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Making Sense of "The General Public" Under B&P Section 17200

Alice: If I had a world of my own, everything would be nonsense. Nothing would be what it is because everything would be what it isn't. And contrary-wise; what it is it wouldn't be, and what it wouldn't be, it would. You see?

Lewis Carroll, *Alice's Adventures in Wonderland*

Hon. Ronald M. Sabraw

Were Mr. Carroll in our midst and writing today, the title to his famous work might read: *Alice's Adventures in California*. Discretion and the seriousness of the topic preclude a more fanciful comparison between Alice's Wonderland and the evolving legal landscape surrounding Business and Professions Code section 17200, California's Unfair Competition Law (the "UCL"). Humor can, however, highlight the uncomfortable fact that when litigating claims on behalf of "the general public" under the UCL, "the general public" often is what it isn't, and isn't what it is.

UCL jurisprudence resembles Wonderland because we lack a consistent approach to claims brought in the interest of "the general public" under section 17204. One might expect that "the general public" would have the same meaning as "The People of the State of California," that is to say "the People as a body, rather than as individu-

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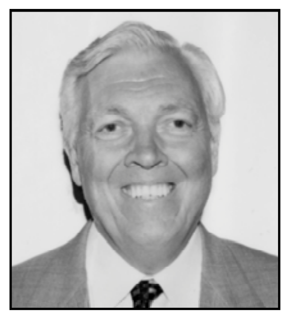
The Feeney Pit and the Pendulum: Swings in Criminalizing Securities Laws

Some thirty years ago, meetings of the multi-agency Organized Crime Strike Force in San Francisco consisted largely of listening to stories of drug raids in the Golden Triangle and other non-securities-related prosecutions. We attorneys at the SEC always referred criminal securities matters to the United States Attorney's Office in the Southern District of New York, owing to the unwillingness or inability of the United States Attorneys' offices in other districts to pursue such cases.



Robert C. Friese

How times have changed. In 2003, there were 246 securities-related prosecutions in 38 jurisdictions. During this period, the SEC has sought to bar 144 offending corporate executives and directors from holding positions with public companies. (Donaldson, Chairman of the SEC, *Senate Committee testimony re Sarbanes-Oxley* (Sept. 9, 2003).) The Justice Department budget for fiscal year 2003 included funds for 35 new assistant U.S. Attorneys to tackle corporate fraud — one-quarter of those prosecutors assigned to California. The number of prosecutors in San Francisco devoted to securities fraud increased by almost 50 percent.

This article analyzes the positive and negative aspects of this dramatic swing and makes cautious suggestions and predictions for the future.

The Sentencing Guidelines

The Organizational Sentencing Guidelines first created in 1991 accomplished Congress' goal of remedying what it perceived to be a "softness" on white collar crime by the federal judiciary, and conveyed substantial powers to

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federal prosecutors that can be used to encourage cooperation and guilty pleas from defendants. Since the guidelines often provide for extreme sentences, based largely on the amount of money lost by investors, persons not directly or knowingly involved in the alleged fraud may find themselves facing potential offense levels in the 40-plus range, translating to possible decades-long incarceration.

There is growing concern over reports of instances where individuals have materially changed their stories once offered the ability to plead to one or two counts for crimes other than the type of securities fraud at the heart of the allegations. (*See* Schacter & Stern, *Bringing Out the Rough Stuff*, 25 Nat'l L.J. No. 47 (Aug. 11, 2003) at 15.) The carrot from the prosecution is the prospect of a "downward departure" from high-term sentences no longer subject to judicial discretion, depending upon the degree of "cooperation" given by the defendant — with cooperation measured at the time of sentencing. Given the hope of probation or a year or less in prison with possibly some time in a halfway house or home detention, compared with decades in prison, the impetus to bend the truth to implicate others becomes large.

While being the first to plead guilty has always been the key to favored treatment, the extremes of the sentencing guidelines combined with the complexity of the financial issues involved in some of these cases invite injustice. The recent sentencing of Jamie Olis in the Dynegy case highlights the concern. Here, a mid-level executive who did not cooperate with the prosecution (read plead guilty and implicate others), received a 24-year sentence. (*United States v. Olis*, No. 03-CR-217-ALL (S.D. Tex., filed June 10, 2003.) Had he been sentenced for the same crime in 1999, his sentence would have been one-fourth as long. The significance of this is not to suggest that a 24-year sentence may not be appropriate under certain circumstances, but to question the repercussions of such sentencing.

The Feeney Amendment

On its face, the Prosecutorial Remedies And Other Tools To End The Exploitation Of Child Today Act of 2003 (the "PROTECT Act") is intended to intensify the penalties for child exploitation and to fund state kidnapping-alert systems like the popular Amber Alert in California. (Pub.L.No. 108-21, 117 Stat. 650 (2003).) Instead, it appears to have become an example of the doctrine of unintended consequences. These consequences stem from an add-on known as the Feeney Amendment (*id.*, 117 Stat. at 657), which in essence restricts federal judges from exercising their discretion with respect to the federal sentencing guidelines in criminal cases.

The Feeney Amendment's attempt to limit judicial sentencing departures applies to *all* federal sentencing matters, not just those involving child abduction or exploitation. (Cahill, *Tightening the Reins*, 2 ABA Journal E-Report 13 (April 4, 2003), *available* at LEXIS, ABA Library, E-Report File.) Under the Feeney Amendment "downward departures" in sentencing are now to be tracked on a judge-by-judge basis through reporting to the Department of Justice both by the Judicial Commission and by the United States Attorneys' offices. The result is potential "blacklisting" of judges deemed too lenient in their interpretation of sentencing guidelines.

The reaction to this amendment has been swift and fierce. Although the Feeney Amendment has been constitutionally upheld (*see U.S. v. Bordon*, 300 F. Supp. 2nd 1288 (S.D. Fla 2004)) (Feeney Amendment challenged in part based on the alleged violation of the Constitution's separation of powers requirement), opposition to it has been widespread and not limited to individual judges and defense counsel. The opposition includes the Judicial Conference of the United States, the U.S. Sentencing Commission and the American Bar Association. (*See, e.g.*, Letter from A. Carlton, President of the ABA, to Sen. Hatch (April 1, 2003), http://www.abanet.org/poladv/letters/108th/sent 040103.html.) This loss of discretion has led to the resignation of some federal district judges, who strongly believe that *de novo* review by the circuit courts of appeal does not give an equivalent impression of the live testimony and evidence in a courtroom. (Post, *Two U. S. Judges Fire at "Feeney,"* 26 Nat'l L. J. No. 23 (Feb. 9, 2004), at 4.)

