ASSOCIATION OF BUSINESS TRIAL LAWYERS

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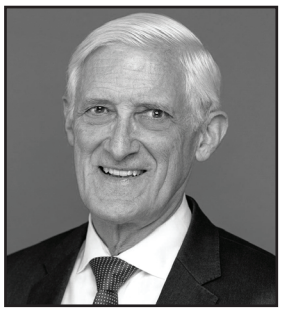
# Do You Want a Bench Trial With a Date Certain?

## *Having Your Case Heard by a Temporary Judge Might Be a Fast Track to Resolution*



Hon. Wynne S. Carvill (Ret.)

Given the impact of the pandemic on court dockets—especially in state courts—litigants are facing either trial dates in the distant future or trial dates that appear certain but are frequently continued shortly beforehand. The latter can be extremely frustrating and expensive because the parties are forced to spend the time and money to prepare for trial only to be told their case has been continued. This can happen repeatedly, as was often the case before California adopted delay-reduction measures and standards decades ago.

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Also in This Issue



# The Importance of Mentoring Junior Trial Attorneys

## *Part One*

Hon. Marie S. Weiner

There has been a successful push by the judiciary, especially the federal district court judges, to get law firms to assign junior attorneys – be it associates or junior partners – to take the lead on court appearances. This has been to the benefit of everyone. Whether it be due to earnest effort or gripping fear, I have found the junior attorneys appearing in my courtroom to be the best prepared on the law and the facts – and preparation is the key to being an effective trial attorney.

But something got lost along the way. Throwing junior attorneys into the courtroom pond to either sink or swim is not how it used to be. Although one can certainly learn through the school of hard-knocks, it is a far far better method to actually train and equip younger lawyers in preparation for courtroom appearance and for prosecuting/defending trials. I suggest that law firms and senior trial attorneys revisit the training method of individual mentoring, and take the time to do so.

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Diego Flores

# *Mitigating Preference Exposure*

Diego Flores

Entering Summer 2022, interest rates are on the rise and fears of a recession—and the potential uptick in bankruptcy filings it would bring—loom large. Given the economic outlook, practitioners can expect calls from clients concerned that counterparties have not paid debts on time or otherwise may be in financial distress. Counsel advising clients in such situations should consider whether and to what extent the client might face preference exposure, and how to minimize that exposure.

## 1. What Is A Preference?

"Preferences are transfers in which an insolvent debtor favors certain creditors over others." 5 Collier on Bankruptcy ¶ 547.10 (16th ed. 2022). The elements of a preference claim are laid out in Section 547 of the Bankruptcy Code, which provides that "*any* transfer of an interest of the debtor in property" may be avoided where it is "(1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; [and] (3) made while the debtor was insolvent;" (4) transfer was made within 90 days preceding the debtor's bankruptcy filing (or one year in the case of transfers to "insiders"); and (5) allows the creditor to receive more than it would absent the transfer in a chapter 7 liquidation. 11 U.S.C. § 547(b).

Under the Bankruptcy Code, "transfer" is defined "*extremely* broad[ly]" and captures in essence, anything a debtor might do to "dispos[e] of or part[] with" any property interest, whether directly or indirectly. *See*, *e.g.*, *Batlan v. Bledsoe (In re Bledsoe)*, 569 F.3d 1106, 1113 (9th Cir. 2009) (quoting *Bernard v. Sheaffer (In re Bernard)*, 96 F.3d 1279, 1282 (9th Cir. 1996)) (emphasis in original); 11 U.S.C. § 101(54). For example, where a debtor pays off within the preference period a debt that was guaranteed by a non-debtor, both the creditor and the guarantor may have preference exposure because the payment relieves the guarantor of its obligation to pay the debt and thereby provides value to the guarantor, which is itself a creditor by virtue of its contingent right to recover from the debtor if forced to pay on the guarantee. *See*, *e.g.*, *Stahl v. Simon (In re Adamson Apparel, Inc.)*, 785 F.3d 1285, 1292-93 (9th Cir. 2015). Involuntary transfers, such as sheriff's levies, are also susceptible to attack as preferences. *See*, *e.g.*, *Richardson v. Wells Fargo Bank (In re Churchill Nut Co.)*, 251 B.R. 143, 147-48 (Bankr. N.D. Cal. 2000). And because "[t]he intent or state of mind of the parties to a transfer is not material to the general question of whether that transfer is a preference[,]" *Johnson v. Barnhill (In re Antweil)*, 931 F.2d 689, 692 (10th Cir. 1991) (citation omitted), even a transfer made and received in the utmost good faith is susceptible to attack as a preference if the statutory elements are met.

Given the broad definition of "transfer," the lack of any intent requirement, and a statutory presumption that debtors are insolvent "on and during the 90 days immediately preceding" a bankruptcy filing, *see* 11 U.S.C § 547(f), virtually any transaction in which a financially-distressed debtor gives up something of value on account of a pre-existing debt could give rise to preference exposure. Moreover, because many corporate debtors have a panoply of options when determining where to seek bankruptcy protection, the recipient of a purportedly preferential transfer may be forced to defend a preference action hundreds or thousands of miles away. *See*, *e.g.*, Samir Parikh, *Modern Forum Shopping in Bankruptcy*, 46 Conn. L. Rev. 159, 164, 180-93 (2013) (discussing corporate debtors' forum selection options); *Heinrich v. Haley Techs., Inc. (In re Insys Theraputics, Inc.)*, Adv. Proc. No. 21-50141 (JTD), 2021 Bankr. LEXIS 1612, at *4 (Bankr. D. Del. June 17, 2021) (holding 28 U.S.C. § 1409's small-action venue rule inapplicable to preference actions).

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## Hon. Socrates Peter Manoukian

# *On* DISCOVERY

Hon. Socrates Peter Manoukian

In 2007, I was honored to be invited to teach California Civil Procedure at Santa Clara University School of Law. On the first line of every class since then, I have posted "The Top 10 Tips to Succeed in the Legal Profession." Rule #3 has been "The opposing counsel on the *second*-biggest case of your life is going to be the trial judge of the *biggest* case of your life."

