

Q&A with the Hon. Cormac J. Carney
By David A. Lee



[Editorial Note: Judge Carney graduated from Harvard Law School in 1987, after which he practiced at Latham & Watkins and O'Melveny & Myers. Gov. Gray Davis appointed him to the Orange County Superior Court in 2001. President George W. Bush nominated him to the federal bench barely a year later. On a more personal note, Judge Carney is the son of immigrant Irish parents, was born in Detroit but grew up in Long Beach

where he played football at St. Anthony High School. When Judge Carney graduated from UCLA in 1983, he was the team's all-time leading receiver with 108 receptions for 1,909 yards and was twice an all-Pac-10 selection.]

Q: What drew you to a career in law?

A The fundamental principle for which our country stands, liberty and justice for all. I believe strongly in that principle and I thought wow, this is something worth dedicating your life to and fighting for.

Q: You had tremendous success as a college football player. How did that experience prepare you for a ca-

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Vexing the Vexatious: Using California's Vexatious Litigant Statute to Obtain a Stay, Attorneys' Fees or a Dismissal

By Kimberly A. Chase

With the economic downturn persisting, many civil plaintiffs are choosing to represent themselves in their lawsuits, appearing *in propria persona* ("in pro per") rather than obtaining attorney representation. Several commentators have noted that lawsuits filed by pro per plaintiffs have increased in recent years. Various court systems and organizations throughout the State, including the Superior Court for the County of Orange, have dedicated staff at courthouses and have posted educational materials online to assist pro per litigants with the litigation process.



The great majority of pro per plaintiffs have a good faith belief in their case, and such individuals are certainly entitled to their day in court. A small percentage, however, repeatedly initiate litigation with less savory purposes in mind, such as extracting nuisance settlements. From the defendant's standpoint, there are few things more frustrating than being forced into meritless or frivolous litigation filed by a pro per plaintiff. Defending such lawsuits can become expensive if defense counsel is faced with poorly drafted pleadings, service issues, meritless motions, or noncompliance with discovery rules.

So how can one best defend a frivolous case filed by a pro per plaintiff? Enter California's vexatious litigant statute, California Code of Civil Procedure ("CCP") section 391, *et seq.* The California Legislature enacted the statute in 1963 "to curb misuse of the court system by those acting in propria persona who repeatedly relitigate the same issues." *In re Bittaker*, 55 Cal. App. 4th 1004, 1008 (1997). The statute creates two types of relief against a plaintiff who falls within the statutory definition of "vexatious litigant": (1) the court may order the plaintiff to post security for the benefit of the defendant; or (2) the court may prohibit the plaintiff from

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Message from the President:

By Melissa R. McCormick



This year promises to be a great year for the Orange County Chapter of the ABTL, and I am honored to serve as our chapter's 2012 President. I am fortunate to have the opportunity to work with a terrific Executive Committee: Mark Erickson is our Vice President, Jeff Reeves is our Treasurer, and Michele Johnson is our Secretary. Linda Sampson, ABTL-OC's Executive

Director, continues to do wonderful work for our chapter. ABTL-OC is also privileged to have the support of the federal and state judges who serve on our Board of Governors and Judicial Advisory Council, and who participate in and attend our programs. In addition, special thanks are owed to Darren Aitken, ABTL-OC's 2011 President, who guided our chapter with energy and good cheer. We are grateful to Darren for his service to our chapter.

Before turning to our 2012 plans, I would like to introduce ABTL-OC's new attorney Board members. ABTL-OC continues to be fortunate to have talented and committed attorney Board members, and our newest additions are no different. They are:

Paul L. Gale, a partner of Troutman Sanders LLP. Paul has 35 years of experience in complex commercial litigation, including all aspects of intellectual property litigation and arbitration, including patent, trademark, trade secret and copyright disputes. Paul has also served as an arbitrator in numerous complex American Arbitration Association matters.

Alan A. Greenberg, a shareholder of Greenberg Traurig. Alan has more than 20 years of experience in complex business cases and trials and is Co-Chair of Greenberg Traurig's Orange County litigation practice.

Thomas S. McConville, a partner of Orrick. Tom has 20 years of combined federal prosecutorial and private sector experience, including numerous criminal and civil jury trials.

Elizabeth L. McKeen, a partner of O'Melveny & Myers LLP. Elizabeth's practice focuses on complex financial services litigation, class action litigation and related regulatory matters.

Maria Z. Stearns, a senior counsel of Rutan & Tucker,

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ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl

ORANGE COUNTY

8502 E. Chapman Avenue, Suite 443
Orange, CA 92869

Phone: 714.516.8106 • Fax: 714.602.2505

E-mail: abtloc@abtl.org

www.abtl.org

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The “Sham Guaranty” Defense: A Bar to Summary Judgment?

By Lynnnda McGlynn



As the real estate market continues its downward trend, foreclosures are at a historical high, and lenders find themselves significantly under-secured, the issue of guarantor liability is becoming increasingly more significant. In response, guarantors and their counsel have become more creative in their defenses. The most common of these creative defenses is the “sham guaranty” defense. The “sham guaranty” defense is discussed herein in the context of commercial loans secured by real property.

Anti-deficiency Protections

Following the collapse of real estate values during the Great Depression, California enacted a number of statutes designed to limit the liability of real property owners following foreclosure. These statutes - commonly known as the “anti-deficiency” statutes - Code of Civil Procedure section 580(a) (fair value limitation for non-judicial foreclosure), 580b (no deficiency judgment on any purchase money loan or loan secured by owner-occupied one to four family dwelling), 580d (no deficiency judgment after non-judicial foreclosure), and 726 (one action rule) expressed the public policy of California that deficiency judgments should not be permitted following foreclosure in certain situations. Because of this strong public policy objective, the anti-deficiency protections cannot be altered or waived at the time the purchase money obligation is created or renewed. *Palm v. Schilling*, 199 Cal.App.3d 63, 69 (1988).