The United States Supreme Court, in its just issued opinion of *Blakely v. Washington,* struck down the sentencing guidelines of Washington State. This decision effectively forces the courts to revisit the federal guidelines as well. It will hopefully result in more judicial sentencing discretion, while letting the guidelines guide.

Representing a Business Entity and/or an Individual

Defense counsel's strategic analysis differs substantially where a business entity is a potential defendant in addition to the individuals who may be targets. Historically, in securities-related cases, the practice has been not to indict the entity. This too is changing, leading to profound consequences to individuals when the company cooperates with the government.

The shift towards corporate cooperation can be seen in an SEC Section 21(a) report. Exchange Act Release No. 34-44969, 77 SEC Docket (CCH) 220 (Oct. 23. 2001). This report sets forth the so-called Seaboard Guidelines on cooperation, an ironic bit of publicity since Seaboard's cooperation led to a case ultimately brought only against an individual. Among the thirteen factors the SEC will consider in determining the sufficiency of the level of cooperation are whether the corporation turned over investigative information to the SEC, whether the entity distanced itself from individuals suspected of the wrongdoing, and (though not actually required) whether the corporation agreed to waive the attorney-client privilege with respect to the company's internal investigation(s) and knowledge of information concerning the suspected individual wrongdoers.

The net impact of the SEC's definition of cooperation is to make the company in effect an investigative arm of the government. This may not be a bad thing from the point

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of view of the investing public and the company itself, but certainly can wreak havoc on those individuals who find themselves abandoned (or worse) by their now former employer. In practice, such cooperation often involves bringing in separate investigative counsel — usually counsel to the audit committee — and lessening or removing the involvement of the company's regular counsel.

Apart from the waiver of attorney-client privilege issue, the effect on individuals trying to establish their innocence can be profound. This impact can start with the refusal of the employer to share information of any sort with the individual and his or her counsel. In its more extreme form, it involves willingness by the company to provide interview summaries and other information derived from its investigation to the regulatory authorities while denying access to this same information to counsel for the potential individual targets.

Adding to the complexity of the situation for the individual is the increasing inability to obtain cooperation from other defense counsel. In the current climate, one must assume that there are parallel proceedings with the SEC and the relevant United States Attorney's Office in all securities fraud cases. Defense counsel experienced in dealing with white collar criminal matters have a greater tendency to assert their clients' right against self-incrimination than do civil practitioners, resulting in limited or no information sharing. And where the criminal enforcement process results in the stay of civil discovery, individuals and their counsel may be denied their ability to obtain information necessary to present a defense.

Increasing Risk of Guilty Pleas From Inability to Fund Defense Costs

Another emerging trend is the inability to finance one's defense in a major government fraud action. While this has always been a problem for individuals and entities with limited resources, the problem is particularly acute when facing parallel proceedings brought by multiple agencies — situations frequently accompanied by civil class actions and derivative litigation.

Complicating matters further is the increasing tendency of insurance carriers not only to decline coverage, but to pursue separate proceedings seeking to establish that no coverage obligation exists. In some cases, insurance carriers return premiums with the announcement that the policy is rescinded, relying on certain exclusions now being more aggressively pursued. This is especially problematic in cases where restated financials are involved, giving the carrier the argument that it relied in issuing the coverage on a more favorable body of financial data than was in fact present.

For persons and entities without substantial resources, there often appears to be little alternative to "cooperating" when this is the only avenue to obtaining a lesser sanction or a non-prosecution commitment. Public Defenders' offices offer little comfort to individuals in such situations.

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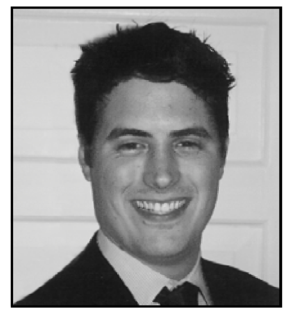
E-Discovery: The Future is Now

If you have not yet engaged in electronic discovery, you soon will. Virtually every case involves electronic documents, from e-mail to electronically stored memoranda, from correspondence to PowerPoint presentations. Your clients use redlining and editing software programs to create and edit drafts of documents, without printing hard copies. Many agreements and nearly all types of business communications are memorialized solely via e-mail. If your discovery requests or productions are limited to paper documents, you risk missing documents crucial to your client's case.

Recognizing the need for electronic discovery is just the first step. The bigger problem is getting electronic documents from your client. Despite the importance of electronic documents, a recent survey found that over half of the respondent corporations have no formal e-mail retention policies, and nearly 40% of those with electronic records retention policies do not regularly follow them. Cohasset Associates, Inc., "*Electronic Records Management Survey — A Call to Action*" (2004), available at www.MERresource.com/ whitepapers/ survey. Regardless of your client's electronic document retention policy, if electronic documents are requested, you will be required to investigate thoroughly which types of electronic documents are accessible, and then collect, review, and produce them. This article provides an overview of the key legal standards governing electronic discovery and offers practical tips on how to engage in electronic discovery.



Jason Yurasek

Legal Standards For E-Discovery

Courts continue to develop rules governing which types of electronic data are discoverable and who bears the costs of that discovery. Due to the large volume of electronic documents typically created in today's business world, the cost of e-discovery may be substantially larger than traditional discovery involving only paper documents.

What Is Discoverable? Though the legal landscape is constantly changing, several basic principles have been established. First, electronic documents are just as discoverable as paper records. *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003). Second, the general rule that "the responding party pays" likewise applies to electronic discovery, but courts will consider shifting the cost of production to the requesting party when "inaccessible" data are sought. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003); *see also Open TV v.*

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Liberate Technologies, 219 F.R.D. 474, 476 (N. D. Cal. 2003). Inaccessible data includes back-up tapes that are not organized for retrieval of individual documents or files, as well as erased, fragmented or damaged data. *Zubulake*, 217 F.R.D. at 319-20. Third, although a party is obligated to preserve relevant evidence if it reasonably anticipates litigation, it generally is not required to preserve recovery backup tapes unless they contain "accessible" data (*i.e.*, are actively used for information retrieval). *Zubulake v. UBS Warburg, LLC.*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Fourth, the requesting party has no right to access the responding party's actual computer systems without a showing that relevant documents exist that are being unlawfully withheld. *Bethea v. Comcast*, 218 F.R.D. 328, 330 (D.D.C. 2003).

