ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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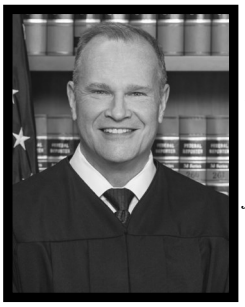
Q&A with the Honorable John W. Holcomb
By Kristopher R. Wood



[*Editor's note: Judge Holcomb currently serves as a judge on the United States District Court for the Central District of California. He was nominated by President Trump in November 2019 and confirmed by the United States Senate in September 2020. Judge Holcomb spent much of his professional career in private practice, including as a partner at Greenberg Gross LLP and Knobbe, Martens, Olson & Bear, LLP. He has a B.S. in civil engineering from MIT, an M.B.A. from Harvard Business School, and a J.D. from Harvard Law School. Judge Holcomb served in the United States Navy from 1980 to 1989, and was on active duty as a Commissioned Officer from 1984 to 1989.*]

Q: Many past profiles about you note that you knew you wanted to be a judge even before law school—now that you achieved your goal, what are your aspirations going forward?

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Importance of Collection Strategy: Ensuring Judgement Collection
By Darrell P. White and Maxx E. Sharp

Knowing the available judgment collection methods is important when setting realistic expectations for a case. This is equally helpful for attorneys who regularly take contingency fee cases or operate with flexible billing arrangements. The collectability of a potential judgment determines whether a case is worth filing and the amount of resources that should be allocated to the matter. Understanding the available collection methods available to the plaintiff (and potential creditor) is pertinent to properly framing a case for collection.

Pre-Judgment Asset Investigation

When it comes to collection, information about the debtor's assets is pertinent to deciding whether obtaining a judgment is worth the time and money. Thus, it is important to have a discussion about the defendant's assets with the plaintiff before filing a case. Additionally, public information such as bankruptcy proceedings, civil litigation, judgments, and liens can be obtained before a case is filed. This information may reveal that a defendant has outstanding liabilities exceeding any collectable assets. These searches can also be conducted on a defendant's companies, which weighs the general character of the defendant as it relates to debts. If a potential defendant is already dealing with multiple creditors, then joining that list may be an exercise in futility. However, if the Plaintiff is informed and still wants to proceed, a prompt money-up-front settlement with the defendant may be a good way to

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President's Message
By William C. O'Neill

The great Stanford and 49ers head football coach, Bill Walsh, once said that he never understood calling a player an "overachiever" because "either you're an achiever or you're not." While the sentiment is a good one, I have to respectfully disagree with the coach because being President of this organization full of achievers and difference-makers feels a whole lot like overachieving.

I have had a long affinity for ABTL and why it exists. My introduction to ABTL started through my mentor, Mark Erickson. He made program attendance a priority for his associates because he wanted us all to see that iron sharpens iron, personal relationships matter, and professionalism and ethics trump conniving and foolishness.

To the associates reading this column, understand that the few hours that you spend going to a dinner program or Young Lawyers brown bag event are much more than simply putting in face time. They are down payments on your career.

And to partners reading this, encourage your associates to see the bigger picture. Show them how to get where you are, but avoiding some of the professional pitfalls we have overcome (often with the help of others). Professionalism isn't just working across the counsel table, it is oftentimes making the effort to mentor our profession's rising leaders.

Opportunities will abound this year for that improvement and mentorship through ABTL. Our dinner programs, led by Justin Owens, will be fantastic. Our Annual Seminar (October 11-15, 2023) will be held at The Fairmont Orchid on the Big Island of Hawaii. As the host chapter this year, Orange County will play a big role shaping the Annual Seminar's success. My thanks to Vikki Vander Woude for her leadership.

Ultimately, our success as an organization depends on active participation and respecting core values. I would not be here today without Mark's insistence that ABTL would improve my fellow associates and me. Let's all take that kind of mentorship role and ensure that we improve one another and mentor the next generation of leaders too.

♦ *Will O'Neill is a partner at Ross Wolcott Teinert & Prout.*

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abtl ORANGE COUNTY

8502 E. Chapman Avenue, Suite 443
Orange, CA 92869
714.516.8106
abtloc@abtl.org ▪ www.abtl.org

Are Your Applicant Screening Tools Violating the ADA?
By Connor L. Kridle and Philip K. Lem

Introduction and Background

Artificial intelligence, more commonly known as "AI," is ubiquitous. From the facial recognition software used to open an iPhone, to the navigation system that gives seamless directions to a new location, AI runs many of the useful tools we rely on in our daily lives. Companies have harnessed the power if AI to develop tools to aid employers in the hiring process. Many employers now use AI-powered software to screen job candidates or even selectively advertise job postings. These tools simplify and streamline hiring, but they also may subject employers to liability under a range of federal, state, and local laws. As regulatory attention continues to shift toward AI-powered tools, employers need to be aware of the changing landscape and cognizant of where they stand.

This year saw significant advances in the regulation of AI employment tools at nearly every level. At the federal level, both the EEOC and the DOJ released technical guidance, and the EEOC initiated its first enforcement action on the subject. The California Fair Employment and Housing Council (FEHC) (now called the California Civil Rights Council) released proposed revisions of the state's employment non-discrimination laws to address the use of AI in the candidate-screening process. New York City also passed similar legislation, placing certain notice and accommodations obligations on employers and employment agencies in the city that utilize "automated employment decision tools." If trends continue, 2023 could be another busy year for regulators and employers who use AI in the workplace.

AI Defined

Expansive definitions of AI abound. Congress has defined AI as any "machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments." National Artificial Intelligence Act of

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Post-*Bruno* Strategic Considerations When Bringing or Defending a Petition to Remove a Trustee
By Lauren Strickroth

Acting as trustee can be a risky business, particularly when there is disagreement regarding the terms of the trust. When litigation arises, it is common for a beneficiary to file a petition to remove the trustee pursuant to Probate Code sections 15642(a) and 17200. Attorneys should be aware of the risk to the beneficiary of this course of action.

Probate Code section 15642, subdivision (d) permits the court to order the petitioner to "bear all or any part of the costs of the proceeding, including reasonable attorney's fees," if "the petition for removal of the trustee was filed in bad faith and that removal would be contrary to the settlor's intent." In June 2022, the court in *Bruno v. Hopkins,* 79 Cal.App.5th 801 (2022) increased the risk to beneficiaries. It held that the court may hold a beneficiary personally liable for all attorney's fees and costs incurred as a result of a bad faith petition to remove the trustee.

I. The Mildred and James Francis Living Trust

In *Bruno,* Mildred and James Francis were married for 67 years, and had four daughters: Lynne, Gail, Jane and Gwen. Mildred and James created the Francis Living Trust (the "Trust"). James was an attorney and drafted the Trust himself. (*Bruno,* 79 Cal.App.5th at 808.)

At the death of the first spouse, the Trust directed half of the Trust's assets to a revocable survivor's trust, and the other half to an irrevocable marital and family trust. At the death of the second spouse, the Trust distributed $200,000 each to daughters Lynn and Gail from the survivor's trust, and the remainder of the Trust assets to daughters Jane and Gwen. (*Id.*)

At the time Mildred and James executed the Trust, the $200,000 gifts to Lynne and Gail represented about half of the Trust's assets. However, by 2015, the Trust assets increased to $4 to 5 million. (*Id.*)

II. The *Petition* to Invalidate the Trust and Remove the Trustee

After James' death, but while Mildred was still living, their daughter Lynne learned that her distribution was limited to $200,000. Lynne requested a copy of the Trust. At first, Mildred did not provide it, and Lynne

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The Rising Tide of ESG Litigation: An Overview
By Lisa M. Northrup

"ESG," short for "Environmental, Social, and Governance," refers to a set of concepts, goals, or factors that companies and investors are increasingly considering in determining and assessing a company's purpose, policies, and practices. There is no definitive list of ESG factors and the three categories often overlap. Prototypical examples of environment, social, and governance factors include:

E: climate change mitigation and adaptation, waste management, energy efficiency, biodiversity, and water conservation.

