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abtl REPORT

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Compression Algorithm: Big Date in Small Courtrooms

A Santa Clara judge (now on the court of appeal) asked me and my then fellow lawyers how many exhibits we had for our jury trial. One of us said he had 250,000 exhibits. The judge replied, "no, you don't."

Hon. Curtis E. .A. Karnow

Lawsuits are born in the world, but they are resolved in court. The world is a big place with an infinite amount of information, but courtrooms are small and hold only a few facts. So paring a case to its essentials—the convincing essentials—is the central skill of trial counsel.

But trial lawyers spend much of their time, actually, in pretrial work; and the pivot from pretrial work to trial work is difficult. It is difficult because pretrial is usually designed to sweep up everything one can from the world that might conceivably relate to anything that might conceivably be useful. Preparing for trial on the other hand is tossing it all—almost all—out. And it's not just preparing for trial—it's

Continued on page 2

Also in This Issue

To Brief, Or Not To Brief- That is the Question

Not infrequently, an appellate court concludes that the parties have neglected a critical issue or framed it incorrectly, causing the court to consider deciding the case on a basis neither side advocated. That can be disconcerting to the parties, to say the least, and raises important issues for courts and advocates.

Justice Elizabeth A. Grimes

The inclination to decide a case based on a court-generated theory seems deep rooted and has been the subject of controversy for some time. Bernard E. Witkin approved the practice in his 1977 Manual on Appellate Opinions: "The conventional theory is that an opinion should determine points raised by the parties and that it is wrong to inject new issues or apply legal principles neither urged nor mentioned by counsel. But the function of the appellate court is to decide the case, not to judge a debate between counsel; and, if an issue arises from the facts of the case, or if a legal principle may decide it, it may be considered even though it was overlooked or deliberately ignored by the parties." (Witkin, Manual on Appellate Court Opinions (1977) § 85, pp. 154-155.)

But he also acknowledged the "not unfamiliar complaint of a litigation lawyer" that courts should avoid unnecessarily injecting new points, quoting Moses Lasky: "A judge or a court has been awaiting a case in which to convert a pet notion into law or to denounce an aggravation. Along comes an actual controversy which hazily resembles what is needed for the purpose. It is seized upon, an opinion is rendered, and as a result the case described in the opinion is not what the parties thought

Continued on page 6

Continued from page 1

Compression Algorithm

every court motion and appearance. While there are endless backdrops, explanations and ramifications for one's position in court, we do not have weeks to argue, and we do not have page limits of five hundred.

II

We compress audio and photos into relatively small files on our computers; lawyers need compression algorithms, too. I'll mention a few stalwarts, and then focus—just as algorithms do for audio and video files—on numbers; on statistics.

Stalwarts include summaries of voluminous documents—introduced instead of the underlying items. Parties provide the summaries and underlying document to the other side in plenty of time to have all agree the summary is accurate. Fact stipulations should be used. There is (almost) no excuse to have witnesses appear to authenticate things: the parties should agree, or one should have used a request for admission and so perhaps make the recalcitrant side pay for insisting on the witness's appearance. Pretrial, the judge reviews the wide variety of summaries available—graphs, charts, timelines and so on, to ensure they are not misleading (misleading charts might be the subject of a separate note) and are otherwise unobjectionable. Documents that must be introduced are as thin as possible: the cover page, the key passages, and the minimum needed for context.

This is routine; or should be routine. The undiscovered country here, though, is statistics. A statistic is number about the whole world—but it fits inside a courtroom.

As basic knowledge on electronic discovery has become essential over the last 20 years, so too I suggest that statistical literacy now should be thought of as a basic legal skill. It's a powerful tool. Misused, statistics powerfully mislead. If lawyers and judges do not understand these numbers, the legal process is bilked.

Statistical literacy is essential for many class actions, including most of the wage and hour ones. Statistics are useful for many damages calculations and in some cases, such as some antitrust cases, they are essential. They are often required to show defendants' wrongdoing in securities fraud cases. They are the bedrock of much expert testimony on the impact of drugs and medicines, all epidemiology; and the existence of and impact of discrimination. Statistical analysis is the key predicate supporting the expert use of DNA, fingerprints and other identification evidence such as soil, hair, tire tracks, blood splatter, questioned document analysis, ballistics, and forensic odontology. Statistics are often used to justify legislation in the face of a constitutional attack.

Here's one way to think about the power of statistics: if the evidence is about anyone other than an individual—it may depend on statistics. And so a lot we think we know, actually based on anecdotal evidence, isn't true. There's bad science on the effect of drugs, foods, alcohol, cell phones and high voltage wires, immunization, teaching methods, and on and on. The airwaves, landlines and traditional media are filled with bad inferences, correlation confused with causation, fake correlations, cherry-picked data, and other 'studies' without substance.

We'd like to think our touted adversarial system will find the flaws when this stuff is used in court. Maybe not. The problem is not just with the popular press and its electronic cousin the web. Serious scientists make mistakes too. Peer reviewed scientists. There are a lot of mistakes; basic ones. (There is a vast literature on this, some of which I collect in my annotated reading list found at https://works.bepress.com/curtis_karnow/26/. For some immediate examples see e.g., http://www.statisticsdonewrong.com/mistakes.html; http://www.economist.com/news/briefing/21588057-scientists-think-science-self-correcting-alarming-degree-it-not-trouble.) So who will catch the problems? Not the jurors. If judges and lawyers don't catch the problems, very bad things—such as being unjustly convicted of first degree murder—happen. Details on six classic cases, and some plain English background on statistics and probability, are found in my paper "Statistics In Law: Bad Inferences & Uncommon Sense," at https://works.bepress.com/curtis_karnow/4/.

III

How much statistical literacy do we need? We're not the experts. We don't have to pass a test. As lawyers we need to be able to work with our experts to create a framework for direct, and to cross the other side's experts. Judges are entitled to rely on the parties to educate them in the context of, for example, an in limine motion to exclude evidence, and to keep the other side honest.