What Happens When Your Client Has Deleted E-documents? Clients not only write millions of e-mails, they delete them too. Therefore, you must counsel your client on the repercussions of deleting relevant e-documents. Numerous courts have addressed the issue of whether a party should be given access to the responding party's computer system to try to retrieve deleted e-mail, and what sanctions may be appropriate. These cases demonstrate the specific obligations you are likely to face when producing electronic documents.


Victoria Wong

Recovery of Deleted Files. In *Playboy Enterprises v. Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999), defendant admitted regularly deleting e-mail during litigation. Contingent on plaintiff's ability to demonstrate a likelihood of recovering deleted e-mail, the court gave plaintiff's expert access to defendant's computer to recreate the deleted files at plaintiff's expense.

Sanctions for Failure to Comply with E-Discovery Obligations. In *Metropolitan Opera Association v. Local 100, Hotel Employees & Restaurant Employees International Union*, 212 F.R.D. 178 (S.D.N.Y. 2003), the court found defendant acted willfully and in bad faith, entered a finding of liability against defendant, and awarded attorneys' fees because defendant had, among other things: (1) failed to search all of its computers as ordered by the court; (2) falsely represented that it had fully complied with discovery requests; (3) lied about the existence of certain documents; and (4) disposed of computers after being notified the plaintiff intended to forensically examine those computers.

In *Procter & Gamble Co. v. Haugen*, 179 F.R.D. 622 (D. Utah 1998), *rev'd in part on other grounds*, 222. F. 3d 1262 (10th Cir. 2002), the court decided not to impose sanctions for P&G's deletion of relevant e-mail during litigation because there was no prior discovery order putting the company on notice of its obligations. Nor did the court find P&G guilty of spoliation. However, the court did impose sanctions for the deletion of e-mail of five employees identified by P&G in Rule 26 disclosures as having relevant information because P&G was clearly on notice as to them.

E-Discovery Roadmap

Assess Your Client's Data Practices. In every case, you need to assess your client's exposure and get ready for discovery. It is no different in litigation involving e-discovery. You will need to meet with your client to make an initial assessment regarding discovery issues, including electronic discovery.

Determine how your client conducts its daily business. How are documents created? How extensively is e-mail used? How does your client log telephone calls and appointments? Chances are your client conducts most, if not all, of its communications through electronic means.

Determine the strengths and weaknesses of your client's electronic document preservation practices. Many companies either do not have well-developed policies for preserving electronic documents or do not follow them closely. Knowing your client's practices will help you protect your client's interests when you negotiate the scope of e-discovery with opposing counsel.

Identify custodians with relevant information. Work with your client to identify custodians within the company who may possess relevant information, and notify those individuals to preserve all relevant documents. To make sure those documents are preserved, work with the client to design a document retention protocol. Methods for helping custodians retain relevant documents include creating desktop and e-mail case folders for electronic documents and e-mail, as well as a desk file for paper documents. Have in-house counsel regularly remind custodians of their continuing obligation to preserve relevant information, and check in to make sure individual custodians are identifying responsive documents and storing them in their electronic and paper case folders.

Make sure any company-wide practices are modified to ensure that relevant documents are preserved. Ensure your client both suspends any computer programs that automatically delete electronic documents or e-mail (to the extent those programs affect relevant documents) and preserves all backup tapes containing relevant information until the litigation is resolved.

Put Opposing Counsel on Notice. Preserving electronic data is of paramount importance. Once you have protected your client from inadvertently destroying its evidence, you must prevent your opponent from destroying its evidence. Therefore, immediately send notice to opposing counsel that their client is under an obligation to preserve relevant documents — especially all relevant electronic documents. This is also a good opportunity to propose to meet and confer on electronic discovery protocols and stipulations.

Prepare for E-Discovery. You next need to begin preparing your client for the electronic discovery process, which is almost certain to require significant time and effort on the part of numerous employees. Discuss the time frame and logistics for document collec-

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tion, review and production, so that the client knows what to expect. In addition, find out what obstacles electronic discovery may present for your client. For example, the opposing party may have requested files in a format that cannot readily be produced by your client. Or, your client may have proprietary software that requires special processing so that you can collect, review, and produce responsive documents.

Negotiate a Stipulation. Negotiating a comprehensive stipulation between the parties is crucial to successfully navigating the electronic discovery process. Given the sheer number of electronic documents created each day, it is in your client's best interest to negotiate and agree to limits on the scope of electronic discovery. Otherwise, discovery costs could quickly spiral out of control.

Items you should consider as part of any stipulation include the following:

(1) a date range limitation for electronic documents to be produced;

(2) a limit on the number and/or identity of custodians of electronic documents;

(3) a list of topics to limit the subject matter of electronic discovery;

(4) a list of search terms to be used to limit the collection and review of electronic documents;

(5) capturing metadata, which is "information about a particular data set which describes how, when and by whom it was collected, created, accessed [and] modified and how it is formatted" (*The Sedona Principles: Best Practices — Recommendations & Principles for Addressing Electronic Document Production*, The Sedona Conference Working Group Series, March 2003) at 42);

(6) the format of production (*e.g.*, paper, native electronic format on compact disc, .tiff format with accompanying metadata in an agreed upon software database format, or a shared web-based database);

(7) procedures for resolving disputes (*e.g.*, inadvertent production of privileged material or motions to compel);

(8) cost shifting (*e.g.*, who bears the cost of each production, and under what circumstances the parties will agree to cost-shifting); and

(9) backup tapes (*e.g.*, are they discoverable and under what circumstances will they be made available).

Collect and Review Data. In collecting and reviewing data, the first step is to identify the custodians who have the documents you need. Counsel (both outside and in-house) may be required to actually collect the documents, or you may choose to hire an outside vendor to collect and compile electronic files and set up an electronic review process. Either way, you will need to coordinate with: (1) the client's information technology and records management staff; (2) the individual custodians; and (3) client staff who handle systems security or internal audit functions. Working smoothly with each will enable you to minimize the cost and inconvenience to the client by, for example, identifying where relevant data is stored (*e.g.*, on shared servers, individual hard drives, or backup tapes). You should meet with this team of people as soon as possible to explain your objectives and goals and to set up a collection protocol. Because you will likely be dealing with a huge volume of documents, make sure you track the collection and review of documents closely.