S: human rights, diversity and inclusion, wages and benefits, racial justice, community relations, and health and safety.

G: corporate board structure, executive compensation, anti-bribery and corruption, and corporate reporting obligations.

ESG is still an emerging set of concepts, and there is no international consensus regarding the standards governing ESG disclosures. The competing frameworks include, for example, the Sustainability Accounting Standards Board ("SASB") standards, the Global Reporting Initiative ("GRI") standards, and United Nations Principles for Responsible Investment ("PRI").

This lack of definitive industry standards, combined with newly proposed and recently adopted legal regulations in the United States, has created a situation ripe for litigation. Several key areas of emerging ESG litigation are discussed below.

Greenwashing Litigation

"Greenwashing" refers to the practice of misrepresenting the sustainability or eco-friendliness of a company's products or services. As consumer demand for "green" products escalates, companies are rushing to meet that demand. In the rush, company messaging is at times conflating the aspirational with the actual. Indeed, in a recent survey conducted by Harris Poll for Google Cloud, 72% of North American executives agreed that their organization has overstated its sustainability efforts. (https://services.google.com/fh/files/misc/google_cloud_cxo_sustainability_survey_final.pdf). Plaintiff consumer and activist organizations have taken

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A: Well, an appointment under Article III is a lifetime appointment, so I want to stay for life. I love this job. It's what I've always wanted to do, and I want to do it for as long as I can. Rarely does one find the perfect job, but that's the way I feel about being a judge. It's so nice to simply try to find the right answer without being beholden to a client's interests. Not that there's anything wrong with representing a client's interests—it's what you all do and what I used to do as a lawyer. But it's nice to be able just to apply the facts to law. It's like a puzzle, and I'm trying to find the right answer.

Q: Do you have a judicial philosophy?

A: There's an old story about three grizzled baseball umpires, probably enjoying an adult beverage after a game and talking about the art of calling balls and strikes. The first says, "I calls 'em as I sees 'em." The second says, "I calls 'em as they are." And the third says, "Nah, they ain't nothing until I calls 'em." I like that story, and I tell it often, because it illustrates three views of reality.

The first umpire acknowledges that there is an objective truth. The pitch is objectively either a ball or a strike, and the first umpire does his best to identify that truth and make the call accordingly. The second umpire also acknowledges that there is an objective truth, but he denies any possibility of error in his perception of that truth. The third umpire denies that there is any objective truth; his view is that "I determine the truth because I alone call it a ball or strike."

It seems to me that those are also three possible views of the law and the art of judging. I agree with the first one. There is an objective truth—the correct ruling under the law—and my mandate as a judge is to seek that correct ruling as best I can.

Q: Do you have any legal mentors or heroes that particularly influenced your career?

A: Yes, certainly. I clerked for a bankruptcy judge in Chicago, Judge Ronald Barliant. He was (and is) a great judge and a great man. One of the many things I learned from him was patience. When I was clerking for him, he would have a hearing on a motion, and I would be quick to conclude that he should grant or deny it. He would say, "Slow down, let's look into this. Take our time, and get it right."

He also would never interfere with a lawyer's style. Sometimes at hearings a lawyer would be really aggressive or, in my view, annoying. Judge Barliant and I would talk afterward and I would ask "Why didn't you cut him off?" He would say, "I never want to interfere

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with a lawyer's style. That's just the way he's presenting. What I care about is the substance of his argument; how he's applying the law to the facts."

From my time at Knobbe, the late Don Martens was certainly an influence, as was the late Jim Bear. Jim was the managing partner for many years until his retirement in '05 or '06. We shared a secretary early in my career and my office was next to his, so I got an unusual opportunity as a new associate to see how he performed as a managing partner—especially his humanity, and his deep concern for all the people in the firm, including non-lawyer staff members.

I was a partner at Greenberg Gross for a year before my nomination was confirmed. My former partners, Alan Greenberg and Wayne Gross, are both terrific trial lawyers. When I was there, I witnessed Alan Greenberg win an absolutely unwinnable jury trial. It was a work of art.

A more recent mentor is my colleague in Riverside, Judge Jesus Bernal. After I was confirmed I spent the first year and a half in the Riverside courthouse. While many of my colleagues were state court judges or magistrate judges before becoming district judges, this was my first time on the bench. There is a steep learning curve, and having Judge Bernal there to bounce things off of and to provide guidance was critical and extraordinarily helpful. He is an amazing judge—a wise judge—and a close friend.

Q: Are there any non-legal experiences or interests that have served you especially well on the bench? In what way?

A: I think my time in the Navy shaped my view of life in general. I was 21 years old when I was commissioned as an officer. I reported to my first ship just before 22nd birthday, and I immediately had a division of 50 sailors working for me. That early opportunity to lead people was critical to my approach to life and to the law. The sailors under me were mostly a bunch of teenagers, and, shockingly, they had a tendency to get into disputes and other kinds of trouble. I'd listen to one sailor's version of the events and think "you're absolutely right"—but then I would talk to the second sailor and realize there is a totally different set of perspectives and facts. One of the critical things I gained is an appreciation that you have to listen to both sides before making any conclusion or decision.

Q: What was the biggest unexpected difference for you between private practice and being a judge?

A: I came from a purely civil law background, and I knew there would be many new areas of law that I had never practiced before or had exposure to before. I expected to dread cases from areas of law that I wasn't familiar with like criminal law, antitrust, class actions, and civil rights cases. But I found that I really like them. It's fun learning new areas of law. I learn new things every single day. It's one of the great things about this job. You're constantly learning new things and constantly being exposed to new areas of law.

Take, for example, civil rights cases. I had almost no exposure to those cases coming onto the bench, but I very quickly found I really enjoy them. That's not to trivialize these cases—some of the facts are tragic and the outcome is extraordinarily important to the parties. But sorting those cases out and applying, for example, the qualified immunity doctrine, is really fascinating from an intellectual perspective.

That said, IP cases still interest and fascinate me as well. I enjoy *Markman* hearings, for example, in patent cases. I feel like I've got a pretty good handle on the Lanham Act, trademark cases, and copyright cases. I had a lot of trade secret cases as a lawyer, so I enjoy seeing those come in.

Q: What is something you've learned as a judge that you wish you had known when you were in private practice?

A: The limited time and attention that courts have to apply to any given case. I personally look at every filing every day. I get a report every morning of everything that was filed in all my cases on the previous day. Now, I may not look closely at a summons or even an answer. But I read every new motion, every opposition, every reply, every Rule 26(f) report—those sorts of things. Then, the week before the hearing on a motion, I meet with my two law clerks. If the motion is relatively straight forward, I'll make a decision, and it will be done pretty quickly.

So, my point is, there's not a lot of time for us to appreciate nuances. As lawyers sometimes we focus on the details, such as specific word choices to use in a brief. But when the judge gets it, that doesn't matter at all. What you've got to do is catch the judge's attention. Be extraordinarily overt in what you're trying to say in your brief. "This is a motion for judgment on the pleadings, the court should grant it and dismiss the complaint without leave to amend because there is this error that is unfixable, and here's why." Don't bury those key points or make your brief read like poetry, where there's some beautiful nuance in the 15th stanza. Of course, there are cases that are extraordinarily complicated and the nuances matter. In those cases, you can and should go into

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detail. But be sure to tell me up front what the filing is about, and what you want me to do.

Q: Are there any common lawyer practices you find ineffective or counterproductive?

A: Disorganization, lack of clarity, *ad hominem* attacks, and lack of civility. For example, failure to grant continuances or stipulate on an issue when it's not going to hurt your case at all can leave a really bad impression. Sometimes it comes from the client, and lawyers generally have to do what their client tells them. But that's an issue of client control, where the lawyer needs to convince the client to do the right thing.

I don't want to see an *ex parte* application for more time, for example, when the request is reasonable. When I get an *ex parte* application, I literally stop what I'm doing to look at it. And if it's something that doesn't warrant my immediate attention, it's extraordinarily annoying and reflects badly on someone. Maybe on the party filing it when it didn't need to be filed, or maybe it's the party opposing, for example, a pretty standard request for an extension of time. I wish parties wouldn't waste judicial resources like that. And it is resources, I've only got so much time in the day. I've only got two law clerks and a judicial assistant, and we really ought to be spending our time on the matters that warrant legal attention at a high level.

