ASSOCIATION OF BUSINESS TRIAL LAWYERS
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Brown Bag Lunch with Magistrate Judges Karen Crawford and David Bartick

By Mathieu Blackston

Judge Crawford

Judge Bartick

Although their practice areas prior to taking the bench were different, two of the Southern District of California's newest magistrate judges have the same view of their role – to efficiently facilitate cases for the parties and the court. Magistrate Judge Karen Crawford spent the bulk of her career before joining the bench as a commercial litigator, most recently with the international law firm of Duane Morris. Prior to joining the bench, Magistrate Judge David Bartick spent 26 years as a prominent criminal defense attorney.

On May 7, the two judges sat down with local attorneys and shared their views of their roles as magistrate judges and provided pointers for how attorneys can most efficiently utilize their magistrate's courtrooms to resolve their clients' disputes. The brown bag lunch was sponsored by the San Diego Chapters of ABTL and the Federal Bar Association. During the luncheon, the judges discussed the value of early neutral evaluation conferences, the role of case management conferences, and the work they expect attorneys to do before bringing discovery disputes to the court.

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Appellate Court Makes Clear: A Defendant Who Files a Meritless Anti-SLAPP Motion Does Not Get Fees Just Because the Plaintiff Dismisses Its Complaint in Response

Brett Weaver

A Strategic Lawsuit Against Public Participation — or "SLAPP" as it is better known — is a civil action aimed at preventing citizens from exercising their First Amendment rights or punishing those who have done so.[1] The plaintiff's purpose in filing a SLAPP "is not to win the lawsuit but to detract the defendant from his or her own objective."[2] In response to the problems created by such meritless lawsuits, California's Legislature enacted Code of Civil Procedure section 425.16, et seq. — the "anti-SLAPP statute" — "to prevent SLAPPs by ending them early without great cost to the SLAPP target.'"[3]

Most litigators in California are familiar with the basics of the anti-SLAPP statute. In a nutshell, a defendant may bring a special motion to strike any cause of action in the plaintiff's

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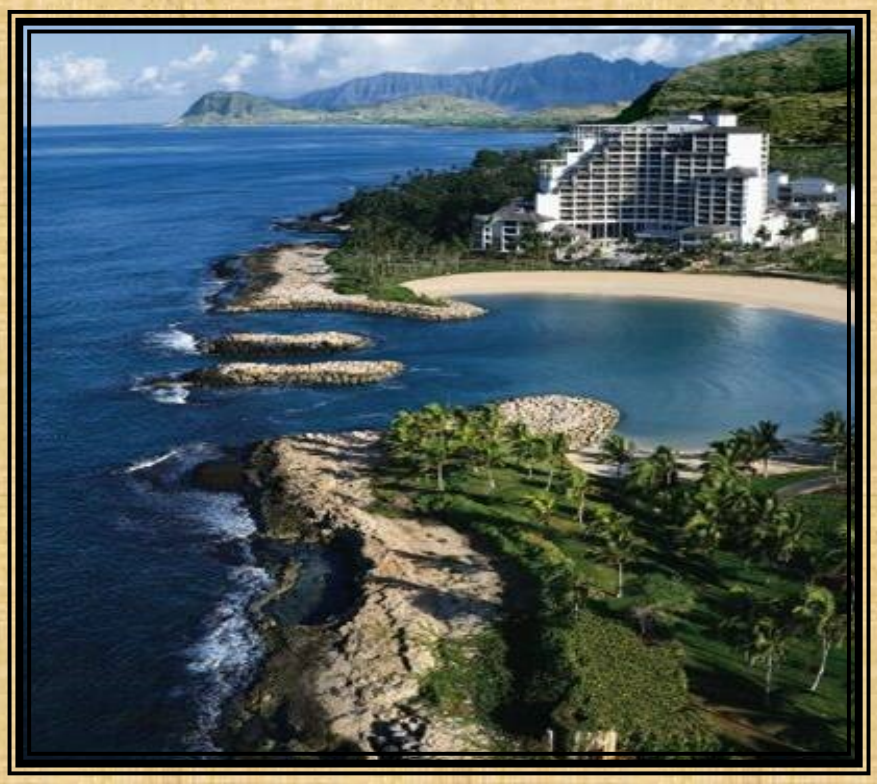

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President's Letter

By Marisa Janine-Page

Promoting its mission of an open dialogue between the Bench and Bar, on April 22, 2014, the Association of Business Trial Lawyers lead San Diego's first Bench & Bar Summit. The Summit was very well attended by federal, state, and appellate judges and 18 leaders of local bar organizations. Chief Judge Barry Moskowitz graciously hosted the Summit in the beautiful 16th floor conference room of the new Federal Courthouse Annex. Although the view was breathtaking, the group's focus was on the fiscal crises facing our state and federal courts and how the bar organizations and their members can help to ensure continued equal access to justice. The highlights of the spirited, educational, and inspiring discussion follow.