It is rumored that trial judges do not like to get involved in discovery fights. This is untrue in most cases, true in some others. It is untrue since, by far, most attorneys are competent and skilled professionals adhering to principles of professionalism. Discovery disputes often involve cutting edge issues and many judges and lawyers are at the front of unique cases where new rules and procedures are tested for the first time. However, the rumor is true when the lawyers reduce themselves to petty sniveling, bickering and whining over simple discovery issues.

"It is a central precept to the Civil Discovery Act of 1986 that civil discovery be essentially self-executing. A self-executing discovery system is one that operates without judicial involvement." *Clement v. Alegre*, 177 Cal. App. 4th 1277, 1291 (2009) (internal citations and punctuation omitted.) The purpose of the "Meet & Confer" requirement is a tool to achieve that precept.

"Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery" is a misuse of the discovery process. Code of Civil Procedure, § 2023.010(i). Monetary sanctions can be imposed against whichever party is guilty of such conduct even if that party wins the discovery motion in question. Code of Civil Procedure, § 2023.020.

"Meet & Confer" forces lawyers to reexamine their positions, and to narrow their discovery disputes to the irreducible minimum, before calling upon the Court to resolve the matter. It also enables parties and counsel to avoid sanctions that are likely to be imposed if the matter comes before the Court. *Stewart v. Colonial Western Agency, Inc.*, 87 Cal. App. 4th 1006, 1016-1017 (2001).

Factors considering the extent of efforts to satisfy as reasonable "Meet & Confer" can be found in *Obregón v. Superior Court (Cimm's, Inc.)*, 67 Cal. App. 4th 424, 434-435 (1998).

In most cases the quality of the "Meet & Confer" is acceptable. In others, it is more akin to a series of drive-by shootings designed to achieve one-upspersonship for a tactical advantage rather than an attempt to work out the otherwise-simple discovery requests in a reasonable manner. In those cases, monetary sanctions may be imposed against both counsel at the same time. In *Volkswagenwerk Aktiengesellschaft v Superior Court (Golsch)*, because of personal dislike for each other, counsel failed to make any real effort to negotiate the disputed issues. The Court could have refused to rule on the motion to compel because of moving party's counsel's failure to "meet and confer." But in order to resolve the matter without wasting judicial resources, the Court heard the motion, found both lawyers to have violated the requirement, and ordered each to pay $150.00 out of his own pocket to the other lawyer's client. 122 Cal. App. 3d 326, 331-334 (1981).

As to how to rule on the merits of the motion when the judge finds that "Meet & Confer" efforts were unsatisfactory, the courts have traditionally taken two approaches.

Some courts automatically deny discovery, reasoning that any other order would be "in excess of the trial court's jurisdiction." *See Townsend v. Superior Court (EMC Mortgage Co.)*, 61 Cal. App. 4th 1431, 1439 (1998).

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Marie Bafus

# *On* SECURITIES LITIGATION

Marie Bafus

Documents obtained pursuant to Delaware's shareholder inspection statute have become increasingly important in the early stages of fiduciary duty litigation. Section 220 of the Delaware General Corporation Law ("Section 220") allows shareholders of Delaware corporations to inspect corporate books and records for any proper purpose, including to investigate potential breaches of fiduciary duty by a company's officers and directors. Because Delaware courts have admonished shareholders to use the "tools at hand" – *i.e.*, documents obtained pursuant to Section 220 – to draft well-plead complaints, shareholders often seek to inspect corporate books and records as a precursor to filing breach of fiduciary duty claims. Recognizing that shareholders might take such documents out of context, Delaware allows companies to require that documents produced pursuant to Section 220 be incorporated by reference in any complaint filed by the shareholder, thereby opening the door to consideration of these materials on a motion to dismiss. What this means on a practical level is that Section 220 documents can be instrumental in either moving the case past the pleading stage or stopping the case in its tracks on a motion to dismiss.

Section 220 documents can be especially powerful in alleging or defending against claims that a board failed its oversight duties. The duty of oversight requires directors to ensure reasonable reporting and information systems exist that would allow them to know about and prevent wrongdoing that could cause corporate trauma. Oversight claims – also known as "*Caremark*" claims – are one of the most difficult claims to plead, requiring a shareholder to allege particularized facts that: (1) the board utterly failed to implement any reporting or information system or controls, or (2) having implemented such a system or controls, consciously failed to address red flags indicating corporate misconduct. Two recent oversight cases – *In re the Boeing Co. Deriv. Litig.*, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021) ("*Boeing*") and *Firemen's Ret. Sys. of St. Louis v. Sorenson*, 2021 WL 4593777 (Del. Ch. Oct. 5, 2021) ("*Sorenson*") – are illustrative of the important role documents obtained pursuant to Section 220 can play in the early stages of board oversight litigation.

In *Boeing*, the Delaware Court of Chancery sustained an oversight claim at the pleading stage, finding that the complaint alleged particularized facts establishing that a majority of Boeing's board faced a substantial likelihood of liability with respect to that claim. *Boeing* arose in the wake of the crashes of two Boeing 737 Max airplanes, which led to the grounding of the Boeing 737 Max fleet and billions of dollars in losses to the company. Plaintiffs alleged that this corporate trauma was caused by Boeing's prioritization of speed and profit over safety and brought an oversight claim against the directors. Plaintiffs asserted that the board failed to establish a reporting system to ensure that airplane safety issues were raised to the board and later turned a blind eye to red flags suggesting safety problems with the 737 Max following the first crash.

The court found that, although airplane safety was "mission critical" to Boeing's business, board-level materials obtained by plaintiffs via Section 220 showed that the board: (1) had no committee charged with responsibility to monitor airplane safety; (2) did not regularly monitor, discuss, or address airplane safety; (3) had no protocols requiring management to update the board on airplane safety; (4) never were alerted to red flags that management saw prior to the crashes; and (5) ignored red flags following the first crash that suggested the 737 Max had safety issues. Thus, board-level materials obtained via Section 220 were critical in

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HOWARD ULLMAN

# *On* ANTITRUST

Howard Ullman

With largely bipartisan support, antitrust enforcement has been on a rather dramatic uptick in the past few years. Critiques of a narrow focus on the consumer welfare standard have been advanced, the agencies have stepped up the scope and pace of their work and a plethora of articles in the popular press have called for more aggressive enforcement. The press have blamed everything from low wage growth to purportedly dominant online platforms on a supposedly outdated "Chicago School" economic approach that has been equated with a laissez faire mentality. Against this backdrop, it is not surprising that antitrust law itself has been amended and that discussions of future amendments continue to percolate actively at the federal and state levels. This is a notable development given that the main federal antitrust laws have been in place for more than a century and the most recent amendment of any significance (the Foreign Trade Antitrust Improvements Act, or FTAIA) is 40 years old.

