ASSOCIATION OF BUSINESS TRIAL LAWYERS
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abtl REPORT

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The Federalization of Class Action Cases

By Anthony J. Battaglia, United States Magistrate Judge and Jan M. Adler, United States Magistrate Judge

On the heels of changes in class action litigation procedures under amended and new provisions to Federal Rule of Civil Procedure 23,[1] more sweeping changes have occurred to this area of law with the passage of the *Class Action Fairness Act* (CAFA), Pub. Law 109-2 (2005). The law applies to any civil action commenced on or after the February 18, 2005 enactment date.

Hon. Anthony J. Battaglia

The bill was passed upon findings by Congress that while class actions are an important and invaluable part of the legal system, there have been abuses of the class action device that have harmed class members, have adversely affected interstate commerce and have undermined public respect for the judicial system in the United States. CAFA is styled and subtitled as a consumer class action

Hon. Jan M. Adler

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1 The rule amendments deal with five general areas in class action practice. These are judicial oversight of settlements, the timing of the certification decision, notice, attorney appointment and attorney compensation. The provisions regarding attorney appointment and attorney compensation are totally new. The Amendments are discussed in greater detail in Class Action Rules Poised For Change, Federal Bar Association, San Diego Chapter Newsletter, Fall 2003, Federal Bar Association.

Filing Documents Under Seal: Another Trap for the Unwary

By John T. Brooks, Esq. of Luce, Forward, Hamilton & Scripps LLP

For many years, it was standard practice to produce trade secret or other confidential documents subject to a stipulated protective order that required the documents, if filed with the court, to be filed under seal. Courts frequently signed off on such sealing orders as a matter of course. But if you have had occasion to seek such a protective order recently, you may already know that things have changed. This article gives practical advice for how to protect your client's confidential information when, as now, courts are less likely to seal documents.

John T. Brooks

Filing documents under seal in the trial court is now governed by California Rules of Court 243.1 and 243.2. Rule 12.5 governs the same topic in the Courts of Appeal. All these rules were enacted in response to *NBC Subsidiary v. Superior Court*, 20 Cal.4th 1178 (1999), which found a presumptive right of public access to court proceedings based on the First Amendment and California's open court statute, C.C.P. § 124.

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Inside

President's Message: ABTL Programs and Some Observations on San Diego Courts

By Charles Berwanger, Esq. of Gordon & Rees LLP

Since January 1, 2005, the ABTL has put on two successful dinner programs, each attended by more than 200 judges and attorneys. The ABTL's brown bag lunches — put on every second month — continue to be popular, allowing attorneys to informally meet with and get a better understanding of the judges before whom we appear.

Charles Berwanger

Our recent panel discussion with three independent calendar judges was both a success and highlighted several recent developments and the ever-present budget crisis our statewide courts face. I will briefly discuss those developments and court budget issues. In addition, our upcoming programs will be discussed.

The ABTL independent calendar judge program of March 21, 2005 brought out several facts worthy of repetition. First, San Diego has been selected to be a pilot court for court-wide electronic filing. Our court is preparing to put this program into effect and it will require all of us to have in-house computer capability — both hardware and software — to participate in the program. Second, San Diego is one of the Judicial Council's preferred destination for coordinated cases, which tend to be complex, massive and challenging. The reason — San Diego courts' excellence. That consistent excellence is the rationale for there being no specialized complex litigation department. Third, thanks to the budgetary skills of our bench, our court will not have to close courts or downsize. Judges Einhorn and Sammartino recently met with State Senator Joe Dunn, who is truly a friend of the courts, and they report that there is a good chance that legislation will be enacted that should maintain adequate funding for all state courts in the years to come.

As an aside, Chief Justice Rehnquist in his 2004 Year-End Report on the Federal Judiciary addressed "the funding crisis currently affecting the federal judiciary." That crisis has required "many [federal] courts to impose hiring freezes, furloughs and reductions in forces." Our Southern District, reports Clerk Samuel Hamrick, Jr., having been very careful with its resources, does not anticipate such ill consequences. Mr. Hamrick reported that the Central District has made significant staff cuts. Anyone who has tried to speak to a Central District clerk — probably without success — understands the significance of such cuts.

Although San Diego attorneys can, at least for now, feel some relief, they should nevertheless support our courts and Senator Joe Dunn's efforts. Without our support, our courts are at risk.

On a different topic, please get your calendars out as you read on. Currently scheduled ABTL events are as follows:

The May 16, 2005 ABTL dinner will feature Leslie Caldwell. Ms. Caldwell, who headed the United States Attorney's Enron Task Force, will speak about her experience in various high profile prosecutions.

The June 8, 2005 ABTL brown bag lunch will be hosted by Magistrate Judges Adler and Battaglia. They will address new federal class action legislation discussed in this newsletter, how it is supposed to work, and the many issues it raises.