Chief Judge Moskowitz started off the evening describing the prolific impacts of the financial cuts suffered by the Southern District of California. The U.S. Marshals have been reduced to bare bones, 22 functioning courtrooms have been reduced to eight, 500 employees have been reduced by 30 percent, the courtrooms now have to share court reporters, and the floors are being vacuumed on a weekly rotation. But, the ever-positive Chief Judge finished on a high note: "The Court is saved – for now." Thanks to the strategic planning and foresight of Chief Judge Moskowitz and his predecessors, Irma Gonzalez (Ret.) and Marilyn Huff, the skillful management of the Court's excruciatingly limited resources, and its hard-working judges, loyal staff, and state of the art on-site drug testing facility, the Southern District managed to continue to operate during sequestration and continues to fully function today.

Presiding Judge Danielsen reminded us of the dismal "bad old days" and how diligent his predecessors worked to make San Diego Superior into a one with financial reserves and trial dates on the fast track. San Diego Superior made tough strategic decisions early on that enabled it to fare far better than its counterparts in other counties through the prolonged and repeated budget cuts. But, Judge Danielsen lamented that sagacity came with an unforeseen disadvantage. For example, when specific funding was offered for certain programs, San Diego was ineligible because it had already found a way to save the targeted program at the expense of another program. The politicians turned the Court's foresight and skilled management into a double-edged sword, using it as an excuse to warrant cutting resources even deeper. Judge Danielsen advises that if San Diego doesn't want to see a return to those "bad old days," those who use the court (i.e. litigants/constituents) need to "mitigate and agitate." Mitigate the problem by not causing "motion sickness" and agitate the politicians until they properly fund the courts.

Judge McKeown shared with the Bar leaders how the ninth circuit too has suffered reductions in staff attorneys but, the appellate court was very excited to have John Owens and Michelle Friedland recently confirmed to the Ninth Circuit Court of Appeals. They join at a time when the appellate court is inundated with appeals and deluged with immigration cases. Like the Southern District and San Diego Superior, the ninth circuit is managing its limited resources thriftily and has in place several programs to mitigate the budget crises including its mediation program and mentoring program.

The Bench and Bar Summit was an inspiring dialogue that educated the Bar on how the courts are managing these tough financial times, explored ideas to mitigate the financial crises impact, including the courts' mitigation experiments (i.e. scheduling 50+ motions on a law and motion calendar, conducting in-chambers pre-hearing demurrer conferences, and calendaring the next demurrer hearing upon granting leave to amend), and strengthened a collaborative legal community. We recessed the conversation armed and motivated to "mitigate and agitate." I am proud that the ABTL initiated this Bench & Bar Summit, was honored to be a part of it, and hope to see the collaborative discussion continue for many, many years.

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Mitigation Action Items:

- The SDCBA's Court Funding Action Committee is gathering critical information to present to the Governor. They need your clients' real-life hardship stories due to lack of access to the courts. Please tell your client's story at: https://www.sdcba.org/index.cfm?pg=Court-Budget-Cuts-2013-Real-World.
- E-File – 100% e-Filing utilization would free up enough clerk capacity to significantly reduce processing backlogs.
- Don't cause "motion sickness." That is what judges wittily call motions to dismiss that "no matter what are always 25 pages." One judge advised: "Such motions should only be filed if it is likely to reduce the parties or the cost of discovery." When the motion is not likely to accomplish one or both of these objectives, it leaves the judge wondering if the lawyer has adequately informed the client of the true value they will be getting from filing the motion.
- Don't "over-plead your case."
- Try civility rather than a discovery motion. One judge commented: It all lies in the "meet and confer not being done adequately" and a "breakdown in professionalism." "Lawyers need to meet in the same room – not by letter."
- The ninth circuit is looking for volunteer mentors. If you are interested, more information can be found at http://cdn.ca9.uscourts.gov.

Judicate West Congratulates Hon. William McCurine, Jr. for His 10 Years of Service as a Federal Magistrate for the Southern District

We are very honored to welcome Judge McCurine to our exclusive panel of neutrals to serve as a full-time mediator, arbitrator and private judge. During his service as a federal magistrate, he was revered by all for his vast legal acumen and ability to analyze even the most complex of cases. Prior to his service on the bench, he was a civil trial attorney for over 30 years.

