ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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The Anti-SLAPP Statute: The SLAPP Fights Continue

By Kent A. Halkett, Esq. of Musick, Peeler & Garrett LLP

The tidal wave of litigation generated by California's "Anti-SLAPP Statute" (Cal. Code Civ. Proc. Section 425.16, enacted in 1992 to combat "strategic lawsuits against public participation") and its companion statute (C.C.P. Section 425.17, enacted in 2003 to alleviate the "disturbing abuse" of that statutory remedy) may have crested, but SLAPP disputes continue to flood the California courts. Recent decisions demonstrate that litigants and their counsel should keep abreast of the latest developments in this rapidly evolving area of the law.

Kent A. Halkett

Supreme Court Decisions

The California Supreme Court was relatively quiet on SLAPP issues in 2004. In March, it granted review in *Varian Medical System v. Delfino* (S121400) on the issue of "does an appeal from the denial of a special motion to strike under the anti-SLAPP statute … effect an automatic stay of the trial court proceedings?" The Court held oral argument on December 7, 2004. In April, it rendered a decision in *Zamos v. Stroud*, 32 Cal.4th 958 (2004) (explaining the "interface" between the Anti-SLAPP Statute and malicious prosecution). In October, it granted review in *S.B. Beach Properties v. Berti* (S127513) on the issue of "does a trial court have jurisdiction

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Inadvertent Disclosure of Privileged Material Presents Complex Ethical Issues for the Recipient

By Doug Lytle, Esq. of Duckor Spradling Metzger & Wynne

Courts typically do not treat an inadvertent disclosure of documents protected by the attorney-client privilege as a waiver. But when a lawyer receives documents from the opposition that appear privileged, the issues quickly become complex. Questions arise as to the appropriate response. And unlike challenging a claim of privilege asserted in a privilege log, when the full substance of the communication is revealed through an inadvertent production, there is often a powerful

Doug Lytle

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Inside

President's Message

By Charles Berwanger, Esq. of Gordon & Rees LLP

It is my honor and privilege to serve you as the President of the ABTL of San Diego during 2005. I will be joined by Maureen Hallihan – Vice-President; Judge Jan Adler – Secretary; and Robin Wofford – Treasurer. We are here to serve you. It is your ABTL – any suggestions or comments you have, please pass them on to any one of the four officers.

Charles Berwanger

We have planned an exciting year of dinner programs and an excellent seminar. Those dinners and the seminar provide you with the opportunity to meet in a relaxed social setting the lawyers and judges with whom you deal as professionals. The dinner programs and seminar also are intended to be timely, interesting and informative.

ABTL's 2005 annual seminar will be held at Loews Ventana Canyon Resort in Tucson, Arizona, October 20-23, 2005. Please plan to join hundreds of other ABTL members of the bench and bar for a weekend of education, recreation and relaxation in the scenic foothills of Arizona's Santa Catalina mountains. The annual seminar committee is hard at work planning another ABTL-quality trial techniques program. Using a topical fact pattern presented in a very entertaining manner, the 2005 annual seminar program will showcase masters at work, demonstrating the latest techniques and tactics to build to the closing argument. In addition, there will be many opportunities for you and your family to enjoy the amenities of the Ventana Resort. For golfers, tennis players and those who simply want to work out in splendor, the Ventana Resort is the place to go. For those who want to go on nature walks or to simply relax, the Resort holds ample opportunities for you.

The present planning for dinner programs includes the February 2, 2005 presentation by Professor James McElhaney, Professor Emeritus in Trial Practice Advocacy at Case Western Reserve University Law School, who will speak on the language of persuasion. The February 2, 2005 dinner program, as is true with all ABTL programs, will provide you with the opportunity to meet informally at the pre-dinner reception and talk with many of the San Diego state and federal court judges before whom you appear and with your fellow business litigators.

Our plans for ABTL dinner programs for the remainder of 2005 include a roundtable on current issues with judges from the San Diego Superior Court and an entertaining and informative program entitled the "Act of Communication," during which actors Alan Blumenfeld and Katherine James 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 also plan to present evenings with two distinguished litigators: Leslie Caldwell, the former director of the Justice Department's Enron Task Force, on her experiences in prosecuting white collar crime; and veteran Washington D.C. litigator Roger Adelman, who will discuss conducting the modern business trial. Any suggestions you would like to make for a dinner program should be provided to Program Chair Tom Egler at tome@mwbhl.com.