But we ought to have at least a visceral feel for a few basic notions. As Vanderbilt's Professor Cheng urges in his battle against what he calls legal innumeracy, "All of us, regardless of background, are capable of understanding at a conceptual level how various statistical techniques work and why the resulting inferences are valid." Edward K. Cheng, "Fighting Legal Innumeracy," 17 GREEN BAG 2D 271 (2014).

Test yourself. Do you have at least a general sense of what these terms refer to: random sampling error; mean; standard deviation; confidence level; confidence interval (margin of error); p values; regression analysis? If not, it's worth looking around for instruction or self-education perhaps starting with the sources in the

Continued on page 3

Continued from page 2

Compression Algorithm

annotated reading noted above.

To end this note, I list a few issues which, in some cases, might red-flag a problem with an expert report or study presented in court. I draw from a variety of sources, including California and other cases.

Does the research actually measure the effect at issue? Or is the research looking at only a proxy for the effect, making assumptions about the strength of the analogy or model? For example, is the effect of a drug on human cancer being measured in a mouse study? Is a conclusion on milk prices actually based on a general dairy or broader category of food product prices? The analogy might be valid—but it probably depends on the validity of some other study.

Are conclusions limited to the population from which the data were actually gathered?

Were samples chosen from the population truly at random? Might the samples have been biased, and if so, how was the bias corrected? Some polls tend to use landlines, but much of the population uses cell phones; querying readers of newspapers won't reach those who get their news from the internet.

Did the sample self-report, was it made up of volunteers? Such a sample might be biased.

Does the study provide confidence levels or margins of error? Confidence intervals? Are those acceptable? Studies with enormous margins of error—or, worse, none reported—are useless.

Is there a good basis for the assumptions on population variability? Was there a pilot study done to determine this? Populations with high variability, for example employees with a wide range of hours (many categories of data) require a larger sample size than populations with little variability, such as voters who will opt for only one of two candidates (which is only two types of data).

How certain are the underlying measurements? How vague or equivocal are the responses?

Does the study explain or distinguish practical significance, and effect size, as compared to 'statistical significance'? Does it need to?

Does the study justify the size of the sample based on e.g., variability in the population, margin of error and confidence levels?

Continued on page 8

JAYNE LAIPRASERT

Business as Usual:

Email Evidence and the Business Records Exception in the Ninth Circuit

At a time when businesses are increasingly utilizing more ephemeral methods of communication such as chat, text, and instant messaging, email has become the standard form of business communication. Indeed, cases where companies do not use email for everyday business are the exception rather than the norm. Despite that, many practitioners still find to their dismay that sometimes even though a business communication is an email, it is not automatically admissible as a business record. In its very omnipresence, email poses a unique challenge because it encompasses a wide variety of types of communications, from formal reports and memorandums, to off-the-cuff, casual bantering among employees. As such, judges frequently question the trustworthiness of business emails. The challenge to the modern practitioner seeking to admit business emails, is in determining how to best alleviate those concerns.

Jayne Laiprasert

As recent federal cases demonstrate, cautious counsel can surmount this obstacle by establishing certain hallmarks of trustworthiness to satisfy the business records exception, asking *inter alia*, whether the author has the requisite knowledge to support the emailed statements, and whether the organization has a coherent business email practice.

Consider three different emails offered in a hypothetical contract dispute between a "Mom & Pop" small business (plaintiff) and its manufacturer WidgetCo (defendant) regarding the interpretation of an ambiguous contract scope provision:

The first, and most common, case involves emails between internal and external parties. For example, plaintiff's counsel seeks to admit Email #1 from WidgetCo's VP to Mom confirming the contract terms the parties have agreed to. The executive's statement would be admissible against WidgetCo since it is a statement by a party-representative offered against that party; admissions by a party opponent do not constitute hearsay. Fed. R. Evid. 801(d)(2).

Federal law provides for the admissibility of out-of-court statements under a variety of other circumstances,

Continued on page 4

Continued from page 3

Business as Usual

including to show the declarant's state of mind. Fed. R. Evid. 803(3). An email summarizing matters that were discussed during a particular event or meeting could also be offered to circumstantially demonstrate that the event or meeting occurred. Fed. R. Evid. 803(3). Alternatively, an email may be offered to establish the effect the email had upon the recipient, or, even more fundamentally, to show that the email has actually been sent or received by a specific party. Fed. R. Evid. 801(c).

• Emails Among Internal Parties and NonParties: Is it Hearsay or Does it Fall Within an Exception?

What about purely internal emails sent among a party's employees or those sent to nonparties? Consider these two scenarios:

• Email #2: Mom, who negotiated the contract, writes to Pop to tell him about the outcome of negotiations and the terms agreed upon.

• Email #3: Mom writes to Aunt B, who does not work for their business, about the negotiations to ask her if Aunt B thought that the scope terms, as Mom understands them, are fair. Mom also writes that she feels like WidgetCo was trying to bully them into a tough deal.

Here, plaintiff's counsel wants these emails admitted to demonstrate Mom's understanding of the scope terms, but cannot argue that the emails are not hearsay because they are not made by party opponents. Instead, faced with a hearsay issue, many attorneys will instinctively turn to the business records exception, assuming that emails, with their ubiquitous presence in the modern workplace, certainly qualify. The reality is that the business records exception is no guarantee when it comes to email because its applicability is heavily fact-based. For that reason, the examples above likely will end with different results.

Judges are often concerned about the trustworthiness of emails, even in the business environment, because of their frequently informal and spontaneous nature. Even if counsel is able to question an email's author – here, Mom – on the stand regarding the substantive content of Emails #2 and 3, many judges may balk at admitting the emails themselves. As Judge Mark B. Simons of California's 1st District Court of Appeals has observed: "As a trial judge, I was sensitive to, almost allergic to efforts to convert conversations or testimony into exhibits that can be published to the jury and, subsequently, provided to the jury during deliberations." The business records exception, therefore, steps in to try to allay those concerns by benchmarking objective factors that can establish some degree of trustworthiness so that judges can feel more comfortable with admitting what would otherwise be considered written hearsay.