Let's start with the bills that have already been enacted. Last year, Congress passed the Competitive Health Insurance Reform Act of 2020 (Public Law No. 116-327). That law repeals the McCarran-Ferguson Act's (15 U.S.C. §§ 1011, *et seq*.) federal antitrust exemption for health and dental insurance (which to begin with was a complicated and never full exemption). At the same time, however, the law expressly permits (1) the collection, compilation or dissemination of historical loss data; (2) determination of a loss development factor applicable to historical loss data (a component of how insurers usually calculate rates); (3) the performance of actuarial services if they do not amount to a restraint of trade; and/or (4) the development of standard insurance policy forms, provided that the insurers do not agree to adhere to the terms of such forms. Thus, in many cases, the new law does not fundamentally alter the federal landscape. That said, it is important to keep in mind that state law antitrust regulation of health insurance remains in force.

At the end of 2020, Congress also passed the Criminal Antitrust Anti-Retaliation Act of 2019 (Public Law No. 116-257). That law provides "whistleblower" protections to private sector employees who report criminal antitrust violations or assist in federal investigations and prosecutions.

Now let's turn to the bills still being considered. In 2021, both Republicans and Democrats introduced six antitrust bills in the House (some of which were also introduced in the Senate). These bills focused on curbing the purported power of technology platforms. Last April, the Senate antitrust subcommittee (chaired by Senator Amy Klobuchar) held a hearing on competition in app store markets. (Senator Klobuchar has written an entire book on antitrust. The title, "Antitrust," is generic, but its subtitle, "Taking on monopoly power from the gilded age to the digital age," gives a better sense of its contents.) As of this writing, two major or important bills are still actively being considered: the "Competition and Antitrust Law Enforcement Reform Act" ("CALERA") and the "Open App Markets Act."

CALERA would do several things. It would increase the federal antitrust enforcement budgets. It would also amend the Clayton Act to prohibit mergers that could "create an appreciable risk of materially lessening competition "more than a *de minimis* amount" (as opposed to the current standard which prohibits mergers that "substantially lessen competition") and for certain types of mergers it would shift the burden of proof in court to the merging parties rather than the government. It also would prohibit "exclusionary conduct" by dominant firms, *i.e.*, conduct that materially disadvantages competitors or limits their opportunity to compete that presents an "appreciable risk of harming competition."

The proposed Open Markets Act would regulate digital technology platforms. Among other things, it would prohibit those platforms from requiring application developers to use the platforms' in-app payment systems, allow app developers to sell their software directly to users, and prohibit platforms from

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## *Do You Want a Bench Trial With a Date Certain?*

Unfortunately, this may well be our immediate future. Civil case backlogs are skyrocketing as a result of the pandemic. In the Alameda County, California, Superior Court, for example, the caseload for each civil direct calendar judge has roughly doubled since the start of the pandemic. The problem is compounded by staff shortages that are a "hangover" from pandemic-related budget cuts. While budgets have definitely improved, hiring courtroom clerks is a challenge. The situation is so dire in Alameda County that the issue is not the availability of courtrooms, but rather the availability of clerks to staff them. Civil cases cannot be set for trial unless a courtroom clerk is "reserved" through the supervising judge for the expected trial date. Currently, most of those "reservations" are limited to preference cases, which means most civil cases are being continued.

Under these circumstances, litigants can expect a return to the "bad old days" of repeated trial settings and continuances. Cases are set knowing that many will settle before trial. In Alameda County, before the pandemic, each civil direct calendar department scheduled trial dates that were 12 to 18 months after the first case management conference. By the trial date, the cases would be winnowed down to one or two, and one of the double-set cases could usually be handed off to another direct calendar judge. With the pandemic, the surge of preference cases in Alameda County and the shortage of courtroom clerks, this whole system of moving cases along has been fundamentally disrupted. While the challenges in Alameda County may have some unique features, the backlog of civil cases and the resulting delays are common throughout California.

Where the parties have a non-jury case, however, they do not have to suffer exceptional delays with the attendant expense. Instead, they can actually get to trial relatively quickly and with a date certain by simply taking advantage of the temporary judge alternative provided for in the Constitution of California (Article VI, Section 21) or a consensual general reference to a referee pursuant to section 638 of the California Code of Civil Procedure (CCP). The two routes are governed by parallel provisions in the California Rules of Court (CRC) (compare section 2.830 et seq. with section 3.900 *et seq*.), but there are some differences.

The principal difference is that a temporary judge is always a judge for all purposes, and may enter a judgment on the case from which an appeal may be taken, as with any other judgment. On the other hand, a referee may be appointed for a limited purpose or by a consensual general reference pursuant to section 638. Only a referee appointed pursuant to a consensual general reference may issue a decision that "stands as the decision of the court ... [on which] judgment may be entered thereon ... in the same manner as if the case had been tried by the court." If a referee is not appointed pursuant to a consensual general reference, his or her decisions are only recommendations to the trial court. In addition, while a temporary judge must be a member of the State Bar, referees need not even be lawyers, which in some situations may be helpful.

Whether one uses a temporary judge or a referee, parties electing to take advantage of either alternative do incur the expense of the private judge or referee (unless the neutral agrees to serve pro bono); however, that expense will likely pale in comparison to the expense of repeated trial settings and continuances. As a result, cost may not be an appreciable factor, and the parties can actually get to trial as quickly as they want. If there is a mutual interest in a particular trial date, that of course may be stated up front as a condition to selecting the particular temporary judge or referee.