The ABTL also provides opportunities to participate in highly productive committees where you will not only work with your peers, but also contribute to the ABTL. The ABTL Report, published four times a year, is prepared by the Publication Committee, chaired by Alan Mansfield. The ABTL Report is read by all members of the ABTL and is provided to all members of the state and federal judiciary in San Diego. The Publication Committee is responsible for soliciting articles on timely topics and editing those articles to maintain the high quality of the Reports. You are invited to contact Alan to not only volunteer your time and energies for the

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When Do I File? Let Me Count The Days

By Alan M. Mansfield, Esq. of Rosner, Law & Mansfield

Just when you (or your secretary) thought you had your motion calendaring system down pat, in an attempt to "clarify" the law to "reduce gamesmanship", the California Legislature changed the rules for calendaring motions subject to C.C.P. Section 1005. Effective for all motions filed after January 1, 2005, A.B. 3078 requires such motions be set on a "court day" calendar – sixteen (16) court days for moving papers, nine (9) court days for opposition, and five (5) court days for reply. While this seems simple enough, several issues have already arisen: 1) Is this law only in effect until June 30, 2005? 2) What happens if the filing deadline falls on a court holiday? 3) Do you include or exclude court holidays that fall between the hearing date and when the brief is due?

As to the first question, earlier in January the San Diego County Public Law Library issued a bulletin noting that A.B. 3081 was officially chaptered after A.B. 3078. Section 13 of A.B. 3081 also amended C.C. P. Section 1005 but retained the old 21/10/5 calendar, effective July 1, 2005. As a later adopted statute, the amended rule arguably trumped the "new" rules. However, pursuant to Section 63 of A.B. 3081, as Section 23 of A.B. 3078 amended the counting provisions as of January 1, 2005, these new provisions prevail, even though A.B. 3081 was the later adopted law (for those who care about such matters, this was known as a "double jointed" bill).

As to the actual computation under the new rules, while the goal was to eliminate ambiguity

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Proposition 64 Applies To Pending Unfair Competition Laws Cases Brought on Behalf of the General Public

By Shannon Z. Petersen, Ph.D., Esq. of Sheppard, Mullin, Richter & Hampton, LLP

Beginning in 1933, the California Legislature granted plaintiffs the privilege of bringing unfair competition law claims under Bus. & Prof. Code §17200 *et seq*. ("UCL") as representative actions "on behalf of the general public," without having to establish injury-in-fact and without having to follow class action procedures. With the passage of Proposition 64 in November 2004, the electorate repealed this expansive statutory privilege by requiring that private suits only be brought by persons who have suffered "injury-in-fact" as a result of acts of unfair competition, and by requiring that representative actions adhere to class action procedures. These amendments bring UCL claims back into line with the common law regarding suits brought only by real parties-in-interest.

Shannon Z. Petersen

The expansive standing previously allowed under the UCL never existed at common law, but was created solely by statute. As the dissent of Justice Baxter in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553 (1998), observed: "No statute of which we are aware in this state or nation confers the kind of unbridled standing to so many without definition, standards, notice requirements, or independent review." *Id.* at 584.

Based on this creation of a statutory right, the repeal of the statute creating such statutory rights should apply to any pending cases. In *Governing Board of Rialto Unified School District v. Mann*, 18 Cal.3d 819 (1977), a statute gave a school district the right to bring suit to dismiss a school teacher who had pled guilty to marijuana possession. While an appeal was pending, the Legislature repealed this statutory right. The Court held that "since the Legislature has now withdrawn the school district's authority [to bring such an action] … the trial court judgment in favor of plaintiff must be reversed." *Id.* at 822.

According to the Supreme Court in *Mann*, "A long well-established line of California decisions … hold under the common law that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, a repeal of the statute without a saving clause will terminate all pending actions based thereon." *Id.* at 829. This is true even though "courts normally construe statutes to operate prospectively." *Id.* "The justification for this rule is that all statutory remedies are pursued with full realization that the Legislature may abolish the right to recover at any time." *Id.* "This general rule has been applied in a multitude of contexts." *Id.* at 829-30. "If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered." *Id.* at 822.

In *Willcox v. Same*, 162 Cal. 455 (1912), state law granted the plaintiff a statutory right to sue the defendant under a contract theory that did not exist at common law. The plaintiff filed suit based on this statutory right. Months later, before a final judgment was entered, the particular provision granting the right to sue was repealed. *Id.* at 458-59. The Supreme Court applied the repeal to the pending action, holding that:

> We are here concerned with the right of action given by the section as it stood originally, but omitted from it upon its later readoption. Unless a vested right had arisen in favor of plaintiff's decedent prior to the amendment of the constitution without a saving clause, the privilege of bringing suit … was withdrawn by the repeal of the law granting it, and all pending litigation not prosecuted to final judgment fell for want of

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Proposition 64 Cannot Properly Be Applied to Pending Cases

By Sharon J. Arkin, Esq. of Robinson, Calcagnie & Robinson, LLP

The burning issue in the world of Unfair Competition Law cases ("the UCL", Business & Professions Code sections 17200, *et seq.*) is whether the new standing provisions imposed by Proposition 64 apply to pending cases. Trial courts have ruled both ways on the issue (the most recent count is about 50/50), and the question is pending before several appellate courts right now. Existing law – and the representations of the proponents of the initiative themselves – make clear that Prop. 64 is not intended to apply to pending cases.