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The Early Neutral Evaluation Conference

Both judges see the early neutral evaluation (ENE) conference as the first opportunity to meet with the parties and to gain an understanding of the case. They agree that attorneys need to fully prepare for the ENE conference in order to gain the most benefit from the early resolution procedure that the Southern District provides. That preparation starts with a thorough yet concise ENE statement. "We read them very carefully in advance of the ENE conference," Judge Crawford said, adding that attorneys need to adhere to the five-page limit and not overwhelm the court with numerous extraneous attachments. "Limit attachments, if any, to salient documents that help the judge understand the case."

Both judges said they take a somewhat casual approach at the ENE conference, but that the casual nature of the conference should not cause attorneys and their clients to undervalue the importance of the ENE process. The Local Rules require that the parties themselves attend the ENE, which can be burdensome for parties from out-of-town. But, the judges say, the ENE is the parties' opportunity to put the issue of settlement on the table and to discuss the roadblocks to resolution before traveling down the expensive path of litigation.

"The ENE is the parties' opportunity to put the issue of settlement on the table and to discuss the roadblocks to resolution before traveling down the expensive path of litigation."

"I have found that the mediations have been very productive," said Judge Bartick. "Even in the cases that don't resolve, I've found that through these early settlement conferences, I am able to gain a better understanding and comprehension of the case."

Judge Bartick and Judge Crawford agree that often times the ENE conference results in a settlement shortly after that conference itself.

Judge Bartick said he takes a roll-up-the-sleeves approach to the ENE conference and will entertain creative suggestions for resolution. He does not have attorneys provide opening statements at the ENE as he feels that they often result in the parties digging in their heels at the onset of the conference. Rather, he has a quick introductory group session then breaks out to caucuses where he shuttles back and forth between the parties.

Judge Bartick and Judge Crawford both said they are willing to help attorneys provide realistic expectations of their cases to their clients during the ENE and look for cues from the attorneys to do so. They advise that before the ENE attorneys should provide a cost/benefit analysis of the fees their clients will incur through discovery and trial so that clients fully understand the reality of what the upside and downside of taking a case to trial will actually be. Often times, the judges say, the most productive way to settle a case is simply a matter of having the clients understand the costs associated with taking a case to trial.

The Case Management Conference

The Case Management Conference (CMC) provides the opportunity for attorneys to educate the magistrate judge about the discovery issues that are likely to arise in the case, says Judge Crawford. These discovery issues should be discussed with the magistrate judge early on, at the CMC, and not left to the end of discovery when there is little time left to resolve discovery-related concerns.

Judge Crawford and Judge Bartick expect that attorneys and their clients will perform the necessary due diligence regarding discovery issues well before the CMC. Attorneys are expected to know what documents may be relevant to the dispute and how the documents are retained. Similarly, attorneys should be prepared to address the issue of electronic discovery and how their client's electronic files can be located and produced. For example, electronic files may be so voluminous that the only practical way to retrieve them is through the use of search terms or "intelligent" searches. In other matters, the production of hardcopy documents may suffice. The judges concur that attorneys should discuss these issues amongst themselves at the beginning of the litigation so that they can be fully addressed at the time of the CMC.

(see "Crawford and Bartick" on page 6)

Crawford and Bartick

(continued from page 5)

Judge Bartick adds that, as a magistrate judge, he reviews the parties' joint discovery plan and tries to adhere to the parties' requests, although he generally does not allow for phased discovery. He notes, however, that magistrates adhere to court time constraints to promptly bring cases to trial. The discovery plan needs to be both realistic and efficient, he adds.

Once the scheduling order is entered, both Judge Bartick and Judge Crawford expect counsel to work diligently to ensure that it is adhered to. Nevertheless, both judges said they recognize that there are instances where discovery deadlines legitimately need to be extended. The best way to obtain an extension, Judge Bartick said, is to demonstrate that the parties have worked diligently throughout the case. "If counsel has been diligent, then the magistrate judge can be a party's best ally in influencing the district judge in moving the dates forward."

"The Southern District focuses on being accessible to litigants and magistrate judges strive to be "user friendly.""

Discovery Disputes

Judge Bartick and Judge Crawford both advise that attorneys should try their best to limit their submissions to the court to those discovery issues where the parties have diligently tried to resolve the dispute but could not. A shotgun approach to discovery motions over burdens the court and is not in the best interest of the parties.