Unfortunately for guarantors, these same public policy objectives do not exist. As such, while these anti-deficiency protections are theoretically available to a guarantor as well, they can be, and generally are (particularly in transactions with institutional lenders) waived by the guarantor. *Cadle Co. II. v. Harvey*, 83 Cal.App.4th 927, 932 (2000). In the context of this disparity, the “sham guaranty” defense was born.

The “Sham Guaranty” Defense

The “sham guaranty” defense is derived from the well established principle that a borrower cannot also be the guarantor of his/her/or its own debt. See, Civil Code section 2787 (“A surety or guarantor is one who promises to answer for the debt . . . of another . . .” [emphasis added].) A “sham guaranty” then is a guaranty executed by a party

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A “Like”ly Story: Facebook Advertising and the Right of Publicity

By Mark S. Lee

Facebook likes its users to use the “like” button on their profile pages, because Facebook can and often does make money each time a member does so. At least five lawsuits have been filed against Facebook over these practices, and it has responded with an aggressive legal strategy that is showing its first strains. This article discusses Facebook, the right of publicity based claims made by Facebook members against the company, and how Facebook and the courts are responding to the claims made against it.



FACEBOOK AND ITS ADVERTISING

By any measure, Facebook is a remarkable social networking success. Launched in February 2004, as of February 2012 Facebook has 845 million members who visit the site, creating personal profiles, exchanging messages with friends, and clicking on buttons to describe what they “like.” (See “Facebook,” <http://en.wikipedia.org/wiki/facebook> retrieved on January 27, 2012.) Facebook is free, or at least does not require members to pay money. Facebook’s revenues nevertheless have grown from \$52 million in 2006 to over \$3.8 billion in 2011, with over \$5.7 billion in revenues estimated for 2012. (Michael Arrington, “Facebook goes beyond college, high school markets,” techcrunch.com retrieved April 26, 2006; Brian Womack “Facebook revenue will reach \$4.27 billion,” bloomberg.com, retrieved September 25, 2011; Julianne Pepitone, “Facebook readies for blockbuster IPO,” [CNN Money](http://CNNMoney.com), retrieved February 1, 2012). Facebook has just begun the process of commencing an initial public offering that is expected to generate \$5-10 billion. (“Facebook readies for Blockbuster IPO,” *supra*.)

How does Facebook generate all this revenue? Advertising. Except for some game revenue, Facebook depends almost exclusively on banner and other advertising for its income. *Id.*

There has been a problem in Facebook’s advertising system, however -- dramatically lower “click through” rates for its banner ads than are present on other websites. While 80,000 of 1 million viewers might “click through” banner ads on other sites, only 400 of 1 million Facebook users have done so. (“Google Adwords Click Through Rates Per Position,” [Accuracast](http://Accuracast.com), October 9, 2009, re-

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Brown Bag Lunch with Hon. Charles Margines
By Anthony Gomez and Karen Morao



On December 1, 2011, the Honorable Charles Margines of the Orange County Superior Court graciously invited ABTL members with fewer than ten years in practice to his courtroom for a brown bag lunch. Joined by Angel Leung, a research attorney for the Law and Motion Department of the Orange County Superior Court, Judge Margines gave advice on effective law and motion practice.

Judge Margines began with general tips for drafting motions, noting the famous words of Mark Twain in correspondence to a friend, "If I had more time, I would have written a shorter letter." Judge Margines emphasized that movants must remember their audience (research attorneys and judges), who (a) know what they are doing, and (b) are very busy. For instance, they appreciate any motion that starts with a succinct summary that focuses on what the movant is seeking and the evidence and the law that supports it. As another



example, Judge Margines mentioned that there is no need to draft a treatise on the procedural standard in the memorandum of points and authorities; instead, attorneys should focus their law on answering two important questions when drafting a motion: (1) what is the authority for the motion, and (2) what is the authority for the proposed relief? Furthermore, if the motion can be decided on one or two very good points, Judge Margines advised to keep those at the forefront, as they might get lost otherwise. Lastly, Judge Margines emphasized the importance of citing on-point procedural case law and of not overlooking adverse authority.

Judge Margines then transitioned to particular motions. While Judge Margines usually finds demurrers to be unhelpful, Ms. Leung noted that she appreciates those that help make the issues clearer for the court, such that everyone is on the same page by the time the motion for summary judgment rolls around. However, Judge Margines also suggested that demurrers may be hurtful as they can "educate" opposing counsel when otherwise he or she would have fumbled the issues to the point of prejudice when the time for trial is near. Judge Margines and Ms. Leung also discussed discovery motions, which have taken up a large part of the Court's time.

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ABTL Volunteers: Habitat for Humanity
By William C. O'Neill

By the time this edition of the Report heads to print, a new home will have been built at the corner of Ellis and Beach Boulevard in Huntington Beach thanks to the coordination of Habitat for Humanity and countless volunteer hours of organizations like ABTL. Led by ABTL's Vice President, Mark Erickson, twenty-three volunteers from six ABTL member firms participated in this inaugural event.



The Habitat for Humanity organizers had no shortage of work for the ABTL volunteers. Some participants painted trim while others used power tools to cut and install siding on the home. The construction and lunch break allowed the volunteers an opportunity to interact with colleagues outside their typical suit-and-tie environments. The local girl scout troop even dropped by to deliver home-made cupcakes as a show of appreciation.



Based on the overall positive reaction this event garnered, the ABTL will consider making this an annual event to allow other member firms to engage in the same community-building program. We hope you will join us next time!

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reer in the law, and ultimately, as a judge?

A: Football has been very good to me. What did it teach me? First of all, the importance of preparation. I always have to quote John Wooden whenever I get the opportunity – “failing to prepare is preparing to fail” - and whatever you do in life you have to be prepared and that really was driven home. But second of all, don't take yourself too seriously. Football is a humbling game. Hopefully you will succeed and have victories, but you are going to fail at some point. There is always going to be someone who's bigger, stronger, faster, smarter. And ultimately, you have to learn that character counts. It is okay to lose, it is okay to fail, but get back up and play hard. Those principles helped me in my career because there are obviously disappointments and if you have experienced failure before, then you can deal with those disappointments and set-backs and keep them in perspective.