It is the general rule in California that the touchstone for determining whether a new law, passed by either the Legislature or the voters, is to be applied to pending cases is always legislative (i.e., voter) intent. The seminal decision on this issue is *Evangelatos v. Superior Court* 44 Cal.3d 1188 (1988). The *Evangelatos* rule has been reconfirmed by the Supreme Court no less than three times in the last two years. *Myers v. Philip Morris, Inc.* 28 Cal.4th 828, 841 (2002); *McClung v. Employment Development Dept.* 34 Cal.4th 467, 475 (2004); *Elsner v. Uvegas* 34 Cal.4th 915, 936 (December 20, 2004).

The general presumption on retroactivity is that new laws will be applied only prospectively and not to causes of action that accrued prior to the time the law was passed. This presumption can be rebutted only where, applying rules of statutory interpretation, it is clear that the legislative body unambiguously intended the measure to apply retroactively. 7 B. Witkin, *Summary of Cal. Law*, Constitutional Law §§ 496-497. If, using standard statutory construction principles, it does not appear that the legislative body intended retroactive application, the question becomes whether the change is purely procedural (which means it can be applied to pending cases) or substantive (which means it cannot). *Evangelatos*, at 1206, 1218; *Myers*, at 841; *Tapia v. Superior Court* (1991) 53 Cal.3d 282.

There are at least three reasons why Prop. 64 should not be applied to pending cases.

(1) Proposition 64 contains no express retroactivity provision. Had the proponents intended that Proposition 64 apply retroactively to pending cases, nothing would have been easier than to expressly provide that it should do so – just as was done with Prop. 215, which included an express retroactivity provision, and Prop. 69 – also on the November 2004 ballot.

Sharon J. Arkin

In fact, the proponents of Prop. 64 represented to at least one voter – and who knows how many others – that the initiative would not be retroactive. As reflected in recent news stories, and as substantiated in a declaration filed in several cases where this issue is pending, at least one voter specifically inquired of the proponents before the election whether the initiative would be retroactive. The proponents replied that "No, it will not." See, *Firms' Drive on Lawsuits Attacked*, Kevin Yamamura, Sacramento Bee Capitol Bureau, December 29, 2004, available at www.sacbee.com/content/business story.

As the Supreme Court just confirmed, the intent of the author of a statute expressed before the statute's passage is compelling evidence that a statute was not intended to be retroactively applied. *City of Long Beach v. Dept. of Industrial Relations* 34 Cal. 4th 942, 952 (December 20, 2004) (Supreme Court accepted pre-passage statement of a bill's author as definitive evidence of a lack of intent to have a statutory change apply to pending cases).

(2) Any implied contrary intent would be ambiguous and thus unenforceable. In the absence of an express provision mandating retroactive application of a statute, courts may resort to legislative history, such as the ballot pamphlet. *Evangelatos*, 44 Cal.3d at 1210-1211. Neither the

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President's Message

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Publication Committee, but also to propose article topics and author an article. He can be contacted at alan@rosnerandlaw.com.

The ABTL of San Diego is a part of the five chapter network of ABTL's throughout California. During this upcoming year we anticipate that there will be a statewide ABTL committee to monitor the budgeting processes for both Federal and State courts. This statewide committee will not be a partisan committee but, rather, will focus its energies on taking all appropriate action to preserve and protect the resources of the courts to ensure that justice is dispensed in a timely, efficient and fair manner. There will also be a statewide ABTL committee focusing on discovery reform to address many of the discovery abuses that we all encounter and bemoan. Should you have any interest in participating in either of the statewide ABTL committees, please contact me at cberwanger@gordonrees.com.

The ABTL, in participation with the State Bar of California Litigation Section, will continue to sponsor judicial brownbag lunches. These lunches are informal occasions for members of the judiciary to speak to ABTL members on their judicial perspectives, from law and motion to trials. These are the very same judges who we appear before and who we often try to persuade. Vital to persuasion and effective advocacy is knowing and understanding your audience – the judiciary. Here is your chance to have your audience tell you what is important to them. You will receive periodic notices of these brownbag lunches.

Your ABTL looks forward to another year of excellent programs and continuing opportunities for you to socialize with both our judges and other ABTL members. I look forward to meeting you. ▲

Privileged Material

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incentive to challenge the applicability or scope of the privilege.

Simultaneously at work are several competing principles, policies and rules. On one hand, privileged information is often highly relevant. Arguably, fairness requires that a factfinder consider all relevant evidence, especially if our legal system aims to uncover truth. And lawyers may legitimately view their duty of zealous advocacy as requiring that they argue waiver or challenge the existence or scope of the privilege.

On the other hand, our legal system depends upon litigants being able to communicate freely with their chosen counsel. Attorneys must be free to investigate favorable as well as unfavorable aspects of their cases. And as a matter of policy, the rule is that attorney-client communications are protected from compelled disclosure. Since a lawyer's initial response to receipt of an opposing party's privileged communications potentially can result in disqualification, it is imperative that business trial lawyers understand the issues involved when there is an inadvertent disclosure of privileged information and follow how the courts are shaping the rules that balance these competing principles and policies. Currently under review by the California Supreme Court is *Rico v. Mitsubishi Motors*, a case that squarely addresses these issues and should provide guidance to the bar.