I've also been taking a harder line with my scheduling orders in terms of sticking to the schedule. I'll generally give the parties what they want in terms of the original case schedule, within reason. But then, three weeks before the pretrial conference, I'll get a stipulation to continue the trial date by six months because the parties simply didn't get everything done. My scheduling order is not carved in stone, but it is serious. It's a court order, and the parties are expected to adhere to it. Now, when there is a good reason, such as lead counsel experiencing health issues, I'll grant more time. But "we didn't finish taking discovery and we're not ready" does not constitute good cause for amending the scheduling order.

Finally, aesthetics can matter. The formatting of briefs, line numbers aligning with text, and things like that are easy things to get right. Now, I'm not going to deny a motion over formatting issues—I'm going to deal with it on the substance. But first impressions can matter, and why not get the easy things right? Make your papers look professional. Make sure they're organized. Make a good first impression.

Q: Do you have any tips or advice for lawyers appearing in your courtroom?

A: I think I may soon modify my standing order to provide that counsel should let the court know if there is a relatively young or inexperienced lawyer who is going to argue a motion. We'll conduct the hearing and let him or her handle it. I'm a big proponent of letting less experienced attorneys get some experience. And the only way they're going to get experience arguing motions is by doing it, so I want to encourage that. It doesn't mean I'm going to be easier on the client or the substance of the motion, but I do want to encourage parties to let less experienced lawyers have a chance.

Many of my colleagues nationwide are also really big on this point. I remember one case when I was in private practice where an associate and I appeared before Judge Otero on a summary judgment motion. It was a strong motion, and at the start of the hearing, Judge Otero said he wanted to hear argument from the associate. Of course, Judge Otero told me that I could assist if the associate needed help. But Judge Otero was perceptive enough to understand that the associate had put in a lot of work on the motion and knew the case well. Ultimately, the associate did a great job and we won. I don't know that I'm going to go that far in my courtroom—put the junior associate on the spot. But I think it'd be nice if everyone knew that there was a chance I might.

♦*Kristopher R. Wood is a senior associate in the Orange County office of Orrick, Herrington & Sutcliffe LLP and is a member of the firm's Complex Litigation and Dispute Resolution Group.*

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cut the line of creditors. Additionally, once a case is commenced, discovery of relevant information will often lead to disclosure of information that provides the plaintiff with a better understanding of the defendant's assets. Note that any applicable discovery related protective orders could interfere with using said information in collection efforts, depending on the language of the order. Thus, it is pertinent to evaluate protective order language carefully under the perspective of a potential creditor.

Preliminary Relief to Protect Collectable Assets

When dealing with a defendant who is at risk of liquidating assets, the plaintiff may be able to obtain preliminary relief to ensure collectible assets are available by the time a judgment is obtained. To obtain a temporary restraining order or preliminary injunction, the moving party must make a showing of irreparable harm if the requested relief is not granted. (Cal. Civ. Proc. Code § 527.) Insolvency or the inability to otherwise pay money damages is a classic type of irreparable harm supporting the issuance of an injunction as a provisional remedy. (*See California Retail Portfolio Fund GMBH & Co. KG v. Hopkins Real Estate Group* (2011) 193 Cal.App.4th 849; *see also Earth Island Institute v. U.S. Forest Service*, (9th. Cir. 2003) 351 F.3d 1291 (holding degree of irreparable harm required for preliminary injunction increases as probability of success on merits decreases, and vice versa.)) Additionally, in suit for a preliminary injunction ancillary to an accounting and dissolution of a limited partnership, preliminary injunction was properly issued as necessary to prevent "irreparable injury" to the partnership assets where it was necessary to assure that the partnership assets would remain intact pending an accounting and a final hearing on the merits. (*See Wind v. Herbert* (1960) 186 Cal.App.2d 276.) Further, receivership of a company can be granted "[w]here a corporation is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights… [and] In all other cases where necessary to preserve the property or rights of any party. (Cal. Civ. Proc. Code § 564(b). The plaintiff should be sure to assert her rights to preserve collectable assets by requesting preliminary relief when necessary. Even when not enough information is known to request a remedy like an account freeze, a precautionary order preventing the liquidation of funds can set up for contempt sanctions if this order is violated.

Judgment Debtor's Exam

Once a judgment is obtained, a judgment debtor's exam is a useful tool to apply pressure on a debtor and to obtain complete information about a debtor's assets. A debtor's exam requires a debtor to appear at Court and answer questions under the penalty of perjury about their finances and ability to pay the judgment owed. If a debtor does not appear at a debtor's exam at the time, date, and location ordered by the Court, the debtor will be subject to a bench warrant for arrest for contempt of Court. Indeed, California's Debtor's Exam form (EJ-125) puts the debtor on notice of this, stating: "if you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court, and the court may make an order requiring you to pay the reasonable attorney fees incurred by the judgment creditor in this proceeding." This threat of a potential bench warrant assists with inducing compliance. Once the debtor appears, the presiding judge will explain the seriousness of the exam and the debtor will be sworn in under oath. The presiding judge may also warn the debtor that the creditor's attorney has a right to return to the courtroom and compel the disclosure of certain information if the debtor refuses to answer the creditor's questions. After that, the attorney and the debtor will leave the court room with a court reporter to begin questioning. Note that this proceeding can be recorded, so the creditor should bring a court reporter.

The scope of a debtor's exam is extended to any information that will aid in the enforcement of the judgment or that relates to the debtor's assets or liabilities. Note that it may be helpful to review the applicable collection forms to determine which information is necessary. For instance, the bank levy collection form requires the bank name and the account number of the account sought to be levied. Additionally, the bank levy form requests the social security number of the debtor, thus making this information relevant to the collection efforts. Further, the debtor's exam may extend to review of any documents furnished by the debtor and even the review of the wallet of the debtor. The debit or credit cards in a debtor's wallet could also be used to cross-examine any previous answers relating to the debtor's bank accounts.

Post-Judgment Asset Investigation

In some situations, like a default judgment, a creditor might not be able to find the debtor in order to serve him with notice to appear at a judgment debtor's exam. In this situation, an asset search conducted by a private investigator may be the best available option to obtain information concerning a debtor's assets. It is important to ensure that the private investigator's findings are made in compliance with the law, such as the Gramm–Leach–Bliley Act (GLBA) Section 313.15 (a)(2)(ii). Additionally, it is important to ensure that the private investigator

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obtains this information in a Court admissible manner. Many private investigators are commonly used for this reason and will have no issue with making these representations to attorneys to provide peace of mind that the information can be used for collection purposes.

Bank Levy

The Plaintiff may be surprised to learn that, after obtaining a judgment, the Plaintiff is permitted to collect the judgment directly from the debtor's bank account(s). Learning this information can potentially alleviate the Plaintiff's concerns of inability to collect and help the Plaintiff understand the power of a legal judgment.

A bank levy is a collection method conducted by the Sheriff's Department, wherein the Sheriff will serve legal notice on a bank and collect funds due under a judgment directly from the debtor's bank account. When attempting to obtain a bank levy, it is important to note that a Writ of Execution must be signed by the Court permitting the Sheriff to begin the transfer of property under the judgment.

After the writ is obtained, the creditor must send the Sheriff instructions for each bank account sought be levied. Note that the applicable Sheriff's Department is based on the location of the bank designated in the Sheriff's instructions. For instance, if a bank in Orange County is served with the levy, then the Orange County Sheriff's Department must receive the Sheriff's instructions. These instructions may vary between jurisdictions and are generally accessible from the Sheriff's website. Also, while some banks accept service at any branch, other banks have set locations for service for the entire State of California. The California Department of Financial Protection and Innovation maintains an easily accessible list of designated locations for service of a legal process at: https://dfpi.ca.gov/central-locations-for-service-of-legal-process/. If a bank does not appear on the State of California website, it can likely be served at any branch. (Cal. Civ. Proc. Code § 684.115(b) ["Should a financial institution required to designate a central location fail to do so, each branch of that institution located in this state shall be deemed to be a central location at which service of legal process may be made, and all of the institution's branches or offices located within this state shall be deemed to be a branch or office covered by central process."].)