Another advantage of this route is that the parties have the ability to select the temporary judge or referee with the kind of expertise that is most suited to the case. This can be particularly useful in intellectual property disputes, complex construction cases or detailed accountings involving voluminous records. In the latter circumstance, selecting a referee instead of a temporary judge would allow the parties to select, for example, an accountant rather than a State Bar member. Retaining a neutral who is experienced in the field may also facilitate a more efficient pre-trial and trial process because there is no need to "educate" a judge who may be unfamiliar with the substantive area. Discovery and motion practice can also be more efficient because a private judge or a referee can be readily available to handle discovery issues by phone or set a motion for

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a prompt hearing. All of these features may reduce cost and enhance the quality of the decision-making process.

The authority and mechanism for appointing a temporary judge is found in the CRC. CRC 2.831(a) requires a written stipulation by the parties with the name and office address of the State Bar member to be appointed. The stipulation is submitted to the presiding judge or the judge designated by the presiding judge, and the order designating the temporary judge must refer to the stipulation. CRC 2.831(b). "The temporary judge must take and subscribe the oath of office and certify that he or she is aware of and will comply with applicable provisions of canon 6 of the Code of Judicial Ethics and the California Rules of Court." *Id.* The temporary judge may proceed with the matter "after the stipulation, order, oath, and certification has been filed." CRC 2.831(c).

The process for appointing a referee is very similar. A "written stipulation ... for an order appointing a referee under Code of Civil Procedure 638 must be presented to the judge to whom the case is assigned, or to the presiding judge or law and motion department if the case has not yet been assigned." CRC 3.901(a). The stipulation under section 638 must "[c]learly state whether the scope of the requested representation includes all issues," state whether the referee is to be privately compensated and include a proposed order. CRC 3.901(b). If the stipulation is to appoint a particular referee, it must be accompanied by the proposed referee's certification required by CRC 3.904(a). The latter is a written certification "that he or she consents to serve as provided in the order of appointment and is aware of and will comply with applicable provisions of canon 6 of the Code of Judicial Ethics and with the California Rules of Court." The certification must be filed with the court.

Note that it is very important that the stipulation and order for appointment of a referee specify whether it is a consensual general reference or a limited one. CCP section 638(a) provides that a referee may be appointed upon the agreement of the parties "[t]o hear and determine any or all of the issues in an action or proceeding, whether of fact or law, and report a statement of decision." Section 644(a) provides that "[i]n the case of a consensual general reference pursuant to Section 638, the decision of the referee ... upon the whole issue must stand as the decision of the court, and ... judgment may be entered thereon in the case in the same manner as if the case had been tried by the court." These same sections provide for the appointment of discovery referees by consent or on a motion, but unless it is a consensual general reference, "the decision of the referee ... is only advisory." CCP section 644(b). There is an optional Judicial Council form that may be used for either a consensual general reference or the appointment of a discovery referee (ADR109). There is also an optional form for the actual order (ADR110).

Both a temporary judge and a referee are subject to disclosure requirements. For a temporary judge, "[i]n addition to any other disclosure required by law, no later than five days after designation as a temporary judge or, if the temporary judge is not aware of his or her designation or of a matter subject to disclosure at that time, as soon as practicable thereafter, a temporary judge must disclose to the parties any matter subject to disclosure under the Code of Judicial Ethics." CRC 2.831(d). A referee must disclose to the parties whatever is "subject to disclosure under either canon 6D(5)(a) or 6D(5)(b) of the Code of Judicial Ethics" and "[a]ny significant personal or professional relationship the referee has or has had with a party, attorney, or law firm in the current case." CRC 3.904(b). The disclosure must include "the number and nature of any other proceeding in the past 24 months in which the referee has been privately compensated by a party, attorney, law firm, or insurance company in the current case for any services." CRC 3.904(b)(2). If the referee is unaware of any matter requiring disclosure at the time of appointment, the referee must disclose it as soon as practicable thereafter.

Disqualification procedures are specified for both temporary judges and referees. With a temporary judge, "[i]n addition to any other disqualification required by law, [he or she ] ... disqualif[ies] himself or herself as provided under the Code of Judicial Ethics." In the case of a referee, stipulating to an order appointing a referee does not constitute a waiver of grounds for objection to

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the appointment of a particular individual as a referee under CCP section 641, but any objection "must be made with reasonable diligence and in writing ... and served on all parties and the referee and filed with the court." CRC 3.905. The objection must be heard by the judge to whom the case is assigned or, if not yet assigned, by the presiding judge or law and motion judge. *Id.* A party may file a motion to withdraw a stipulation for appointment supported by a declaration establishing good cause for withdrawing the stipulation, but good cause cannot be based on a declaration that a ruling was based on an error of fact or law. CRC 2.831(f) and 3.906(a).

A party who stipulates to a temporary judge or referee under CCP section 638 is "deemed to have elected to proceed outside court facilities." CRC 2.834(c) and 3.907. Interestingly, though, "[c]ourt facilities, court personnel, and summoned jurors may not be used in proceedings pending before such a referee *except* on a finding by the presiding judge or his or her designee that their use would further the interests of justice." (Emphasis added.) While it is extremely unlikely that a presiding judge would make such a finding, the reference to "summoned jurors" indicates that it is at least theoretically possible to have jury trials before a temporary judge or referee!

As a practical matter, bench trials pursuant to CRC 2.830 or referees pursuant to CCP section 638 are held outside of courthouses. Most alternative dispute resolution providers have such facilities; however, if the person the parties select is not affiliated with such a provider, any number of venues may suffice – be it a commercial office or a hotel conference room. If the proceeding before a referee is one that would be open to the public if held before a judge, it must be open to the public regardless of the location. CRC 2.834(a) and 3.931(a). To that end, the temporary judge or referee must file a statement providing the name, telephone number, email address and mailing address of the person who may be contacted for information about the date, time, location and "general nature of all hearings scheduled in matters pending before the referee." CRC 2.834(b)(1) and 3.931(b)(1). This statement must be filed at the same time as the temporary judge's or referee's certification under CRC 2.834(b)(1) or 3.904(a). The original of documents presented to temporary judges or referees are must be filed with the court because they are "court records" within the meaning of CRC 2.400. CRC 2.833 and 3.930. Only file-stamped duplicates should be provided to the temporary judge or referee. CRC 2.400(b)(1).