"Rather than trying to win the dispute, try to resolve it to the best of your abilities and leave to us those areas where the parties really have not been able to reach resolution," Judge Crawford said. "We don't know as much about the case as the parties do, and our decision may be one that neither party likes or contemplated."

Judge Crawford and Judge Bartick generally do not hold hearings for discovery motions. Judge Crawford notes that hearings can be helpful where there are complex issues that may need to be explained. Judge Bartick said he is not reluctant to set a hearing for a discovery dispute, but only if he feels that a hearing would be productive.

Judge Bartick adds that the Southern District focuses on being accessible to litigants and magistrate judges strive to be "user friendly." Judge Bartick encourages attorneys to call his chambers to assist in the resolution of evidentiary objections that arise during a deposition and that, as long as he is not presiding over a criminal proceeding, he is happy to take telephone calls from counsel to assist in the resolution of these types of disputes.

"This is your courtroom," Judge Bartick told the attorneys gathered at the brown bag luncheon. "I want to be able to work with you to get your matter resolved efficiently."

Judge Crawford's and Judge Bartick's chamber rules can be found at https://www.casd.uscourts.gov/SitePages/Judges.aspx.

Mathieu Blackston is a Deputy Attorney with the California Department of Transportation and is a member of the Editorial Board of the ABTL Report.

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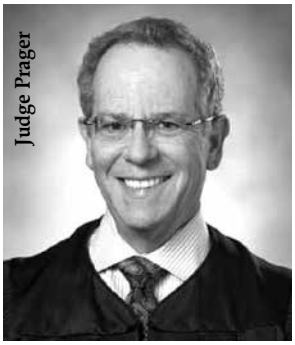
An Open Dialogue with our Superior Court Judges

Please join the ABTL for an engaging evening with our San Diego Superior Court judges.

Our panelists, Judge Lewis, Judge Prager and Judge Taylor, will kick off our evening with a panel presentation that will then be handed off to their colleagues in the audience for breakout table discussions. At least one Superior Court judge will be seated at each dinner table and will lead an engaging roundtable exchange. You will not want to miss this unique and rare opportunity to have an intimate and open dialogue with our state court judiciary on matters affecting business litigation.


Judge Lewis


Judge Prager


Judge Taylor

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6:00 dinner
6:45 - 7:45 pm program

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Choose Appellate Issues Wisely

By Kate Mayer Mangan

Kate Mayer Mangan

Imagine you're an appellate judge. You pick up an opening brief that raises nine issues. You groan, struggling to skim through the issue statement. You're an excellent judge, so you will not throw up your hands in frustration. Instead, you'll figure out which of these issues matter, knowing they can't all be critical. You'll wade through the nine responses—and there will be nine responses because most respondents feel compelled to address every issue raised, no matter how frivolous. You'll do all this work, even though you strongly suspect the respondent will prevail. As one court wrote, "When a party comes to us with nine grounds for reversing the district court, that usually means there are none." Fifth Third Mortgage Company v. Chicago Title Insurance Co., 692 F.3d 507 (6th Cir. 2012).

Back to being a lawyer. By now, it should be obvious that at least one reason you should carefully select issues for your appeal is to hold the judges' attention — and good humor. Judges read thousands and thousands of pages. Asking them to decide unnecessary issues is sure to lose their attention and irritate them. By the time they have decided six irrelevant issues, they may have little patience for deciding the seventh — actually critical — issue.

There are other reasons to choose your issues carefully. You'll be able to argue effectively within word limits because you won't waste space on sideshows. A sensible selection of issues also demonstrates competence and confidence in your positions. In contrast, raising a host of tangential issues signals that you don't know what you're doing and you aren't sure what your case is really about. Finally, issue selection is critical because it dictates the structure of your brief; the issues are the hooks upon which everything else hangs.

So how do you choose good issues?

- The first rule of thumb is that you should not raise too many. Three is usually plenty. Raising a lot of issues makes your brief hard to follow, and it can be difficult for a court to figure out what exactly you want it to do. If you find yourself with a list of 10 must-raise issues, try some of the following techniques to determine whether you really need to raise all ten.
- Know why you are appealing and determine whether winning a particular issue will further that goal. Is the goal a new trial, a smaller judgment, or a different rule of law? Will winning on a particular ground achieve the result your client seeks? Be aware of when you are focusing on issues that mattered during discovery or trial, but that are irrelevant to the appellate goals.
- Determine how likely you are to prevail. This, in part, requires you to figure out what the relevant standard of review is. Will it help or hurt you? For example, if the appellate court must apply a deferential standard of review to your issue, you are much less likely to win it. If, on the other hand, the appellate court can apply a de novo standard of review, you stand a far better chance of winning.
- Especially after surviving a heated trial or long discovery season, it may help to step back from the case. The appellate court will be viewing the case with fresh eyes. The judges or justices will not know about the dozen motions to compel or ugly depositions. They will, however, quickly identify the crux of the controversy. That's what you should focus on when identifying issues: what is the true flashpoint of controversy? Most times, that flashpoint will direct you to the issues you need to raise for the appeal to be worthwhile.