A lawyer's receipt of materials that appear privileged initially triggers several questions. What duties arise for a lawyer who obtains information or documents protected by the attorney-client privilege? How should the lawyer receiving the information respond? May the receiving lawyer assume the privilege was waived? Or should the lawyer receiving the privileged infor-

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mation notify opposing counsel of receipt? How extensively should the lawyer analyze the information before notifying opposing counsel? Does the content of the privileged information matter? May the lawyer receiving the potentially privileged information provide it to his client or expert to analyze?

In 1999, the Second District Court of Appeal addressed these issues in *State Comp. Ins. Fund v. WPS, Inc.* 70 Cal.App.4th 644 (1999) (hereafter "State Fund"). In *State Fund*, WPS' lawyer received copies of State Fund's privileged attorney-client communications when State Fund's outside lawyers inadvertently sent them along with other documents produced for use at trial. WPS' lawyer gave some of the privileged documents to his expert witness. The expert in turn gave the documents to another lawyer who was pursuing a different claim against State Fund. When State Fund's counsel discovered the error and requested return of the documents, WPS' lawyer refused. The trial court found the conduct of WPS' lawyer to be in bad faith and contrary to ethical standards generally governing the legal profession and imposed monetary sanctions against appellants WPS, Inc., and its lawyers, under C.C.P. section 128.5.

The Court of Appeal, however, noting an absence of a controlling decision, statute or ethical rule in California covering the duties of a lawyer who receives inadvertently produced privileged documents or information, disagreed with the trial court's reliance on an American Bar Association (ABA) Formal Ethics Opinion No. 92-368 (Nov. 10, 1992) and the ABA Model Rules of Professional Conduct as a basis for imposing sanctions. But the Second District also purported to establish the following standard for lawyers and courts to follow in future cases: "When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified."

While the *State Fund* opinion provided some guidance to practitioners, it left unanswered questions as to the method and procedure for challenging the existence or scope of the privilege when the substance of the communication has been revealed. For instance, if counsel receiving potentially privileged information seeks to challenge the applicability or scope of the privilege, must certain procedures be followed, since filing motions publicly risks further exposure of the allegedly privileged information? If measures are taken to preserve confidentiality, such as seeking an order sealing the record, may the parties then argue the substance of the allegedly privileged communication, or must they confine the arguments solely to whether the privilege applies? Does the content of the allegedly privileged document ever matter?

In 2004, the Fourth District Court of Appeal (Division Two) answered some of these questions when it applied the *State Fund* standards in *Rico v. Mitsubishi Motors* 116 Cal.App.4th 51 (2004) (rev. granted Jun. 9, 2004) (hereafter "*Rico*"). *Rico* involved serious injuries and death resulting from an SUV rollover. Before trial, plaintiffs' counsel obtained a document summarizing a dialogue in which defense attorneys and defense experts discussed the strengths and weaknesses of the defendants' technical evidence. Plaintiffs' counsel did not notify defense counsel that he had obtained the document. Rather, plaintiffs' counsel examined, disseminated, and used the notes to impeach the testimony of defense experts during their depositions. The trial court had found that the summary constituted work product and ordered the disqualification of plaintiffs' counsel, relying upon legal and ethical standards established in *State Comp. Ins. Fund v. WPS, Inc*.

The Fourth District Court of Appeal affirmed the trial court's disqualification order. The court reviewed and rejected *Rico's* analogy to *Aerojet-General Corp. v. Transport Indemnity Insurance*

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Anti-SLAPP

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to consider a motion for attorneys fees under §425.16 if the action was voluntarily dismissed before the special motion to strike was filed." Three other cases involving anti-SLAPP motions, *Barrett v. Rosenthal* (S122953), *Kids Against Pollution v. California Dental Ass'n* (S117156), and *Soukup v. Hafif* (S126715) are also pending.

Section 425.17

Section 425.17 survived the initial challenges to it. See, e.g., *Physicians Committee for Responsible Medicine v. Tyson Foods, Inc.*, 119 Cal.App.4th 120 (2004); *Metcalf v. U-Haul International, Inc.*, 118 Cal.App.4th 1261 (2004); *Brenton v. Metabolife International, Inc.*, 116 Cal.App.4th 679 (2004). *Tyson Foods*, *Metcalf* and *Brenton* all held that Section 425.17 is applicable retroactively to cases filed prior to its effective date (January 1, 2004). That triology also held that Section 425.17(c), the commercial speech exemption, was constitutional since it does not violate any protection embodied in the First Amendment (*Brenton* and *Tyson Foods*) and does not violate equal protection principles (*Metcalf*). In *Metcalf*, the Court of Appeal summarized Section 425.17(c) as follows:

"[Section 425.17(c)] makes the anti-SLAPP statute inapplicable to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services … arising from any statement or conduct if the statement or conduct (1) consists of a representation of fact about that person's or a competitor's business operation, goods, or services; (2) is made or engaged in to obtain commercial transactions in the person's goods or services, and (3) is directed to an actual or potential customer."