Federal Rule of Evidence 803(6) provides that "[a] record of an act, event, condition, opinion, or diagnosis" is admissible if:

• The record was made at or near the time by someone with knowledge;

• The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

• Making of the record was a regular practice of that activity, as demonstrated by the testimony or certification of the custodian or another qualified witness; and

• The opponent does not establish that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6).

What modern practitioners may forget is that the prevalent use of emails for business does not obviate the basic elements required by the business records exception. The standard for the admission of electronic business records fundamentally remains no different than the one applicable to paper business records.

• The Ninth Circuit Rejects Automatic Admissibility of Emails Under the Business Records Exception.

In its seminal decision in Monotype Corp. PLC v. International Typeface Corp., 43 F.3d 443 (9th Cir. 1994), the Ninth Circuit clearly stated that it had no intention of giving email any special treatment. There, defendant ITC tried to enter a non-party email as a business record because the author knew about the transaction, wrote the email to his superior, and the record was kept in the course of regularly conducted business. Id. The Monotype court held that email was not automatically admissible as a business record, observing that "[e]-mail is far less of a systematic business activity than" other computer-generated business records. Id. at 450.

Although the Ninth Circuit has not revisited the issue since the Monotype decision, several district courts within the circuit have since found emails admissible under the business records exception. Unfortunately, many courts have not laid out a detailed explanation for their analysis. In Volterra Semiconductor Corp. v. Primarion, Inc., No. C-08-05129 JCS, 2011 WL 4079223, at *7 (N.D. Cal. Sept. 12, 2011), the court explained that "[plaintiff had] laid a foundation at trial establishing that the email was admissible under the business record exception to the hearsay rule" but did not describe that foundation.

In contrast, in Age Group Ltd. v. Regal West Corp., No. C07-1303BHS, 2008 WL 4934039, at *2-3 (W.D. Wash. Nov. 14, 2008), the court determined that plaintiff's foundation regarding an email was insufficient for the business records exception. The author testified that she "neither had personal knowledge of the missed shipments nor recorded the statement at or near the time of the missed shipments." Id. Finding that plaintiff failed to present evidence that the author had either made or recorded her statement based on personal knowledge of the issues discussed in the email, the court excluded it as inadmissible hearsay. Id.

Continued on page 9

ROGER HELLER

On CLASS ACTIONS

For class practitioners, the most recent Supreme Court term was one of the most closely-watched in recent history, with highly-anticipated opinions addressing such important issues as Article III standing, the use of statistical sampling, and the effect of Rule 68 settlement offers to class representatives. The general consensus is that the results in these cases, taken together, were reasonably positive news for the plaintiffs' side of the bar, if for no other reason than for what the Supreme Court did not do.

Spokeo, Inc. v. Robins, 136 S.Ct. 1540 (2016) was perhaps the most closely-watched of this triumvirate of cases. The Court weighed in on Spokeo's challenge that the plaintiff lacked Article III standing to pursue his claim under the Fair Credit Reporting Act. The District Court had dismissed on that basis, but the Ninth Circuit reversed. The Supreme Court then considered whether the Ninth Circuit had applied the proper standard in holding that the plaintiff alleged a sufficient "injury in fact." Spokeo, 136 S. Ct. at 1548-1550. While some predicted the Court might tighten Article III standing requirements in Spokeo, the Court instead reiterated the standard that has been in place for more than two decades, which requires courts to consider whether plaintiff's alleged injury was "concrete" and "particularized." Id. (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). The Supreme Court vacated the Ninth Circuit's holding on the ground that it failed to properly consider the first prong of that analysis. The Court went on to provide guidance regarding what constitutes a "concrete" injury for purposes of the analysis, and when alleged "intangible" harms are sufficiently concrete. Spokeo, 136 S.Ct. at 1549.

Article III challenges in class cases alleging statutory violations had already been increasing following the grant of certiorari in Spokeo. In the months following Spokeo, they have continued to pile up, requiring lower courts in the Ninth Circuit and elsewhere to analyze and apply Spokeo in a variety of contexts. While the results to date are certainly not uniform, class practitioners should be mindful of some emerging trends in areas where standing challenges have been most prevalent.

In cases involving alleged privacy violations, some courts have found standing based, in significant part, on Spokeo's direction "to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." Spokeo, 136 S.Ct. at 1549. For example, in Matera v. Google, Inc., 2016 WL 5339806 (N.D. Cal. Sept. 23, 2016), the Court found the plaintiff had Article III standing where defendant allegedly intercepted, scanned, and analyzed plaintiff's communications in violation of the federal Wiretap Act and California Invasion of Privacy Act. Citing the "close relationship" language in Spokeo, the Court noted that "[i]nvasion of privacy has been recognized as a common law tort for over a century," and rejected the suggestion that the elements of plaintiff's statutory claims needed to be identical to those of a common law claim in order to find standing. Id. at *10-11; see also In re Nickelodeon Consumer Privacy Litig., 827 F.3d 262, 273-74 (3d Cir. 2016) (finding plaintiffs had standing where defendant allegedly unlawfully collected information about plaintiffs through its website); but compare Gubala v. Time Warner Cable, Inc., 2016 WL 3390415, *5 (finding alleged unlawful retention of personal information insufficient to establish standing).

Roger Heller

In privacy cases and in other contexts, courts have focused much of their attention, post-Spokeo, on whether the rights at issue are "substantive" or "procedural." Courts wrestling with how to best draw this arguably amorphous distinction in the Article III context have looked to legislative history for guidance. To date, they have been least inclined to find standing where they perceive the requirement and alleged violation to be technical. In many cases, the answer to the "substantive or procedural" question significantly drives the standing determination. See, e.g., Guarisma, 2016 WL 407196, * 4 (S.D. Fla. July 26, 2016) (finding FACTA requirement to truncate customers' credit card numbers on receipts to be substantive, citing the statute's legislative history); McCollough v. Smarte Carte, Inc., 2016 WL 4077108, at *3 (N.D. Ill. Aug. 1, 2016) (finding defendant's failure to get consent to retain fingerprint data, where plaintiff knew such data would have to be retained for some period, was a procedural violation insufficient to confer standing).