If you choose your issues wisely, you will be well on your way to a successful appeal and a happy client.

Kate Mayer Mangan is a partner at Hahn Loeser & Parks, where she co-chairs the firm's appellate practice. She also is a former law clerk to the Honorable M. Margaret McKeown and founder of the USD School of Law's Appellate Litigation Clinic.

A Conversation with Sandra Day O'Connor

On May 9, 2014, ABTL – San Diego hosted a Conversation between Retired United States Supreme Court Associate Justice Sandra Day O'Connor and Judge M. Margaret McKeown, United States Circuit Judge, Ninth Circuit Court of Appeals, at the U.S. Grant Hotel.

Presented in a casual format, the event consisted of Judge McKeown asking Justice O'Connor questions on a wide range of topics that covered her life experiences from lessons learned during her childhood growing up on her family's Arizona ranch to the experiences of her multi-faceted career which included serving as Assistant Attorney General of Arizona, in the Arizona State Senate, Judge of the Maricopa County Superior Court, Justice of the Arizona Court of Appeals and culminating in her appointment, by President Ronald Regan, to the U.S. Supreme Court in 1981. She served on the high court for 25 years.

Since her retirement Justice O'Connor has devoted her efforts to expanding the teaching of Civics in state public schools. To that end she developed a program known as iCivics, which is now being used in almost all 50 states. iCivics provides lessons free of charge to teach such things as how the U.S. government works, how judges are appointed and the role citizens play in government all with the goal of developing a nation where all young Americans are prepared for "active and intelligent citizenship."

iCivics provides students with the tools they need for active participation and democratic action, and teachers with the materials and support to achieve this. The free resources include print-and-go lesson plans, award-winning games, and digital interactives. The iCivics games place students in different civic roles and give them agency to address real-world problems and issues. They are rooted in clear learning objectives and integrated with lesson plans and support materials. More than 40,000 educators and three million students use iCivics each year. iCivics games have been played more than ten million times by students across the country. For more information on what iCivics has to offer go to www.icivics.org.

—Lois M. Kosch, Wilson Turner Kosmo LLP

No Class Certification In Call Recording Cases

By Jay Ramsey and Shannon Petersen, Sheppard Mullin Richter & Hampton LLP

In recent years, illegal call recording class actions have flooded California courts. In them, consumers complain that a company violates the law when it records calls without first providing notice that they may be recorded. In *Hataishi v. First American Home Buyers Protection Corp.,* 223 Cal. App. 4th 1454 (2014), the California court of appeal made it much more difficult to certify a class action in such cases.

In *Hataishi,* the defendant recorded all calls with its sales department. For inbound calls, an electronic notice played notifying customers that their calls may be recorded. For outbound calls, no electronic notice played. The plaintiff sued, alleging a single cause of action for violation of California Penal Code section 632. Section 632 prohibits a party from recording or monitoring a "confidential communication" without the consent of all parties to the conversation and imposes a statutory penalty of up to $5,000 per violation. The plaintiff claimed that the two outbound calls placed by sales representatives to her were recorded without her consent.

The court of appeal held that a plaintiff may pursue a claim under Section 632 only if she had "an objectively reasonable expectation" that the conversation was not being overheard. This standard proved the undoing of the class claims. The court held that each plaintiff's objectively reasonable expectations would turn on individualized inquiries, including the length of the class member's experience with the defendant, whether the class member had ever been notified that her calls with defendant may be recorded, and each class member's experience with other businesses that record or monitor calls.

The plaintiff's own experience illustrated that individualized inquiries were necessary. She placed 12 inbound phone calls to the defendant's sales department, and each time she received an electronic notice that her call may be recorded. Not once did the plaintiff tell the defendant that she refused to be recorded and she never terminated the call to avoid being recorded. In addition, the plaintiff also testified that she had participated in "dozens and dozens and dozens" of telephone calls with other companies where she understood her call could be recorded.

These facts, the court held, affected the plaintiff's objectively reasonable expectations. "A jury could rationally reach a different conclusion concerning another plaintiff who has not had the same experience." Individualized issues thus predominated, precluding certification of a class.