It concluded that the California Legislature rationally and legitimately created "classifications of litigants who can take advantage of the anti-SLAPP statute" so as to correct the problems caused by commercial defendants improperly "invoking the procedural protections of the anti-SLAPP statute by claiming their advertising impacted the public interest."

The California Legislature also eliminated the immediate right to appeal the denial of an anti-SLAPP motion based upon the exemptions in Section 425.17(b) and (c). Cal. Code Civ. Proc. Section 425.17(e); *Goldstein v. Ralphs Grocery Company*, 122 Cal.App. 4th 229 (2004). Nonetheless, in *Goldstein*, the Court of Appeal held that "a defendant dissatisfied with a ruling that a special motion to strike must be denied pursuant to section 425.17, subdivisions (b) or (c)" may seek immediate writ review.

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18 Cal.App.4th 996 (1993). There the court held that inadvertent disclosure and subsequent use by the opposition did not warrant disqualification or sanctions because it was not so obvious that the documents obtained were privileged and only the name of a witness was disclosed (which was discoverable anyway) thereby resulting in no prejudice. The *Rico* court's analysis of *Aerojet* was interesting because it necessarily involved analyzing the substance of the privileged communication to determine whether there was prejudice. Yet later in the opinion, the *Rico* court stated that whether the privilege applies does not involve an inquiry into the substance of the privileged material: "Once an unintended reader ascertains that the writing contains an attorney's impressions, conclusions, opinions, legal research or theories, the reading stops and the contents of the document for all practical purposes are off limits." *Id.* at 73. The *Rico* opinion gave practitioners only limited guidance concerning how to approach challenging the applicability of the privilege, and specifically, whether reference can be made to the substance of the privileged material.

On June 9, 2004, the California Supreme Court granted review of *Rico v. Mitsubishi Motors* in Supreme Court Case No. S123808. Although the Supreme Court's opinion has yet to be published, review of the docket entries shows the record sealing procedures set forth in California Rules of Court 243.2 and 12.5 were followed. Business trial lawyers can track the progress of the *Rico* case through the email notification feature of the court website (see : http://appellatecases.courtinfo.ca.gov/email). Sometime in 2005, the California Supreme Court is expected to publish an opinion balancing the competing principles and policies and setting forth the rules to follow when there is an inadvertent disclosure of privileged documents. ▲

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Discovery

It is well-established that Section 425.16(g) "automatically stays all discovery in the action as soon as a SLAPP motion is filed but permits the trial court to lift this ban upon a showing of good cause." *The Garment Workers Center v. Superior Court*, 117 Cal.App.4th 1156, 1161(2004). In *Garment Workers*, the Court of Appeal identified several factors that trial courts should consider in determining whether "good cause" exists for lifting the discovery ban, including whether the evidence necessary to establish the opposing party's *prima facie* case is in the hands of the moving party or a third party, whether the information sought through formal discovery is readily available from other sources or can be obtained through informal discovery, and whether the requested discovery is needed in the context of the issues raised by the anti-SLAPP motion. Significantly, it held that the trial court abused its discretion in allowing the plaintiff to depose two of the defendant's employees with respect to the actual malice element of its libel claim prior to holding a hearing on the defendant's anti-SLAPP motion. The Court of Appeal reasoned that such limited discovery might "turn out to be unnecessary, expensive and burdensome" if the trial court decided the motion in the defendant's favor as a matter of law, without having to address the malice issue.

Voluntary Dismissal

A successful moving party on an anti-SLAPP motion is entitled to recover attorney's fees and costs. Cal. Code Civ. Proc. Section 425.16(c). The offending party cannot avoid such sanctions by dismissing the challenged pleading after the anti-SLAPP motion is filed, but before the hearing. *S.B. Beach Properties v. Berti*, 120 Cal.App.4th 1001, 1003 (2004)(citing *Pfeiffer Venice Properties v. Bernard*, and *Liu v. Moore*). In *S.B. Beach Properties*, the Court of Appeal extended that principle by holding that "an offending plaintiff can [not] avoid sanctions simply by dismissing his complaint before the defendant files his motion" under the Anti-SLAPP Statute. *Id.* at 1005. It reasoned that the purpose of the Anti-SLAPP Statute would not be achieved if a party could file and serve an offensive pleading, but avoid the adverse consequences of doing so by simply dismissing the pleading. The California Supreme Court granted review on October 27, 2004.