The September 12, 2005 ABTL dinner will feature Roger Adelman, a former Assistant U.S. Attorney who prosecuted John Hinckley and white collar crimes while with the Justice Department. Mr. Adelman will speak on complex civil litigation, use of technology and jury expectations and persuasion.

The October 21-23 ABTL Seminar Program — "Building to the Close" — at the Ventana Resort, Arizona and coordinated by our chapter, will showcase California's best trial lawyers who will demonstrate trial skills before a jury. More infor-

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Developments in Electronic Discovery

By Benjamin Galdston, Esq. of Bernstein Litowitz Berger & Grossmann LLP

At the opening of a complex case, your adversary serves document requests demanding "all documents" concerning a litany of facts alleged in the complaint revolving around events that occurred two years ago. Naturally, your client BigCo – a multinational corporation with 15,000 employees and half a dozen facilities scattered across the globe – stores its documents in both paper and electronic form.

BigCo did circulate document preservation instructions to all its employees when litigation first started brewing. So, collecting and producing those documents should be a straightforward, albeit laborious, task. Right?

But wait, the plot thickens. BigCo has a traditional server and client PC network called a "local area network" or "LAN" at each of its office locations. But, among is various locations, BigCo also uses another dedicated computer network, called a "wide area network" or "WAN." Some employees also have laptop PCs, which they use for travel, while other employees are allowed to work from home using their personal computers. Some employees are provided with "personal digital assistants" or "PDAs" (e.g., BlackBerry), cellular telephones or a device for digital messaging. E-mail, word processing, and some database and spreadsheet functions are performed using ordinary

Benjamin Galdston

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bill of rights.[2]

The expressed goals of the legislation are:

1. To assure fair and prompt recoveries for class members with legitimate claims;

2. To restore the intent of the framers of the United States Constitution by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction; and,

3. To benefit society by encouraging innovation and lowering consumer prices.

The Act includes new provisions for judicial review and approval of non-cash settlements;[3] protection against net loss by class members because of payments to class counsel; a prohibition against court approval of a proposed settlement providing for greater payments to certain class members because they are located in closer geographic proximity to the court than other class members; and specific requirements regarding notification to federal and state officials of proposed settlements by each defendant participating in the settlement. (*See*, 28 U.S.C. §§1711 through 1715.)

Congress felt that state and local courts are keeping cases of national importance out of federal court; that they sometimes demonstrate a bias against out-of-state defendants; and that they are imposing their views on other states and residents of those states. To address these particular issues, CAFA also greatly expands federal court jurisdiction in class action cases. This is accomplished in three ways. The first is in the area of diversity jurisdiction (*See*, 28 U.S.C. §1332) and the second is by amending removal jurisdiction provisions (*See*, 28 U.S.C. §1441, *et seq.*). Finally, CAFA includes mass actions within the federal court's jurisdiction either as a matter of original jurisdiction (through minimal diversity requirements) or by way of new removal provisions.

Unfortunately, in the name of fairness to consumers, some rights may have been forfeited. In federalizing interstate class action practice, the CAFA collides with existing Supreme Court precedent limiting federal court review where too many varying state laws are involved in a multi-state class action. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). If jurisdiction is vested in the federal court, yet the court cannot certify a class, no class action remedy may be available. Litigants would have to resort to individual state court actions or regular single plaintiff diversity cases to attempt a remedy. The utility or ability to bring these types of matters piecemeal is doubtful.

This appears to be an intended consequence. Senators Feinstein and Bingaman offered an amendment to cure this problem [SA.4, 151 Cong. Rec. S.1215 (2005)]. But it, like all other amendments to the bill, was defeated. *Id.* The Feinstein/Bingaman amendment proposed that the court not deny class certification where varying state laws arguably applied, but rather, that the court issue subclassifications to permit the action to proceed or attempt to apply the state laws to the extent practical.

Overall, the statute would appear to alter the concept that federal courts are courts of limited jurisdiction, at least in the class action context, by giving district courts original jurisdiction over any class action meeting the criteria set forth in the statute. From this premise, a series of exclusions are crafted to eliminate certain cases with a predominating state interest, or smaller cases based on the number of potential class members or the amount in controversy. This change in federal court jurisdiction will be examined in greater detail in this article.

While diversity jurisdiction is traditionally based on the concept of complete diversity,[4] a new minimal diversity standard now applies for class actions under CAFA. CAFA grants district courts [through amendment of 28 U.S.C. §1332(d)] original jurisdiction in all class actions with 100 or more class members[5] and in which the matter in controversy exceeds $5,000,000[6], exclusive of interest and costs, and

(See "CAFA" on page 5)

2 These findings are set forth in section 2(a) of the bill. Ten days after the enactment of CAFA, the Senate Committee on the Judiciary filed its Report on S.5 containing, *inter alia*, a description of the purposes, background and need for the legislation, a description of the way the legislation works and the changes it makes in existing law, a section-by-section analysis, and minority views on the legislation. No committee report was prepared prior to consideration and passage of the legislation, as is typically the case.