The appointment of a referee to hear the entire case requires the consent of all parties and should not be confused with CCP section 639, which covers situations where one party may move for the appointment of a referee, or a judge may appoint one on his or her own motion. These appointments are for only a portion of a case and most often are used to address complex discovery matters. Section 639 appointments are governed by a distinct set of rules (CRC 3.920 through 3.926), and the referee only makes a report and recommendation to the judge. A stipulation is required if you want a bench trial where the referee's decision will be entered as a final judgment subject only to the right of appeal.

Historically, a temporary judge or consensual general reference of an entire case has been most commonly used in family law. However, civil litigators whose clients want to avoid the expense and delays of repeated trial settings and also prefer a decision-maker with relevant expertise may want to give this alternative serious consideration. It can provide them with a date certain for trial on a relatively fast track while – in contrast to arbitration – preserving all the procedural protections of a traditional superior court trial and the right of appeal.

***Hon. Wynne Carvill (Ret.)**, a former judge of the Alameda County Superior Court, is a mediator and arbitrator with JAMS. He can be reached at wcarvill@jamsadr.com.*

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# *The Importance of Mentoring Junior Trial Attorneys*

## *Part One*

I was very fortunate as an attorney to have bosses that firmly believed in one-on-one mentoring to train new litigators. For the first six months of my employment, my first boss read and gave feedback on everything I wrote. And I mean everything – every letter, every brief. Perhaps it was overkill, but he believed that the most important tool of advocacy was the written word. He did not want to see any typographical errors, so you learned not to do such. On the other hand, it was great to get paperwork back from him with a smiley face! Yes, a smiley face.

My first boss also took me with him to every hearing on every case to which I was assigned, including those out of town. Even though I was not the one speaking to the Court, it was important to watch and learn. Also important to the learning process, it gave me the opportunity to learn the players. Let's face it: the law, like medicine, has become specialized by necessity. So it is important to learn the identities, the strengths, the weaknesses, and the personalities of the people on both sides of the aisle. These are the people that an attorney will be working with and against during his or her career, so introductions – whether active or passive – are part of the learning process.

My second boss was Joe Cotchett, so every day was a living advocacy program for 17 years.

Yet it is not about getting the junior attorneys to mimic their mentors, or becoming someone that they are not. Rather, it is about being given practical examples, experience, tools, training, guidance, *etc*. as a *foundation* to then incorporate into that junior trial attorney's own style and/or decide whether to adopt as part of their own trial attorney personality and practice.

As a judge, I am seeing junior (less experienced) attorneys appearing for hearings and trials, and taking the lead on cases, but they are often lacking skills and polish that they should have been provided before they were sent to court in the first place. If you don't take the time to mentor them, then they are left to "learn" on their own, and many "learn" bad habits that are not to the benefit of themselves or the clients that they represent as advocates. Time spent at the beginning of their litigation careers will reap numerous benefits in the long run.

So this series of articles identifies some of the mentoring that should be provided to junior trial attorneys, but seems to be overlooked. All of the examples are real, but of course no real names are used.

***Be Helpful and Courteous to the Courtroom Staff***

It is to the benefit of attorneys and their clients to have a good working relationship with the courtroom staff. When going to the courtroom to make an appearance at a hearing, or for the start of a trial, the trial attorney should "check-in" with the courtroom clerk. Be helpful by providing your business card reflecting your name and the name of your law firm, *and pre-write* on the business card the name/number of the case and the name of the party that you are representing. If you don't have a business card, then it is appreciated if you write it on a piece of paper and hand it to the clerk, rather than orally dictating the information that the courtroom clerk must write down instead. Also give a business card with the same detailed information to the court reporter.

When you do speak to the courtroom clerk, it is a good idea to be friendly and courteous. But never flirtatious. Just saying something, "Hello. How are you today?", can make a difference for the staff – and for you and your client.

If you are appearing remotely, rather than in person, an attorney should be sure that the "name" input into your Zoom video log-in sets forth your full name on the screen. The courtroom clerk needs your full name and correct spelling. If the "name" on Zoom only says your telephone number or has some other identification, e.g., "Conference Room B", then that creates extra work for the staff in having to get the attorney to change it to the correct and full name. Learn how to change the name on the screen, if needed, using whichever remote platform you use.

Don't show up late. Indeed, appear in the courtroom with sufficient time *before* the hearing is supposed

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## *Part One*

to start. Courtroom clerks find it frustrating to have attorneys come rushing into the courtroom after the calendar has started, and then make an appearance on a matter without having checked-in first with the clerk, *i.e.*, giving the clerk the information as to your name, who is your client, and on which case you are appearing. The courtroom clerk has to input all of that information into the Minutes for that hearing, and it is more difficult (and sometimes inaccurate) trying to do it on-the-fly.

If you are starting a trial, provide a copy of your list of witnesses to the court reporter. Otherwise, write up and provide a list of the names, with correct spelling, of all the attorneys and witnesses that expect to be part of the trial – so that they have a complete "cast of characters". This avoids the need for the reporter to have to go back and correct/change transcripts where the spelling was solely phonetic because no actual spelling was provided at the time. Having a full list ahead of trial also avoid confusion in the record, especially where parties and/or witnesses have common last names, or similar sounding names.