Next, you will need to determine who will actually collect the documents. You may want to be more involved in collecting electronic documents than you usually have been in traditional discovery. For example, to accurately identify relevant electronic documents, you will likely have to conduct on-site interviews with custodians in conjunction with a vendor or the client's IT staff, who can then download files as appropriate. Absent a lawyer's prompting, individual employees are often unaware of the large volume of electronic records that their company may have as a result of everyday electronic "conversations." It is better to find this out before the employees are asked the question at deposition or, worse, on the stand.

After collecting documents, you will need to create guidelines for coding to ensure consistency in the review process. This is especially important when you are dealing with a massive amount of documents and many attorney reviewers. The more work you do at the beginning, the more smoothly your production will go. For example, a manual for document reviewers can provide guidance on how to identify responsive documents, how to handle privileged documents, how to draft privilege log entries, and whether to produce duplicate documents.

The larger the volume of documents, the more time you will need to manage each stage of document review. Allow yourself (and your opposing counsel) a reasonable time frame within which to complete the review and production process. Inevitably, you will face technical problems that will slow things down.

Tips for Successfully Managing the Electronic Discovery Process

Maintain Central Control of Organization and Decision-Making. Consistency is extremely important in electronic discovery. The process will run much more smoothly if you are able to follow a strict protocol for collecting, storing, reviewing, logging, and producing documents.

Choose Your Vendor Carefully. Because the vendor will typically be responsible for managing the collected documents, you and your client will rely heavily on the vendor's ability to meet deadlines and ensure that the document database serves all purposes required. Consider the following when selecting a vendor:

- Can the vendor meet client and court deadlines?
- Is the vendor's software user-friendly?
- Will you need access to the document database from multiple locations? (If so, you will likely want a web-based database. If not, a locally managed database should be just fine.)
- What will it cost?
- Can the vendor handle the volume of documents?
- Have any of your colleagues used the vendor in the past?

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E-Discovery: The Future is Now

Protect Privileged Information. Develop a protocol for electronically screening out privileged documents from the production through the use of search terms (*e.g.*, attorney and firm names, and the phrases "work product" and "privilege"). You can then make sure that these documents are in fact privileged by reviewing them separately.

Select the Production Format Most Advantageous to Your Client. Before choosing a production format, consider which format best suits your client's needs.

Conclusion

Electronic discovery is a reality in almost every case. By setting up a consistent, streamlined, well-controlled collection and review process, you can avoid many of the common pitfalls associated with electronic discovery. More importantly, by identifying your client's needs and using electronic discovery tools to serve those needs, you can gain an advantage over your opponent.

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Complications of Cooperating with the Government

The conflict between the requested cooperation sought by the SEC in its October 2001 report on "cooperation" and that sought by the Department of Justice gives rise to immense difficulty in deciding what, if anything, to say before or when the government calls. Deputy Attorney General Larry Thompson's January 20, 2003 memo on Principles of Federal Prosecutions of Business Organizations updates the Key 1999 "Holder Memorandum." Of particular note is the extent to which an entity's active willingness to assist in prosecution of alleged wrongs can reward the assisting entity. Relevant quotes from section VI entitled "Charging a Corporation: Cooperation and Voluntary Disclosure" of this memo highlight the issue and difficulties it presents:

> One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel.... Prosecutors may, therefore request a waiver in appropriate circumstances. The Department does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation.

Moreover, it appears now that cooperating with the government itself is not enough. In the recent criminal investigation of former executives of Computer Associates, the government pursued and the court approved guilty pleas to obstruction of justice charges based on the fact that the executives lied to lawyers hired by the company to conduct an internal corporate investigation, who then passed on the false information to prosecutors. Berenson, *Case Expands Type of Lies Prosecutors Will Pursue*, N.Y. Times, May 17, 2004, at C1, available at LEXIS, News Library, NY Times File.

Evolution of the No-Intent Crime

The onset of the Sarbanes-Oxley legislation, coupled with case law eroding traditional concepts of criminal intent, can leave targets with no clear idea of whether they have a realistic chance of defending themselves. This leads to more pleas when perhaps more trials, or even more declinations to prosecute, should be the result.

The U.S. Supreme Court enunciated the "responsible corporate officer doctrine" in *U.S. v. Dotterweich*, 320 U.S. 277 (1943) and *U.S. v. Park*, 421 U.S. 658 (1975), providing a narrow exception from the normal criminal intent standard required of the government in cases involving violations of public welfare statutes (*i.e.*, Food, Drug and Cosmetic Act). The rationale was that "penalties commonly are relatively small [for violating these statutes] and conviction does no grave damage to an offender's reputation." *Morissette v. U.S.*, 342 U.S. 246, 256 (1952).

Now, the Sarbanes-Oxley Act requires CEOs and CFOs of public companies to certify that certain reports filed with the SEC fairly present the financial condition of the company. 15 U.S.C.A. § 17241; 17 C.F.R. §§ 229.302 and 229.308. This certification requirement and others like it in the Act essentially greatly expand the responsible corporate officer doctrine by requiring the corporate officer, in effect, to agree in advance to abandon a "lack of knowledge" defense.

Conclusion

We are now observing two pendulum swings: one toward increasing difficulty and risk for entities and individuals asserting legitimate defenses that could lead to declinations to prosecute (but not necessarily avoiding civil fraud allegations by the SEC); and the other toward a growing realization that unfairness and possible violation of constitutional rights may be involved. The securities enforcement function at both civil and criminal levels should consider the perfect storm created for potential targets by joint proceedings and extreme but differing agency interpretations of what constitutes cooperation.

Traditionally, the enforcement agencies looked to defense counsel for assistance in performing their roles, correctly citing limited resources and the need for such assistance. When the stakes become as high as they are at present, however, much of this assistance is lost behind assertion of the Fifth Amendment privilege. The broad adverse reaction to the Feeney Amendment, and juror reluctance to convict in complex accounting cases, may be harbingers of at least a swing back to a slightly less aggressive posture, where civil penalties or lesser criminal sanctions would suffice. This may be a more appropriate

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WALTER STELLA

On EMPLOYMENT

With the recent upturn in the economy, companies are beginning to hire again. As employee mobility increases, so do employer concerns about protecting valuable company assets when employees leave to join other companies. To address these concerns, many employers rely on post-termination restrictive covenants to limit employees' competitive activities. California strictly limits the enforceability of these agreements.