3 Note that the court is already required to review and approve class action settlements under Fed. R. Civ. P. 23(e)(1)(A).

4 28 U.S.C. §1332(a)(1-4); *Strawbridge v. Curtiss*, 7 U.S. 267 (1806) (any instance of common diversity prevents federal diversity jurisdiction).

5 28 U.S.C. §1332(d)(5)(B).

6 28 U.S.C. §1332(d)(6).

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where any class member:

1. Is a citizen[7] of a state different from any defendant;

2. Is a foreign state or a citizen or subject of a foreign state and **any** defendant is a citizen of a state (of the United States); or,

3. Is citizen of a state (of the United States) and **any** defendant is a foreign state or citizen or subject of a foreign state.[8]

For purposes of establishing jurisdiction, citizenship is determined as of the date of filing of the complaint or amended complaint in federal court or, where the initial pleading is not subject to federal jurisdiction, as of the date of service of an amended pleading indicating the existence of federal jurisdiction [§1332(d)(7)].

As indicated, there are some limits built into the legislation concerning the extent to which federal jurisdiction will be expanded. These limits include cases where a state, state official, or other governmental entity is a primary defendant[9] against whom a district court cannot order relief [§1332(d)(5)] and cases where there are less than 100 members in the proposed class [§1332(d)(6)]. Additionally, other limitations regarding jurisdiction exist in the form of types of cases where, based on certain findings, facts or circumstances, the court **may** decline to exercise jurisdiction as well as those where the court **must** decline jurisdiction. These exclusions essentially focus on the balance between the state and federal interests in a particular case, characterized initially by the proportion of class members who are citizens of the state where the case is filed.

Under §1332(d)(3), a court *may* decline jurisdiction where between one-third and two-thirds of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed, and upon considering six other factors:

1. Whether the claims asserted involve matters of national or interstate interest;

2. Whether the law of the state where the case is filed will govern (as opposed to the laws of other states);

3. Whether the case is pleaded to avoid federal jurisdiction;

4. Whether the forum has a distinct nexus with the class members, the alleged harm, or the defendants;

5. Whether the number of citizens of the class from the forum state is substantially larger than the number of citizens from any other state and the citizenship of the other class members is dispersed among a substantial number of states; and,

6. Whether one or more class actions asserting the same or similar claims have been filed in the three previous years.

Clearly, the stronger the national or interstate interest in light of these considerations, the more likely it will be that the federal court will exercise its discretion to retain jurisdiction over the case.

Certain situations, where an overwhelming state interest appears clear, are specified as inappropriate for federal jurisdiction. In these circumstances, the federal court *shall* decline to exercise jurisdiction. *See*, §1332 (d)(4). The statute describes these situations as follows:

1. Where two-thirds of the class or more are citizens of the state where the action was filed and the primary defendants are citizens of that state [§1332 (d)(4)(B)]; *or*

2. Where over two-thirds of the class are citizens of the state where the case was filed and at least one defendant is one:

A. from whom significant relief[10] is sought by the class;

B. whose alleged conduct forms a significant basis[11] for the claims asserted by the class; and,

C. who is a citizen of the state in which the action was originally filed.

In addition, to qualify under this latter test for mandatory declination of jurisdiction, the principal injuries resulting from the alleged conduct of each defendant must have been incurred in the state of filing and no other class actions must have been filed within three years of the filing of the subject class action asserting the same or similar factual allegations against any of the defendants.[12]

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7 Citizenship is defined as of time of filing the complaint or amended complaint or if removed at time of the filing of a pleading indicating the existence of federal jurisdiction [1332(d)(7)]. Unincorporated associations are deemed citizens of the state under whose laws they are organized and state where they have principal place of business [1332(d)(10)]. The statute does not change traditional definitions or law realting to the citizenship of individuals or corporations.

8 28 U.S.C. §1332(d)(4).

9 This term, like many other key terms and concepts in CAFA, is left undefined.

10 Like primary defendants this term is also undefined.

11 Also undefined.

12 §1332(d)(4)(A).

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This legislation does not define primary defendants, nor does it provide any guidance into the meaning of the concepts significant relief, significant basis or principal injuries, among many other key terms and concepts. These concepts will be important in the analysis and resolution of jurisdictional issues. If jurisdiction is challenged, these quantitative and qualitative factors will be the obvious focus of early discovery and much argument from varying viewpoints. In the end, because so many matters are left undefined in the statute, further definition of these pivotal terms will inevitably result from litigation.