Provide help and details if you are calling the courtroom clerk or emailing that department. Instead of contacting the department themselves, it is common for attorneys to tell their assistant or paralegal to do it. If delegating the task, the junior attorney needs to know that their own staff must first be sufficiently informed of what is being requested of the Court. Otherwise, it results in multiple phone calls or multiple emails, wasting the time of the courtroom staff -- and leaving a negative impression. Here are examples of what unfortunately happens:

***Phone Call #2 to the Judge's Department:***

*Your Assistant: "Hello, this is Lee from Campbell & Gonzalez. I called yesterday and left a message asking for a hearing date on a motion, but you never returned my phone call."*

*Clerk: "Yes. I listened to your voice mail message, but you forgot to leave us a phone number."*

*Your Assistant: "Oh. Well, my attorney wants a hearing date for filing a motion in the judge's department.*

*Clerk: "Which case?"*

*Your Assistant: "The case is Coyote v. Roadrunner."*

*Clerk: "What is the case number?"*

*Your Assistant: "I don't know."*

*Clerk: "Okay, I will need to search our court system to find the case number first."*

*[Two-minute delay.]*

*Clerk: "Which party does your law firm represent?"*

*Your Assistant: "I think Plaintiff."*

*Clerk: "What type of motion are you filing?"*

*Your Assistant: "I don't know. The attorney didn't tell me. I was just told to get a hearing date. What dates do you have available?"*

*Clerk: "In order to calendar the hearing, we will need to know what type of motion. What date frame were you looking for, or when do you plan to file your motion papers?"*

*Your Assistant: "I don't know; I will have to call you back."*

***Phone Call #3:***

*Your Assistant: "Hi. I talked to the attorney. We are filing a motion to compel."*

*Clerk: "A motion to compel discovery; or a motion to compel arbitration?"*

*Your Assistant: "I don't know. Let me go ask."*

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# *The Importance of Mentoring Junior Trial Attorneys Part One*

*[Four-minute delay.]*

*Your Assistant: "It's a motion to compel discovery. We want to set it for hearing on May 5th."*

*Clerk: "Okay. It looks like May 5th is available at 2:00 p.m. Have you talked to opposing counsel as to whether they are available on that date?"*

*Your Assistant: "No, I don't think so."*

*Clerk: "The judge previously issued an order in this case that counsel are to meet and confer regarding hearing dates on motions. It avoids unnecessary ex parte applications to change hearing date."*

*Your Assistant: "I will have to call you back."*

*[Thereafter, the matter is not calendared until after Phone Call #4, when the full information is provided.]*

As you can see, the extra time taken to mentor the junior trial attorneys, and teaching them to also take the time to instruct their support staff, is time well-spent.

[*Next time: Putting Deposition Testimony into Evidence]*

***Hon. Marie S. Weiner*** *has served on the San Mateo County Superior Court since 2002; is presently the Civil Supervising Judge; and was previously the designated Complex Civil Litigation Judge for 11 years. Judge Weiner is a member of the ABTL Northern California Chapter Board.*

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# *Mitigating Preference Exposure*

**2. <u>Strategies For Managing Preference Exposure.</u>**

Creditors have at their disposal a number of strategies to minimize the likelihood that a preference action will be brought and maximize the likelihood of a successful defense. A handful—changing payment terms, obtaining credit support, utilizing "safe harbors" in the Bankruptcy Code, and carefully drafting nonbankruptcy settlement agreements—and the concepts underpinning them are discussed below.

(a.) *Seek Payment Terms That Limit Preference Exposure.*

If a transfer is not "for or on account of an antecedent debt," meaning a debt that the debtor owed before the transfer, the transfer is not a preference. 11 U.S.C. § 547(b)(2). For example, where a buyer prepays a seller for goods, the buyer's payment generally will not be a preference. *See*, *e.g.*, *Maxwell v. Penn Media (In re marchFirst, Inc.)*, Adv. Proc. No. 03 A 1141, 2010 Bankr. LEXIS 3480, at *24 (Bankr. N.D. Ill. Oct. 14, 2010) (collecting cases). A party seeking to rely on prepayment to limit preference exposure should keep in mind that prepayments may be avoidable as fraudulent transfers if the goods or services for which prepayment was made are not actually delivered (since the transferor gave no "reasonably equivalent value"). *See*, *e.g.*, *id.* at *27-29. It also bears mention that, where a buyer prepays for goods, the subsequent delivery of goods may expose the buyer to a preference action should the seller find itself in bankruptcy.) But true prepayments cannot be preferences.

In addition, an otherwise-preferential transfer is not avoidable where the parties intend it to be, and it is, a "substantially contemporaneous exchange" for "new value given to the debtor." 11 U.S.C. § 547(c)(1). Thus, cash-on-delivery and similar payment arrangements can protect a transferee from a preference action

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## *Mitigating Preference Exposure*

(particularly if documented, to establish the parties' intent). Creditors should be aware that although the "substantially contemporaneous exchange" requirement is at least somewhat flexible, delay between an event triggering a payment obligation and the payment itself may increase the risk that a transfer will be found non-contemporaneous. *See*, *e.g.*, *Pine Top Ins. Co. v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, 969 F.2d 321, 328-29 (7th Cir. 1992). Thus, a debtor's noncompliance with agreed-upon payment terms may hamper a subsequent attempt to invoke the contemporaneous exchange for new value defense to preference liability.

(b.) *Obtain Credit Support.*

Because establishing preference liability requires showing that a creditor received more than it would have in a chapter 7 liquidation and fully-secured creditors in chapter 7 liquidations are generally paid in full, a creditor can eliminate its preference exposure by obtaining a security interest in the debtor's property to secure the debtor's payment obligations. *See, e.g.*, *Telesphere Liquidating Tr. v. Galesi (In re Telesphere Communs.)*, 229 B.R. 173, 177-78 (Bankr. N.D. Ill. 1999) (discussing application of 11 U.S.C. § 547(b)(5) liquidation test to secured creditors). Thus, a valid and enforceable security interest gives a fully secured creditor a strong "first line of defense" that turns on readily-ascertainable facts and clear documentation.

To be sure, a security interest is not necessarily a "silver bullet." Creation of a security interest is a "transfer" under the Bankruptcy Code, 11 U.S.C. § 101(54), and as such can be avoided as a preference if all Section 547(b) elements are satisfied (but not, for instance, if taken in a substantially contemporaneous exchange for new value, as discussed above). Insufficiently valuable collateral may leave a creditor undersecured and thereby exposed to a preference action. And a creditor with a so-called "floating lien" on inventory, receivables, or proceeds thereof may face preference exposure to the extent that the creditor was undersecured at the inception of the preference period and subsequent changes in the composition or value of collateral improve the creditor's position during the preference period. *See*, *e.g.*, *Batlan v. Transamerica Commer. Fin. Corp. (In re Smith's Home Furnishings, Inc.)*, 265 F.3d 959, 964-66 (9th Cir. 2001). Thus, proper diligence and counseling are critical in ensuring that security arrangements work as intended for bankruptcy and nonbankruptcy purposes alike.