In cases involving alleged Telephone Consumer Protection Act ("TCPA") violations, as before Spokeo, the majority view, though not the uniform view, continues to be that an alleged TCPA violation is sufficient to confer Article III standing at least as long as the plaintiff alleges some sort of resulting interruption or loss of time or resources. See, e.g., Juarez v. Citibank, N.A., 2016 WL 4547914, * 3 (N.D. Cal. Sept. 1, 2016) (standing where plaintiff alleged unwanted calls caused wasted time and annoyance); Booth v. Appstack, Inc., 2016 WL 3030256, * 5 (W.D. Wash. May 25, 2016) (same); compare Stoops v. Wells Fargo Bank, N.A., 2016 WL 3566266, * 11-13 (W.D. Pa. June 24, 2016) (plaintiff who bought phones and phone plans for purpose of bringing suits lacked standing to pursue TCPA claim).

Continued on page 8

Continued from page 1

To Brief, or Not To Brief

they were litigating. The losing party is the innocent bystander who just happened to be in the way." (Witkin, supra, pp. 154-155.)

In 1986, the Legislature weighed in by enacting Government Code section 68081. It provides that prior to issuing a decision, "based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing." And "[i]f the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition . . . ." Despite this statutory enactment, there are still appellate courts that decide appeals on grounds the parties did not brief. Ten years after section 68081's enactment, one Court of Appeal felt compelled to express the "significant principle" that "judges, including appellate judges, are required to follow the law. In this case, the Appellate Department of the Los Angeles Superior Court decided a case on a point not raised by the parties, and without notice to the parties that it might do so." (California Casualty Ins. Co. v. Appellate Department (1996) 46 Cal.App.4th 1145, 1147 (California Casualty).)

Sean SeLegue

In California Casualty, the defense in a court trial elicited an expert opinion over plaintiff's objection. On appeal, the defense argued the opinion was inadmissible and the error was prejudicial. Plaintiff responded there was no abuse of discretion and no prejudice. The appellate department scrutinized the record to determine if the expert opinion was admissible and in doing so also scrutinized the defense objection, concluding it was inadequate to preserve the issue for appellate review — an issue no party had asserted or briefed. The Court of Appeal held it was error to decide the case on that ground without warning the parties the court was considering that ground, and giving them an opportunity to brief it. (California Casualty, supra, 46 Cal.App.4th at p. 1149.)

So what is counsel to do when surprised by a new issue raised by the court at argument? Our advice is to object at the first hint of this. To be sure, counsel faces a dilemma when questioned at oral argument about an issue that was not briefed. On the one hand, counsel want to appear responsive to the court's concern and, if the issue appears adverse, might hope that it can be brushed aside. On the other hand, counsel may be unprepared to answer the question, and it may be wiser to object. Hoping the court might forget about a point that it came up with independently is probably not a good bet.

If you object, leave out the "Respectfully, Your Honor" part; just say, "That issue was not raised or briefed by the parties. I request the court issue a Government Code letter framing the issue and give the parties an opportunity to respond." If your objection is not heeded, and the decision comes down based on an unbriefed issue, petition for rehearing. If you do nothing, you leave any justice who would support you alone in the conference room to argue the error. And take heart that research attorneys are instructed to consult their justices if they identify an unbriefed issue that may be dispositive or substantially affect the result. (Judicial Council of Cal., California Court of Appeal Judicial Attorney Manual (3d ed. 2013) pp. 30-31.)

However, be mindful that there is a distinction between an unbriefed issue and different ways of framing or analyzing an issue. In Plumas County Dept. of Child Support Services v. Rodriquez (2008) 161 Cal.App.4th 1021, the court wrote that "Government Code section 68081 does not require us to give the parties the opportunity to brief every statute (or other authority) that we may apply in deciding the issues in their case, so long as the parties have had the opportunity to brief the issues themselves." (Id. at p. 1029, fn. 1.) This is a good reason to address adverse authority in your own brief — even if opposing counsel has missed it — because otherwise you may lose your best and maybe only opportunity to explain in writing why that authority does not apply to your case or is wrongly decided.

If your panel needs convincing that supplemental briefing is required, point out the benefits the court and the parties get from briefing as compared to a purely oral presentation. There is a reason that briefs are the main way counsel communicate with the court in modern practice. They allow thoughtful and thorough presentation of an issue. When an issue is decided without an opportunity for briefing, some significant problems arise. Counsel do not have time to prepare by researching the record and the law and reflecting on the results. Even when counsel are given notice of a new issue by a "focus letter" from the court prior to argument, there is a limit to what information can be conveyed during argument. In addition, there is a tendency for more liberties to be taken at argument by stating facts not in, or contrary to, the record. That may often be inadvertent and is something that can be avoided by the rigor that reducing an argument to writing compels.

In seeking additional briefing when truly needed, do not limit your efforts to convincing the court that Government Code section 68081 requires supplemental briefing. Remember, section 68081 entitles a party to relief only when an issue that neither party asserted or briefed is the basis for decision. That does not include every rule, principle or theory of law that the parties did not brief in discussing an issue. You may well be able to make the case that supplemental briefing should be received even if section 68081 does not require it. But if you hang your hat entirely on a contention that the court must do something, rather than that it should do something, you may regret it.

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AMY BRIGGS

On INSURANCE

It is time to settle the case you have been defending for the last five years. Your client's insurer issued a reservation of rights a long time ago when the case first began, but you haven't looked at it in years, much less spoken with your client about it. Why should you now? Because nine times out of ten, the insurer has reserved its right to deny coverage for "matters deemed uninsurable" under the applicable law. This language is commonly found in professional liability policies and therefore often in play when it comes to coverage for commercial litigation and determining whether the insurer will pay for the defense and settlement.