The second part of the expansion of diversity jurisdiction is the inclusion of mass actions under §1332(d)(11). Mass actions are defined as any "civil action … in which the monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact …" [§1332(d)(11)(B)(i).] In these cases, each plaintiff's claim must exceed $75,000, exclusive of interest and costs.

As with the original jurisdiction provisions for class action cases in general, this legislation recognizes specific types of mass action cases where the state interest would be predominant and federal jurisdiction would not exist. The categories of cases excluded from federal jurisdiction under §1332(d)(11)(B)(ii) are those where:

1. All claims arise from an event or occurrence within a state with injuries suffered in the state and contiguous states;

2. The claims are joined by defense motion;

3. Cases brought on behalf of the general public (as opposed to those brought on behalf of individual claimants or members of a purported class) under a state statute specifically authorizing such an action (*i.e.*, at least some B&P 17200 claims would be excluded); or

4. Claims consolidated for pre-trial purposes only.

To the extent that these mass action cases are

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brought to federal courts under the removal statues (28 U.S.C. §1441, *et. seq.*), as opposed to being initially filed in federal court, they cannot be transferred to another court by the Judicial Panel on Multidistrict Litigation (MDL) pursuant to 28 U.S.C. §1407 unless the transfer is requested by the majority of plaintiffs [§1332 (d)(11)(C)(i)].[13]

As a result, the benefit obtained in utilizing the MDL statute to achieve consolidation in a single forum of large and complex cases could be lost or diminished. The impact on the local federal courts, especially those already experiencing judicial shortages, could be severe. It seems highly incongruous to recognize federal jurisdiction in the first place, assuming that federal interests outweigh those of the forum state, while mandating a particular local nexus to the venue for the proceedings in federal court.

The other substantive impact regarding mass actions relates to any limitations period on the claims asserted in mass actions removed to federal court. Under the statute, the limitations period will be tolled during the period that the action is pending in federal court [§1332(11)(D)]. This obviously contemplates the potential for remand and the possible harm to claimants in the absence of tolling.

The second phase in federalizing class actions (and mass actions) is a significant enhancement of removal jurisdiction. This is accomplished by adding a new code section to the removal statutes. New §1453 embraces the minimal diversity jurisdictional standard of new §1332(d)(2), so that cases that could be brought originally under the more expansive diversity standard may be removed from state court, if filed there first. This new section also significantly changes prior well-known removal practice in the class action set-

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13 This precondition to seeking transfer under 28 U.S.C. §1407 does not apply to cases certified as class actions or to cases that plaintiffs propose proceed as a class action [§1332(d)(11)(C)(ii)].

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ting. In summary form, these changes, set forth specifically in §1453(b), are as follows:

1. The one year time limit for removal [§1446(b)] is not applicable. A case of this type may be removed at any time where amended pleadings or other papers show that the suit has become removable;

2. Even a home state defendant can remove. This is an abrogation of the limitation in 28 U.S.C. §1441(b), which will continue to apply to all other federal civil cases not within the scope of CAFA; and

3. Any defendant can remove without the consent of all defendants. Hence, the former rule of unanimity [See, *Hewitt v. City of Stanton*, 798 F.2d 1230 (9th Cir. 1986)] is not applicable in these cases.

No changes have been made in the timing for a motion to remand. The 30 day time limit to move to remand based on procedural defects under §1447(c) remains intact. Similarly, remand based on a lack of subject matter jurisdiction, as before, can be raised at any time before final judgment. *Id.* These new areas of jurisdiction and remand may lead to a greater need for early, expedited discovery. Issues concerning the number of claimants and their geographic distribution will arise. These number and distribution questions will lead to answers focusing the standard of review as permissive [a court may decline jurisdiction, §1332(d)(3)] or mandatory [a court shall decline jurisdiction, §1332(d)(4)] as well as playing a key role in the outcome of remand decisions.

In view of the extensive legislation previously enacted with respect to securities class action and derivative suits, CAFA carves out claims under §16(f)(3) of the Securities Act of 1933 and §28(f)(5)(E) of the Securities Exchange Act of 1934, as well as shareholder derivative suits. 28 U.S.C. §1332(d)(9); §1453(d). Pursuant to previous legislation, virtually all securities class actions are already being litigated in the federal courts, while shareholder derivative suits can still be litigated in state court. CAFA thus does not disturb prior legislation with respect to securities litigation.

Appellate review of remand orders has also been created for these cases. With the exception of civil rights cases, orders remanding a case to state court are not generally reviewable on appeal. 28 U.S.C. §1447(d). This is no longer the case in class action litigation. New §1453(c) provides the courts of appeal discretion to accept an appeal from an order of a district court granting or denying a motion to remand. The appeal must be brought within seven days after entry of the order on the remand motion. If the Court of Appeals accepts the appeal, a decision must be rendered within sixty days. The Court of Appeals may unilaterally extend the period by 10 days in the interests of justice or for any other time period if all of the parties agree. If the court has not ruled on the appeal by the end of the sixty day period (plus any extension if one has been granted or agreed upon by the parties), the appeal is deemed denied.