Q: What areas of law did you practice before becoming a judge?

A: I practiced general business litigation. I started with Latham & Watkins for a few years in their Orange County and Chicago offices. I then joined O'Melveny & Meyers and practiced primarily general business, commercial litigation, with a little intellectual property experience. Within those broad groups, I practiced quite a bit of insurance coverage litigation, environmental insurance coverage, some securities litigation, but primarily general business litigation like breach of contract and business torts.

Q: What do you like most about being a judge?

A: There are many aspects of this job that I love. It is more a calling than a job for me, but there is something really neat about safe-guarding and ensuring people's constitutional rights. What I worry about every day is trying to do the right thing. It is a tremendous luxury that lifetime appointment affords because I don't have to worry about being popular and instead I can focus on really trying to do the right thing. That is not to say I always do the right thing, but I strive to do the right thing. That is comforting.

Q: That sounds like why the lifetime appointment was written into Article III.

A: I think so. Some would say [the Framers had] divine wisdom, but I think our Constitution, the way it was set up, is magnificent and I really think the lifetime appointment is critical to this job and the decisions I have to make.

Q: How do you compare your experience as a Superior Court Judge with the Federal Bench?

A: That is actually a simple question, but it is a difficult one for me to answer given I wasn't a Superior Court Judge for that long. My experience as a Superior Court Judge was just wonderful. I met two of my dearest friends, Judge Rick King, who's on the criminal panel, and Justice Richard Fybel, when we were all assigned together at North Court. If you had to ask me who is one of the best criminal judges I've ever seen, it would be Judge King. Coming from a civil background, the criminal system could be overwhelming. Having Judge King there was a great educational process for me and it was a great stepping-stone to this job which is both civil and criminal. Justice Fybel had a background very similar to mine [as a civil attorney]. He was on the Bench before me, so he had gone through this educational training process. I not only had an expert like Judge King around me, but I could also tap into Justice Fybel who, candidly, I think is one of the greatest legal minds on the bench. He is a brilliant guy and incredibly thoughtful. So I learned the practical, day-to-day experience from Judge King and was also heavily influenced by Justice Fybel and his knowledge and analytical ability. I learned how to be a judge on the Superior Court, and a year-and-a-half later I got this job.

Q: How would you describe your judicial philosophy?

A: People ask that question and I always smile because, well, are you a conservative, are you a liberal, are you an activist or do you believe in judicial restraint? The longer I live, the more I think that those labels are inapplicable or maybe meaningless to what I do. I like to consider myself as someone who is practical and realistic. The law is what the law is, and I try to do the best I can while also realizing that I am neither the Executive Branch nor the Legislative Branch. As a District Court Judge, my job is to determine what the right thing to do is and what the fair thing to do is. I have to consider the facts and the equities. The appellate courts worry about what the law is, but I deal with people and the laws that I have to understand and apply; a lot of which are just general standards. I have learned in life that there are very few absolute rights other than your right to a jury trial. The First Amendment is not absolute. The Fourth Amendment rights are not absolute. The right to privacy is not absolute. They are always subject to certain conditions and that is what is so interesting. Every case is so unique and you try to apply these very important fundamental principles to a case. You just try to do the best you can. So people can look at many decisions that I've made and say “wow, that's a pretty conservative decision,” or other people can look and say “wow, that's a pretty liberal
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decision.” Some even say that “*this guy, he’s difficult to predict.*” But I like to think that I am predictable. I like to think that I try to do the right thing based on precedent, realizing that there are no absolutes in life. You have to exercise judgment. I was appointed to do that.

Q: Is there anything you did not learn until taking the bench that you wish you had known in private practice?

A: Good question. It is not that I didn’t know this in private practice, but I have always believed that gamesmanship and intellectual dishonesty are fatal mistakes. I know how it impacts me and I know how it impacts my colleagues. In private practice, some colleagues and clients almost expect that if you are dealing with someone who is being a jerk, tit for tat is necessary. If you are on a case, the name of the game is to win. I am not saying that people outright lie, but they fudge, they try to spin. What I have learned in this job is that it just doesn’t sell. In the short term, people may get away with the gamesmanship and the tit for tat, but in the long run, those tactics will not be successful. I appreciate that better now because I have lived longer and I have seen things. At the end of the day, those people get what they deserve. I did not fully realize that as a young lawyer.

Q: What advice would you give to a young lawyer appearing before you for the first time?

A: Simplify, simplify, simplify things and complete honesty in all that you do.

Q: How do you like to spend your free time?

A: With my family and outdoor activities like jogging, hiking, going to the beach.

The ABTL thanks Judge Carney for his time.

◆ *David Lee is an associate at Weiland, Golden, Smiley, Wang, Ekvall & Strok, LLP.*

filing any new litigation in any California court as a pro per plaintiff without leave of court. Notably, the Judicial Council’s list of “vexatious litigants” who cannot initiate new litigation without leave of court currently spans 47 pages and identifies over 1,200 individuals and entities.

As detailed below, the vexatious litigant statute can be a valuable litigation tool for defense counsel. The statute not only allows a defendant to obtain security from the plaintiff, but also allows the defendant to obtain a stay of proceedings, an attorneys’ fees award, and perhaps even an early dismissal. This article summarizes the ways in which defense counsel can best use the statute to keep the cost of litigation down and to obtain a favorable resolution in cases filed by vexatious litigants.

Who Qualifies as a Vexatious Litigant?

Before turning to the types of relief available against vexatious litigants, it is first helpful to examine what activity or patterns of conduct can be used to prove that the plaintiff qualifies as a “vexatious litigant” within the meaning of CCP section 391(b). The moving defendant bears the burden of demonstrating that the plaintiff qualifies as such under one or more of the prongs of the statutory definition.