What does "matters deemed uninsurable" include? Many attorneys already know that under California law, loss caused by the "willful act of the insured" are "deemed uninsurable" as a matter of statute and public policy. Cal. Ins. Code § 533. But, from the insurer's perspective, "deemed uninsurable" is broader and may also exclude coverage for amounts paid as restitution or disgorgement. (Whether and under what circumstances restitution and disgorgement are, in fact, uninsurable under California law is beyond the scope of this article. It is sufficient to note, however, that carriers frequently raise this issue as a defense to coverage.) Defense counsel and insureds should be cognizant of this lurking legal issue as they prepare to negotiate the resolution of lawsuits, particularly where plaintiffs seek both traditional damages as well as restitution or disgorgement, as is common, particularly in class actions. As a recent decision from a Delaware Superior Court illustrates that what is (or is not) in the settlement agreement could have a profound impact on coverage. TIAA-CREF Individual & Institutional Services, LLC et al. v. Illinois Nat'l Ins. Co., et al., Superior Court of the State of Delaware, C.A. No. N14C-05-178 JRJ CCLD.

The TIAA-CREF decision also provides clearer guidance for insureds facing this issue than currently exists under California law, which has become muddled as "damages", "restitution" and "disgorgement" have not always been used with precision. See generally Jaffe v. Cranford Ins. Co., 168 Cal.App.3d 930, 935 (1985) (noting, in dicta, "[W]e have doubts whether an insurance policy which purported to insure a party against payments of a restitutionary nature would comport with public policy"); AIU Insurance Co. v. Superior Ct., 51 Cal.3d 807, 836 (1990) ("reimbursement of response costs is restitutive in that it attempts to restore to the agencies the value of a benefit constructively conferred on [the insured]," it "is not restitutive in the narrow sense identified by Jaffe as inappropriate for insurance coverage") (italics added); Bank of the West v. Superior Ct., 2 Cal. 4th 1254, 1269 (1992) ("[W]e noted that Jaffe bars coverage only in 'situations in which the defendant is required to restore to the plaintiff that which was wrongfully acquired'") (italics in original); Pan Pac. Retail Properties, Inc. v. Gulf Ins. Co., 471 F.3d 961, 967 (9th Cir. 2006) (district court found no coverage for underlying shareholder lawsuit because "settlement reflected restitutionary damages").

TIAA-CREF arose out of the defense and settlement of three class action lawsuits alleging that the retirement services provider had failed to pay its customers the gains that accrued in their accounts between the time the customers placed an order to transfer or withdraw funds and the date that TIAA-CREF actually acted upon that order.

TIAA-CREF's professional liability insurers denied coverage for the settlements arguing, inter alia, that they constituted uninsurable disgorgement under New York law. On summary judgment, the Delaware Court never had to reach whether disgorgement was uninsurable under New York law because it held that the challenged settlements did not constitute disgorgement in the first instance. The court gave three reasons: (1) in the settlement agreements, TIAA-CREF denied all liability, (2) no governmental entity was involved in the conduct at issue in the underlying actions, and (3) the insurers did not establish a "conclusive link" between the insured's misconduct and the payment of monies that would render the settlement agreements uninsurable disgorgement. In the court's view, these factors set the TIAA-CREF settlements apart from other lawsuits where money paid to settle the claims had been deemed to constitute uninsurable disgorgement. See, e.g., Vigilant Ins. Co. v. Credit Suisse First Boston Corp., 2003 WL 24009803 (N.Y. Sup. Ct. Jul. 8, 2003) (consent judgment with SEC expressly stated that insured's payment was for disgorgement of money obtained improperly through alleged misconduct); Millennium Partners, L.P. v. Select Ins. Co., 889 N.Y.S.2d 575 (N.Y. App. Div. 2009) (SEC order asserted that Millennium generated tens of millions in profits through market timing trades of mutual fund shares and carrier out fraudulent scheme to avoid detection).

Amy Briggs

As for the first and second ground, denying liability in civil lawsuits is standard. And defense counsel often has little control regarding the involvement of a governmental entity. But the third factor – the absence of a "conclusive link" between the insured's alleged misconduct and the payment of money – is where defense counsel can (and should) add value.

While the TIAA-CREF court was willing to rely on a standard general denial of liability to find no "conclusive link" between misconduct and the payment of money, a

Continued on page 8

Continued from page 3

Compression Algorithm

Could the study be replicated- that is, is the underlying data available? Has it been replicated?

IV

We are litigating issues unheard of two hundred years ago. Especially in the United States, the courts are exposed to an ever-widening range of issues, such as those of widespread environmental impact, extraterritorial actions, the science of mind and intent, the complex effects of stock and other complex financial markets, advertising's impact on millions of consumers, and the sometime subtle impact of discrimination. But in the end we have the same decision making mechanism we had centuries ago: a judge, or a jury of twelve, spending a relatively few hours trying to figure it out.

Well-reasoned statistics may help fit those enormous issues within the constraints of a trial. Innumeracy will generate results no better than random noise, occupying precious time in court—signifying nothing.