No review of the Court of Appeals' decision is provided. There is also no limit on the number of times the issue can be raised on appeal. Conceivably, after a case is removed to district court, a series of remand motions and appeals could occur. Adding in time for associated discovery, a case could be pending for many months before typical class action proceedings could commence to address class certification, appointment of class counsel, early settlement and, of course, merits discovery. This will redefine the variables associated with the notion that class certification should be addressed at an early practicable time under Fed. R. Civ. P. §23(c)(1)(A).

Finally, new notice provisions will be imposed regarding settlements under new §1715. Under 28 U.S.C.§1715(b), not later than 10 days after a proposed class action settlement is filed with the court, each defendant participating[14] in the settlement must serve a notice of proposed settlement upon the appropriate state official (the person with primary state regulatory authority) of each state in which a class member resides and the appropriate federal official (the Attorney General or person with primary federal regulatory authority).

This notice must include a variety of documents and information specified in the statute [§1715(b)(1)] including the settlement details. Presumably, this notice will afford government officials an opportunity to monitor the settlement as it affects their citizens, and even to intervene or object. Importantly, any court order giving final

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14 This is yet another term lacking definition in the statute.

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approval of the proposed settlement may not be issued earlier than 90 days after the later of the dates on which appropriate federal and state officials are served with this notice. Failure to comply with this notice provision allows a class member to refuse to comply or be bound by the settlement agreement or consent decree from the case [§1715(e)(1)].

Practically speaking, what types of new and different cases will the Federal courts be seeing? Certainly, more mass tort cases, including toxic tort and product liability claims, as well as consumer class actions are likely to be filed in or removed to federal court. This latter category will include those cases brought by state Attorneys General. Attempts to eliminate those cases from federal jurisdiction by excluding any cases "brought by or on behalf of any Attorney General" was advanced as an amendment to CAFA and rejected.[15]

The number and wide array of cases that will now find their way into the federal courts is hard to predict.

The practical impact of this legislation is clear. With minimal diversity, a low aggregate amount in controversy requirement, enhanced removal jurisdiction and the inclusion of mass action cases, this legislation will result in an influx of very large and complex cases for the federal district courts. This infusion of cases will likely be front-loaded with motions and discovery requests directed to jurisdictional issues and remand motions (in removal actions). This will impact already stressed judicial resources.

Since the statute fails to define numerous key terms, such as primary defendants, significant injury, and significant relief, a fair amount of discovery may be necessary to frame the issues and to afford the district courts and the courts of appeal with a sufficient record to apply meaning to these focal and undefined factors. Delay in the progress of class action cases in general is inevitable as the law is clarified in practical terms for more expedient future application. While these threshold matters are resolved, more fundamental issues concerning class certification itself, the appointment of class counsel and the merits of the dispute will simply have to wait.

Courts will need to devote attention, time and creativity in devising effective case management strategies and techniques to survive the added cases CAFA will bring with it. Traditional notions of case management will need revision to move this expanding caseload and to efficiently and effectively resolve the numerous new issues that will be litigated, particularly in the early stages of the cases. Of course, the remaining stable of federal question and diversity cases, as well as the significant federal criminal caseload, will require significant attention as well. These are issues and matters that courts must tend to immediately in the interest of providing justice to all.

Lawyers will need to be equally creative and industrious in the investigation and planning of their cases to address the jurisdictional issues (including removal and remand) and the data associated with the number and geographic diversity of the putative class. Long before the Rule 26(f) conference, considerable thought and effort should be devoted to grappling with the information needed and assessment of the factors bearing upon jurisdiction and any necessary discovery associated therewith. This information will be critical in defining the standard of assessment of jurisdiction (discretionary versus mandatory) as well as the disposition of the issues presented in each case.

For lawyers and judges alike, Bob Dylan probably best characterized the challenge that lies ahead:

…you better start swimmin'
Or you'll sink like a stone
For the times they are a-changin'.[16] ▲

15 Senator Pryor advanced SA.5, 151 Cong. Rec. S1215 (2005). It was tabled by the Senate. *Id.* These actions may not be subject to federal jurisdiction [§§1332(d)(3) or (4)] since they may be particularly single state oriented by the pleadings.

16 "The Times They are a Changin", Bob Dylan ©1963.

President's Message

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mation will be forthcoming.

The November 14, 2005 ABTL dinner will feature actors Alan Blumenfeld and Katherine James, who will edify us on how acting techniques can make us better courtroom advocates and more persuasive in our interaction with other attorneys, juries and judges.

