: A Challenging Task

Your client is a business owned and/or operated by persons of a distinctive group ('minority party') that is embroiled in a business/commercial dispute with persons or entities that will predominate in the composition of the trial jury pool ('majority party') likely to be summoned for the case. Assume that the majority party's background and/or heritage reflects the majority of persons in the community, say 'Anglo' or heterosexual, while the minority party includes owners, employees and/or favorable witnesses who are recent immigrants from Asia, Caribbean, Eastern Europe, Middle East, Africa or Latin America or who are openly gay. Assume that the relevant community includes citizens from all of these groups and the dispute warrants that the case be tried to a jury pursuant to California Constitution Art. I, section 16, and C.C.P., section 592, *i.e*., the gist of the action is legal rather than equitable in nature. (*C & K Engineering Contractors v. Amber Steel Co., Inc*. 23 Cal. 3d 1, 9 (1978).)

Stanley M. Roden

For obvious reasons, the attorney for the minority party is concerned that the trial jury pool will not reflect the distinctive characteristics of the client and that this absence may contribute to cultural bias or prejudice, which could taint the proceedings.

The following discussion includes an examination of the constitutional right to a jury pool that is randomly drawn from a cross section of the community, a discussion of the parameters of a party's right to exercise the peremptory challenge, and a focus upon the available, although limited, strategies available to trial counsel in such situations. A recent California Supreme Court criminal case provides some insights for the business trial attorney facing these issues. (*People v. Burgener*, 29 Cal. 4th 833 (2003).)

The Showing Required to Challenge a Jury Pool

Under the federal and state Constitutions, the right to a jury trial includes the right to an impartial jury that is drawn from a representative cross-section of the community. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16; *People v. Burgener*, 29 Cal. 4th 833, 835(2003).) While most appellate opinions arise from criminal cases, the same general principles apply to civil cases. (*HollHolHolley v J. & S. Sweeping Co*., 143 Cal. App. 3rd 588, 592-3(1983), holding that Wheeler violations; *i.e*., peremptory challenges based upon group bias, applies with equal force to civil cases.)

Moreover, the right to an impartial jury applies at each stage of the jury selection process, including the court's compilation and manipulation of various 'source lists' and creation of the 'master lists,' 'qualified juror lists,' 'jury pools' or 'trial jury panels.' (See Cal. Code Civ. Proc. § 194 for definitions of these terms.)

In order to challenge the actions of the court or its employed jury commissioner, counsel must prove the following three (3) elements:

- The group alleged to be excluded must be a *distinctive group* in the community;
- The representation of the distinctive group is *not fair and*

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Challenging a Jury Pool

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reasonable in relation to the number of such persons in the community; and

• This under-representation is caused by *systematic exclusion* of the group in the jury selection process. (See, Duren v. Missouri 439 U.S. 357, 358-367(1979); *People v. Howard*, 1 Cal.4th 1132, 1159(1992).)

What is a Distinctive Group?

Certain groups are constitutionally and statutorily protected based upon membership or identification based upon race, religion, color, sex, national origin, sexual orientation or other "similar grounds." (Cal. Code Civ. Proc. § 231.5.) Other groups will be protected only if there is proof that the group is 'distinctive.' What is a 'distinctive group' is based upon a complicated two-part formula; *i.e.*, that the alleged group shares a common perspective based upon group identification and that other members of the community cannot represent this group. (*See, Rubio v Superior Court*, 24 Cal. 3d 93, 98(1979), which holds that ex-felons and resident aliens were not 'distinctive' groups within the meaning of the representative cross-section rule.)

In *Burgener, supra*, the court reaffirms that persons of low income do not constitute a 'distinctive' group under the first-prong of the Duren test. (29 Cal.4th at 856). As to young persons, however, the court ducked the question and reserved the question for a subsequent case. However, it pointed out that lower courts have rejected the claim "a number of times." (*See, e.g., People v. Stansbury*, 4 Cal.4th 1017, 1061(1993).)

What Constitutes Disparity?

The second-prong of the Duren test —- challenging the fairness of group representation — requires a constitutionally significant difference between the number of members of the cognizable group appearing for jury duty and the number in the relevant community. This can be measured as either an absolute disparity or as a comparative disparity. (*See, People v. Ramos*, 15 Cal.4th 1133,1155(1997).)