The first type of vexatious litigant is the **constant suer** — the person who, in the past 7 years, has filed as a pro per plaintiff 5 or more “litigations” that were “finally determined” against him or that unjustifiably remained pending for over 2 years without being brought to trial. CCP § 391(b)(1). The phrase “finally determined” means that all avenues for appeal have been exhausted or that the time for appeal has expired. *Childs v. PaineWebber Inc.*, 29 Cal. App. 4th 982, 993 (1994). The term “litigation” is broadly defined in the statute as “any civil action or proceeding, commenced, maintained or pending in any state or federal court.” CCP § 391(a) (emphasis added). This necessarily includes not only civil trials and proceedings, but also writ petitions and civil appeals, even if dismissed for being untimely filed. *McColm v. Westwood Park Ass’n*, 62 Cal. App. 4th 1211, 1214-15 (1998); *Fink v. Shemtov*, 180 Cal. App. 4th 1160, 1173-74 (2010). Even cases that the pro per plaintiff voluntarily dismissed *without prejudice* count toward the “5 litigations” benchmark, because such cases burden the judicial system and the defendant. *Tokerud v. Capitolbank Sacramento*, 38 Cal. App. 4th 775, 777, 779-80 (1995).

Proving that the plaintiff qualifies as a vexatious litigant under this prong necessarily involves searching

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various state, federal, and appellate court case records for prior suits filed by the plaintiff, and then ordering and inspecting the court files to see whether any such suits were “finally determined” against the plaintiff or unnecessarily remained pending for over 2 years. This research may be well worth the time and expense: those court files are judicially noticeable, and by attaching relevant excerpts of 5 such cases to its motion, the defendant can provide clear, tangible grounds for the court to grant its requested relief.

Another type of vexatious litigant is the **repeat offender** — the plaintiff who has repeatedly attempted to re-litigate claims as a pro per plaintiff against the same defendant, when such claims were already finally determined against the plaintiff; or the plaintiff who has already been declared a vexatious litigant by any state or federal court in an action based on the same or similar facts, transaction, or occurrence. CCP § 391(b)(2), (4).

The final type of vexatious litigant is the **frivolous or vexatious litigator** — the plaintiff who repeatedly files unmeritorious motions, pleadings, or other papers; who conducts unnecessary discovery; or who engages in other tactics that are frivolous or solely intended to cause delay. CCP § 391(b)(3). Litigation tactics that “cumulatively evidence a ‘level of vexatiousness’” — even in the absence of unmeritorious filings — may be sufficient for the plaintiff to qualify as a vexatious litigant under this prong. *Golin v. Allenby*, 190 Cal. App. 4th 616, 639 (2010). “What constitutes ‘repeatedly’ and ‘unmeritorious’ under subdivision (b)(3), in any given case, is left to the sound discretion of the trial court.” *Morton v. Wagner*, 156 Cal. App. 4th 963, 971 (2007). If arguing that the plaintiff qualifies as a vexatious litigant under this prong, a defendant may note that the rules of professional conduct apply to pro per litigants, and pro per litigants are “held to the same standards as attorneys.” *Kobayashi v. Super. Ct.*, 175 Cal. App. 4th 536, 543 (2009).

Although frivolous or vexatious litigation tactics can certainly be irritating for the defendant and defense counsel, such conduct has a subjective element and therefore may be more difficult to quantify in moving papers or in a court order. Thus, if at all possible when bringing a vexatious litigant motion, it is helpful to prove that the plaintiff qualifies as a vexatious litigant under both this prong (section 391(b)(3)) and under another more objective prong of the statutory definition (section 391(b)(1), (2), or (4)).

The Benefits of Moving for Security: Obtaining a Stay, Forcing the Plaintiff to Post Security, and Obtaining Attorneys’ Fees or a Dismissal

As noted above, one type of relief available under the vexatious litigant statute is an order forcing the plaintiff to furnish security for the benefit of the defendant. CCP § 391.1. For the court to issue such an order, the defendant must prove that (1) the plaintiff qualifies as a “vexatious litigant” within the meaning of the statute, and (2) there is no “reasonable probability” that the plaintiff will prevail in the subject litigation. CCP §§ 391.1, 391.3. In evaluating the second element, the trial court is not bound to assume the truthfulness of the vexatious litigant’s complaint, but rather is to weigh the evidence presented by each side, such as declarations, written evidence, or even oral testimony presented at the hearing. CCP § 391.2; *see Moran v. Murtaugh Meyer & Nelson, LLP*, 40 Cal. 4th 780, 782, 785 n.7 (2007) (disapproving *Devereaux v. Latham & Watkins* (1995) 32 Cal. App. 4th 1571, in which the Court of Appeal had held that the plaintiff’s allegations are to be credited).

Proving that there is no reasonable probability that the plaintiff could prevail can be difficult and time-intensive. The defendant must present sufficient evidence to defeat the plaintiff’s position, and it also must clearly and concisely set forth the requisite legal authority. In some cases, this may be almost as arduous as preparing a motion for summary judgment. However, the effort and expense of this process may be worthwhile when one considers the possible benefits of both filing and prevailing on such a motion.

First, the simple act of filing the motion stays the litigation until the motion has been heard. CCP § 391.6. A stay can be particularly useful when dealing with a plaintiff who routinely abuses the discovery process, files unmeritorious motions, or engages in other vexatious conduct. The stay cuts off the plaintiff’s ability to continue such practices while the motion is pending, hopefully reducing the amount of attorneys’ fees incurred in dealing with the plaintiff’s vexatious conduct.

Second, if the court determines that the plaintiff is a “vexatious litigant” within the meaning of the statute and that there is no reasonable probability that he will prevail in the litigation, the statute requires the court to order the plaintiff to furnish security for the benefit of the defendant. CCP § 391.3. The security must be in an amount sufficient to “assure payment” to the defendant of its “reasonable expenses,” including its attorney’s fees and costs. CCP § 391(c). The stay remains in effect until 10 days after the plaintiff has furnished the required security and the defendant has given written notice thereof. CCP § 391.6.