Timing

The Anti-SLAPP Statute contains two deadlines for anti- SLAPP motions: (i) the motion must be filed within 60 days after service of the challenged pleading, and (ii) the motion must be noticed for hearing within 30 days after service of the motion, "unless the docket conditions of the court require a later hearing." C.C.P. Section 425.16(f). Those statutory deadlines are jurisdictional. See, e.g., *Fair Political Practices Com. v. American Civ. Rights Coalition, Inc.*, 121 Cal.App.4th 1171, 1175 (2004)(citing *Decker v. U.D. Registry, Inc.*). The California Legislature enacted a strict timeline to avoid prolonged discovery stays. *Id.* In *Fair Political Practices*, the Court of Appeal affirmed the trial court's denial of the defendant's anti-SLAPP motion as untimely, since the hearing was noticed for and held after the 30-day window, even though defense counsel requested a hearing date within the statutory timeframe and settled upon the "earliest available date" given to them by the trial court's clerk. The Court of Appeal explained that defense counsel could and should have asked the trial court for an earlier hearing date by *ex parte* motion or waited to serve the anti- SLAPP motion until less than 30 days before the scheduled hearing.

Opposing Party's Burden

Once the moving party satisfies its burden to show that the case or a particular claim is subject to the Anti-SLAPP Statute, the opposing party must show the "probability" that it will "prevail on the claim." C.C.P. Section 425.16(b)(1); *Zamos*, 32 Cal.4th at 965 (explaining that the opposing party must "state and substantiate a legally sufficient claim."). In *Zamos*, the California Supreme Court explained that the opposing party must demonstrate that its case or claim is "both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by [it] is credited." *Id.* (quoting its prior decision in *Jarrow Formulas, Inc. v. LaMarche*). Significantly, the opposing party must use "admissible evidence" to support its claim. *Fashion 21 v. Coalition for Human Immigrant Rights of Los Angeles*, 117 Cal.App.4th 1138, 1147 (2004) (explaining that

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> authority to maintain it. We have concluded that the privilege of bringing an action like this was taken away by the later enactment.

Id. According to the Court, a "statute creating the privilege to sue … gave no vested rights which the Legislature could not take away." *Id.* at 464-65.

A number of more recent appellate opinions confirm this rule. In *Brenton v. Metabolife International, Inc.*, 116 Cal. App. 4th 679, 684 (2004), the plaintiff brought UCL claims against the defendant, which then filed an anti-SLAPP motion. The court held that recent amendments to the anti-SLAPP statute, effective January 1, 2004, repealed the defendant's right to bring such a motion. "Where, as here, the Legislature has conferred a remedy and withdraws it by amendment or repeal of the remedial statute, the new statutory scheme may be applied without triggering retrospectivity concerns." *Id.* at 690. "[T]he fact that a party acted in an authorized manner at the time he or she invoked the former version of a procedural or remedial statute at trial is no impediment to the appellate court applying the current version of that procedural or remedial statute when evaluating the appeal from the trial court's ruling." *Id.* at 691.

Similarly, in *Physicians Committee for Responsible Medicine v. Tyson Foods, Inc.*, 119 Cal. App. 4th 120, 125 (2004), the Court of Appeal held that:

> The repeal of a statutory right or remedy … presents entirely distinct issues from that of the prospective or retroactive application of a statute. A well-established line of authority holds: 'The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered.' (emphasis in original).

Since Proposition 64, which does not contain a savings clause, repealed the privilege of bringing representative suits without establishing injury-in-fact and without following class action procedures, the amendments to the UCL's standing requirements should be applied to all pending representative actions.

Proposition 64 also should be applied to pending actions under a separate line of authorities that involves non-substantive statutory rights, or a mix of statutory and other procedural rights. Under these cases, "a statute is not made retroactive merely because it draws upon facts existing prior to its enactment. Instead, the effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future. For this reason, we have said that it is a misnomer to designate such statutes as having retrospective effect." *Tapia v. Superior Court*, 53 Cal.3d 282, 288 (1991). To determine whether a new statute is procedural or substantive, and therefore whether it applies to pending actions, the Court in *Tapia* looked to whether the statute "changed the legal effect of past events." *Id.* at 289.

Proposition 64 changes the rules for representative standing, but does not change the legal effect of past events. The Legislature has previously recognized that standing is a procedural requirement by codifying C.C.P. Section 367, requiring that "every action must be prosecuted in the name of the real party in interest" as part of the California Code of Civil Procedure. Case law has repeatedly characterized standing as a procedural issue. See, e.g., *Anthony v. Snyder*, 116 Cal. App. 4th 643, 651 (2004) (addressing the issue of standing under the heading of "Procedural Issues"); *Holt v. Booth*, 1

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Save The Date!!

ABTL's 2005 Annual Seminar will be held at the Loews Ventana Canyon Resort in Tucson October 20-23, 2005. Plan to join hundreds of other ABTL members of the bench and bar for a weekend of education, recreation and relaxation in the scenic foothills of the Santa Catalina mountains.

Details in upcoming issues!!