As of this date, the US Supreme Court has not defined either the means by which any form of disparity may be measured or the constitutional limit of permissible disparity. (*See, People v. Anderson*, 25 Cal.4th 543, 567 (2001).)

Courts calculate "absolute disparity" by subtracting the percentage of the underrepresented group in the pool from that group's percentage in the population; "comparative disparity" is the ratio created by the same two percentages. (*People v. Ochoa*, 26 Cal. 4th 398, 427.(2001)— 13 percent of the jury-eligible population of the Northwest Judicial District was Hispanic, but only 7.7 percent of the district's jury pool in May and June 1992 was Hispanic, which resulted in an "absolute disparity" of 5.3 percent and a "comparative disparity" of approximately 40.8 percent.) In *People v Currie*, 87 Cal App 4th 224, 233-234 (2001), Kern County Hispanics were found to be 16.3% of the general population and only 8.3% were in the jury pool. These numbers represent an absolute disparity of 8% and a comparative disparity of roughly 49%.

The California Supreme Court *has* determined that there is no violation of the second-prong of Duren where the facts showed an absolute disparity of between 2.7 and 4.3 percent and a comparative disparity between 23.5 and 37.4, stating that these percentages are generally "within the tolerance accepted" by reviewing courts. (*See People v. Ramos, supra*, 15 Cal. 4th at 1156.) Likewise, *Burgener* holds that an absolute disparity between 1 and 1.2 percent and a comparative disparity of between 22 and 27 percent was not sufficient to warrant a challenge to the jury pool. (29 Cal.4th at 860.)

What Constitutes Systematic Exclusion?

If the first and second prongs of the Duren test are satisfied, the third prong requires a showing that the *disparity resulted from an improper feature of the jury selection process*. (See, generally, *People v. Howard, supra*, 1 Cal.4th at 1160; *People v. Bell*, 49 Cal. 3d 502, 530 (1989).) If a one party establishes a prima facie case of systematic under-representation, the burden shifts to the other to provide either a more precise statistical showing: (1) that no constitutionally significant disparity exists or (2) that a compelling justification exists for the procedure that resulted in the disparity. (*People v. Horton*, 11 Cal. 4th 1068, 1088 (1995), citing *People v. Sanders*, 51 Cal. 3d 471, 491 (1990).)

The first significant hurdle for counsel contemplating a challenge is that many counties compile juror pools from a combination of voter registration lists and Department of Motor Vehicle (DMV) records, which include registered drivers and holders of identification cards. When these records are properly merged into a master list and purged of duplicates, the combined list is deemed "inclusive of a representative cross-section of the population." (*People v. Ochoa*, 26 Cal.4th 398, 427 (2001); Cal. Code

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Civ. Proc. §197(a) & (b).) A computer program that 'merges and purges' and that is used in approximately 600 courts in North America, including most federal courts and those in California, guarantees that the combined result will err on the side of inclusion. In courts that use this technology, including Santa Barbara County, it is difficult for a party to prove an improper action or motive associated with the selection process if any particular jury panel is not reflective of the community at large.

Where the challenge is upon the grounds that under-representation results from unduly lax practices and methods employed by the jury commissioner's office in excusing persons on grounds of hardship, it is likely to fail absent proof that the resulting disparity was caused by improper motives. (*See, People v. Bell*, 49 Cal. 3d 502 (1989); *People v. Morales*, 48 Cal. 3d 527, 547 (1989).) Even a showing of possible laxity in race/class neutral excusal practices does not constitute a *prima facie* case of systematic exclusion. For example, in *Morales, supra*, the evidence demonstrated that any juror could apply for exemption or excusal, but the evidence did not indicate that Hispanics were granted a disproportionate number of exemptions or excuses. (48 Cal. 3d at 549.) By contrast, in *Duren, supra*, Missouri law automatically exempted all women from jury duty, upon their request. In other words, the under-representation of women on state juries was the immediate and direct result of the state's exemption laws.

Burgener also found that the liberal granting of excuses based upon economic hardship did not constitute systematic exclusion because the guidelines for excusing prospective jurors from service was neutral as to age and, except as to economic hardship, were also neutral as to income. "Neither the state nor federal Constitutions oblige local government to increase jury fees or otherwise ameliorate the economic hardship caused by jury duty." (29 Cal. 4th at 857.)