Post-script: Cases on Statistics

Fairly recent cases discussing statistics include of course Duran v. U.S. Bank Nat. Assn., 59 Cal. 4th 1, 325 P.3d 916 (2014), as well as Dailey v. Sears, Roebuck and Co., 214 Cal.App.4th 974, 1000 (2013); Cochran v. Schwan's Home Service, Inc., 228 Cal.App.4th 1137, 1143 (2014); Mies v. Sephora U.S.A., Inc., 234 Cal. App. 4th 967 (2015); Alberts v. Aurora Behavioral Health Care, 241 Cal.App. 4th 388 (2015) (Rothschild, P.J., concurring); Brown v. Nucor Corp., 785 F.3d 895, 908 (4th Cir. 2015); Food & Water Watch, Inc. v. Vilsack, 808 F.3d 905, 917 (D.C. Cir. 2015); Lewis v. Ascension Par. Sch. Bd., 806 F.3d 344, 362 (5th Cir. 2015); Chen-Oster v. Goldman, Sachs & Co., 114 F. Supp. 3d 110 (S.D.N.Y. 2015); E.E.O.C. v. Freeman, 778 F.3d 463, 469 n.1 (4th Cir. 2015); People v. Cunningham, 61 Cal. 4th 609, 652 (2015) cert. denied sub nom. Cunningham v. California, No. 15-7177, 2016 WL 280896 (U.S. Jan. 25, 2016); In re Sutter Health Uninsured Pricing Cases, 171 Cal. App. 4th 495, 509 (2009); Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 40 (2011); *Lubin v. Wackenhut Corp.*, Cal.App.5th, 2016 WL6835499 (No. B244383, Nov. 21, 2016)

The Hon. Curtis E.A. Karnow is a Judge of the San Francisco Superior Court

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Continued from page 5

On CLASS ACTIONS

The Supreme Court's decision in Spokeo is still young. Exactly how lower courts will interpret and apply its guidance continues to evolve. While the early returns suggest that Spokeo is probably not the game changer some predicted it might be, and that many of the divergent views and lines of authority concerning Article III standing that existed pre-Spokeo, will continue to persist post-Spokeo, class practitioners on both sides should pay careful attention to developments in this area. Such developments will not only affect the results in pending cases, but are also likely to influence future trends in class action practice more generally.

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Continued from page 7

On INSURANCE

better practice – where possible and accurate – is to include a statement that the settlement is for those claims seeking damages (or words to that effect). That is, so long as it is consistent with the theories of liability propounded in the underlying action, negotiating for the characterization of the settlement as insurable damages could go a long way in protecting your client.

It is important to note that often the only non-privileged evidence as to what has settled comes from the nature of the claims asserted and the settlement agreement itself. So characterization matters. See, e.g., Howard v. American Nat'l Fire Ins. Co., 187 Cal. App. 4th 498, 533 (2010) ("Absent evidence of fraud or collusion, we will not set aside a settlement negotiated between an insured and injured parties and recharacterize the sums paid under their agreement."). It also helps avoid factual disputes regarding the nature of the settlement that could prolong resolution of the coverage issues. See, e.g., Pan Pac. Retail Properties, Inc. v. Gulf Ins. Co., 471 F.3d 961, 971 (9th Cir. 2006) (genuine issues of fact as to whether settlement of shareholders' suit reflected only uninsurable restitutionary payments precluded summary judgment on claim that settlement involved covered loss; remanded to district court for further proceedings). And, of course, it is always a benefit where defense counsel can resolve both the underlying liability and help the client collect on insurance.

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Continued from page 4

Business as Usual

• Federal Guidance From Outside the Ninth Circuit: Deepwater Horizon's Emphasis of the Fundamental Hallmarks of Trustworthiness under Rule 803(6)

Several courts outside of the Ninth Circuit have taken a closer look at the application of the business records exception to emails in an attempt to provide guidance for practitioners. A recent notable effort can be found in In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mex. ("Deepwater Horizon") 2012 WL 85447 (E.D. La., Jan. 2012). Plaintiffs sought to have approximately 300 emails produced by defendants collectively admitted as business records (even if they were admissible under other theories), arguing that: (1) the emails had been created as part of ongoing and normal business activities; and (2) the courts' "increasingly liberal view of emails as corporate business records" warranted admission. Id. at *1.

The court disagreed, and instead explained that the elements of Rule 803(6) must be applied to each email – on an email by email basis. The court laid out the following five requirements:

- The email must have been sent or received at or near the time of the event(s) recorded in the email.
- The email must have been sent by someone with knowledge of the event(s) documented in the email.
- "The email must have been sent or received in the course of a regular business activity,…which requires a case-by-case analysis of whether the producing defendant had a policy or imposed a business duty on its employee to report or record the information within the email."
- It "must be the producing defendant's regular practice to send or receive emails that record the type of event(s) documented in the email."
- A custodian or qualified witness must attest that these conditions have been fulfilled. Id. at *3.

The court further explained: "[i]t is not enough to say that as a general business matter, most companies receive and send emails as part of their business model." Id.

Several courts have since followed Deepwater Horizon, recognizing that practitioners needed guidelines for when Rule 803(6) would apply to emails. See, e.g., Its My Party, Inc. v. Live Nation, Inc., No. JFM-09-547, 2012 WL 3655470 at *5 (D. Md. Aug. 23, 2012) (unpublished) (excluding emails because "more specificity is required regarding the party's record keeping practices to show a particular e-mail in fact constitutes a reliable business record."); United States v. Cone, 714 F.3d 197 (4th Cir. April 15, 2013); Candy Craft Creations, LLC v. Gartner, No. 2:12-cv-91, 2015 U.S. Dist. LEXIS 148165, at *2-8 (S.D. Ga. Nov. 2, 2015) (plaintiff's customer emails regarding complaints were not within the scope of any regularly conducted business activity and not sufficiently reliable); Roberts Technology Group, Inc. v. Curwood, Inc., No. 14-5677, 2016 U.S. Dist. LEXIS 65438 (E.D. Pa. May 17, 2016) (party must show specific foundational evidence showing that emails are trustworthy).

Back in the Ninth Circuit, the court in Rogers v. Oregon Trail Elec. Consumers Co-op., Inc., No. 3:10-CV-1337-AC, 2012 WL 1635127, at *10 (D. Ore. May 12, 2012) expressly adopted the Deepwater Horizon test, observing that "[h]olding emails to some standard under the business records hearsay exception, as opposed to broadly accepting them as admissible business records, is the best approach." There, defendant sought to admit emails regarding disciplinary warnings against the plaintiff. Id. at *8. Defendant's manager Ray declared: "I do have personal knowledge that [Exhibits G and H] are personnel records that are made and kept in the regular course of [defendant's] regularly conducted business activity and are routinely relied on by [defendant] in that business activity." Id. at *10.