As restraints on trade, covenants not to compete are generally unenforceable, unless necessary to protect an employer's trade secrets. California Business & Professions Code Section 16600 ("Section 16600"); *see, e.g., Metro Traffic Control, Inc. v. Shadow Traffic Network*, 22 Cal. App. 4th 853, 859 (1994). One common misconception among employers is that "trade secrets" include all the information that might be considered proprietary and confidential information under standard non-disclosure agreements. In reality, a trade secret is more narrowly defined. It must derive "independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use" and be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." California Civil Code § 3426.1(d).

Even if the information is clearly a trade secret, proving that a former employee has disclosed it to a new employer can be difficult. Some federal courts outside California have adopted a theory commonly referred to as the "inevitable disclosure" doctrine. Under this doctrine, the former employer need not show that trade secrets have actually been disclosed, but rather that the new job will necessarily require the former employee to rely on trade secrets. *PepsiCo, Inc. v. Redmond*, 54 F. 3d 1262 (7th Cir. 1995).

State and federal courts in California have consistently rejected this doctrine as inconsistent with Section 16600. *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1460 (2002); *see also GlobeSpan, Inc. v. O'Neill*, 151 F. Supp. 2d 1229, 1231 (C.D. Cal. 2001); *Bayer Corp. v. Roche Molecular Sys.*, 72 F. Supp. 2d 1111, 1120 (N.D. Cal. 1999). Therefore, a California employer must be prepared to demonstrate an actual or threatened misappropriation of its trade secrets if it wants to prevent an employee from working for a competitor.

Another common misconception is that non-solicitation covenants, which prohibit a former employee from bringing former co-workers or customers to the new company, fall outside the scope of Section 16600. While these types of covenants may, in fact, be less restrictive, California courts have been reluctant to enforce them unless they are necessary to protect an employer's trade secrets or prevent unfair business practices from occurring.

This proposition was recently reinforced by the California Court of Appeal's holding that covenants restricting the solicitation of customers are enforceable only when necessary to protect an employer's trade secrets. *Thompson v. Impaxx, Inc.*, 113 Cal. App. 4th 1425 (2003). Impaxx fired Mr. Thompson for refusing to sign an agreement that restricted his ability to solicit its customers for a period of one year after his employment ended. Thompson sued Impaxx for wrongful termination in violation of public policy and claimed the non-solicitation clause was an unenforceable restrictive covenant that violated Section 16600. The California Court of Appeal held that Impaxx's non-solicitation clause was enforceable only if it was necessary to protect the company's trade secrets. It directed the trial court to determine whether Impaxx's customer list was, in fact, a trade secret.

The enforceability of provisions barring solicitation of former co-workers is also questionable. In *Loral Corp. v. Moyes*, 174 Cal. App. 3d 268 (1985), the only published opinion on the subject, the court upheld an agreement that restrained ex-employees from "raiding" their former co-workers. It is unclear whether the case stands for the proposition that agreements prohibiting the solicitation of employees in non-raiding cases are valid under Section 16600. At least one court in an unpublished opinion has held that they are not. In *Liberty Mutual Insurance Company v. Gallagher & Company*, No. C94-3384 MHP, 1994 U.S. Dist. LEXIS 18412 (N.D. Cal. Dec. 19, 1994), the federal district court analyzed California law and concluded that Section 16600 prohibits enforcement of all restrictive covenants, including non-solicitation clauses. The court found that the only exception to that broad prohibition is when the challenged activity constitutes unfair competition, such as the unauthorized use of trade secrets or confidential information.

Walter Stella

Thus, to obtain the maximum enforceability, California employers should draft restrictive covenants to protect trade secrets. To protect other proprietary or confidential information, employers should have employees execute agreements not to use or disclose this information. These non-disclosure agreements will not prevent an employee from going to work for a competitor, but they will provide a remedy in the event sensitive information is improperly revealed to the new employer. To further safeguard proprietary information, employers should instruct employees about appropriate use and disclosure of such information, limit who has access to it, and conduct exit interviews to remind employees of their continuing obligations to safeguard the company's proprietary information.

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approach than expending time and resources to present claims based on obstruction of justice or other claims not specifically identified as violations of the securities laws.

While the current environment is understandable in light of the many excesses of recent years, it should not blind us to the reality that lives are destroyed when the criminal and civil securities regulatory processes emphasize efficiency at the expense of fairness. Good and effective prosecution hinges not only on counting the number of consents, pleas and convictions. It also depends on making sure that individuals and their counsel are not so constrained from presenting their positions that justice is lost.

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Making Sense of "The General Public"

als." *People v. Eubanks*, 14 Cal. 4th 580, 589-590 (1996). Not so. Currently, a private plaintiff bringing claims under the UCL might also represent: (1) "the general public," but in a way that is "fundamentally different" from an otherwise identical claim brought by a government entity, *Net2phone v. Superior Court*, 109 Cal. App. 4th 583, 587 (2003); (2) "the general public" as a whole when seeking injunctive relief, but only the injured members of "the general public" when seeking monetary relief, *Cruz v. PacifiCare*, 30 Cal. 4th 303, 316, 319-320 (2003); or (3) only the injured members of "the general public" as defined through class certification, *Corbett v. Superior Court*, 101 Cal. App. 4th 649 (2002).

Depending on the circumstances, "the general public" has been treated as:

- The general public as an indivisible whole (the "Attorney General" approach);
- The injured members of the general public without formal class certification (the "De-facto Class" approach);
- The general public as a whole for injunctive relief but the injured members of the general public for monetary relief (the "Relief-based" approach); or
- The named plaintiff (the "Individual Plaintiff" approach).

These unspoken definitions of "the general public" mark some of the fault lines within the UCL.

Standing

A private plaintiff asserting a UCL claim on behalf of the general public in state court does not need to meet traditional standing requirements. This reflects an Attorney General approach and makes sense if the plaintiff truly represents the general public as a whole. It might be re-thought by the Legislature or the appellate courts if a UCL plaintiff really represents only the injured members of the general public.

Typicality, Adequacy and Competency

A named plaintiff asserting a representative UCL claim retains complete control over the litigation (an Individual Plaintiff approach) even though he or she represents the general public. There is no institutionalized judicial oversight to ensure the general public is represented adequately.

This may be changing. In *Kraus v. Trinity Management Services*, 23 Cal. 4th 116, 138 (2000), the California Supreme Court held that a trial court can dismiss a representative UCL claim if a defendant demonstrates the plaintiff is not competent to represent the affected members of the general public. Any competency analysis would probably borrow from the typicality and adequacy requirements familiar to class actions. Notably, if a UCL plaintiff truly represents the general public, then perhaps he or she need only be typical of the general public, not the injured persons. Also noteworthy is that defendants have the burden of proof to demonstrate that UCL plaintiffs are not competent to represent the general public whereas class representatives have the burden of demonstrating that they are competent to represent absent class members.