When serving the bank levy, the Sheriff will also serve the debtor with notice of levy to inform the debtor that the levy is occurring. Upon re ceiving this notice the debtor has the right to object to the levy. The debtor can object and argue that funds should be exempted from collection "to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor." (Cal. Civ. Proc. Code § 704.225.) Also, the debtor is automatically protected from a levy to the extent that it would reduce her account below $1,788. (Cal. Civ. Proc. Code § 704.220.)

Vehicle Levy

Similar to a bank levy, a creditor may request the Sheriff to levy and subsequently auction the debtor's vehicle to satisfy a judgment. This collection device goes beyond the monetary realm and will apply significant pressure on the debtor. To serve a vehicle levy, there is no requirement to exhaust all possible monetary collection methods, thus this method could potentially be used to induce a payment of the full judgment amount if the debtor has a compelling reason to remain in possession of the applicable vehicle (i.e. luxury vehicle or classic car). Note that if the property to be seized is in a private place, such as a garage or fenced lot, the Sheriff cannot seize it without a private place court order issued pursuant to Code of Civil Procedure § 699.030 unless the debtor voluntarily surrenders it. Thus, when conducting a debtor's exam be sure to request the debtor to identify locations where his vehicles are stored to determine whether a private place order is necessary. Also, a vehicle levy may require the creditor to pay the Sheriff's office to store the vehicle.

Property Lien

A property lien provides the creditor with the opportunity to secure her judgment using the debtor's real property. To secure a lien against real property, the creditor must obtain a signed Abstract of Judgment from the Court. Then, the creditor must record this Abstract of Judgment with the recorder's office in the county where the property is located. A lien will remain on the property for 10 years, but can be re-extended if necessary. The lien will permit the creditor to collect on his judgment when the when the debtor refinances or sells the property. If the debtor's property is foreclosed upon, keep in mind that the debtor's mortgage company(ies) may hold first priority in terms of payment on said lien. Note that mortgage and property tax liens will almost always take priority over judgment liens, so this collection method may not lead to any recovery on an underwater property.

Wage Garnishment

Wage garnishment permits a creditor of a consumer debt to take a percentage of a debtor's wages to satisfy a judgment. This order will go directly to the debtor's employer, thus avoiding having to deal directly with a debtor. The percentage of wages that a creditor can garnish depends on the type of debt as well as federal and state garnishment limits. Title III of the Consumer Credit Pro-

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tection Act (CCPA) prohibits an employer from discharging an employee whose earnings have been subject to a garnishment for one debt. But Title III does not protect an employee from discharge if the employee's earnings have been subject to garnishment for a second or subsequent debt. (See 15 USC §1671 et seq.; 29 CFR Part 870.) Thus, creditor's should be cognizant of whether there an existent creditor already has a garnishment in place.

Collection from International Defendants

For Defendants located outside of the United States or who maintain bank accounts in other countries, it is pertinent to gather information concerning the location of their assets. When it comes to collection, the location of the assets determines the applicable entity involved with collection. While the Hague Convention permits service of complaints in many jurisdictions outside of the United States, there is no guarantee of enforcing a United States judgment in jurisdictions outside of the country. Still, if the debtor owns tangible assets in the United States, such as real property, this can provide a method for judgment enforcement via property lien, even if a defendant is not in the United States. Relating back to preliminary relief, when dealing with a defendant with significant assets outside of the United States, ensure that the plaintiff asserts her right to obtain preliminary relief preventing the irreparable harm that would occur due to conduct such as transferring assets out of the United States (i.e. moving money offshore).

Importance of Assessment of Collection

There are many collection devices available, thus it is important to evaluate a wide variety of potential assets and revenue sources for any defendant or potential debtor. In doing so, attorneys can set realistic expectations for collection for their clients. This is equally helpful for attorneys who regularly take contingency fee cases or operate with flexible billing arrangements. If you are unsure whether a case has collection potential, you can contact Kimura London & White LLP.

♦ *Darrell P. White, co-founding partner at Kimura London & White LLP, specializes in business trials and commercial litigation. (949) 474-0940 or dwhite@klw-law.com*

♦*Maxx E. Sharp, litigation associate at Kimura London & White LLP, handles commercial litigation matters. (949) 474-0940 or msharp@klw-law.com*

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2020 § 5002(3). Similarly, the proposed revisions put forward by the FEHC define an "automated-decision system" (ADS) as any "computational process, including one derived from machine learning, statistics, or other data processing or artificial intelligence techniques, that screens, evaluates, categorizes, recommends, or otherwise makes a decision or facilitates human decision making that impacts employees or applicants." Cal. Code Regs. tit. 2, § 11008(d) (revisions proposed July 28, 2022).

Such broadly defined key terms give regulators a wide net, sweeping in many ubiquitous technologies. For example, the above definitions would encompass a wide range of tools currently used by many employers, such as: resume screening software, facial or vocal recognition software, software that uses a question-and-answer format to make predictive assessments of applicant "fit," software utilized to test physical or mental dexterity or cognitive abilities, software used to assess personality traits or emotional intelligence, and potentially many more.

EEOC and "Algorithmic Fairness"

The Initiative

In 2021, the EEOC launched an agency-wide initiative "to ensure that the use of software, including artificial intelligence (AI), machine-learning, and other emerging technologies used in hiring and other employment decisions comply with federal civil rights laws that the EEOC enforces." *EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness* (Oct. 28, 2021), https://www.eeoc.gov/newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness. The EEOC explained that this "Algorithmic Fairness" initiative would "examine more closely" how technology like AI "is fundamentally changing the way employment decisions are made." *Id*.

The Agency's First Enforcement Action

In its first major undertaking following the announcement of the initiative, the EEOC brought an enforcement action against online tutoring software company iTutorGroup. *See EEOC v. iTutorGroup, Inc*., No. 1:22-cv-02565 (E.D.N.Y. May 5, 2022). The company (composed of three integrated entities) hired thousands of United States-based tutors each year to provide remote online tutoring to students primarily residing in China. *Id*. at 2-3. iTutorGroup job applicants, as a component of the hiring process, were required to list their birthdates and age. *See id*. at 5. Unbeknownst to applicants, iTutorGroup had programmed their application-gathering software to automatically reject female applicants aged 55 or older and male applicants aged 60 or older. The lawsuit was

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brought after an over-55 applicant who was "immediately rejected" discovered she could get an interview if she provided a fake, younger age. *Id*. The EEOC utilized this information to discover that the iTutorGroup software had already automatically rejected more than 200 applicants on the basis of their age. *Id*. at 6. EEOC Chair Charlotte A. Burrows explained that "[t]his case is an example of why the EEOC recently launched an Artificial Intelligence and Algorithmic Fairness Initiative." *EEOC Sues iTutorGroup for Age Discrimination* (May, 5, 2022), https://www.eeoc.gov/newsroom/eeoc-sues-itutorgroup-age-discrimination. She went on to note that "workers facing discrimination from an employer's use of technology can count on the EEOC to seek remedies." *Id*.

The Agency's First Guidance

Only one week after the iTutorGroup enforcement action, the EEOC released its first guidance related to employer use of AI. This non-binding, technical guidance added color to the Algorithmic Fairness initiative and provided employers with several guidelines in making AI-assisted employment decisions, especially as it relates to the Americans with Disabilities Act (ADA). Specifically, the guidance demonstrated the EEOC's expansive view of the issue, explained the potential for employer liability due to vendor software, provided examples of how AI could violate the ADA, and endorsed several ways employers can better comply with the ADA while using AI tools. *See* EEOC, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees* (May 12, 2022), https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term.