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Attorney General's title and summary nor the Legislative Analyst's fiscal analysis advised voters that the measure would apply to pending cases. In fact, the Legislative Analyst explained that Proposition 64 "prohibits any person, other than the Attorney General and local pubic prosecutors, from *bringing* a lawsuit for unfair competition unless the person has suffered injury and lost money or property." (emphasis added.) The proponents' ballot arguments also emphasized Proposition 64 would "[allow only the Attorney General, district attorneys, and other public officials to *file* lawsuits on behalf of the People of the State of California …" (emphasis added.) Even if there are contrasting or conflicting statements in the ballot materials that would otherwise support an inference of an intent to apply the statute retroactively, that would, at best, create an ambiguity. Any such ambiguity must be construed so as to preclude retroactive application. *Myers*, at 841-42 (finding no retroactivity even though the statute the court was examining expressly provided that "'[i]t is also the intention of the Legislature to clarify that such claims which were or are brought shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense.'")

(3) Prop. 64 may have a substantive effect. An amendment is "substantive in its effect, [where] … it imposes a new or additional liability and substantially affects existing rights and obligations." *Aetna Casualty and Surety Co. v. Industrial Accident Com.* (1947) 30 Cal.2d 388, 395. As noted in *Aetna*, determining if a statute is procedural or substantive is not as simple as it may appear:

> In truth, the distinction relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears.

Id. Prop. 64 deprives certain individuals and groups who had standing prior to its enactment of the right to pursue their claims. If Prop. 64's new standing requirements are applied in pending cases, and those standing requirements cannot be met, defendants are arguing in various motions that these cases must be dismissed with prejudice. But if those cases are dismissed, the statute of limitations may have expired on some or all of the conduct at issue, and not even the Attorney General or District Attorney may be able to prosecute that misconduct. It is hard to envision any result that is more substantive.

Relying on two Supreme Court decisions, *Governing Board of Rialto School District v. Mann* 18 Cal.3d 819 (1977) and *Younger v. Superior*

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Cal. App. 4th 1074, 1082 n.8 (1991) (characterizing standing as a procedural issue rather than a substantive one); *Kane v. Redevelopment Agency*, 179 Cal. App. 3d 899, 903 (1986) ("we find the procedural issues of standing . . .").

Federal courts have also regarded standing as a procedural issue subject to the Federal Rules of Civil Procedure, even when deciding the substantive issues of a case under state law. See, e.g., *Canady v. Allstate Ins. Co*., 282 F.3d 1005, 1019 (8th Cir. 2002). Similarly, the class certification requirements now imposed by Proposition 64 are procedural in nature. See *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 326 (2004) ("The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious."). Since Proposition 64 only addresses the standing of certain persons to bring representative actions on behalf of others, and requires the use of class action procedures to proceed on behalf of others, it is a procedural amendment that should be applied to all pending representative UCL actions.

Under either line of authority discussed above, Proposition 64's requirements should be applied to pending UCL actions brought by persons who did not suffer injury-in-fact on behalf of the general public because: (1) such suits are based on statutory rights that may be (and were) repealed at any time; and (2) the changes to the UCL's standing and class action requirements are purely procedural in nature, and thus are presumed to apply to pending cases. ▲

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Court 21 Cal.3d 102 (1978), proponents of retroactivity claim that the repeal of a statutory right or remedy applies to pending claims unless the legislation contains an express savings clause. There are several reasons why the repeal rule does not apply to Prop. 64:

(1) Prop. 64 did not "repeal " anything. No remedies were changed, no substantive requirements for demonstrating what constitutes a claim under the UCL were altered. What Prop. 64 did was to add standing requirements, not repeal rights or remedies.

(2) The repeal rule does not apply to a statute derived from the common law such as the UCL. The *Mann*/*Younger* line of cases holds that the repeal of a statutory right - a right "unknown at common law" - requires a savings clause in order to avoid retroactive application. But the UCL cause of action was not "unknown at common law." In fact, the predecessor to section 17200, Civil Code section 3369, codified the common law tort of unfair business competition. The UCL codified the common law and courts then extended the common law protection "once afforded only to business competitors" to the entire consuming public. *Barquis v. Merchants Collection Assn.,* 7 Cal.3d 94, 109 (1972); *People ex rel Mosk v. Nat'l Research Co.,* 201 Cal.App.2d 765, 770-771 (1962). Because the UCL is derived at least in part from common law, the repeal rule is inapplicable to claims like section 17200 that exist "by virtue of a statute codifying the common law." *Callet v. Alioto,* 210 Cal. 65, 68 (1930).

(3) The *Mann* and *Younger* repeal rule is no longer good law and can be harmonized. The *Mann*/*Younger* line of cases were all decided before the Supreme Court expressed the modern analysis of the rule of construction in *Evangelatos*. The Supreme Court has not referred to, or relied on, the repeal rule since *Evangelatos*.