The competency analysis is not well established, as reflected in *Rosenbluth International v. Superior Court*, 101 Cal. App. 4th 1073 (2002). In that case, the defendant filed a motion for summary judgment asserting that the plaintiff was not competent to represent the general public. The court took a De-facto Class approach, presumed that the UCL claim concerned only the alleged victims (all large corporations), and suggested that the plaintiff (a private citizen) was not an adequate representative of the corporate victims. Then, instead of holding that the plaintiff did not represent the corporate victims adequately, the court held that the corporate victims were not members of the general public, and granted the motion for summary judgment on that basis. *Id.* at 1077-79. The dissent would have denied the motion for summary judgment based on procedural grounds, but took an Attorney General approach to the nature of a representative UCL claim and suggested that "the general public" includes the interests of individuals, small businesses, and large corporations. *Id.* at 1081.

Contractual Restrictions on Access to the Courts

Individuals may limit their access to the courts through contractual agreements regarding arbitration, venue selection, choice of law, and other matters. If an individual bound by such an agreement brings a claim on behalf of a class then the agreement can determine the rights of the class members. *Sanders v. Kinko's*, 99 Cal. App. 4th 1106 (2002). In contrast, when a government entity brings an action on behalf of the general public, the government is not bound by contractual agreements entered into by the affected members of the general public. *EEOC v. Waffle House*, 534 U.S. 279 (2002) (EEOC not bound by arbitration agreements signed by injured employees); *Net2phone, supra*, 109 Cal. App. 4th at 587 (public prosecutors asserting UCL claims not bound by forum selection clauses).

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PETER BENVENUTTI

The Supreme Court's decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), interpreted the Eleventh Amendment, which prohibits any "suit" in federal courts against a State by "Citizens of another State, or by Citizens or Subjects of any Foreign State." *Seminole Tribe* found that the Eleventh Amendment barred all actions against a nonconsenting State, including actions by that State's own citizens. The decision also created considerable confusion about bankruptcy court jurisdiction — confusion which has now been clarified, to an extent, by the Court's recent decision in *Tennessee Student Assistance Corporation ["TSAC"] v. Hood*, — U.S. —, 124 S.Ct. 1905 (May 17, 2004). Though *Hood* concerned an individual debtor, its holding and reasoning should apply equally to business bankruptcies.

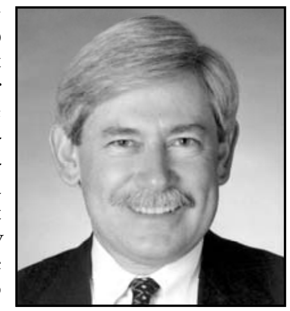
The current bankruptcy laws seek to centralize in the federal bankruptcy courts substantially all proceedings concerning the debtor's discharge from debts and administration of the bankruptcy estate. The Constitution provides that "Congress shall have power…[t]o establish…uniform Laws on the subjects of Bankruptcies throughout the United States." U.S. Const. Art. 1, § 8, cl. 4. Under this authority, the federal district courts are granted, and have delegated to the bankruptcy courts, exclusive jurisdiction over bankruptcy cases and property of bankruptcy estates [28 U.S.C. § 1334(a) & (e); 28 U.S.C. § 157(a)]. That jurisdiction is enforced by the automatic stay [18 U.S.C. § 362], which voids any acts that violate the stay, and subjects any knowing violation of the stay to statutory and contempt sanctions. The bankruptcy courts exclusively decide whether to grant or deny the debtor a discharge of indebtedness. They also have jurisdiction, exclusive in some circumstances and concurrent in others, to determine whether particular debts are excepted from discharge under 18 U.S.C. section 523.

The bankruptcy court's exclusive authority can conflict with acts taken by state governments. States, including state agencies and many other state-created entities — such as taxing authorities, creditors in other capacities, and regulators — frequently hold or assert interests which affect and are affected by a bankruptcy case. In each role, a state may take a position adverse to the bankruptcy trustee or debtor, posing the question whether, in light of the Eleventh Amendment, the bankruptcy court has authority to decide the dispute without the state's consent.

After *Seminole Tribe*, lower federal courts grappled with the issue of the bankruptcy court's power over "States," producing a variety of answers. For example, in *In re Mitchell*, 209 F. 3d 1111 (9th Cir. 2000), the Ninth Circuit held that the bankruptcy court lacked jurisdiction to decide the debtors' request to determine the amount and dischargeability of their state tax debt, reasoning that the Eleventh Amendment and *Seminole Tribe* preclude any lawsuit against a nonconsenting state. In the Ninth Circuit's view, requiring the state to respond to an adversary proceeding complaint filed and served against it subjected the state to *in personam* jurisdiction of the bankruptcy court. This made the Eleventh Amendment applicable even though the action did not seek affirmative monetary relief from the state.

Other lower courts have reached a different result. The Sixth Circuit, on the theory that the Constitution's "uniform bankruptcy laws" clause reflected an agreement by the States to cede to Congress their sovereignty over bankruptcy matters, held that TSAC (a state-equivalent agency) could be required to litigate in bankruptcy court over whether student loans could be discharged. *Hood v. TSAC*, 319 F. 3d 755 (6th Cir. 2003). The Supreme Court granted certiorari to review this question and affirmed, but on different reasoning.

Without deciding whether the Bankruptcy Clause empowers Congress to abrogate state sovereign immunity, the Court concluded that the discharge of a debt in bankruptcy is an *in rem* proceeding based on the bankruptcy court's possession of the *res* (the bankruptcy estate) and its power to resolve claims against that *res*, and that this exercise of power does not infringe state sovereignty. The Court also rejected an argument advanced in Justice Thomas' dissent (substantially the same argument adopted by the Ninth Circuit in *Mitchell*) that the summons, complaint and adversary proceeding procedure employed by the *Hood* debtor was such an affront to Tennessee's sovereignty as to be regarded as a "suit" for Eleventh Amendment purposes. Instead, the Court held that these procedural steps were irrelevant, and did not alter the *in rem* nature of the proceeding.