Applying Deepwater Horizon, the Rogers court found this was inadequate. Id. Specifically, "Ray [did] not articulate whether the individuals sending the email have personal knowledge of the events discussed therein; [did] not put forth evidence of a policy that imposed a business duty on [defendant] employees to send and retain emails…[and] did not analyze the applicability of the test on an email-by-email basis." Id. The court further observed that "[d]isciplinary memoranda are designed to be a formal record…and carry a stronger presumption of accuracy and reliability than email, which is an informal mode of communication that is not inherently reliable." Id.

These decisions provide useful guidance for resolving the question whether Emails #2 and #3, described above, are admissible under the business records exception to the hearsay rule. If counsel can establish that Mom's regular duties included reporting on negotiations to Pop and that this was one such report, Email #2 will likely be admitted as a business record. Email #3, however, will probably be rejected because even though it constitutes evidence of Mom's understanding of the contract's scope, it was not sent in the normal course as a regular business report or record, and therefore lacks the hallmarks of trustworthiness described by Rule 803(6).

Applied more broadly, cautious counsel should carefully assess each email and develop the foundation necessary to establish the requisite trustworthiness to satisfy the business records exception, including asking: (1) who is authoring the communication; (2) whether the author has the appropriate knowledge to support the statements at the time the email was written; (3) whether the organization has a coherent business email practice, and (4) whether the email qualified under that practice. Considering these questions will help ensure that an attorney is well prepared to establish the trustworthiness required by the business records hearsay exception even under the most stringent judicial review of business emails.

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FRANK CIALONE

Trust and Estate Litigation

No Contest Clauses and the Anti-SLAPP Law

On January 1, 2010, the California Legislature enacted Probate Code Section 21311, which significantly limited the application of "no contest" clauses in wills and trust instruments. Prior to that statute, a no-contest clause could be applied to disinherit any person who brought an unsuccessful "direct contest" to a will or trust instrument – a "direct contest" being one that alleges the invalidity of an instrument on grounds such as undue influence, lack of capacity, or disqualification of a particular beneficiary. Under the new statute, which applies to any instrument that became irrevocable on or after January 1, 2001, a no contest clause will be enforced, in the context of a direct contest, only if the contest is brought without probable cause.

Frank Cialone

This change brings significant benefits to potential contestants, to other beneficiaries who may be affected by, but not directly implicated in, a contest, and to the courts. No-contest clauses are often included in instruments to provide an in terrorem effect, and deter any beneficiary or heir from contesting an instrument lest she risk losing whatever benefits the testator or settlor provided to her. A potential contestant has only a limited time to decide whether to bring a contest – for example, a contest to a trust must be filed within 120 days of the contestant receiving a notice that the trust is now irrevocable and will be administered, or within 60 days of the terms of the trust being mailed to her. A beneficiary might learn that her parent had amended his trust or revised his will, to significantly reduce what was provided to the beneficiary, just shortly before the parent passed away and under questionable circumstances. She would then have to retain counsel and make the always-difficult decision of whether to file an action, knowing that doing so would put at risk whatever benefits the parent had provided her. And she and her counsel would only have a few weeks, or at most a few months, to investigate the circumstances regarding the new instrument in order to decide if a contest was worth the risk. Moreover, because of the potentially draconian consequences of a no-contest clause, a petition regarding a trust instrument was often preceded by a "Safe Harbor Petition" asking the court to find that a proposed petition was not a direct contest (by arguing, for example, that the proposed petition only sought "interpretation" of the instrument in question), did not violate the no-contest clause, or was subject to some other exception to the enforcement of non-contest provisions. These Safe Harbor Petitions often added months or, with appeals, years of delay at the outset of trust administration, to the disadvantage of those waiting to inherit under the instrument.

Under Section 21311, no-contest clauses are not self-executing, but must be enforced by the courts through the filing of a petition to disinherit – often filed in response to the original contest. A petition to disinherit asserts, in essence, that a contest violates the no-contest provision of an instrument and that the no-contest provision is enforceable under the statute – for example, that it constitutes a direct contest brought without probable cause.

This is where the anti-SLAPP law, C.C.P. Section 425.16, comes into play – and perhaps the "law of unintended consequences" does too. Because a petition to disinherit arises directly out of the filing of litigation – i.e., the original petition contesting the instrument – it will necessarily satisfy the first prong of the anti-SLAPP law, that the action is one arising from "protected activity." The burden then shifts to the party filing the petition to disinherit to establish, through admissible evidence, a prima facie showing of facts sufficient to prevail on the claim. That can be quite a challenge, especially at the outset of a case and before any discovery is conducted – especially in this context, where the petition to disinherit requires "proving a negative" and showing that the contestant did not have probable cause to initiate the action. Probate Code Section 21311 states that "probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery." Under this definition, facts that may be known only to the proponent of the challenged instrument (i.e., the executor or trustee) are irrelevant to the determination of probable cause, even if those facts would indisputably be sufficient to establish the validity of the instrument when the dispute is ultimately adjudicated. Instead, the proponent must submit admissible evidence to show what the contestant did or did not know when she filed the case, an extraordinarily difficult burden to meet before any discovery is conducted. This seems to shift the balance too far in the other direction. It is entirely appropriate to limit the sway of no-contest provisions, so that meritorious challenges are not deterred. But if this effectively precludes applying such provisions to frivolous contests, it goes too far. Moreover, the potential for anti-SLAPP motions, rulings on which are subject to direct appeal, brings back the delay that eliminating the Safe Harbor process sought to avoid. Perhaps the solution is for the Legislature to require that, in any direct contest of an instrument with a no-contest clause, the court will not only adjudicate the merits but, if it denies the petition, will decide whether it was brought with probable cause, without requiring that a petition to disinherit be filed.