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Third, in the event the plaintiff actually furnishes the security and ultimately loses the lawsuit, the defendant may have its attorneys' fees paid out of the security posted by the plaintiff. This is true even if the defendant would not normally be entitled to recover its attorneys' fees in a lawsuit of that nature. *Singh v. Lipworth*, 132 Cal. App. 4th 40, 44-47 (2005). The vexatious litigant statute itself provides the authority for the fees award. *Id.*

Finally and perhaps most importantly, if the plaintiff does not post security as ordered, the statute requires the court to dismiss the litigation as to the moving defendant. CCP § 391.4. The plaintiff's inability or unwillingness to post the security does not excuse his noncompliance with the security requirement. *Moran*, 40 Cal. 4th at 786 (rejecting the argument that CCP section 391.4 unconstitutionally discriminates against plaintiffs "of modest means"). Thus, as a practical matter, prevailing on a motion for security will often result in a dismissal if the vexatious litigant plaintiff cannot afford to post the security.

The Threat of the Judicial Counsel's Vexatious Litigant List

Another type of relief available under the vexatious litigant statute is an order prohibiting the plaintiff from filing any new litigation as a pro per plaintiff in California courts without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. CCP § 391.7. Such orders, which the court can make on its own motion or on the motion of any party, operate "beyond the pending case." CCP § 391.7(a); *Shalant v. Girardi*, 51 Cal. 4th 1164, 1170 (2011). Once the court enters such an order, the presiding judge of the court where the litigation is proposed to be filed may permit new litigation "only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay." CCP § 391.7(b).

The Judicial Council distributes its vexatious litigant list annually to all clerks of court in California to prevent vexatious litigants from filing new litigation in pro per without obtaining leave of court. The public can currently view the list at <http://www.courts.ca.gov/documents/vexlit.pdf>, although there has been some debate about whether the list should remain available for public review. As noted in the introduction, the list is currently 47 pages long and identifies over 1,200 vexatious litigants. A vexatious litigant who falsely claims in a subsequent lawsuit that he is not the person identified on the list (i.e., a false claim of mistaken identity) may be subject to criminal prosecution. See *Kobayashi*, 175 Cal.

App. 4th at 543 (finding that the appellant had likely made such a false claim and directing the appellate court clerk to send a copy of the opinion to district attorneys and the Attorney General "for them to take whatever action they may deem fit").

For the vexatious litigant who is attempting to make a career out of filing unmeritorious lawsuits and obtaining nuisance settlements, the threat of being put on the vexatious litigant list could be so great as to incentivize an early dismissal. Thus, seeking additional relief under CCP section 391.7 in a motion for security may be beneficial.

Closing Words on Constitutionality and Public Policy Considerations

California courts have repeatedly upheld the vexatious litigant statute as constitutional. *Moran*, 40 Cal. 4th at 786; *Wolfgram v. Wells Fargo Bank*, 53 Cal. App. 4th 43, 56-59 (1997); *Childs*, 29 Cal. App. 4th at 992. As one court explained, "the right to petition has never been absolute," and "the general right of persons to file lawsuits . . . does not confer the right to clog the court system and impair everyone else's right to seek justice." *Wolfgram*, 53 Cal. App. 4th at 56. As another court explained shortly after the statute was first enacted, "[t]he constant suer for himself becomes a serious problem to others than the defendant he dogs. By clogging court calendars, he causes real detriment to those who have legitimate controversies to be determined and to the taxpayers who must provide the courts." *Taliaferro v. Hoogs*, 237 Cal. App. 2d 73, 74 (1965). Needless to say, these public policy considerations are all the more relevant today during the current budget crisis.

♦ *Kimberly A. Chase is an associate in Haynes & Boone's Orange County office.*

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LLP. Maria represents businesses in employment litigation and transactional matters, and has extensive experience with wage and hour class action lawsuits.

ABTL-OC is pleased that these fine attorneys have joined our Board of Governors.

Turning to our plans for 2012, ABTL-OC has fascinating programs planned for February and April. On February 1, Wylie Aitken of Aitken * Aitken * Cohn, Jane Froyd of Jones Day, and jury consultant Harry Plotkin, in a discussion moderated by Orange County Superior Court Judge Glenda Saunders, addressed the topic "Where the Rubber Meets the Road: Presenting Damages to the Jury." On April 4, O'Melveny & Myers partners Tad Allan, Kenneth L. Nissly, Susan van Keulen and Kenneth R. O'Rourke will discuss their successful representation of Hynix Semiconductor in *Rambus, Inc. v. Hynix Semiconductor, Inc., et al.*, "Defense 9, Plaintiff 3: Winning Over the Jurors in the \$12 Billion Rambus Antitrust Trial."

Then, on June 6, ABTL-OC will hold its 13th annual winetasting fundraiser benefiting the Public Law Center. Over the past twelve years, ABTL-OC has raised more than \$150,000 for the Public Law Center. These funds help PLC pursue its mission of providing access to justice for low income Orange County residents.

Finally, it is not too early to save the date for ABTL's 39th Annual Seminar, September 19-23, 2012, at the Grand Hyatt Kauai Resort & Spa. California's Chief Justice Tani Cantil-Sakauye will deliver the keynote address on Saturday, September 22. I hope that many ABTL-OC attorneys will plan to attend.

Thank you for your continued support of ABTL-OC. I look forward to seeing you at our 2012 events.

-Sham Guaranty: Continued from page 3-

who is already obligated on the guaranteed obligation. This most commonly occurs where individual partners of a general partnership or the general partner of a limited partnership execute guaranties of partnership debt. The legal basis behind this argument is that the guarantor is the *de facto* borrower, and thus should be entitled to the unwaivable anti-deficiency protections of the borrower. *River Bank America v. Diller*, 38 Cal.App.4th 1400, 1420 (1995).