Broad Scope

The guidance defined "software," "algorithms," and "artificial intelligence" quite broadly. *Id*. For example, the guidance warned that such ubiquitous technologies as: "resume scanners that prioritize applications using certain keywords"; "virtual assistants" or "chat bots" that ask job candidates about their qualifications; video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and widely-used testing software that provides "job fit" scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived "cultural fit" based on their performance on a game or on a more traditional test," could create ADA liability. *Id*. Such broadly defined key terms sweep many tools used by employers into the EEOC's expanding regulatory purview.

Responsibility for Vendor-Designed and Vendor-Administered Tools

The guidance also noted that "in many cases" an employer would be held responsible under the ADA for its use of an AI tool, even if such a tool was "designed or administered" by another entity. *Id*. For example, an employer may be subject to liability for tests that discriminate against disabled individuals "even if the test was developed by an outside vendor." *Id*. Situations where employers grant vendors the authority to act on their behalf could also provide a basis for ADA liability, such as through the administration of noncompliant AI tools in the hiring process. *See id*.

Common Ways AI Tools May Violate the ADA

The guidance focused on three "common ways" the use of an AI tool could subject an employer to ADA liability: (1) failure to provide a reasonable accommodation, (2) "screening out" a disabled individual, and (3) an inadvertent "medical examination" of a job applicant.

1) Individuals with disabilities may require "specialized equipment [or] alternative tests or testing formats" to allow "a more accurate assessment." Some employers may inadvertently fail to provide necessary reasonable accommodations by relying on AI tools that fail to take into account the testing subject's potential disability. For example, an individual with limited manual dexterity may find it difficult to take a "knowledge test" which relies on something like a keyboard or trackpad to manually input data. Absent some sort of undue hardship, the applicant should be provided an alternative version of the test, such as one allowing oral responses.

2) AI tools may automatically "screen out" an individual with a disability who is able to perform the essential functions of the job with or without accommodation. The EEOC explained that "screening out" can occur in a variety of ways, such failing to take into account special circumstances or failing to measure what is intended to be measured because of someone's disability. For example, a "chatbot" programmed to elicit applicant information may inadvertently reject all applicants with a significant gap in employment that may had been caused by a disability. The EEOC also provided the example of a video interviewing tool that analyzes applicant speech patterns to assess problem-solving skills which may screen out an individual with a speech impediment. Additionally, a common "personality test" designed to screen for "successful employees" may negatively score an individual with Post-Traumatic Stress Disorder who struggles to ignore

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distractions. While the test may be generally valid and predictive, the guidance cautions that "it might not accurately predict whether the individual still would experience those same difficulties under modified working conditions such as a quiet workstation or permission to use noise-cancelling headphones."

3) Many AI tools pose "disability-related inquiries" or ask for information that qualifies as a "medical examination" before any conditional offer of employment. This misstep can create liability regardless of the disability status of the applicant. An employer may violate the ADA if an AI tool requests information about an applicant's medical conditions or physical restrictions or if it explicitly asks if the applicant has a disability. An AI tool may conduct an improper "medical examination" if it "seeks information about an individual's physical or mental impairments or health." The AI screening tool may lawfully pose questions that "might somehow be related to some kinds of mental health diagnoses," such as whether the individual is "generally optimistic." However, if the tool uses a question like this to screen out an individual because of a disability (like Major Depressive Disorder), it may still be found to violate the ADA because the tool would disqualify an applicant who may otherwise be able to perform the essential functions of the job.

Practical Tips for ADA Compliance

The guidance does not foreclose employer use of AI tools in hiring and concludes by endorsing several ADA-compliant mechanisms to guide employers. These examples include:

1) Providing notice before performing an AI assessment. Specifically, the EEOC recommends that employers provide information "in plain language and accessible formats" concerning "the traits that the algorithm is designed to assess, the method by which those traits are assessed, and the variables or factors that may affect the rating."

2) Training staff to better recognize and process accommodations requests or more easily provide alternative means of testing or application intake.

3) Providing transparency in the application process, such as by giving clear instructions that the applicant may request reasonable accommodations.

4) Performing due diligence on software used by the employer or administered by an outside vendor in the applications process to ensure it does not ask job applicants or employees questions likely to elicit information about a disability or questions seeking information about an individual's physical or mental impairments or health.

5) Ensuring AI tools maintain focus on essential functions of the job. The EEOC emphasizes that AI tools should "only measure abilities or qualifications that are truly necessary for the job" and measure those qualifications "directly, rather than by the way of characteristics or scores that are correlated with those abilities or qualifications."

See id.

The EEOC's enforcement action and detailed guidance demonstrate that the Algorithmic Fairness initiative has teeth and these combined actions may signal the EEOC's enforcement priorities going forward.

The DOJ's Guidance

On the same day that the EEOC released its guidance, the DOJ released its own related guidance. Entitled "Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring," the DOJ guidance largely mirrors the EEOC's. While they almost entirely overlap in substance, the combined effort provides a clear indication that federal law can and will be applied to employer use of AI. *See* DOJ, *Justice Department and EEOC Warn Against Disability Discrimination* (May 12, 2022), https://www.justice.gov/opa/pr/justice-department-and-eeoc-warn-against-disability-discrimination.

State and Local Regulation

California

On March 15, 2022, the FEHC (now the Civil Rights Council) released draft revisions to California's non-discrimination laws expanding liability to employers that use, or vendors that distribute or administer, a wide range of employment-screening tools or services that use an "automated-decision system" (an "ADS") like AI. Cal. Code Regs. tit. 2, *et seq*. (revisions proposed Mar. 15, 2022). The Council later released a subsequent version of the proposed revisions on July 28, 2022. Cal. Code Regs. tit. 2, *et seq*. (revisions proposed July 28, 2022).

The revisions proposed by the FEHC, like the EEOC guidance, are broad and define key terms in expansive fashion. For example, the proposed revisions define an "automated-decision system" (ADS) as any "computational process, including one derived from machine-learning, statistics, or other data processing or artificial intelligence techniques, that screens, evaluates, categorizes, recommends, or otherwise makes a decision or facilitates human decision making that impacts employees or applicants." July 28 Proposed Revisions § 1108(e).

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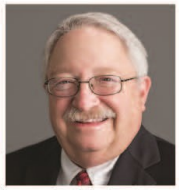
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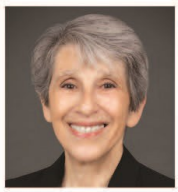
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The proposed revisions provide several examples of employer use of an ADS. These largely mirror the EEOC's list of AI tools and includes:

1) Directing job advertisements or other recruiting materials to targeted groups;

2) Screening resumes for particular terms or patterns;

3) Analyzing facial expressions, word choices, and voices in online interviews;

4) Computer-based tests that include questions, puzzles, games, or other challenges;

5) Predictive assessments about an employee or applicant, or measuring skills, abilities, and/or other characteristics, including but not limited to dexterity, reaction-time, or other physical or mental abilities or characteristics; and/or

6) Tests or questionnaires measuring personality traits, aptitudes, cognitive abilities, and/or cultural fit.

See id.

The proposed revisions then connect this expansive view of AI tools to the state's pre-existing antidiscrimination framework. Under the revised framework, the use of ADS in a manner that is intentionally discriminatory, or in a facially neutral way that results in a discriminatory impact, would be unlawful.

Employers are not the only parties affected by the FEHC's proposal. The proposed revisions also extend liability to third parties that act as agents of an employer through the provision of employment services such as: "recruiting, applicant screening, hiring, payroll, benefit administration, evaluations and/or decision-making regarding requests for workplace leaves of absence or accommodations, or the administration of automated-decision systems for an employer's use in making hiring or employment decisions that could result in the denial of employment or otherwise adversely affect the terms, conditions, benefits, or privileges of employment." *Id*. at § 1108(a). The proposed revisions also further expand the definition of "employment agency" to include "any person that provides automated-decision systems to an employer, provides services involving the administration or use of those systems on an employer's behalf, or otherwise acts on the employer's behalf using automated-decision systems." *Id*. at § 1108(i). They also create wide-ranging "aiding and abetting" liability for anyone engaged in "the advertisement, sale, provision, or use" of an ADS tool if the use results in unlawful discrimination. *Id*. at § 11020(a)(1).