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NorCal Editors Hail 25th Anniversary

Ragesh Tangri I took over as Editor only this year, so I will be brief. This is the first issue of the 25th volume of the ABTL (Northern California) Report. To celebrate that momentous event, we've reached out to the illustrious former editors of the Report for their memories, thoughts and reflections on a collective 25 years of work on this great project.

Chip Rice It's hard to believe that it has been 25 years since my law partner Art Shartsis, who helped start our local chapter of the ABTL and served as its first President, asked me to become the Editor of a new publication for our members. The Southern California chapter already had a Report, but we wanted to start our own publication that would give our members practical advice from the best lawyers, judges and other professionals in our area. And we were ambitious: we wanted the *ABTL Report for Northern California* to be better than other legal publications – brighter, lighter and tighter.

One of our first and best decisions was to hire Stan Bachrack, who was the Managing Editor of the Southern California chapter's publication. Stan designed the format for our Report and has taken care of all the details of printing and mailing ever since. We also decided to have regular columnists who were experts on various areas of business litigation. Those columnists have changed over the years, but they have always provided timely and trenchant commentary on developments in their specialties. (I gave myself the job of writing regular columns about litigation skills and strategy.) Most importantly, we were able to get interesting articles from prominent attorneys and judges – too many to name here – that dispensed concise and pragmatic advice about the practice of law.

I want to take this opportunity to all of the columnists and other authors who have given their time and wisdom to making our Report a success. It's very gratifying to see that subsequent Editors have maintained (and, perhaps, even improved) the quality of our publication. I hope it has been as interesting and fun for our readers as it has been for me.

Ben Riley I was fortunate to serve as the Editor of the Northern California ABTL Report from 2001 to 2006. Tim Nardell served as my co-editor. I loved every minute of it, especially working with and getting to know the authors and learning about new areas of litigation.

Flipping through the articles and columns we published, several stand out. There's a stunning President's column by Rob Fram (March 2002, Vol. 11, No. 2) about landing in New York City at 6 a.m. on the morning of September 11, 2001, to be with his mom who had suffered a ruptured aneurysm. Rob remained in NYC for the next two weeks through the horrors of 9/11. "Normal life had been blown apart. The useful illusions of daily life — that we will live safely, if not forever; for a long, long time; that things can be taken for granted; that our work is important; that our financial aspirations and anxieties really do deserve our attention — all were shredded." He concluded, "Having a drink with friends at the ABTL February meeting was a solid step back."

Judge Carlos Bea of the Ninth Circuit wrote an insightful and incredibly helpful set of articles on How the Ninth Circuit Works on Your Appeal and Bettering Your Chances for En Banc Review. (Fall 2005 and Spring 2006, Vol. 15, Nos. 1 and 2.) I always reread these articles when I'm working on a Ninth Circuit appeal — so should you. (All our past issues are on line at www.abtl.org.)

Then there's Judge Jeremy Fogel. As a lawyer, Judge Fogel worked for a legal services program serving people with mental and emotional impairment; as a Superior Court judge, he presided over hundreds of cases in family court. He reflected on how his complex federal cases often featured the same human emotional intensity and psychological dynamics, offering this advice to the ABTL membership: "What I am suggesting is that we lawyers and judges not assume that litigation is an appropriate option simply because no law or ethical rule prohibits it, that we explore with great care and to the greatest extent possible the interests and concerns that bring parties to the point of considering litigation, and that we look to facilitative processes earlier and more often. I suggest that we become better listeners and counselors: that we seek to understand as well as to advocate."

Wise words. And such a pleasure to edit them and so many other astute and interesting articles.

Continued on page 12

Continued from page 11

25th Anniversary

Tom Mayhew

Ben Riley handed the ABTL Report off to me in 2006, just as he was becoming the president for the Northern California chapter. For the next six-plus years, I edited the Report with the help of co-editor Howard Ullman.

I really enjoyed being the Editor of the Report. The Report does in printed form a lot of what ABTL dinner programs and the annual seminar try to do in person: educate business trial lawyers about the diverse range of subject matters that our work touches, go deep on practical and strategic ideas about how to approach critical case events with great advice shared by both experienced practitioners and younger lawyers willing to share what they've learned, and foster communication from the federal and state court judges that we appear in front of about what they're looking for and how we can all improve our own practice. While we hope that readers of the Report get all these benefits, in the process of editing I, of course, got them even more: I spent more time trying to understand what each article was teaching, and then working closely with the authors of both the articles and columns to make sure that their knowledge and advice was being conveyed effectively.

The work was hard: I expected that it would get easier over the years, but some aspects – like pushing busy lawyers and judges to make a deadline, or editing the overall set to get it exactly down to the right word count for 12 pages (no, lawyers never wrote too few words) – don't become that much easier with practice. But the feeling of being an active participant in our legal community, with a goal of improving as lawyers by helping share knowledge, was a great reward.

Frank Cialone

I greatly enjoyed my three years of editing the ABTL Report for the Northern California Chapter. It is difficult to single out any issue or article that I most enjoyed working on, but I will give two examples. First, there was the article about motions to seal in federal courts, from the Honorable Jacqueline Corley which gave such thorough and detailed guidance to practitioners that I felt I should get CLE credit just for helping edit the piece. Better still, I was able to apply that information almost immediately in one of my cases. Second, there was the piece from the Honorable William Alsup, encouraging young attorneys to go forth and "advocate!" I had

25th Anniversary

long been aware of Judge Alsup's efforts to develop the next generation of courtroom lawyers and this may have been the article I always wanted to run. And then there was the Honorable Curtis Karnow's discussion of Sargon… and the two-part interview with Allen Ruby about some of his high-profile and challenging cases… and the thoughtful discussions of developments in patent litigation… and so on and so on. Like I said, it's difficult to single out any one article. I can only hope that readers enjoyed the publication, and that our readership will continue to contribute to the ABTL Report.