We look forward to seeing you at our many events and enlisting your help to support our courts when that help is needed. ▲

Under Seal

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These sealing rules do not apply to attorney-client privileged documents. C.R.C. 243.1(a)(2); *Huffy Corp. v. Superior Court*, 112 Cal.App.4th 97, 108 (2003). Nor do they apply to grand jury proceedings or matters ancillary to such proceedings. *Los Angeles Times v. Superior Cour*t, 114 Cal.App.4th 247 (2003). There are also special sealing rules for false claims act cases. C.R.C. 243.5 et seq.

Rules 243.1 and 243.2 represented a sea change in the handling of requests to file documents under seal in state court. The rules require the court to conduct a rigorous analysis and make express findings of the same type required to justify a law abridging freedom of speech. Specifically, the court must find: (i) there is "an overriding interest that overcomes the public right of access to the record," (ii) "the overriding interest supports sealing the record," (iii) a "substantial probability exists that the overriding interest will be prejudiced if the record is not sealed," (iv) "the proposed sealing is narrowly tailored," and (v) "no less restrictive means exists to achieve the overriding interest." C.R.C. 243.1(d).

In short, getting a sealing order is no small feat. Indeed, the few published cases interpreting Rules 243.1 and 243.2 have yet to find a party to have made the required showing. See *In re Providian Credit Card Cases*, 96 Cal.App.4th 292, 301 (2002); *Huffy Corp.*, 112 Cal.App.4th at 108. See also *Universal City Studios v. Superior Court*, 110 Cal.App.4th 1273 (2003) (acknowledging that the defendant's confidential financial information would normally have qualified for sealing, but finding waiver due to previous public disclosure).

In business litigation, trade secrets are perhaps the most pertinent category of documents that potentially qualify for sealing. However, other types of information may also qualify. These include (i) a business's confidential financial information, and (ii) information a party is contractually obligated to keep confidential. *Universal City Studios v. Superior Court*, 110 Cal.App.4th at 1283-86.

Even after enactment of the rules, some courts may still sign off on protective orders with sealing provisions without the necessary scrutiny (*Huffy Corp. v. Superior Court*, 112 Cal.App.4th at 102) but presumably that will become less common as judges become more sensitized to the new rules. Moreover, even if a trial court does seal documents without the required scrutiny, that would be no protection on appeal because the Court of Appeal would not be bound by the trial court's sealing order. *Id.* at 105.

Accordingly, if you have a case involving records you may want sealed, you need either to plan to satisfy the necessary court showing, or find a way to avoid having to make the showing. Here are a few suggestions to that end.

1. Figure out early in the case, if possible, whether confidentiality and sealing may become important issues. Then figure out if you have a strong or weak case for sealing. Be careful: the fact that your client has a strong and legitimate interest in confidentiality isn't enough. Courts have seized upon technical defects – such as the failure to put in place sufficient internal confidentiality safeguards, or previous unsealed disclosure in other cases – to deny sealing. See *Providian*, 99 Cal.App.4th at 308; *Universal Studios*, 110 Cal.App.4th at 1286. Be sure to check for any Achilles Heel of this type.

2. If you think you have a strong need for sealing but a weak record on which to get it, that fact may weigh in your decision to consider (i) binding arbitration, where you can ensure confidentiality, or (ii) removal to federal court, where you may find more lenient sealing standards.

3. Don't produce the confidential documents in the first place, if there is any legitimate way you can avoid it. In the past, the most efficient thing to do may have been to produce confidential documents subject to a protective order requiring filing under seal, rather than wage an expensive discovery battle. The increased difficulty of sealing documents changes the calculus of when to produce and when to fight.

4. If you have to produce the documents, try to redact the most sensitive information before production. This can be accomplished by pre-production agreement with your opponent (at least if the redacted information is not important to his or her case), or by court order following a motion to compel battle. A court's discretion to order redaction as part of a discovery order is less constrained

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than its discretion to order sealing. If your opponent only gets redacted documents, you don't need to worry about what gets filed.

5. If you have to produce unredacted confidential documents, consider an agreement with your opponent either not to file the confidential documents with the court, or to make redactions before doing so. Your opponent may want the documents merely because they might lead to admissible evidence, not because he or she expects to rely on the documents themselves as proof. In that event, your opponent may agree to the foregoing to avoid a discovery battle.

6. If you none of the foregoing works and you have to make a case for sealing to the court, be specific and limited in what you request sealed. Don't ask to seal the entirety of a document if only parts of it need protection. Parties that have taken an all-or-nothing approach to their sealing requests have gotten nothing. See *Providian*, 99 Cal.App.4th at 309; *Huffy*, 112 Cal.App.4th at 107.

7. Finally, pay close attention to your evidentiary record. Your showing of an overriding interest in confidentiality should be supported by specific, non-conclusory declarations of appropriate declarants. Be sure to show that your client has taken adequate prior steps to ensure confidentiality, and that there has not been prior voluntary disclosure. An adequate evidentiary record will be important not only to success in the trial court, but also to any chance of success on a writ petition in the event that becomes necessary.