What if a court, motivated by good intentions, adds minority members to the summoned trial jury pool in order to ensure that panels are not under-represented for a distinctive group? While the US Constitution "forbids the *exclusion* of members of a cognizable class of jurors, it does not require that venires created by a neutral selection procedure be supplemented to achieve the goal of selection from a representative cross-section of the population." (*People v. Ochoa, supra*, 26 Cal. 4th at 427.) In Burgener, the Supreme Court chastised the Riverside County court for intentionally moving African Americans from one panel to another in order to protect against *Duren* challenges. The court stated: "…race-conscious assignment, no matter how infrequent, is not consistent with the spirit of the Sixth Amendment guarantee of a jury drawn from a fair cross- section of the community or with our own Constitution. (*See, e.g.*, Cal. Const., art. I, § 31.)…. Accordingly, we find it prudent, as an exercise of our supervisory power over California criminal procedure, to prohibit our state courts in the future from making race-conscious assignments from the jury assembly room to a courtroom." (29 Cal. 4th at 861.)

Unlawful Use of the Peremptory Challenge

A peremptory challenge "…may be predicated on a broad spectrum of evidence suggestive of juror partiality. The evidence may range from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative." (*People v. Muhammad* 2003 WL 1963202, 1963205, 2003 Daily Journal D.A.R. 4706.)

By contrast, a constitutional violation occurs when a party exercises a peremptory challenge that is motivated not by individual circumstances but by group bias. *Muhammad* holds that a mistrial was justified because the prosecutor's reasons for several peremptory challenges were not "convincing." However, the trial court also imposed sanctions on the prosecutor, which sanctions

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U.S. Supreme Court Cases of Note

A recent United States Supreme Court decision has further restricted the discretion of the judiciary to use punitive damages as a form of punishment. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S.Ct. 1513 (2003), the Court struck down a $145 million punitive damages verdict against an insurance company, holding that an award of that size under the circumstances of the case was "neither reasonable, nor proportionate to the wrong committed, and…was an irrational and arbitrary deprivation of property of the defendant." *Campbell, supra*, 123 S.Ct. at 1526.

The facts that gave rise to the litigation are tragic, to say the least. Curtis Campbell was driving his automobile in Cache County, Utah, when he attempted to pass six vans traveling ahead of him on a two lane highway. As Mr. Campbell drove down the wrong side of the highway, Todd Ospital, driving in the opposite direction, was forced to swerve onto the shoulder of the highway to avoid Mr. Campbell. Mr. Ospital ultimately lost control of his vehicle, and was killed when he hit an oncoming car. The driver of the oncoming car, Robert Slusher, was also seriously injured as a result of the incident. Mr. Campbell, as well as his wife who was in the car with him at the time of the incident, escaped unscathed.

Ryan P. Eskin

State Farm Mutual Automobile Insurance Company ("State Farm"), Mr. Campbell's insurer, declined offers by Mr. Ospital's estate and Mr. Slusher to settle the claims for the policy limit of $50,000 ($25,000 per claimant). State Farm ignored the advice of one of its own investigators and took the case to trial, assuring the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel." *Id.* at 1518.

A jury determined that Mr. Campbell was 100% at fault for the incident, and a judgment was returned for $185,849, far more than the amount offered in settlement. State Farm initially refused to cover the $135,849 in excess liability.

After the Utah Supreme Court denied Campbell's appeal, State Farm ultimately agreed to pay the entire judgment, including the amounts in excess of the policy limits. Nonetheless, the Campbells decided to initiate a bad faith action against State Farm. After several years of litigation, a Utah jury found that State Farm's decision not to settle was unreasonable because there was a substantial likelihood of an excess verdict. Additionally, a jury found State Farm liable for fraud and intentional infliction of emotional distress, and awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million respectively. The Utah Supreme Court, however, reinstated the original $145 million punitive damages award on appeal. State Farm then petitioned the United States Supreme Court for review.

The Court returned to the framework it had constructed in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116, S.Ct. 1589 (1996), in which the Court refused to sustain a $2 million punitive damages award which accompanied a verdict of only $4,000 in compensatory damages. In Gore, the Court instructed

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lower courts reviewing punitive damages to consider three guideposts:

- The degree of reprehensibility of the defendant's misconduct;
- The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
- The difference between the punitive damages awarded by the jury and the civil penalties authorized or awarded in comparable cases. *See Gore, supra*, 517 U.S. at 575.

Based on the Gore framework, the Court concluded that the punitive damages award was "no doubt" presumptively unconstitutional. In coming to this conclusion, the Court removed much of the ambiguity surrounding the Gore decision.