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Hood is a narrowly drawn decision. The Court explicitly did not decide whether the Eleventh Amendment would permit the bankruptcy court to *enforce* the discharge injunction against a state or that "every exercise of a bankruptcy court's *in rem* jurisdiction" against a state will pass Eleventh Amendment muster. The Court also explicitly noted that TSAC would, on remand, be free to challenge the bankruptcy court's authority if it "exceeds its *in rem* jurisdiction."

Hood provides some answers for judges and practitioners concerning the bankruptcy court's authority to decide disputes with state agencies, but raises additional questions as well. Most significantly, what is the scope of the bankruptcy court's *in rem* jurisdiction? Does it encompass determination of a debtor's tax liability, independent of dischargeability? To what other exercises of *in rem* jurisdiction by federal courts does the *Hood* holding apply? Quiet title actions? Receiverships? And, when confronted once again with the question on which it granted review in *Hood*, how will the Court resolve the conflict between the Bankruptcy Clause and the Eleventh Amendment? Stay tuned for the Court's next pronouncement on this subject.

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Appellate courts go in all directions when determining whether contractual limits apply to representative UCL claims. In *Cruz*, 30 Cal. 4th at 315-320, the court took a Relief-based approach and held that representative UCL claims seeking injunctive relief are in the public interest (an Attorney General approach) but claims seeking monetary relief further private interests (a De-facto Class approach). Accordingly, the court held that claims for injunctive relief were not subject to arbitration but claims for monetary relief were subject to arbitration. Justice Chin's dissent took an Individual Plaintiff approach and reasoned that if a plaintiff has signed an arbitration agreement then he/she must arbitrate all claims where he/she is the named plaintiff. The dissent suggested, however, that the real Attorney General (or "any member of the general public who had not signed the arbitration agreement") could assert the same claims in the interest of the same general public and would not need to arbitrate those claims. *Id.* at 341.

In *Net2phone*, 109 Cal. App. 4th 583, issued six weeks after *Cruz*, the court took a De-facto Class approach, found that the named plaintiff (which had not signed the relevant contract) stood in the shoes of the parties to the relevant contract, and enforced a forum selection clause for both injunctive and monetary claims. The dissent suggested an Attorney General approach and reasoned that the forum selection clause should not be enforceable because the plaintiff was "acting on behalf of the general public, rather than only for any group of Net2Phone customers." *Id.* at 596.

None of these opinions addressed whether the named plaintiff signed the relevant agreement in his or her individual capacity or as one with authority to bind the general public. Generally, a person who signs an arbitration agreement in one capacity cannot be compelled to arbitrate claims they bring in another capacity. *Benasra v. Marciano*, 92 Cal. App. 4th 987, 990 (2001). Thus, representative UCL claims arguably should not be subject to procedural limitations unless someone with authority to represent the general public has agreed to the limitations.

Class Certification

The role of class certification in representative UCL claims is baffling. If one takes an Attorney General approach there is no need to certify a class. *General Tel. Co. v. E.E.O.C.*, 446 U.S. 318 (1980) (EEOC claims in the interest of the public do not require class certification). If one takes a De-facto Class approach and certifies a class defined as "the injured members of the public," then the claim is no longer truly in the interest of "the general public."

Many cases have taken a De-facto Class approach and certified classes to pursue UCL claims. *Corbett, supra*. Rather than continually redefining "the general public" with each class certification order, these cases could be read as holding that when a court certifies a class to pursue a UCL claim, the UCL claim ceases to be on behalf of the general public and becomes an individual UCL claim; the court then certifies the plaintiff to represent a class of similarly situated individuals each of whom is asserting an individual UCL claim. This approach would also avoid the logical (but untested) notion that the class definition for every UCL claim in the interest of "the general public" must necessarily include all 35 million California residents.

Relief

If one takes a strict Attorney General approach, then representative UCL claims should focus on providing public benefits. Following the distinctions suggested by *Cruz*, perhaps the primary relief awarded in representative UCL claims should be injunctive, and courts should let private parties pursue monetary relief through individual claims or class actions. In contrast, under the De-facto Class and Relief-based approaches, affording benefits to the injured members of the general public is as important as obtaining benefits for the entire general public.

Settlement

Representative UCL claims can be settled without court approval and in confidence. This is an Individual Plaintiff approach that gives private plaintiffs complete control over the resolution of public claims. In contrast, court approval is required to settle Proposition 65 claims in the public interest, class claims on behalf of absent class members, and derivative claims on behalf of corporations. Health and Safety Code section 25249.7(f)(4); C.R.C. 1859; *Gaillard v. Natomas*, 173 Cal. App. 3d 410, 419 (1985). UCL claims brought by public prosecutors do not require court approval but are generally of public record. There is little case law on the settlement of representative UCL claims, presumably because the parties are satisfied with their settlements and never inform the general public that claims have been resolved on its behalf.

Res Judicata

Wonderland is in stark relief when considering the res judicata effects of representative UCL claims.

Under an Attorney General approach, the resolution of a UCL claim should preclude any subsequent UCL claim. For example, if Dan Lungren (or the Trevor Law Group representing the general public) brought and lost a UCL claim, that result arguably should bind Bill Lockyer or anyone else who represents the public. *Citizens for Open Access to Sand and Tide (COAST) v. Seadrift Assn.*, 60 Cal. App. 4th 1053, 1073, fn 12 (1998). This approach is problematic because there is no mechanism to assure the general public (through the Attorney General, court supervision, or otherwise) that representative UCL claims are prosecuted competently or settled in good faith.

Under the De-facto Class approach, a representative UCL claim becomes indistinguishable from a class action and should preclude subsequent individual claims. *COAST*, 60 Cal. App. 4th at 1073 ("Where…authority to pursue public rights or interests in litigation has been given to a public entity by statute, a judgment rendered is res judicata as to all members of the class represented.") Absent formal class certification, this approach is prob-

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MARY MCCUTCHEON

A public company restates its financial statements. Its stock drops, and shareholders file suit against the company and its directors and officers. The company's Directors' and Officers' Liability Insurer claims that it relied on those financial statements in issuing its policy and, because a restatement acknowledges that those statements were materially false, that it is entitled to rescind the policy. In fact, according to the D&O insurer, it can unilaterally rescind the policy without resorting to any legal process.

Thus, even though no court has sanctioned the rescission, the insurer refuses to pay for defense costs incurred in the ensuing civil, regulatory and criminal proceedings. Bad news for the company, which is faced with exorbitant defense bills in the midst of a financial crisis. Even worse news for individual directors and officers if the company declares bankruptcy and the individuals must bear these costs on their own.

