ASSOCIATION OF BUSINESS TRIAL LAWYERS

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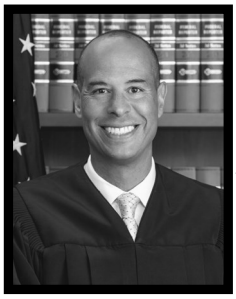
Q&A with U.S. District Judge Fred W. Slaughter
By Darian Nourian



[Editor's note: Judge Slaughter currently serves as a judge on the United States District Court for the Central District of California. He was nominated by President Biden in December 2021 and confirmed by the United States Senate in March 2022. Before joining the federal bench, he served on the Superior Court of Orange County from 2014 to 2022. Judge Slaughter began his legal career in the Los Angeles City Attorney's Office, serving as a Deputy City Attorney from 2000 to 2002. From 2004 to 2006, he worked as a coordinator for Project Safe Neighborhoods. He then served as an Assistant United States Attorney in the Central District of California, Oregon, and Arizona. Judge Slaughter is a "Double Bruin," having received both his B.A. and J.D. from UCLA.]

At the core of Judge Slaughter's approach—as a judicial officer and as a person—is a commitment to uplifting others: encouraging people, helping people, and making people's days better. Ultimately, he wants to "help people be their best self."

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Navigating New Compliance Challenges: Understanding the 2025 Amendments to California's Proposition 65
By Adam B. Korn and Amran N. Chaichi

Introduction

Recent amendments to California's Proposition 65 impose new warning requirements and create additional litigation exposure for businesses operating—directly or indirectly—in the state. This article discusses the changes effective January 1, 2025, and examines their impact on compliance strategies and enforcement risk. Businesses have a three-year grace period to align their warning practices with the amended regulations, which become fully enforceable on January 1, 2028. The amendments reflect a broader regulatory trend toward increased specificity and accessibility of consumer warnings. Therefore, companies may need to reassess existing warning practices, particularly for product labeling, online sales, and vehicle-related exposures. Notably, in February 2026, the California Court of Appeal issued a decision interpreting pre-suit notice requirements, potentially eliminating one of the few procedural defenses businesses had against opportunistic Proposition 65 litigation. As a result, it is more important than ever that businesses plan now to transition into compliance with the new Proposition 65 regulations.

The History of Proposition 65

Enacted in 1986, the Safe Drinking Water and Toxic Enforcement Act—commonly known as Proposition 65—was designed to protect drinking water and inform Californians about exposure to chemicals known to cause cancer or reproductive harm. Over time, however, the statute's reach has expanded well beyond drinking water to encompass more than 900 chemicals that may be present

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President's Message
By Charity M. Gilbreth

I am grateful for the opportunity to serve as President of the Orange County Chapter of the Association of Business Trial Lawyers in 2026. On behalf of our dedicated Executive Committee – Vice President Justin Owens, Treasurer Alejandro Ruiz, and Secretary Jeffrey Singletary – we are excited for the events and opportunities that 2026 will bring.

We are also pleased to welcome our newest board members: Ryan Walsh of Latham & Watkins, Daniel Weiss of Reeves & Weiss, and Assistant Presiding Judge Terri Flynn-Peister of the Orange County Superior Court.

Over my more than twenty years as a member of ABTL Orange County, I have had the privilege of getting to know so many exceptional lawyers and judges. While the demands of our profession often make it difficult to step away from the office or the courtroom, the opportunity to connect with our legal community is invaluable. If it has been a while since you attended an ABTL event, I encourage you to do so this year. Our collective engagement is what makes great things possible.

Our Chapter continues to thrive because of the extraordinary commitment of our members, the active engagement of our judiciary, and the shared belief that excellence in advocacy is inseparable from professionalism, civility, and community. We hope you will join us at our next event on May 27 for the Robert E Palmer Wine Tasting Dinner and Program.

One of my main goals this year is to strengthen our Young Lawyers Division. The goal is not only to engage more young lawyers, but to give them a meaningful seat at the table and a sense of ownership in the future of this Chapter. Under the leadership of YLD Co-Chairs Katie Rosoff, Michael Mosher, and Taylor Brown, we moved to a committee-based structure that expands leadership opportunities and helps create continuity from year to year. To all young lawyers (in practice less than ten years), we invite you to get involved and participate in the variety of events YLD has planned. Next up, mark your calendars for the YLD Happy Hour on May 16.