For instance, while the Court continued to assert that the punitive damages award should be based in part on the degree of reprehensibility of the defendant's misconduct, the Utah trial court was wrong to admit evidence of State Farm's misconduct that was unrelated to the case at hand. As Justice Kennedy, writing for the majority, stated:

> "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt that the Utah Supreme Court did that here." *Campbell, supra*, 123 S.Ct at 1523.

The Court's analysis of the first prong of the *Gore* test touched upon the long-standing popular notion that punitive damages have a deterrent element, and that therefore repeat offenders should be punished more harshly: "Although '[o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual act of malfeasance,' in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions." *Id*. The Court noted that the Campbells had produced "scant evidence of repeated misconduct of the sort that injured them." *Id*.

With respect to the second *Gore* guidepost, the Court reaffirmed its statements in *Gore* that it would continue to apply a strict ratio between punitive and compensatory damages. While the Court passed on identifying a "bright-line ratio", it concluded that "our jurisprudence and the principles it has now established demonstrate…that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id*. at 1524.

With respect to the third guidepost, the Court once again noted the important difference between punitive damages and criminal penalties:

> "Great care must be taken to avoid use of the civil process to assess criminal penalties than can be imposed only after heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." *Id*. at 1526.

Justice Antonin Scalia and Clarence Thomas dissented, on the basis that, as Justice Thomas stated, "I continue to believe that the Constitution does not constrain the size of punitive damages awards," (*Id*.) echoing his dissent in *Gore* seven years earlier. Justice Ruth Bader Ginsburg also dissented, out of deference to states' rights. *Id*. at 1527.

In today's legal times, when a spilled cup of coffee can lead to millions of dollars in damages, the Court's ruling in *Campbell* acts as a natural equilibrium. Few commentators suggest that the *Campbell* ruling will deter plaintiffs' attorneys from seeking monster-sized punitive damages awards. Nor do few expect that juries will be reticent to award them. However, one thing seems certain: this is not likely to be the Court's last word on the subject. Rather, as one commentator has stated, future Court decisions will likely further define the limits identified in Campbell:

> "It seems likely that future decisions will (1) rely on principles of sovereignty to further limit such awards; (2) limit the potential for multiple punitive damages awards based on the same conduct; and (3) narrow the meaning of 'similar conduct.'" (Andreason, Cynthia T., "State Farm v. Campbell: What Happens Next?", *Law Week*, Vol. 71, No. 42, May 6, 2003.)

How state courts will respond to the *Campbell* decision remain to be seen. Remember, the Utah Supreme Court overturned the trial court's decision to reduce the size of both the compensatory and punitive awards. In the end, the ultimate solution may be to heed the words of Justice Ginsburg, who, in her dissenting opinion in *Campbell*, noted:

> "The large size of the award upheld by the Utah Supreme Court in this case indicates why damage-capping legislation may be altogether fitting and proper." *Campbell, supra*, 123 S.Ct at 1527.

— Ryan P. Eskin

The Anti-Slapp Statute: Cure or Curse?

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tiffs. Plaintiffs now have the burden of proving the viability of their claims, without the benefit of discovery." *Navellier*, 29 Cal. 4th at 101 (J. Brown, dissenting opinion).

The minority's concerns simply beg the more fundamental question: Is it "drastic" or undesirable to have a relatively simple procedural device that disposes of clearly frivolous litigation at the outset of a case and forces the unscrupulous initiating party to reimburse the innocent responding parties for the attorneys' fees and costs that they were forced to incur to have the improper pleading or action dismissed? The California Supreme Court is apparently split on that issue. Undoubtedly, reasonable minds could advocate or defend either side.

Traditionally, frivolous actions or pleadings could be challenged at the outset by demurrer, motion to strike or other procedural devices. In 1994, the California Legislature also enacted California *Code of Civil Procedure* Section 128.7 (an "experimental statute" patterned after the federal sanctions provisions contained in Rule 11 of the *Federal Rules of Civil Procedure*) with the intent to deter "frivolous filings." *See Barnes v. Department of Corrections*, 74 Cal. App. 4th 126, 133 (1999); *accord Bockrath v. Aldridge Chemical Co*., 21 Cal. 4th 71, 82 (1999) (Section 128.7 is "a remedy for improperly speculative pleading"). There is growing authority for using Section 128.7 sanctions to deter or compensate for frivolous actions and pleadings. *See, e.g., Eichenbaum v. Alon*, 106 Cal. App. 4th 967 (2003) (affirming sanctions against the plaintiff and his counsel); *Laborde v. Aronson*, 92 Cal. App. 4th 459 (2001) (same); *Liberty Mutual Fire Inc. v. McKenzie*, 88 Cal. App. 4th 681 (2001) (affirming sanctions). Accordingly, many practitioners would agree with Justice Baxter that extending the Anti-SLAPP Statute beyond the intended purpose of protecting free speech and the ability to petition in connection with a public issue creates a "drastic" remedy that should be limited to its intended purpose.