To save the class claims, the plaintiff attempted to add a claim under Penal Code section 632.7, which differs from Section 632 in two key respects: (1) Section 632.7 applies only to telephone conversations where at least one party is on a cellphone or a cordless phone; and (2) Section 632.7 prohibits the recording or monitoring of the call without consent *even if* the call is not a "confidential communication." The court, however, held that individualized inquiries were also necessary under Section 632.7 to determine whether the consumer was on a cellphone or cordless phone.

Despite this decision, plaintiffs continue to file call recording class actions in large numbers. *Hataishi* will make it difficult for these plaintiffs to certify any class.

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Statistical Sampling Inappropriate in Wage and Hour Misclassification Class Action

Duran v. U.S. Bank Nat'l Ass'n, 2014 Cal. LEXIS 3758 (May 29, 2014)

Former banking officers brought a wage and hour class action claiming they were misclassified by defendant employer as outside sales personnel exempt from California's overtime laws and, therefore, unlawfully denied overtime pay. The trial court relied upon evidence from a random witness group (RWG) of 21 out of the 260 class members to find class-wide liability and restitution, and entered a $15 million judgment in favor of the employees. The employer appealed.

The court of appeal reversed the judgment. Specifically, the appellate court found the trial court's trial management plan deprived the employer of its constitutional due process rights in that the employer was prevented from raising individualized challenges to the absent (i.e., non-RWG) class members' claims. Moreover, the appellate court concluded that the case had to be decertified because the trial court erroneously extrapolated findings from the RWG to the entire class. The employees sought review.

The California Supreme Court affirmed the court of appeal's judgment in its entirety. The Court held a trial plan that relied on statistical sampling had to be developed with expert input and had to afford the defendant an opportunity to impeach the model or otherwise show its liability was reduced. Here, the trial court's approach to statistical sampling was fatally flawed because it prevented the employer from showing some class members were, in fact, exempt and entitled to no recovery. Not only did the trial court fail to employ a valid statistical model, but it then improperly extrapolated liability findings from the RWG (a small, skewed sample group) to the entire class. Moreover, the trial court refused to admit relevant evidence relating to banking officers outside the RWG, thereby significantly hampering the employer's ability to present a defense. Having determined that the trial court's findings on liability and damages would have been different absent its erroneous exclusion of evidence and reliance on faulty statistical methodology, the Court reversed both aspects of the trial court's judgment.

The Court left open the potential use of statistical sampling as a means of proving liability and damages in some wage and hour class actions, although employers had hoped the Court would put an end to this practice entirely. As mentioned, any trial plan that relies on statistical sampling needs to be developed with expert input and allow an opportunity for the defendant to impeach the model. The Court also made clear that any class action trial must allow for the litigation of affirmative defenses, even in a class action case where the defense touches upon individual issues.

The Court also advised trial courts to "pay careful attention to manageability when deciding whether to certify a class action." In particular, the Court said that manageability of individual issues was just as important a consideration at the class certification stage as the existence of common questions uniting the proposed class. Also, trial courts must decertify classes if they later determine that individual issues will unmanageable. And, if statistical evidence will comprise part of the proof on class action claims, a trial court should consider at the certification stage whether a trial plan has been developed to address its use, and not merely accept assurances that a plan will eventually be developed. Advising trial courts to consider at the class *certification stage* whether a class would be manageable for trial purposes is a significant development which creates an additional hurdle for litigants seeking to have classes certified.

Anti-Slapp Motions

(continued from cover)

complaint that arises out of the defendant's free speech or petitioning activities.[4] If the defendant demonstrates that a cause of action arises from its protected conduct, the burden then shifts to the plaintiff to demonstrate, ordinarily without the benefit of any pre-trial discovery, a probability of prevailing on that claim.[5] If the plaintiff cannot meet that burden, the offending cause of action is stricken and the defendant is awarded the reasonable attorney's fees and costs it incurred in bringing the motion.[6]

Often times, plaintiffs will dismiss their complaints in response to an anti-SLAPP motion. Sometimes they do it for legitimate reasons; sometimes they do it because they did not realize their complaint was a SLAPP; and sometimes they do it because they've already achieved their goal of harassing the defendant. Of course, allowing a plaintiff to moot an anti-SLAPP motion in order to avoid paying fees by simply dismissing the SLAPP suit would undercut the "legislative purpose of reimbursing the prevailing defendant for expenses incurred in extricating herself from a baseless lawsuit."[7] So California's appellate courts are in agreement. When a plaintiff dismisses an action while an anti-SLAPP motion is pending, the trial court is still obliged to consider whether it should award the defendant the fees and costs it incurred in bringing the motion.[8] But these courts disagree on just how much the trial court must scrutinize the merits of the anti-SLAPP motion itself before awarding fees to the defendant.