Beyond this practical advice, California's sealing rules trigger a number of deeper policy questions. Do courts exist to promote public discourse and transparency, or to efficiently resolve private disputes? The current sealing rules and cases to date appear to value the former over the latter, which may or may not be a good thing. Are there circumstances in which a court-compelled filing of unsealed documents amounts to a government taking of property, such that constitutional property protections and First Amendment considerations collide? As the case law develops on California's sealing rules, we may find some clearer answers to these questions. ▲

Electronic Discovery

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Microsoft Office products. The company also uses a sophisticated, customized enterprise resource planning system ("ERP") to integrate its finance and accounting, human resources, production, logistics, provisioning and executive business units. And for all its sophisticated electronic information systems, the company has five years of archived back-up data for each location and each system. To make your task even more daunting, production of electronic files in native format is requested.

Adrift in a confusing sea of technical terms, abbreviations and acronyms, you need to quickly devise an appropriate document collection plan that does not bring BigCo's business to a grinding halt. In order to adequately represent clients involved in litigation where the discovery of electronic data is at issue, lawyers must master the often complex technical issues associated with the preservation, collection, review, and production of electronic documents – all within a technological environment that is constantly evolving. By now, most practitioners recognize that the vast amount of electronic information maintained by businesses has profoundly changed the discovery process. Less clear, however, are the standards for effectively preserving, collecting, producing and reviewing this information. And the rules may soon change.

The Current Landscape

The above scenario has a number of nightmarish practical challenges, such as collecting and producing data from a computer system that updates itself in "real time." But, it also illustrates some of the real-world dilemmas over what information is truly relevant and discoverable within the reasonable confines of Rule 26.

Case law on discovery of electronic information is constantly developing, but perhaps the most important line of recent decisions come from the Honorable Shira Scheindlin in the Southern District of New York in *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003) ("*Zubulake I*").[1] In *Zubulake I* (pronounced "zoo-boo-lake"), the plain-

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1 *See also* 216 F.R.D. 280 (S.D.N.Y. 2003) (*"Zubulake II"*); 220 F.R.D. 212 (S.D.N.Y. 2003) (*"Zubulake III"*); Case No. 02 Civ. 1243, 2004 WL 1620866 (S.D.N.Y. Jul. 20, 2004) (*"Zubulake IV"*).

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tiff moved for an order compelling UBS to restore its computer back-up tapes at its own expense after the company produced only about 100 pages of e-mail. Over UBS's objections, Judge Scheindlin ordered the company to conduct a sample restoration from five tapes chosen by Zubulake and report to the court on the contents of the e-mails recovered, the time each restoration took and the cost of production. *Zubulake*, 217 F.R.D. at 323-24. In a subsequent decision, the court then applied a three-step analysis to determine whether the remaining tapes should be restored and at whose cost. *Zubulake II*, 216 F.R.D. 280, 284-89, 91 (S.D.N.Y. 2003).

While much has been written about the *Zubulake* decisions, it is important to note that the *Zubulake* decisions crystallized at least four emerging trends in electronic discovery in one case. First, in determining what electronic information a party must ordinarily produce in response to a request for production, Judge Scheindlin drew a practical distinction between that which is reasonably accessible and that which is not. Second, the producing party presumptively pays for production of all reasonably accessible electronic information, while a balancing test determines whether other information should be produced and at whose expense. Third, counsel cannot defer to the client on matters of document preservation or collection. Fourth, parties should confer early and often regarding discovery of electronic information.

However, the *Zubulake* decisions did not directly address many other technological issues that may be encountered in discovery. For example, presently there is no consistent authority on whether a party is entitled to production of electronic information in its native format (also called "live file" production). Unlike a paper document where all information is readily apparent to the eye, an electronic document has several layers of information - each of debatable relevance. Those different layers of information can be displayed depending on the form of the document and whether the user manipulates different features of the parent software.

Spreadsheets and databases illustrate why native format production can be so important. These files are generally not intended to be printed out. They are collections of data with functions that allow the user to sort, correlate, tabulate, and perform calculations at will. Unlike plain text, the data cells in spreadsheets can contain multiple levels of information, such as both a mathematical formula and its numeric value. Data cells may have associated comments that do not print. Data cells' value may be derived from other cells in other spreadsheets; so, when those links are broken, the numeric values and the data relationships are lost. Data cells or entire columns of cells can be "hidden" so that they do not appear on screen or print out. Data cells can be masked by overlaid objects, such as graphic files or charts generated from data in the spreadsheet. And empty cells may or may not have a substantive value in the spreadsheet. While ideally, spreadsheets should be produced in a manner that accurately and completely conveys information in the original, typically spreadsheets are produced in "printed" form resulting in a jumbled, incomprehensible mess with hundreds of "blank pages." Using these print-outs in depositions can be a comedic exercise requiring a collage of pages put before a witness who can't authenticate the document because he never printed those things out and doesn't recognize the poster-size monstrosity.