Conversely, given the high costs and abuses currently existing

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across the board currently in most civil litigation, many other practitioners would support the application of the "procedural screening mechanism" provided by the anti-SLAPP Statute to all civil litigation as a way of eliminating or drastically reducing frivolous litigation for the benefit of all parties or potential parties and the courts. As one appellate court held: "[t]he legislative intent [of the Anti-SLAPP Statute] is best served by an interpretation which would require a plaintiff to marshal facts sufficient to show the viability of the action *before* filing a SLAPP suit." *Ludwig v. Superior Court,* 37 Cal. App. 4th 8, 16 (1995) (italics original); *accord Kids Against Pollution*, 2003 Cal. App. LEXIS at 5478 ("Our approach encourages the party filing a complaint to consider carefully *at the outset* whether to include an attack on the exercise of the First Amendment rights the Legislature sought to protect by the enactment of section 425.16." (italics original)). The California Supreme Court's majority apparently agrees since it notes that the Anti-SLAPP Statute "subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits" (*i.e.*, where the plaintiff cannot state or substantiate a "legally sufficient claim") so that, in essence, it "provides an efficient means of dispatching, early on in the lawsuit, and discouraging, insofar as fees may be shifted, a plaintiff's meritless claims." *Equilon Enterprises, LLC*, 29 Cal. 4th at 63 (citations, internal quotation and punctuation omitted); *accord Wilson*, 28 Cal. 4th at 826 (acknowledging that the Anti-SLAPP Statute provides for "the speedy and low-cost termination of abusive litigation" that is "truly meritless").

The California Supreme Court's majority believes that the Anti-SLAPP Statute "provides an efficient means of dispatching…and discouraging…meritless claims." *Equilon Enterprises, LLC*, 29 Cal. 4th at 63. The outspoken three-member minority counters that "SLAPP motions are now just the latest form of abusive litigation." *Navellier*, 29 Cal. 4th at 96 (J. Brown, dissenting opinion). Indeed, Justice Brown asserts:

> "Under the majority's rule, suits are presumptively SLAPP's until the plaintiff affirmatively makes a requisite showing. This will deter parties with novel claims, burden parties with meritorious ones, and prevent courts from hearing legal theories that warrant consideration. Frivolous filers will gain a new bargaining chip for settlement; a threatened motion to strike, even if unsuccessful, will cost meritorious litigants time and money. In short, the majority's holding helps unmeritorious parties…who file first and harms meritorious parties…who file second. This undermines a litigant's right to petition and our justice system as a whole."

Id. at 104. This classic debate — whether the Anti-SLAPP Statute is a cure or a curse — will continue in California's courtrooms for years to come.

— Kent A. Halkett

Defining and Transforming Arbitration

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mental polices that are delineated in constitutional or statutory provisions…the policy must be 'public' in that it 'affects society at large' rather than the individual, must have been articulated at the time of discharge, and must be 'fundamental' and 'substantial.'"

In *Little*, the court has expanded this doctrine to include common law claims for wrongful termination allegedly indistinguishable from statutory claims for purposes of "public policy" analysis. In the future, the California Supreme Court may confine its expansion of the "public policy" exception to employment cases exemplified in *Armendariz* and *Little*, but as the *Little* minority contends, the *Tameny* doctrine was judicially invented and not statutorily authorized. *Little* is an invitation to quote almost any statute in support of a "public policy" argument and the case is an example of questionable "tethering" a statute to that doctrine.

The merits of *Armendariz* and *Little* are not the issue. Each of these cases exemplify application of litigation analysis to arbitration issues and invoke decisional law apart from legislative authorization. Introducing a non-statutory ground to revoke an arbitration clause predicated on judicially declared doctrine opens the door presumably shut by the legislature and constitutes an incursion of their authority.