At first blush, it seems that this defense would apply to a very limited set of facts. However, courts considering this defense have often expanded the concept beyond the typical partner-partnership scenario. Whether this concept expansion is a result of the current anti-lending atmosphere, or the fact that California law does not define a "sham guaranty," the result is the same: lenders in today's market should not expect a quick, summary disposition of a claim for breach of guaranty if the "sham guaranty" defense is raised.

In determining whether the guarantor is a true guarantor or merely "a principal obligor in guarantor's guise" the courts will assess a number of factors, including:

- ◆ whether the borrower functioned as a genuine entity as opposed to a mere shell for the guarantors as individuals;
- ◆ whether the guarantor was otherwise obligated under the loan;
- ◆ whether the lender purposely structured the loan transaction to avoid protections under the anti-deficiency statutes;
- ◆ whether the guarantors have effective ownership and control of the borrower;
- ◆ whether some or all of the guarantors are the alter egos of the under capitalized borrower;
- ◆ whether the borrower was a single purpose entity created at the insistence or recommendation of the lender;
- ◆ whether the borrower had substantial assets aside from the property itself;
- ◆ whether the lender reviewed and considered the financial information of the principal obligor or simply focused on the assets of the guarantor;
- ◆ whether the lender unilaterally controlled the structure of the loan transaction.

Many California cases have analyzed the factual scenarios of the "sham guaranty" defense, ultimately finding that the guaranty was indeed a "sham guaranty," or at a minimum, that a triable issue of material fact existed precluding summary disposition of the matter. For example, in *River Bank, supra*, the lender initially agreed to form a joint venture with the borrower, whereby the lending bank would be a limited

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-Sham Guaranty: Continued from page 9-

partner and the defendants' principal development company (wholly owned by defendants' family trust), would be the general partner. *Id.* at 1407, 1421-1422. However, during the course of drafting the final loan documentation, the lender changed the entire structure of the proposed agreement and required a participating loan with accompanying guaranties. *Id.* at 1421. The lender also insisted that an entirely new borrower be used that was wholly separate from the original borrower. *Id.* at 1422. The court found a triable issue of fact as to whether the lending bank "subverted the purpose of the anti-deficiency laws by making a related entity the debtor while relegating the principal obligors to the position of guarantors." *Id.* at 1423.

Similarly, in *Valinda Builders, Inc. v. Bissner*, 230 Cal.App.2d 106 (1964), two defendant subdividers purchased a tract of land from plaintiff, paying part of the purchase price and giving a note and deed of trust on the land for the balance. Plaintiff's trust deed was then subordinated to the security of a construction loan secured for the development of the land and construction of houses. Defendants later organized a corporation to take title. The newly formed corporation (which was a nominal close corporation with no working capital) executed a note and deed of trust to plaintiff. When the venture failed, and plaintiff's subordinated security was rendered valueless, plaintiff sued not on the contract of sale or note, but on a provision of the contract of sale by which defendants guaranteed payment of the purchase money note. The court found that a "sham guaranty" existed because: 1) all stockholders in the borrowing entity were also the only guarantors; 2) the guarantors were initially intended to be the individual borrowers; and 3) all of the funds invested in the borrowing entity were contributed by the guarantors.

In *Union Bank v. Brummel*, 269 Cal.App.2d 836 (1969) individual investors originally intended to purchase certain property in their own names. The lender advised them instead to have a corporation take title, and required two corporate officers to execute personal guaranties. This structure was allegedly for the purpose of avoiding the effect of the anti-deficiency legislation. Although the evidence also reflected that the borrowing corporation was in existence at the time of execution of the note and deed of trust and was not formed for the purpose of taking title in its name, the appellate court held that these facts sufficiently raised a triable issue of material fact. *Id.*, at p. 838.

In the final analysis, whether a guaranty will be considered a sham or a true guaranty will depend on the particular facts of the case. However, in the ordinary commercial transaction (where the borrower is often a single purpose entity and the guarantors are members of that entity) a number of the "sham guaranty" factors are likely to be present. The determination of whether a person is a true guarantor or a principal obligor in guarantor's guise is a factual question. See *Yunker v. Reseda Manor*, 255 Cal.App.2d 431, 438 (1967). Accordingly, no matter how carefully the lender crafts the guaranty, if the transaction involves a single purpose borrower, a related guarantor and the guarantor raises the "sham guaranty" defense, so the lender should not expect a quick summary disposition of its enforcement action against the guarantor.

◆ *Lynnda McGlenn is a senior attorney with Dorsey & Whitney, LLP's Southern California office. Ms. McGlenn's practice focuses on general and complex business and commercial litigation, and she has successfully litigated against the sham guaranty defense on behalf of various lending organizations.*

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trieved July 18, 2010; Nick Denton, "Facebook consistently the worst performing site," Gawker, retrieved July 18, 2010). To address this problem, Facebook developed more "personalized" advertising methods that include apparent endorsements from a member's Facebook "friends."

One example of such advertising involves Facebook's own "friend finder" service. Facebook members who use this service grant Facebook access to their email accounts, so that Facebook can compare them with its member database and present the member with a list of other Facebook members he or she knows but are not among his Facebook "friends." That is the service members who choose to use "friend finder" sign up for.

However, Facebook also uses the name and image of members who use "friend finder" to promote the "friend finder" service to others. It does this by placing notifications on the pages of users' accounts that one of their "friends" utilized the service, and encourages them to "give it a try!"

Another Facebook advertising technique involves "sponsored stories." A "sponsored story" is a form of advertisement that appears on a member's Facebook page. It consists of another "friend's" name, profile picture, and an assertion that the friend "likes" the advertiser. Facebook can generate such a "sponsored story" whenever a user utilizes the "post," "like," or "check-in" feature if the content relates to an advertiser. See "Facebook Sponsored Stories," *supra*.