A third party guarantee can also reduce preference exposure. Under the "earmarking" doctrine, a co-debtor/guarantor's payment of the principal debtor's antecedent debt is not an avoidable preference so long as there is no diminution of the debtor's estate because the payment is not a transfer of the principal debtor's property. *See*, *e.g.*, *Manchester v. First Bank & Tr. Co. (In re Moses)*, 256 B.R. 641, 645-51 (B.A.P. 10th Cir. 2000) (discussing earmarking doctrine with reference to in- and out-of-circuit cases). However, earmarking generally will not apply where an unsecured debt is replaced by a secured debt. *Id.* at 651 (citations omitted). Similarly, where the debtor pays a debt that a third party has guaranteed and the debtor has no recourse to the guarantor for reimbursement, the guarantee may not shield the payment from preference exposure. *Cf.*, *e.g.*, *Buchwald Capital Advisors LLC v. Metl-Span I., Ltd. (In re Pameco Corp.)*, 356 B.R. 327, 336 (Bankr. S.D.N.Y. 2006) ("[A] prepetition transfer to a creditor that is fully secured by property of a third party in which the debtor holds no interest is subject to avoidance and does not come within the § 547(b)(5) exception."). Thus, a creditor seeking preference insulation via a guarantee should be mindful of the guarantee's structure and, to the extent reasonably practicable, how that structure would be viewed under the precedents applicable in the venue(s) where the debtor can reasonably be expected to file for bankruptcy protection.

(c.) *Consider Using Section 546's "Safe Harbors."*

The Bankruptcy Code contains "safe harbors" that place beyond the reach of avoidance actions certain payments made in connection with securities, commodities, or forward contracts; repurchase

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## *Mitigating Preference Exposure*

agreements; and swap agreements. *See* 11 U.S.C. § 546(e)-(g). Certain parties may be able to structure transactions so that they fall within a Section 546 safe harbor. For example, if a prospective borrower holds securities, a counterparty could enter into a repurchase agreement with that prospective borrower rather than provide a secured loan. *See*, *e.g.*, *Palmdale Hills Prop., LLC v. Lehman Commer. Paper, Inc. (In re Palmdale Hills Prop., LLC)*, 457 B.R. 29, 42, 56-57 (B.A.P. 9th Cir. 2011) (noting economic similarities and legal differences between repurchase agreements and secured loans). A creditor that is able to avail itself of the Section 546 safe harbors will also obtain significant exemptions from the automatic stay and thereby avoid having to wait for distributions from the bankruptcy estate should the debtor file for bankruptcy before the creditor is paid in full. *See*, *e.g.*, *Calyon N.Y. Branch v. Am. Home Mortg. Corp. (In re Am. Home Mortg., Inc.)*, 379 B.R. 503, 512 (Bankr. D. Del. 2008) (discussing treatment of repurchase agreements under the Bankruptcy Code).

Given the subject matter of Section 546's safe harbors and the expertise required to structure a transaction falling within them, using those safe harbors to prevent preference exposure will be impractical for many (if not most) parties dealing with financially-distressed counterparties. But given the significant and valuable benefits they confer, the Section 546 safe harbors should be given serious consideration whenever it appears one or more may be viable.

(d.) *Draft Nonbankruptcy Settlement Agreements Carefully.*

A creditor dealing with a financially distressed counterparty may wish to simply cut its losses, salvage whatever value it can, and move on from the relationship. Often, the terms of the parties' split will be reduced to a settlement agreement that provides the creditor some recovery in exchange for a release of liability. But settlement payments are transfers and are typically made on account of an antecedent debt, so they are vulnerable to attack as preferences. Moreover, if the settlement agreement releases the debtor from liability other than the obligation to make a settlement payment and the settlement payment is subsequently attacked as a preference, the creditor may be left out in the cold entirely.

A number of risk mitigation strategies are available. For example, a settlement can be structured to require payments by an affiliate of the debtor with a stronger balance sheet. A settlement can also be structured to include a substantially contemporaneous exchange for new value (although parties opting for this approach should pay careful attention to the definition of "new value" in 11 U.S.C. § 547(a)(2)). If payments will be required over an extended period of time, or there is a contemporaneous exchange for new value, taking a security interest to ensure payment may be attractive. Or, if the debt is relatively small, it can be made payable in installments of $6,824.99 or less and at least 90 days apart. *See* 11 U.S.C. § 547(c)(9); 5 Collier ¶ 547.04[9]. Parties can also provide that the debtor will only obtain a full release once the preference period has passed, although careful thought should be given in drafting such a provision to minimize the risk it will be found an unenforceable "ipso facto" clause (*i.e.*, a clause that automatically terminates or modifies the contract upon a party's bankruptcy filing). *See*, *e.g.*, *In re Margulis*, 323 B.R. 130, 135 (Bankr. S.D.N.Y. 2005) (discussing ipso facto clauses).

An outright attempt by the debtor to waive the creditor's preference exposure, however, is likely to fail because "preference actions are creatures of the Bankruptcy Code that exist only [upon a bankruptcy filing] for the benefit of the estate, not the debtor, and hence are unaffected by pre[-bankruptcy] acts of the debtor." *CapCall, LLC v. Foster (In re Shoot the Moon, LLC)*, 635 B.R. 797, 827 n.108 (Bankr. D. Mont. 2021) (citing *Cont'l Ins. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1026 (9th Cir. 2012) and *Bakst v. Bank Leumi, USA (In re D.I.T., Inc.)*, 575 B.R. 534, 536 (Bankr. S.D. Fla. 2017)).

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# *Mitigating Preference Exposure*

### 3. Notes Regarding Preference Litigation

Two points warrant mention regarding the interplay of the above issues with potential defenses once a bankruptcy petition is filed and a preference action is commenced.