Little and *Armendariz* are not the only excursions of the judiciary into public policy as a source of avoiding arbitration. In V*illa Millano HOA v. Il Davorge*, 84 Cal.App.4th 819 (2000), the Court of Appeal invoked CCP § 1298.7 to vitiate an arbitration clause in the sales contract of a Homeowners Association. The court cited Cal. Code Civ. Proc. § 1298.7, a statute authorizing homeowners to initiate litigation for construction defects, in finding a public policy exception to enforcing an arbitration clause. The United States Supreme Court has repeatedly held that states cannot subvert arbitration by enacting statutes specifically applicable to contracts containing arbitration clauses. Cal. Code Civ. Proc. § 1298.7 is patently preempted by the FAA.

In *Phillips v. St. Mary Regional Medical Center*, 96 Cal. App. 4th 218 (2002), the court allowed a cause of action for employment discrimination to proceed on grounds that federal law adequately served as a statutory nexus for public policy despite conflicting California legislation. In *Deschene v. Pinole Point Steel Co*., 76 Cal.App.4th 33 (1999), the court allowed a wrongful termination cause of action to proceed based on allegations that the defendant had retaliated for giving deposition testimony in a suit brought by a former employee. Unable to find a statute to support a public policy argument, the court cited a Labor Code section prohibiting an employer from penalizing an employee for taking time off to attend a court related proceeding.

Generalized notions of good social policy articulated by a court simultaneously expressing concerns about cabining judicial power and insisting on a connection between Constitutional/ statutory law and public policy applicable generally and not to private claims are suspect. Any court can justify its decision by citing the amorphous doctrine of "public policy" and linking it tenuously to a statute or constitutional provision. The intrinsic inability to define the contours of public policy allow verbally dexterous judicial opinions to ignore the talismanic phrase and recharacterize it under an ambiguous doctrine that replicates faux due process; *Potvin v. Metropolitan Life Ins. Co*., 22 Cal.4th 1060 (2000).

California cases relying on public policy to exempt litigation from arbitration are on qustionable grounds. Because the FAA pre-empts state statutory or decisonal law inimical to arbitation, regardless of the underlying merits, the Supreme Court has ruled that "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary...Congress [has] declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration and denied states the right to undercut the enforceability of arbitration agreements...Section 2, therefore, embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable upon such grounds as exist at law or in equity for the revocation of any contract... We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law." *Keating, supra*.

— Hon. Lawrence Waddington (Ret.)

Challenging a Jury Pool

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were overturned on appeal because there was no demonstration that any statutory violation occurred. "…[I]t is a fundamental rule in this state that aside from a contempt proceeding, a monetary sanction can only be imposed against an attorney when authorized by a statute."

The trial court based the sanction order upon the theory that the attorney violated the constitution, and thus could be sanctioned for "violation of a lawful court order" pursuant to Cal. Code Civ. Proc. § 177.5. The appellate court disagreed and indicated that a court must admonish counsel or issue some other order, which is then disobeyed. Absent an order, the trial court lacks the authority to impose sanctions for Wheeler violations. *Muhammad* asks rhetorically, "What should a trial court do in order to preserve the option of imposing a monetary sanction should the conduct of counsel merit that option? Make an order. Yet it seems degrading to the judicial process and to the attorneys who practice before our courts for a court to have to warn counsel that, on penalty of a monetary sanction, they must not violate the Constitution. Based on our reading of *Wheeler* cases in the literature, it appears that the issue usually is raised more than once if it is raised at all, thus giving the court an opportunity to issue an appropriate admonition." (2003 WL at 1963207-8.) If *Muhammad* survives any motion for rehearing or review, it suggests that counsel should try to obtain an appropriate admonishment from the court at the earliest moment that *Wheeler* or other similar misconduct occurs.

Conclusion

The conclusion from these authorities is that trial counsel contemplating a challenge to a jury pool must meet all three *Duren* tests, which challenge must be supported by more than conjecture, "errant speculation" or arguments that a measurable disparity is the product of more that "mere chance." (See, *People v Breaux*, 1 Cal. 4th 281, 298-299 (1991).) Further, an attack on the improper use of the peremptory challenge must be supported with evidence that that motive for the challenge was based upon group bias and unrelated to any facts or reasonable inferences from known facts that would cause a reasonable trial counsel or party to excuse the potential juror.

— Stanley M. Roden

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