Facebook's founder, Mark Zuckerberg, had described these "friend" endorsement ads as invaluable:

"People influence people. Nothing influences people more than a recommendation from a trusted friend. A trusted referral influences people more than the best broadcast message. A trusted referral is the Holy Grail of advertising."

(<http://www.Facebook.com/scionsocial> accessed January 27, 2012.)

Facebook claims that people who view such "friend" ads are twice as likely to remember seeing them and three times as likely to buy the product as with a regular ad. ("Facebook Sponsored Stories For Marketplace," October 20, 2011, facebook.com/ads/stores/sponsoredstoresguide_Oct2011.pdf, retrieved February 2, 2012.)

However, absent permission, this use of members' names and likenesses to promote Facebook and Facebook's advertisers arguably implicates an intellectual property right owned by every member - the right of publicity.

THE RIGHT OF PUBLICITY

The right of publicity is, in some ways, the most intuitive of intellectual property rights. While copyright and patent law protect what you create, and trademark law protects what you symbolize, right of publicity law protects who you are. The "right of publicity" describes an individual's right to control commercial exploitation of his or her identity.

The right of publicity is a creature of state law, but it has been recognized by an overwhelming majority of states. About 40 states recognize the right of publicity for living people, while 18 states have recognized one for heirs of the deceased. See Mark S. Lee, Entertainment and Intellectual Property Law, Chapter 3 (West 2012). No state has rejected the right for the living, and only one state, New York, has clearly done so for the deceased. *Id.*

California recognizes statutory rights of publicity for living and deceased individuals. See Cal.Civ.Code §§ 3344 and 3344.1. It also recognizes additional common law rights of publicity for living, and perhaps deceased, individuals. See *Midler v. Ford Motor Company*, 849 F.2d 460 (9th Cir. 1988) (describing a common law right of publicity for a living individual separate and apart from the statutory right); *Lugosi v. Universal Pictures*, 25 Cal.3d 813 (1979) (holding either that there was no common law posthumous right of publicity, or that there was such a right only in narrow circumstances).

What the right of publicity protects varies from state to state. However, every state to recognize the right has agreed that the right to approve use of one's name or likeness to endorse products or services is included within it. *Midler, supra*; Mark S. Lee, Entertainment and Intellectual Property Law, Chapter 3, *supra*.

RIGHT OF PUBLICITY LITIGATION AGAINST FACEBOOK

Beginning in August of 2010, at least five class actions were filed against Facebook which alleged, inter alia, that Facebook's use of user testimonials violated the users' rights of publicity. Three of these cases were voluntarily dismissed shortly after Facebook demurred, moved to dismiss, or otherwise sought to procedurally affect the proceedings. See *David Cohen v. Facebook, Inc.*,

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No. BC44482 (L.A.S.C.; complaint filed August 26, 2010); see *Meth v. Facebook, Inc.*, No. BC 45479 (L.A.S.C.; complaint filed February 9, 2011); *J.N. v. Facebook, Inc.*, No. 11-CV-2128 (E.D.N.Y. complaint filed May 5, 2011); cases voluntarily dismissed on August 4, 2011 and November 23, 2011.

Substantive rulings issued in only two cases. In *Robyn Cohen v. Facebook, Inc.*, 2011 WL 5117164 (N.D. Cal. October 27, 2011), plaintiffs alleged, inter alia, that Facebook used its members' names and likenesses to promote its "friend finder" service without permission. Facebook responded by arguing that (1) Facebook's name and likeness uses were permitted by the terms of use each Facebook member agrees to, and (2) plaintiffs suffered no economic harm from the use. The Robyn Cohen court addressed both arguments. *Robyn Cohen, supra*, at *1-3.

The court declined to rule as a matter of law that plaintiffs had effectively consented to the use of their names and likenesses in a manner that the complaint alleged was wrongful by agreeing to Facebook's terms of use based on a prior ruling. *Id.* at *1. However, the court dismissed plaintiffs' action based on Facebook's second argument that plaintiffs had not sufficiently articulated economic harm. The court made several points in so ruling.

First, the court stated that plaintiffs' "claim is based on a purported legal right of publicity in their own names and likenesses, which they contend exists without regard to whether or not their names and likenesses have any general commercial value." *Id.*, at *2. Although it did not say why, the court's ruling effectively rejected that argument, implying that facts not available to most people, such as the fact that the person was a celebrity, or worked as an entertainer or model, or otherwise did something to create specific "commercial value" in their identity above and beyond that possessed by all people had to be pled to support the "economic harm" element of a right of publicity claim.

Second, the court distinguished case law cited by plaintiffs in which non-celebrities had been permitted to pursue right of publicity claim under California law, noting that, with regard to one case, "although the individuals did not have celebrity status, they were engaged in the business of modeling." The court also noted that although the plaintiff in another case was neither famous nor a model, "he is a public performer and entertainer, with an obvious economic interest in his likeness unlike anything plaintiffs have alleged here." *Id.* at *3.

Third, the Court thought it "worth noting" that plaintiffs' names and likenesses were not distributed to the pub-

lic, but only to plaintiffs' Facebook "friends," who regularly have access to their names and likenesses whenever they visit Facebook. *Id.*

Finally, the court ruled that the California's provision of statutory damages of \$750 per infringement under Civil Code 3344 "does not eliminate the requirement of a cognizable injury in the first instance." *Id.* The court therefore dismissed plaintiff's complaint with prejudice.

Plaintiffs in *Robyn Cohen* have appealed the district court's decision. (See Notice of Appeal filed November 28, 2011 in *Robyn Cohen v. Facebook*, Case No. 11-1784, Ninth Circuit Court of Appeals.)

Showing that reasonable minds can differ - sometimes with the same Federal District - the "economic harm" argument that the *Robyn Cohen* court accepted was rejected in *Fraley v. Facebook, Inc.*, ___ F.Supp.2d ___, 2011 WL 6303898 (N.D. Cal. Dec. 16, 2011). Fraley alleged right of publicity and other claims based on Facebook's use of members' names and likenesses in "sponsored stories." Facebook moved to dismiss based on "consent" and "no economic harm" arguments similar to those raised in Robyn Cohen, among other arguments. However, the Fraley court rejected the "economic harm" argument Robyn Cohen had accepted.