At least one court has recognized the practical inequities of producing spreadsheets in printed form, and ordered production in native format. In *In re Honeywell Intern., Inc. Sec. Litig.*, No. M8-85 WHP, 2003 WL 22722961 (S.D.N.Y. Nov. 18, 2003), the court ordered Honeywell's auditor PriceWaterhouseCoopers – a non-party – to produce its workpapers in native format. The Court found that PWC's paper production was insufficient because documents were not produced as they were kept in the ordinary course. 2003 WL 22722961, at *2. The Court gave PWC the option to produce the workpapers by either: "(1) producing a copy … on CD-ROMs that could be viewed using commercially-available software; or (2) producing a copy of its workpapers on CD-ROMs that could be viewed using PWC's proprietary software, as well as producing the proprietary software to the extent it is necessary to view the workpapers." *Id.*

But, native format production is fraught with practical considerations: how do you Bate-stamp or mark an electronic file "confidential"? How is a native electronic file redacted? How do you

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authenticate an electronic file in native format? Presently, there is no simple technological solution to these questions, only stop-gap measures. In the meantime, a multi-million dollar industry has evolved to convert electronic information into more secure image form that is akin to a printed paper copy.

Proposed Amendments to the Federal Rules of Civil Procedure

In August 2004, the federal judiciary published a set of proposed amendments to the Federal Rules of Civil Procedure. The proposed changes in part codify themes and innovations developed by Judge Scheindlin in the *Zubulake* decisions. The proposed amendments have precipitated very lively debate and comments from varied practitioners.

The Rules Committee solicited public comment and held hearings in Washington, D.C., San Francisco and Dallas. Many endorsed the proposed amendments as welcome guidance in a confusing technological age while others argued that Rule 26 is more than adequate to contend with any thorny technological issue, as demonstrated by Judge Scheindlin's *Zubulake* decisions. The following is a brief discussion of the proposed amendments:

Definition of Electronically Stored Information: Rule 34(a). The amendments modernize the definition of discoverable materials to add "electronically stored information" to the title and "data" or "data compilations" to the Rule's scope. Rules 33(d) and 45(a) and (c) would be modified accordingly.

Form of Production: Rule 34(b). The proposed amendments allow the requesting party to choose the format for production. The new rule contemplates that a party may request native format production. Rules 45(a), (c), and (d) would be amended accordingly. The new Rule also allows a responding party to object to the requested format. If a production format is not specified, a responding party should produce documents in the format in which the information is "ordinarily maintained" or in an electronically searchable form. Given the default option, a party would likely produce in an image format that allows for text searching.

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Scope of Production: Rule 26(b)(2)(C). The proposed amendments create a "two-tier" system. The responding party must produce relevant electronic information that is "reasonably accessible" and may withhold from discovery any information that is not reasonably accessible. The requesting party can obtain information that is not reasonably accessible only by court order.

Early Discussion of Electronic Discovery Issues: Rule 16(b), Rule 26(f), and Form 35. Parties are encouraged to meet and confer early regarding electronic discovery issues.

Option to Produce Electronically Stored Information in Response to Interrogatories: Rule 33(d). Under the new version of Rule 33, the responding party is allowed to produce e-data when responding to interrogatories so long as the requesting party is able to locate and identify information as easily as the producing party.

Claw-Back Provision for Inadvertently Produced Privileged Documents: Rule 26(b)(5)(B). A party that unintentionally discloses privileged electronic information may retrieve it from the requesting party by providing notice within a reasonable time. The party receiving inadvertently produced privileged information must promptly return, sequester, or destroy the information and all copies. Rule 45 is also amended accordingly.

"Safe Harbor" on Sanctions: Rule 37(f). Here, the proposed amendments would protect parties from judicial sanctions for failing to preserve electronically stored information if the information is destroyed due to a routine function of the computer system and if the responding party took reasonable steps to preserve the information.

Subpoena for Electronically Stored Information: Rule 45: Allows parties to subpoena electronically stored information.

It is unclear whether the proposed amendments will be adopted as published or will evolve further in light of the public comment. In the meantime, several courts have adopted their own local rules and best practices to contend with frequent discovery disputes revolving around electronically stored information.[2] Any amendments, which may be adopted as early as 2006, will harmonize this national trend. ▲

2 *See e.g.* Ninth Circuit proposed model local rules; District Courts for Delaware, Arkansas, Kansas, New Jersey, and Wyoming; and state court local rules for California, Texas, Mississippi, and Illinois.

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