First, the Bankruptcy Code provides an affirmative defense for payment of debts incurred "in the ordinary course of business or financial affairs of the debtor and the transferee" so long as the transfer was also "made in the ordinary course of [the parties'] business or financial affairs" or "made according to ordinary business terms." 11 U.S.C. § 547(c)(2). Creditors should understand that taking any of the above steps may jeopardize their ability to successfully invoke that "ordinary course" defense. *See*, *e.g.*, *Wahoski v. Classic Packaging Co. (In re Pillowtex Corp.)*, 427 B.R. 301, 309 (Bankr. D. Del. 2010) (holding triable issue of material fact existed as to whether change in payment terms defeated ordinary course defense). Whether and to what extent preference mitigation efforts will actually preclude an ordinary course defense (and whether and to what extent that matters), however, must be evaluated on a case-by-case basis with reference to the specific parties involved.

Second, in addition to shielding itself from prospective preference exposure via the contemporaneous new value defense, a creditor can effectively reduce its preference exposure where it provides new value after a preferential transfer. 11 U.S.C. § 547(c)(4). Unfortunately, the applicable statutory framework is not a model of clarity, so the precise contours of the "subsequent new value" defense may vary from jurisdiction to jurisdiction. But, where a creditor has at least arguably provided "new value" to a financially distressed counterparty following a potentially preferential transfer and is threatened with a preference action, counsel should consider the applicability of the subsequent new value defense.

### 4. Conclusion.

The above-discussed strategies by no means represent an exhaustive list of options that a creditor seeking to limit preference exposure might consider. But most fundamentally, counsel should keep in mind the "principal policy objectives underlying the preference provisions of the Bankruptcy Code[:] . . . encourag[ing] creditors to continue extending credit to financially troubled entities while discouraging a panic-stricken race to the courthouse [and] . . . promot[ing] equality of treatment among creditors." *Charisma Investment Company, N.V., Plaintiff-Appellant, v. Airport Systems, Inc. (In re Jet Fla. Sys.)*, 841 F.2d 1082, 1083 (11th Cir. 1988) (citations omitted). When confronted with a financially distressed counterparty and either of those policy concerns is implicated, a closer look at preference law may be warranted.

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# On Discovery

Other courts are more flexible, and may specify additional efforts at informal resolution before turning to the merits of the discovery dispute, depending on the circumstances of the case. *Obregón*, 67 Cal. App. 4th at 434-435. One of these additional efforts that I have adopted is based on a comment made by my good friend and colleague, the Hon. Laura A. Siegle of the Los Angeles County Superior Court, at a meeting of the California Judges Association Civil Committee. She suggested that the trial judge can order the parties to further meet and confer either in person or face-to-face on a virtual platform. I have recently started to use this method, following a stern lecture, with a pleasant degree of success. The Civil Committee is considering proposing legislation to add to Code of Civil Procedure, § 2023.010(i) the use of a virtual platform as a means of meeting and conferring.

I would appreciate hearing about any anecdotal experiences that readers of this article may have had on this interesting subject. Thank you for your time in reading this article.

***Hon. Socrates Peter Manoukian*** *has been a judge of the Santa Clara County Superior Court for 28 years and is currently serving as a Case Manager in the Court's Civil Division. He is a member of the Board of Governors of the ABTL Northern California Chapter.*

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# On Securities Litigation

allowing the plaintiffs in *Boeing* to plead particularized facts to survive a motion to dismiss under the stringent *Caremark* standard.

The opposite result ensued in *Sorenson*. There, the Delaware Court of Chancery dismissed plaintiff's oversight claim on a motion to dismiss based in part on board-level documents produced pursuant to Section 220. *Sorenson* arose in the aftermath of a data security breach at Marriott that exposed the personal information of 500 million guests. Plaintiff alleged that Marriott's board breached its duty of oversight when it ignored red flags about inadequate data protection in its reservation database. In dismissing the oversight claim, the court noted that Section 220 documents demonstrated that the board did not turn a blind eye to red flags indicating that there were cybersecurity risks in the reservation platform; rather, those documents showed that the board had been told that management was addressing the issues, including by hiring audit firms to conduct security assessments, implementing their recommendations, and engaging forensic specialists to investigate once malware was discovered in the database.

Key Takeaways:

- Shareholders who want to bring oversight claims should obtain documents through a shareholder inspection demand prior to filing their complaint. Oversight claims are difficult to plead, but, as illustrated in *Boeing*, such documents can be key to alleging oversight claims with the particularity necessary to survive a motion to dismiss.

- Companies and their boards should make good faith efforts to implement appropriate processes for board-level

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# *On Securities Litigation*

enterprise risk monitoring (especially with respect to "mission critical" risks) to ensure that problems are brought to their attention and timely addressed. Boards should carefully document these processes and their involvement in overseeing and addressing risks in board meeting agendas, minutes, packages, and committee charters in the eventuality that such documents are needed to defend against oversight claims. As seen in *Boeing* and *Sorenson*, such materials can be the difference between a case moving forward to discovery or being dismissed at an early stage.

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# *On Antitrust*

unreasonably preferencing their own applications – subject to an exception where necessary to achieve user privacy, security, or digital safety.

Other bills are also being considered – in March, Senator Elizabeth Warren and Representative Mondaire Jones introduced the "Prohibiting Anticompetitive Mergers Act" that would authorize the FTC and DOJ to reject certain deals out of hand.

The federal government is not alone in revisiting the antitrust statutes. Last year, the New York Senate passed an antitrust bill (S933A) which if enacted would have wide-ranging effects. Among other things, the bill would extend the reach of the Donnelly Act (New York's antitrust law) by enacting "abuse of dominance" provisions. The bill would create a presumption of dominance based on market shares (and would also provide that dominance may be established in other ways). The bill also sets forth a number of categories of "abuse," including leveraging, certain refusals to deal and the like. The bill would also enact a premerger review program separate and apart from the federal Hart-Scott-Rodino premerger notification system and would require New York review for mergers falling below the federal thresholds. The bill would also allow a prevailing party/plaintiff to recover expert (economist) fees. Whether these provisions would be salutary additions to U.S. antitrust law or would impose burdensome, expensive and duplicative state court regulation remains to be seen.

As Ernest Hemingway wrote, one goes bankrupt in two ways – first gradually and then suddenly. The development of U.S. antitrust law may be somewhat similar – the basic laws have remained largely unchanged for almost a century, with only minor modifications. The dam holding back additional amendments, however, might soon be breaking.

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