First, as in *Robyn Cohen*, the *Fraley* court found that the language in Facebook's Terms of Use was not so clear as to support summary dismissal of the complaint, even if those terms of use were judicially noticeable. 2011 WL 6303898 at *5.

Second, the court found that plaintiffs had sufficiently alleged cognizable injury because they claimed that "defendant used their names, photographs, likenesses and identities to sell advertisements for products, services, or brands without obtaining plaintiff's consent, and that plaintiffs were economically injured when denied compensation for such unauthorized use." 2011 WL 6303898 at *7. The court rejected Facebook's argument that plaintiffs' economic harm theory was merely speculative because it found that "plaintiffs have articulated a coherent theory of how they were economically injured by the misappropriation of their names, photographs and likenesses for use in paid commercial endorsements targeted not at themselves but at other consumers without their consent." *Id.* at *9. *Fraley* distinguished *Robyn Cohen* by stating the "plaintiffs here have quoted explicit statements by Facebook's own CEO and COO that friend endorsements are two to three times more valuable than generic advertisements sold by Facebook advertisers." *Id.*

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As this article is being written, *Fraley* is proceeding in the trial court, with issues involving class certification, summary judgment, or trial yet to be decided.

WILL FACEBOOK “LIKE” THE WAY FORWARD?

Robyn Cohen and *Fraley* are both being actively litigated, and it is impossible to accurately predict the ultimate result in either case. However, the *Robyn Cohen* courts’ standard for “economic harm” is very much a minority view. The overwhelming majority of courts and commentators have held or argued that *everyone* has the right to assert a right of publicity claim for decades, with the “commercial value” of the individual’s name or likeness relevant only to damages. See, e.g., J. Thomas McCarthy, *The Rights of Publicity and Privacy* (2d Ed.) § 4:16-4:20 and cases cited therein.

In California, for example, the Ninth Circuit has noted that “[i]t is quite possible that . . . the appropriation of the identity of a relatively unknown person may result in economic injury or may itself create economic value in what was previously economically valueless.” *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 (9th Cir. 1974). A California appellate court noted that “although the unauthorized appropriation of an obscure plaintiff’s name, voice, signature, photograph or likeness would not inflict as great an economic injury as would be suffered by a celebrity plaintiff, California’s appropriations statute is not limited to celebrity plaintiffs [.]” and further noted that “under California law, the statutory right of publicity exists for celebrity and non-celebrity plaintiffs alike.” *KNB Enterprises v. Matthews*, 78 Cal.App.4 362, 367 and fn.12 (2000). Courts across the country have affirmed this principal, with a number holding that defendants’ use of the plaintiff’s identity alone is sufficient to establish economic value in the identity, and thus economic harm from uncompensated use of the identity in advertising. See McCarthy, *The Rights of Publicity and Privacy*, § 4:16-17, *supra*.

Robyn Cohen’s apparent ruling that only people who have commercially exploited their identities through work and entertainment, modeling, advertising, or celebrity status can show economic harm sufficient to support a right of publicity claim seems inconsistent with the weight of this authority and trend of the case law. Furthermore, it is highly unlikely that any advertiser would use an individual’s name or likeness to promote a product or service unless it believed there was an economic benefit in doing so. Professional models are routinely compensated for such uses, and there is no reason why a person who has not previously sought to commercially exploit his or her

identity should not also be compensated when it is exploited without permission. “No social purpose is served by having a defendant get free some aspect of the plaintiff that would have market value for which he would normally pay.” *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977). This common sense proposition is underscored by Facebook’s own admission that its “member referral” method is the “Holy Grail” of advertising, and worth two to three times as much as Facebook’s ordinary advertisements are.

An affirmance of *Robyn Cohen* would appear to significantly narrow the right of publicity in a way that is inconsistent with decades of California case law, and place California in a very small minority in its approach to right of publicity actions. We may gain greater understanding of this issue if the *Robyn Cohen* appeal proceeds to a decision.

◆ *Mark Lee is a partner at Manatt, Phelps & Phillips, LLP.*

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They emphasized the importance of knowing the California Civil Discovery Act and the California Rules of Court (CRC). For example, Judge Margines noted that attorneys have often confused a motion to compel answers with a motion to compel further responses, and briefly discussed the differing requirements for each motion. Lastly, Judge Margines discussed motions for summary judgment, where he stressed the importance of knowing the procedural requirements set forth in California Civil Procedure § 437c and the CRC. Judge Margines and Ms. Leung particularly noted the importance of the separate statement of undisputed facts that must accompany a summary judgment motion.

With respect to oral arguments, Judge Margines advised attorneys to get to the point, as the judge does not need a summary of the facts of the case. He also recommended that attorneys primarily address the issues discussed in the tentative rulings posted prior to the hearing. If the judge has ruled against you, try to convince the judge that he or she is wrong on the law or on the facts, or that the analysis is faulty. If you cannot do that, simply smile and say submitted!

The brown bag lunch ended with two general suggestions by Judge Margines and Ms. Leung when presenting motions before the Court. First, Judge Margines emphasized the need to avoid ad hominem attacks, as those only reflect poorly on the one making them. Second, they recommended that we continuously consult treatises that clarify California's procedural requirements, such as the Rutter Guide, when practicing before the Court.

The ABTL expresses its sincere gratitude to Judge Margines for inviting us to his courtroom and for taking the time to provide us with guidance to improve our practice of law.

◆ *Anthony Gomez is an associate at Crowell & Moring LLP and Karen A. Morao is an associate at Dorsey & Whitney, LLP*

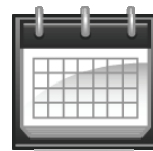
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◆ *William C. O'Neill is an associate in Haynes & Boone's Orange County office.*

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