Recordkeeping obligations are also broadened. Under the new regulation, employers and covered third-parties will be required to maintain records of "the assessment criteria" utilized by an ADS tool. *Id*. at § 11013(c)(5). Though "assessment criteria" is undefined, it could include such wide-ranging information as data used to create the algorithm used by the ADS tool, data provided by applicants or employees in the hiring process, and data created by function of the ADS tool. Employers and covered third-parties would be required to maintain records of this data for four years, double the current law. *Id*. at § 11013(c).

The FEHC held a meeting on March, 25, 2022, to discuss the proposed revisions. FEHC, *FEHC: March 25, 2022 Meeting*, YouTube (March 25, 2022), https://www.youtube.com/watch?v=y-bOSVkR14A. At this meeting, the Council reiterated that its regulatory purview in this area is expansive and important. *See id*. It also endorsed the view that these revisions were devised to sweep in potential claims made under both intentional discrimination and disparate impact theories. *See id*. The Council did not provide a timeline for adoption of these revisions, but signaled that this was the end goal. *See id*.

Other States and Localities

California is not the only state interested in regulating employer use of AI. Illinois has enforced notice and consent requirements on employers who use AI video-interview software since 2019. *See* 820 ILCS 42/1 *et seq*. Maryland has a similar law, restricting the use of facial recognition software during preemployment interviews without the consent of the applicant. *See* Md. Code Ann., Lab. & Empl. § 3-717. And in December 2021, New York City enacted legislation, effective January 2023, requiring employers or employment agencies in the city to notify employees or candidates of the use of "automated employment decision tool" (AEDT) in the application process or for internal assessment. N.Y.C. LL 144. The law also requires the appointment of an independent auditor to conduct an audit of any AEDT prior to its use. *See id*. On September 19, 2022, the New York City Department of Consumer and Worker Protection published proposed rules to aid in implementation of the law. N.Y.C. DCWP, *Notice of Public Hearing and Opportunity to Comment on Proposed Rules*, (Sept. 19, 2022), https://rules.cityofnewyork.us/wp-content/uploads/2022/09/DCWP-NOH-AEDTs-1.pdf. If the past few years are any indication, states and localities are pursuing regulatory agendas potentially even more far-reaching than that of the EEOC.

Conclusion

The ubiquity and use of AI can create liability for unaware employers. Recent actions by regulators at the fed-

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eral, state, and local levels demonstrate increasing regulatory scrutiny. Employers will need to stay aware of the changing landscape and nimbly balance desired efficiency with potential risks. They should carefully evaluate the AI tools they use or are considering using for these risks, consult with vendors who design and administer these tools, and review all of their procedures for both applicants and employees to ensure legal compliance in this fascinating but evolving area.

♦ *Connor Kridle is an associate in Payne & Fears LLP's labor and employment and insurance coverage practice groups. Connor's labor and employment practice includes representing employers in all types of matters ranging from single-plaintiff lawsuits to large class or representative actions.*

♦ *Philip Lem is a partner of Payne & Fears LLP where he represents management in a multitude of labor and employment and business litigation matters. Phil has substantial experience defending wrongful termination, discrimination, harassment, retaliation, and whistleblower claims by employees. Phil's business litigation practice covers complex matters involving breach of contract, breach of fiduciary duty, unfair competition, and copyright and trademark infringement.*

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filed a petition to compel Mildred to produce a copy.

When Lynne received a copy of the Trust, she retained an expert to evaluate it. The expert noted differences between the first and last pages of the Trust versus the remaining pages, and recommended obtaining an original copy to evaluate further. (*Id* at 810.)

After the preliminary expert analysis, Lynne amended her petition. She added a cause of action to remove Mildred as trustee and to declare the Trust "a forgery." In support of the claim to remove Mildred, Lynne alleged that Mildred breached her fiduciary duty by: (1) waiting nine years after James's death to comply with Probate Code section 16061.7; (2) failing to provide a copy of the Trust upon Lynne's request; and (3) "forging and producing forged copies of the Trust instrument and James'[s] Will." (*Id* at 810-11.)

III. The Bifurcated Trial

Mildred, Jane, and Gwen opposed the petition, and brought a motion to bifurcate the eighth cause of action to invalidate the Trust as a forgery. It does not appear that the cause of action to remove Mildred was included in the initial bifurcated phase. (*Id* at 811.)

At trial on the bifurcated issue of forgery, three expert witnesses testified in Lynne's case in chief. The experts opined that pages 1 and 31 of the Trust differed from pages 2 through 30. For example, pages 1 and 31 were written on different paper, had different line, spacing and font, had an inconsistent number of staple holes suggesting pages had been removed and replaced, and had more disturbed paper fibers than pages 2 through 30. (*Id* at 811-12.)

The trial court did not find Lynne's expert testimony compelling. It ruled that Lynne failed to prove the trust instrument was altered, and concluded that the evidence did not support Lynne's claim that her mother and sisters conspired to alter the Trust. (*Id* at 813.)

The sole issue heard at the trial was whether the Trust was forged. There is no indication that the trial court considered any other causes of action or the other two grounds for Lynne's request to remove the trustee. Yet, the trial court entered judgment in Mildred's favor on the *entire* petition. (*Id* at 814, 822.)

IV. The Trial Court's Award of Attorney's Fees and Costs

Following entry of judgment, Mildred, Jane, and Gwen filed a motion for attorney's fees and costs under three theories: (1) court's "broad" equitable powers; (2) Probate Code section 15642, subdivision(d); and (3) Code of Civil Procedure, section 2033.420. The Court granted the motion in full based on its equitable powers, and awarded Mildred $331,274 in fees, and Jane and Gwen $497,762.50 in fees. The trial court also granted an award of costs in the amount of $27,035.89 to Mildred and $69,218.20 to Jane and Gwen. (*Id* at 814-15.)

V. The Court of Appeal's Decision

Lynne appealed the trial court's order arguing that the trial court erred when it ordered her to pay attorney's fees in excess of the value of her potential share of the Trust. Lynne argued that the trial court's jurisdiction is limited to the property of the Trust estate, and it lacked jurisdiction to hold her personally liable for any amount of fees over and beyond her interest in the Trust. Lynne also argued that the trial court erred when it found she instigated the litigation in bad faith. (*Id* at 815-16).

The *Bruno* court affirmed the trial court's order, but on different grounds. It concluded that the trial court did not have the equitable powers to award attorney's fees in excess of Lynne's share of the trust assets. The *Bruno* court instead found that Probate Code section 15642, subdivision (d) permitted the court to impose personal liability on Lynne for attorney's fees and costs incurred by Mildred, Jane, and Gwen, assuming the other require-

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ments of the statute were met. (*Id* at 817, 821-22.) The *Bruno* court reasoned that section 15642, subdivision (d) is specifically designed to protect the trust and its beneficiaries from bearing the cost of a bad faith challenge, and therefore supports the imposition of personal liability. (*Id* at 820.)

The *Bruno* court also found that the trial court did not err in determining that Lynne acted with improper purpose in seeking to remove Mildred on the basis she forged the Trust instrument. (*Id* at 828.) As a result, it affirmed the trial court's fee and cost award in full under section 15642, subdivision (d). (*Id*.)

VI. Implications and Questions Post *Bruno*

The most obvious lesson from *Bruno* is that counsel should carefully evaluate the evidence before attempting to remove a trustee. Courts frown upon using a claim to remove the trustee as leverage to gain an advantage related to the trust. (See e.g. *Kleveland v. Siegal & Wolensky, LLP* 215 Cal.App.4th 534, 545). Therefore, counsel should ensure there is evidence to support each verified allegation in the petition, and that the alleged breaches of fiduciary duty are clear and significant. *Bruno* demonstrates that three testifying experts may not be enough to prevent a finding of bad faith. Regardless of the evidence supporting removal, it is best practice for counsel to advise the client that there is a possibility that a petition to remove a trustee may result in personal liability for all the parties' attorney's fees and costs.