Division Two of the Fourth District Court of Appeal was the first appellate court to address the issue in *Coltrain v. Shewalter*.[9] The *Coltrain* court held that a trial court has "discretion to determine if the defendant is the prevailing party" for purposes of awarding fees under the anti-

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SLAPP statute whenever the plaintiff dismisses the action while an anti-SLAPP motion is pending.[10] "In making this determination, the critical issue is which party realized its objectives in the litigation."[11] "Since the defendant's goal is to make the plaintiff go away with its tail between its legs, ordinarily the prevailing party will be the defendant."[12] In other words, *Coltrain* permits an award of attorney's fees and costs regardless of whether the defendant's anti-SLAPP motion was meritorious or not.

A few weeks after the *Coltrain* court handed down its decision, Division Three of the Second Appellate District considered the exact same issue in *Liu v. Moore*.[13] In stark contrast to *Coltrain*, the *Liu* court made clear that, when considering whether to award fees under the anti-SLAPP statute, "the critical issue is the merits of the defendant's motion to strike."[14]

A few years later, in *Pfeiffer v. Venice Properties v. Bernard*,[15] a different division in the Second District likewise held "[t]he fee motion is wholly dependent upon a determination of the merits of the SLAPP motion."

Just recently, in *Tourgeman v. Nelson & Kennard*,[16] the Fourth District Court of Appeal, Division One, sided with the *Liu* and *Pfieffer* courts and rejected *Coltrain's* holding to the extent it "permits the trial court to award fees and costs . . . *without* first determining whether the defendant would have prevailed on the special motion to strike."[17]

At least one legal commentator predicts the California Supreme Court will eventually weigh into the debate in order to resolve the "split in intermediate appellate court thinking." California Attorney's Fees (January 18, 2014) *SLAPP: Fourth District Division One Decides Lower Trial Court Must Determine If Defendant Would Have Prevailed On The Merits Under SLAPP Statute Where Plaintiff Voluntarily Dismisses for Purpose of SLAPP Fee Recovery.* If, and when that happens, the Supreme Court should overrule *Coltrain* in favor of the more sound decisions in *Liu, Pfeiffer* and *Tourgeman.*

There are at least four flaws with *Coltrain's* reasoning.

First, *Coltrain* is inconsistent with the anti-SLAPP statute's text. Specifically, section 425.16(c)(1) authorizes an award of fees and costs to a "prevailing defendant on a special motion to strike." By its terms then, only defendants who actually "*prevail on the motion to strike* are entitled to fees and costs."[18] As such, even if a plaintiff dismisses its complaint in response to an anti-SLAPP motion, the trial court cannot award the defendant its fees and costs "without determining whether [defendant] would have prevailed on their anti-SLAPP motion."[19]

Second, *Coltrain* shifts the initial burden of proof from the defendant to the plaintiff. As mentioned above, the first prong of the anti-SLAPP statute requires the defendant to demonstrate that the plaintiff's compliant arises out of the defendant's free speech or petitioning activities. But if the trial court does what *Coltrain* requires, and focuses on the outcome of the case, rather than the merits of the defendant's anti-SLAPP motion, the trial court can award a defendant fees regardless of whether the plaintiff's complaint was a SLAPP or not.

Third, *Coltrain* predates Code of Civil Procedure § 425.17, which excludes certain types of claims that would otherwise fall within the scope of the anti-SLAPP statute.[20] The Legislature enacted section 425.17 in 2003 to curb the "disturbing abuse" of anti-SLAPP motions by businesses that were using them as a "litigation weapon" to delay and discourage litigation against them by filing meritless special motions to strike.[21] Actions brought in the public interest and lawsuits against defendants engaged in commercial speech are now generally exempted from the ambit of the anti-SLAPP statute.[22] The complaint in *Tourgeman*, for example, sought to enjoin one of California's self-proclaimed largest debt collection law firms from continuing to engage in debt collection practices that allegedly violated the Fair Debt Collection Practices Act ("FDCPA").[23] The trial court granted the law firm's motion for fees and costs and ordered Tourgeman to reimburse the law firm more than $11,500. The court of appeal reversed based on its finding that Tourgeman's complaint fell

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(continued from page 13)

within the "public-interest" exception to the anti-SLAPP statute.[24] Had the *Tourgeman* court followed *Coltrain*, and ignored the merits of the law firm's anti-SLAPP motion, the law firm would have subverted the Legislature's purpose in enacting section 425.17 by using "the anti-SLAPP motion against [its] public-interest adversar[y]."[25] Even worse, the law firm would have received fees and costs under the anti-SLAPP statute even though Tourgeman's complaint was not subject to an anti-SLAPP motion under § 425.17(b).