Whether the repeal rule is even good law is most evident in the Supreme Court's decision in *Myers*. In *Myers* (which was not considered by the courts in appellate cases such as *Brenton v. Metabolife International, Inc.* 116 Cal.App.4th 679 (2004) or *Physicians Committee for Responsible Medicine v. Tyson Foods, Inc.* 119

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Cal.App.4th 120 (2004) on the repeal issue), the Supreme Court addressed the effect of the repeal of the tobacco immunity statute, C.C.P. §1714.45. As of the effective date of that legislation, tobacco manufacturers had the right to assert the statute as an absolute and complete defense to personal injury product liability claims. The Legislature passed a bill expressly repealing that statutorily-created right to immunity. The question squarely addressed by the *Myers* court was whether the repeal of the immunity statute applied retroactively, *i.e.*, would claims arising during the immunity period still be subject to the immunity provided prior to repeal? Despite the fact that the Court was dealing with the repeal of a statutory immunity, the Supreme Court in *Myers* did not apply the repeal rule. It only applied *Evangelatos* and held that the statutory repeal was only prospective.

Furthermore, even if they had any continuing validity, the *Mann / Younger* line of cases can be distinguished or harmonized with *Evangelatos* and *Myers*. In *Mann*, the statute at issue included language expressly indicating an intent that it be applied retroactively and the facts at issue (a school board had not yet taken action under the former statute against a teacher) related to a prospective application of the law. The statute in *Younger* was a jurisdiction-allocating statute that also included unambiguous evidence of legislative intent to divest the courts of jurisdiction. In *Brenton* and *Physicians Committee*, the appellate courts were dealing with the anti-SLAPP statute – a statute that had already been held to be procedural and, thus, any changes to it would necessarily be retroactive. *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347. Thus, the repeal rule discussion in those cases was unnecessary *dicta*. *Id.*

Myers makes clear that even the repeal of a statutory right does not invoke the rule that a savings clause is required in order to prevent retroactive application of a change in the law. Indeed, no Supreme Court case since *Evangelatos* has applied the repeal rule. As such, Prop. 64 should not be applied to pending cases.

Thanks and appreciation are made to James Harrison and Michael G. Lenett for their valuable contributions to this article. ▲

Let Me Count

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there may be new ambiguities. C.R.C. 200.3(b) and C.C.P. Section 12a (a) state that if an act to be done falls on a Saturday, Sunday or court holiday, the due date goes forward to the next court day. Using this reasoning, if a brief is due on Caesar Chavez Day (which incidentally is a March 31 court holiday), the brief should be filed the next court day. On the other hand, C.C.P. Section 1005 states briefs must be filed "at least" before the deadline, and C.C.P. Section 12 states that when computing time, the first day is excluded and the last day is included – unless that day is a holiday, in which case it is also excluded. According to the Judicial Council (which proposed this amendment), the brief should be filed the day before the court holiday, since any non-court day is to be excluded.

Another potential trap are those situations where a brief may be due on a particular day, but a court holiday falls during the intervening days (for your information, in California there are 13 court holidays interspersed throughout the year, so this is not an isolated issue). Using the definition of a "court day" in C.C.P. section 10, court holidays are not by definition court days, just as a Saturday or Sunday is not a court day (with limited exceptions). So, according to the Judicial Council, such days should not be counted. However, the expressed intent of the Legislature was to reduce gamesmanship when setting briefing schedules. Not counting such days could result in parties having several fewer days to prepare briefs, depending on the time of year and the vagaries of court holidays.

A couple of observations – be careful of relying (at least in the short term) on automatic calendaring programs, since those calendars may not be programmed to account for these changes and when not to count a court holiday. Second, time and judicial practicality will likely work out many of these issues, but until courts or specific judges establish clear ground rules, parties may want to stipulate to a briefing schedule to avoid any unwelcome surprises at hearings. ▲

Anti-SLAPP

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the Anti-SLAPP Statute requires "evidence which is competent, relevant and not barred by a substantive rule").

Frivolous Motions and Appeals

The California Legislature enacted Section 425.17 in response to its finding that there had been "disturbing abuse" in the use of the Anti-SLAPP Statute. C.C.P. Section 425.17(a). The California courts also attempt to stop such abuses. See, e.g., *Moore v. Shaw*, 116 Cal.App.4th 182, 200 n.11 (2004) (noting, generally, that the "increasing frequency" of anti-SLAPP motions has imposed "an added burden on opposing parties as well as the courts"); *People ex rel. Lockyer v. Brar*, 115 Cal.App.4th 1315 (2004). In *Moore*, the Court of Appeal directed the trial court to award reasonable attorney fees to the plaintiff, under Section 425.16(c), for having to oppose the defendant's "frivolous" anti-SLAPP motion. In *Brar*, the Court of Appeal expeditiously dismissed the defendant's "patently frivolous" appeal of the denial of his meritless anti-SLAPP motion since he was simply trying to delay the proceedings against him in the trial court.

Conclusion

Litigants and their counsel will have to ride out the storm as the California courts continue to define the contours of the Anti-SLAPP Statute and Section 425.17. Hopefully the Supreme Court will help in navigating such waters by resolving many of the open issues during the 2005 session. ▲

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