There are other implications of the *Bruno* decision that are less obvious, and are not squarely addressed by the opinion. These issues include: (1) Lynne's liability for fees and costs related to the entire action, and not just those attributable to the removal claim; (2) Lynne's liability for both the trustee's and beneficiaries' fees and costs in the entire action; and (3) the degree of caution that should be exercised when a trust litigation case is bifurcated.

A. Liability for Fees and Costs Related to the Entire Petition

The trial court ordered Lynne to pay attorney's fees and costs incurred in defense of the entire action based on the court's equitable powers, and did not limit the order to only the portion of fees allocable to the removal cause of action. The *Bruno* court found that the trial court "lacked authority under equity to impose attorney's fees and costs," and instead upheld the judicial action under section 15652, subdivision (d). (*Bruno,* 79 Cal.App.5th at 816, 818; citing *Willis v. City of Carlsbad* 48 Cal.App.5th 1104, 1128 (2020).)

Probate code section 15642, subdivision, (d) states ". . . the court may order that the person or persons seeking the removal of the trustee bear *all or any part of the costs of the proceeding*, including reasonable attorney's fees." (§ 15642, subd. (d), emphasis added). Neither the appellant nor the *Bruno* court addressed the meaning of the term "proceeding." However, the *Bruno* court's holding suggests that section 15642 gives the court statutory authority to order the payment of fees incurred in the defense of the entire petition, and not just the removal claim.

As a result, it is best practice for counsel to carefully consider whether a removal claim should be part of a broader petition. If there ae multiple claims and causes of action in the petition, a more conservative approach is to bring the removal action in a separate or subsequent petition. In the event the court finds the request to remove is brought in bad faith, it potentially prevents the trial court from ordering the petitioner to pay attorney's fees for a larger and broader action.

B. Liability for Fees and Costs of All Responding Parties

In addition paying fees related to the entire action, the trial court also ordered that Lynne pay attorney's fees and costs all the parties who opposed the petition. In upholding the trial court's order on different grounds, neither the appellant nor the *Bruno* court specifically addressed whether 15642, subdivision (d) supports awarding attorney's fees to both the trustee and beneficiaries. The ruling implies that it is permissible, and therefore both trustees and beneficiaries should seek fees under the section.

C. Exercise Caution if Claims are Bifurcated

The trial court in *Bruno* only tried the issue of whether the Trust was forged. Yet, following the bifurcated trial on this limited issue, the trial court entered judgment in Mildred's favor without considering the other bases for removal. A cause of action to remove a trustee is frequently bifurcated, and *Bruno* demonstrates that counsel should object to a ruling on the petition as a whole. It is unclear whether the *Bruno* court would have upheld the award of attorney's fees under 15642, subdivision (d) if Lynne objected to the entry of judgment and raised that issue on appeal.

VI. Conclusion

The court is committed to protecting a trustor's intent from bad faith challenges. Post-*Bruno,* counsel should reconsider their strategy when bringing or defending a petition to remove a trustee.

♦*Lauren Strickroth is a partner of Sheppard Mullinichter & Hampton LLP. She is a business litigator, who focuses her practice on trust, estate, and fiduciary litigation.*

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notice and are increasingly focusing their attention on launching class actions asserting false advertising and unfair competition claims grounded in allegations of greenwashing.

The targeted companies are wide ranging. Dutch airline KLM is facing a class action lawsuit over its advertising encouraging consumers to "Fly Responsibly" to "create[e] a more sustainable future," clothes retailer Hennes & Mauritz LP ("H&M") is defending against allegations of false and misleading use of "environmental scorecards" for its products called "Sustainability Profiles," and Burt's Bees recently resolved a case involving its "100% natural" advertising following the court's denial of its motion to dismiss.

In some instances, companies have obtained early dismissals. For example, a court recently granted a motion to dismiss alleging the "100% recyclable" labels on single-use plastic bottles supplied by defendants Coca-Cola, Blue Triton Brands, and Niagara Bottling were false and misleading. *See Swartz v. Coca-Cola Co*., No. 21-cv-04643-JD, 2022 U.S. Dist. LEXIS 209641 (N.D. Cal. Nov. 18, 2022). In addition, Allbirds Inc. prevailed on its motion to dismiss a class action complaint attacking allegedly false advertising statements regarding the environmental impact of its wool shoes. *See Dwyer v. Allbirds, Inc.*, No. 21-CV-5238 (CS), 2022 U.S. Dist. LEXIS 71055 (S.D.N.Y. Apr. 18, 2022).

Yet, the risks facing companies remain substantial. In many instances, courts have permitted actions to proceed after rejecting classic defenses to false advertising claims. For example, Kroger Co. argued its advertising of sunscreen products as reef friendly was mere puffery and the court denied its motion to dismiss. *See White v. Kroger Co*., No. 21-cv-08004-RS, 2022 U.S. Dist. LEXIS 54273 (N.D. Cal. Mar. 25, 2022).

Courts have also expressed deep skepticism when companies appeal to the broader context of the at issue advertising. StriVectin Operating Co. argued its advertising of sunscreen products reading "REEF SAFE* SUNSCREEN" is literally true because an asterisk on the back of the package is followed by fine print stating that the product does not contain two particular ingredients that are widely thought to harm coral reefs. The court labeled this rejected argument "absurd" explaining a company cannot escape liability for a misleading statement by stating in fine print on the back "that's not actually what we mean." *Locklin v. StriVectin Operating Co.*, No. 21-cv-07967-VC, 2022 U.S. Dist. LEXIS 52461 (N.D. Cal. Mar. 23, 2022). Additionally, a court rejected ALDI's argument that its "Simple. Sustainable. Seafood." advertising is not misleading when read in connection with the third-party best aquaculture practices certification symbol. *See Rawson v. ALDI, Inc*., No. 21-cv-2811, 2022 U.S. Dist. LEXIS 88511 (N.D. Ill. May 17, 2022). While both the symbol and slogan appeared on the front of the package, the court explained consumers may not connect the slogan with the certification because of the separation by space and color design.

Not many greenwashing cases have yet made it to the class certification stage. One case that did make it to that stage involved claims that Keurig falsely advertised its coffee pods as recyclable. The court granted plaintiffs' class certification motion. *Smith v. Keurig Green Mt., Inc*., No. 18-cv-06690-HSG, 2022 U.S. Dist. LEXIS 120863 (N.D. Cal. July 8, 2022). Keurig is now waiting for court approval of a $10 million class settlement.

For companies looking to assess their advertising, the Federal Trade Commission (the "FTC") has issued a set of Green Guides designed to help companies avoid making misleading environmental claims. While not binding precedent, courts frequently look to the Green Guides when analyzing environmental marketing claims and several states incorporate the Green Guides into their laws. The FTC last revised the Green Guides in 2012, but announced it plans to update the Green Guides in 2022. (https://www.govinfo.gov/content/pkg/FR-2022-08-05/pdf/2022-16863.pdf).

In addition to issuing regulatory guidance, the FTC occasionally pursues greenwashing actions. For example, in April 2022, the FTC announced a combined $5.5 million proposed settlement with Walmart and Kohl's that also included proposed injunctive relief impacting the companies' future advertising. (https://www.ftc.gov/business-guidance/blog/2022/04/55-million-total-ftc-settlements-kohls-and-walmart-challenge-bamboo-and-eco-claims-shed-light). The settlement arose from allegations that the companies engaged in misleading advertising of products as made from bamboo and therefore environmentally friendly and sustainable, when in fact the products were made from rayon, which involves a manufacturing process that includes chemicals hazardous to the environment. The upcoming release of the updated Green Guides may spur the FTC to increase its scrutiny of companies' eco-friendly advertising statements moving forward.

While greenwashing focuses largely on the environmental aspect of ESG, also on the horizon may be an increase in class actions lawsuits alleging pinkwashing or bluewashing, which focus more on the social aspect of ESG. "Pinkwashing" refers to when a company is promoting its products or services as aligned with LGBTQIA+ values when the company fails to have adequate LGBTQIA + values and labor policies.