Until recently, D&O insurers felt confident taking this position because their policies contain language describing their obligations as a duty to advance or reimburse defense costs (a "duty to pay"), rather than the "duty to defend" provision typically found in general liability policies. They contend that this difference absolves them of the obligation imposed on a general liability insurer to defend a claim even when coverage is in doubt. Recent decisions, however, have blurred the distinction between "duty to pay" and "duty to defend," by holding D&O insurers responsible for advancing defense costs even when the insurer contends that rescission or other coverage defenses preclude coverage for the loss.

In *Associated Electric & Gas Services, Ltd. v. Rigas*, 2004 WL 540451 (E.D. Pa. March 17, 2004) ("Rigas"), former officers and directors of Adelphia Communications Corp. sought advancement of defense expenses under their D&O policies. Adelphia's D&O carriers refused to advance defense fees on the grounds that the policies were "unilaterally" rescinded and certain exclusions precluded coverage. In a declaratory relief action brought by Adelphia's D&O carriers, the *Rigas* court required them to pay defense expenses incurred by the insureds before adjudication of the merits of the insurers' rescission and exclusion claims. The court reasoned that if the D&O carriers had wanted to reserve payment of defense expenses they could have done so through plain language in the policy. The *Rigas* court stated: "Insurance carriers do not function as courts of law. If a carrier wants the unilateral right to refuse a payment called for in a policy, the policy should clearly state that right. This policy does not do so." *Id.* at *15.

Similarly, in *Federal Ins. Co. v. Tyco Int'l Ltd.*, Supreme Court of the State of New York, No. 600507/03 (March 5, 2004) ("Tyco"), the court granted Tyco's former president Dennis Kozlowski's motion for partial summary judgment, providing him with a defense or advancement of his defense expenses in the widely-publicized, pending civil and criminal suits against him. In reaching this conclusion, the *Tyco* court rejected the D&O carrier's assertion that its "unilateral" rescission or pending declaratory relief action excused its duty to defend and/or advance defense costs. The *Tyco* court reasoned that until a court determines an insurance policy may be rescinded, the policy requires payment of defense expenses:

> [U]ntil Federal's rescission claims are litigated in its favor and the Policies are declared void *ab initio*, they remain in effect and bind the parties. Federal contends that these cases [cited by the Tyco court] are inapposite because they do not address the "insurer's right of unilateral rescission"… According to Federal, the circumstances of this case differ because Federal had "unilaterally" rescinded the Policies by delivering the Rescission Letter and returning Kozlowski's premium. However that difference is irrelevant: the cited cases and this action are materially alike in that all the insureds have challenged whether the insurers validly can rescind their policies, and have sought an adjudication finding the policies valid and binding and directing the insurers to perform under them.

Mary McCutcheon

Id. at 7-8.

In other words, rescission did not entitle the insurer to withhold defense payment any more than any other type of coverage dispute under the policy.

Essentially these cases equate the "duty to pay" with the "duty to defend." Their reasoning is consistent with California law, as they rely on 9th Circuit cases addressing the "duty to pay" legal costs in the event of coverage disputes. These cases offer protection to individual insureds entangled in coverage disputes (often unrelated to their own conduct). They also provide powerful leverage to force insurers to participate in settlement of claims, to avoid the exposure for future defense costs. According to *Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th 287, 301 (1993), an insurer is not allowed to litigate coverage issues which impact the underlying liability during the pendency of underlying actions. Thus, the insured can forestall efforts by the insurer to bring declaratory relief pending the determination of the underlying liability claim.

These decisions should prevent an insurer from merely walking away from its insureds, hoping that, somehow, the lawsuit is resolved without its assistance.

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lematic because the absent members of the public have no protection against incompetent prosecution or collusive settlements.

Under the Relief-based approach, the nature of the relief obtained in the first action determines the application of res judicata. *Payne v. National Collection Systems, Inc.* 91 Cal.App. 4th 1037, 1044-47 (2001), suggests that a prior UCL claim bars subsequent claims for injunctive relief but does not bar subsequent claims for monetary relief. This approach is problematic because the res judicata effect of a prior judgment should be tied to the claims asserted, not the relief obtained. *Gates v. Superior Court*, 178 Cal. App. 3d 301, 309 (1986).

Under the Individual Plaintiff approach, the results of prior claims would not preclude any future claims. This would be consistent with the suggestion in *People v. Casa Blanca Convalescent Homes*, 159 Cal. App. 3d 509, 531-32 (1984), that several different state entities may simultaneously or sequentially pursue claims regarding the same conduct. The due process concerns of defendants make this approach problematic.

Finally, the courts could take a case-by-case approach and examine the nature of the claims asserted (consumer/competitor), the alignment of the parties (public/private), and the competence of the representation in the first action. This would require inquiry into whether the prior UCL claims were "public" or "private" in nature. *City of Martinez v. Texaco Trading & Transp.*, 353 F. 3d 758 (9th Cir. 2003) (distinguishing public and private claims arising from the same set of facts). This would also require the defendant to establish in the second action that the first action was litigated competently rather than making that determination in the first action (as in class actions). The case-by-case approach does not provide much predictability.

Ultimately, no approach to the res judicata question is satisfactory. This is unfortunate because courts can expect to see more of this defense in the future.

Summary

March Hare: I have an excellent idea, let's change the subject.

Lewis Carroll, *Alice's Adventures in Wonderland*

Changing the subject within the context of the UCL provides no comfort — it only expands the conundrum. The appellate courts are struggling to develop a uniform approach to the UCL while still respecting the divergent case law. Dissents are common.

Were the Legislature inclined to re-visit the UCL, it might begin by considering why we have class actions, private UCL actions in the interest of the general public, and government enforcement actions, and what each these related processes is intended to accomplish. Legislation harmonizing Code of Civil Procedure section 382 on class actions, Civil Code section 1781 on class actions (Consumer Legal Remedies Act), and Business and Professions Code section 17204 would bring needed clarity. Private UCL claims in the interest of "the general public" might be distinguished from class actions and government UCL actions. A class action statute similar to Federal Rule 23 might articulate class action standards and clarify whether lower certification standards apply for class actions pursuing injunctive relief only.

Failing a legislative solution (a virtual certainty), appellate courts will continue laboring case-by-case to further define "the general public" under the UCL. In this environment, lawyers litigating representative UCL claims will serve their clients and the law well by clearly addressing the issues implicated by claims brought on behalf of "the general public."

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