Fourth, *Coltrain* runs contrary to the California Supreme Court's goal of "discouraging prolonged litigation solely over the matter of fees and costs."[26] Again, take *Tourgeman* for example. Tourgeman's state court case was a tag-along to a class action pending for several years in federal court. The law firm filed its hastily-prepared anti-SLAPP motion the day after the district court ruled that the law firm's debt collection practices complied with the FDCPA (a ruling that is currently on appeal to the ninth circuit). *Tourgeman* then dismissed his state court complaint, not because he feared the law firm's anti-SLAPP motion, but because he recognized he had no chance of convincing a state court to enjoin conduct a federal judge had already said was legal. Rather than being satisfied with its victory, the law firm sought over $20,000 in fees for filing a motion that was virtually identical to anti-SLAPP motions it had filed in previous cases. Unfortunately the trial court granted the motion, though, to its credit, it slashed the law firm's fee request nearly in half.

Fifth, *Coltrain* could lead to a *Catch-22* for plaintiffs. For example, what was Tourgeman supposed to do once the federal court dismissed his FDCPA case? He could either dismiss his complaint and hope the law firm did not press the issue; or oppose the law firm's anti-SLAPP motion solely to avoid paying the law firm the fees and costs it was not entitled to under section 425.17(b). If he choose the first option and dismissed the complaint, he likely would have lost the law firm's subsequent fee motion under *Coltrain's* "prevailing-party" approach. If he opposed the anti-SLAPP motion, and won, he would have saved an injunctive-relief case he had no real chance of winning in light of the federal court's previous dismissal of his FDCPA claim. That, in and of itself, might have been sanctionable conduct.[27] The better approach, and the one the *Tourgeman* court agreed with, was to dismiss the complaint and try to put an end to the litigation as quickly and efficiently as possible.

It's unclear whether the Supreme Court will take up this issue. But for those of us who bring or defend anti-SLAPP motions on a regular basis, this is an area of the law to keep an eye on.

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Anti-Slapp Motions

(continued from page 14)

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(Endnotes)

1 *Church of Scientology of California v. Wollersheim* (1996) 42 Cal. App.4th 628, 645

2 *Church of Scientology of California v. Wollersheim* (1996) 42 Cal. App.4th 628, 645

3 *Flatley v. Mauro* (2006) 39 Cal.4th 299, 312

4 Code Civ. Proc. § 425.16(b)(1)

5 Code Civ. Proc. § 425.16(b)(1)

6 Code Civ. Proc. § 425(c)(1)

7 *Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 446

8 *Major v. Silna* (2005) 134 Cal.App.4th 1485, 1491

9 *Coltrain v. Shewalter* (1998) 66 Cal. App. 4th 94

10 *Coltrain v. Shewalter* (1998) 66 Cal. App. 4th 94 at 106-107

11 *Coltrain v. Shewalter* (1998) 66 Cal. App. 4th 94 at 107

12 *Coltrain v. Shewalter* (1998) 66 Cal. App. 4th 94 at 107

13 *Liu v. Moore* (1999) 69 Cal.App.4th 745

14 *Liu v. Moore* (1999) 69 Cal.App.4th 745 at 752

15 *Pfeiffer v. Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211

16 *Tourgeman v. Nelson &* Kennard (2014) 222 Cal.App.4th 1447

17 *Tourgeman v. Nelson &* Kennard (2014) 222 Cal.App.4th at 1457 (emphasis original)

18 *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 381 (emphasis original)

19 *Tourgeman*, 222 Cal.App.4th at 1458

20 *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 112

21 Code Civ. Proc. § 425.17(a); *Major*, 134 Cal.App.4th at 1496

22 Code Civ. Proc. § 425.17(b) and (c)

23 Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq

24 *Tourgeman*, 222 Cal.App.4th at 1467

25 *Tourgeman*, 222 Cal.App.4th at 1459 (citing section 425.17's legislative history)

26 *S.B. Beach Properties*, 39 Cal.4th at p. 383

27 *See* Code Civ. Proc. § 128.5 (authorizing trial courts to sanction a "party, the party's attorney, or both" for, inter alia, opposing a motion in order to "cause unnecessary delay.")

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