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"Pinkwashing" also refers to companies with advertising aimed at showing support of breast cancer awareness and research, when the companies continue to sell products with cancer-causing ingredients or otherwise fail to take action to genuinely support reducing breast cancer. The term "bluewashing" has been used to describe companies promoting the United Nations Global Compact, including its human rights and labor standards, but at the same engaging in child labor, slavery, or other human rights violations and/or failing to take any real measures to improve in these areas.

SEC's Proposed Rules and Enforcement

The Securities and Exchange Commission (the "SEC") proposed several rules in 2022 directed toward helping protect investors against greenwashing.

One of the proposed rules would amend Rule 35d-1 under the Investment Company Act of 1940 (referred to as the "Names Rule"). The current Names Rule requires a fund to invest at least 80% of its assets in alignment with a particular investment "focus." However, the 80% requirement does not apply to a fund's investment "strategy." (https://www.sec.gov/news/statement/lee-names-rule-statement-052522). The proposed rule eliminates this confusing distinction so that the 80% rule requirement will apply whenever a fund's name suggests a fund concentrates in particular investments. (https://www.sec.gov/rules/other/2020/ic-33809.pdf). As a result, the proposed rule restricts funds aiming to attract investors as an ESG-focused fund from using "ESG," "sustainable," "green," or other terms in the fund name without actually having an investment strategy that prioritizes the relevant, named factors in making investment decisions.

Another proposed rule aims at enhancing the disclosure and reporting requirements for funds regarding their ESG investment strategies and practices. (https://www.sec.gov/rules/proposed/2022/ia-6034.pdf). For example, all ESG focused funds that consider greenhouse gas emissions as part of their investment strategy would be required under the proposed rule to disclose in the fund's annual report the fund's portfolio carbon footprint and weighted average carbon intensity.

Similarly, the SEC also proposed a rule that would enhance the disclosure and reporting requirements for investment advisers pertaining to an adviser's ESG strategies. (https://www.sec.gov/rules/proposed/2022/33-11068.pdf).

In addition to these proposed rules, in 2021 the SEC launched a Climate and ESG Task Force within the Division of Enforcement and has already started concentrating more of its efforts on pursuing perceived ESG related violations based on existing regulations.

On April 28, 2022, the SEC announced it charged Vale S.A., a publicly traded Brazilian mining company, with making false and misleading claims about dam safety prior to the collapse of one of its dams. (https://www.sec.gov/news/press-release/2022-72). The SEC alleged that Vale S.A. manipulated multiple dam safety audits, obtained fraudulent stability certificates, and misled investors about the safety of the collapsed dam through its ESG disclosures.

More recently, on November 22, 2022, the SEC charged Goldman Sachs Asset Management, L.P. ("GSAM") with violating Section 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-7. (https://www.sec.gov/news/press-release/2022-209). The SEC alleged that GSAM failed to have any written policies and procedures for ESG research, and that even once policies and procedures were established, GSAM failed to consistently follow them. GSAM agreed to pay a $4 million penalty.

If and when the SEC's proposed rules become final, the SEC is likely to further increase its focus on ESG-related disclosures by investment advisers and funds.

Securities Shareholder Litigation

In addition to the headline grabbing event driven shareholder litigation following an environmental disaster or other event, shareholders are also bringing derivative actions alleging securities fraud against companies frequently paired with breach of fiduciary duty claims against officers and directors based on a company's ESG disclosures.

Recently, many of these lawsuits have focused on allegations that a company misrepresented its commitments to diversity and inclusion, such as by disclosing a goal of increasing board diversity and then failing to act on this goal. Thus far, companies and directors, including in suits involving Qualcomm, Oracle, and the Gap, Inc., have largely been successful in obtaining early dismissals. *See Kiger ex rel. Qualcomm Inc. v. Mollenkopf*, No. 21-409-RGA, 2021 U.S. Dist. LEXIS 220509 (D. Del. Nov. 15, 2021); *Lee v. Fisher*, No. 20-cv-06163-SK, 2021 U.S. Dist. LEXIS 82804 (N.D. Cal. Apr. 27, 2021); *Klein v. Ellison*, No. 20-cv-04439-JSC, 2021 U.S. Dist. LEXIS 97965 (N.D. Cal. May 24, 2021). The Gap decision, however, is pending appeal before the Ninth Circuit.

More recently, a plaintiff securities class action filed in June 2022 targets Wells Fargo and some of its directors and officers for allegedly misrepresenting its commit-

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ment to diversity in the workplace. *See Ardalan v. Wells Fargo et al*., 3:22-cv-03811-TLT (N.D. Cal. June 28, 2022). The plaintiff class alleges that in 2020, Wells Fargo introduced a policy requiring that at least 50% of interviewees represent a historically underrepresented group with respect to at least one diversity dimension for most posted jobs with compensation greater than $100,000 per year. Then, in May 2022, the New York Times published its article "At Wells Fargo, a Quest to Increase Diversity Leads to Fake Job Interviews" reporting that for many "open" positions a candidate representing a historically underrepresented group would be interviewed, but the job would have already been promised to someone else. Wells Fargo's stock dropped following publication of this article leading to this lawsuit. Defendants likely will file a motion to dismiss in spring 2023 following filing of a new complaint by lead plaintiff.

Plaintiff shareholders are unlikely to be discouraged by these early defeats, and there is a general expectation plaintiffs are likely to continuing pursuing these and other theories moving forward.

ERISA Litigation

On November 22, 2022, the United States Department of Labor released a final rule, "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights." (https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/final-rule-on-prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights.) While clarifying how ERISA's fiduciary duties of prudence and loyalty apply to the selection of investments, the final rule provides that a fiduciary's duty of prudence may include consideration of ESG factors when evaluating investment options and the financial benefits of investing in companies focusing on pursuing positive ESG.

The final ESG rule arrives at a time when many investors and asset managers have an increased interest in ESG investing at the same time there is a growing anti-ESG movement. Notably, Larry Fink, Chairman and Chief Executive Officer of BlackRock, Inc., has been outspoken about supporting ESG, including in his well-publicized Letters to the CEOs in recent years. (https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter). Recently, however, Florida's chief financial officer announced Florida is pulling $2 billion in assets managed by BlackRock over concerns that Blackrock is prioritizing ESG over higher returns for investors. (https://www.reuters.com/business/finance/florida-pulls-2-bln-blackrock-largest-anti-esg-divestment-2022-12-01/).

Antitrust Litigation

Following a discussion about ESG policies at a September 2022 hearing held by the Senate Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights, five senators issued a letter on November 3, 2022 to dozens of law firms. The letter advised the firms of "a duty to fully inform clients of the risks they incur by participating in climate cartels and other ill-advised ESG schemes." (https://www.grassley.senate.gov/imo/media/doc/cotton_grassley_et_altolawfirmsesgcollusion.pdf). More specifically, the letter calls out as a particular concern the "collusive effort to restrict the supply of coal, oil, and gas, which is driving up energy costs across the globe and empowering America's adversaries abroad" and advises "Congress will increasingly use its oversight powers to scrutinize the institutionalized antitrust violations being committed in the name of ESG, and refer those violations to the FTC and the Department of Justice."

Accordingly, companies engaging in concerted action and entering into collaboration agreements, even in pursuit of an ESG goal, could risk a violation of Section 1 of the Sherman Act. Hopefully this will not dissuade companies from participating in industrywide ESG efforts, but companies should take appropriate precautions to mitigate potential risks.

Concluding Thoughts

Companies and their counsel should anticipate that both plaintiffs and regulatory agencies will continue to pursue ESG claims and likely with an increased zeal moving forward. Companies can proactively manage and minimize their litigation risk by engaging in an ongoing review of their ESG advertising, disclosures, policies, and practices. Companies additionally may benefit from reviewing their insurance policies with an eye towards any exclusions that may apply to ESG specific issues and false advertising claims generally.

♦*Lisa M. Northrup is a shareholder at Stradling Yocca Carlson & Rauth. Her practice focuses on complex commercial and white collar matters including contract disputes, business torts, securities litigation, and class action defense.*

8502 E. CHAPMAN AVENUE
ORANGE, CA 92869