Thank you all for your continued support of ABTL Orange County. And thank you to Andrew Wood of Allen Matkins for his continued work as ABTL Report Editor.

I look forward to seeing you throughout the year.

♦ *Charity Gilbreth is a partner at Schilling Law Group.*

"Duty to Defend" Denials Require a Second Look
By Dominic S. Nesbitt

Untold millions of dollars are left on the table by policyholders who fail to challenge wrongful coverage denials. This article aims to remind business litigators of their clients' rights under any liability policy - be it a Directors & Officers, Professional Liability, Employers Practices Liability or Commercial General Liability policy - which includes a "duty to defend."

The "Potential for Coverage" Standard

The California Supreme Court has made clear that a liability insurer owes a duty to defend unless an underlying lawsuit against its insured can *"by no conceivable theory"* raise a *"single issue"* within the policy coverage. *See Montrose Chem. Corp. v. Superior Court*, 6 Cal.4th 287, 300 (1993) quoting *Gray v. Zurich Ins. Co.*, 65 Cal.2d 263, 276, fn. 15 (1966).

Importantly, the California Supreme Court has emphasized that the duty to defend turns on the potential for coverage raised by the "facts" alleged, and not on the formal causes of action pleaded in the complaint. *See Scottsdale Ins. Co. v. MV Transp.,* 36 Cal.4th 643, 654 (2005); *see also Pension Trust Fund for Operating Engineers v. Federal Ins. Co.*, 307 F.3d 944, 951 (9th Cir. 2002) (explaining "remote facts buried within causes of action that may potentially give rise to coverage are sufficient to invoke the defense duty.").

Even facts which are extrinsic to a complaint (*e.g.*, facts in pre-suit communications, interrogatory responses, depositions, and expert reports) can trigger the duty to defend if known to the insurer. *See Montrose, supra,* at 296; *see also American Guar. & Liab. Ins. Co. v. Vista Medical Supply,* 699 F.Supp 787, 794 (N.D. Cal. 1988) (finding duty to defend premised on a declaration made by plaintiff in underlying action).

As Applied to Business Litigation

This broad "potential" for coverage standard is routinely applied by California's courts to hold liability insurers in breach of their duty to defend insureds in

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Courts Attempt to Rein in "Schedule A" Litigation Practice
By Jared Bunker, Marko R. Zoretic and Oren J. Rosenberg

Over the past decade, "Schedule A" litigation has emerged as a powerful and controversial tool for trademark, copyright, and patent owners to attempt to enforce their intellectual property rights against foreign online retailers. Schedule A litigation derives its name from the practice of filing a complaint listing multiple defendants in an appended list, commonly labeled "Schedule A," rather than on the cover or in the body of the complaint. The appended list is filed under seal, and the plaintiff seeks an ex parte TRO to quickly remove online listings and freeze financial accounts. Often, the first time a Schedule A defendant learns it has been sued is when it discovers that its online listings have been removed and its financial account with an online retail platform has been frozen. Some argue that the practice is necessary to combat extensive online infringement by foreign retailers. Others, however, have raised due process concerns with some aspects of the practice. This article provides an overview of the Schedule A litigation practice and its rise over the past decade. It also examines the implicated due process concerns and evaluates the Schedule A litigation practice in California federal district courts and assesses whether the practice is likely to proliferate here. Please contact the authors for a detailed explanation of the methods used to obtain the case filing data from Lex Machina reported in this article, as well as the statistical analyses presented.

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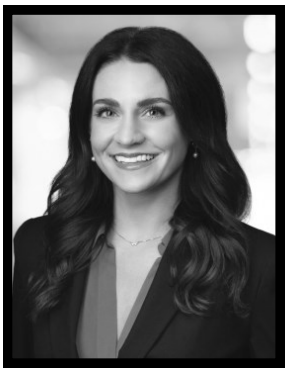
YLD Update
By Katie Rosoff, Michael Mosher & Taylor Brown

The Young Lawyers Division ("YLD") looks forward to a year of very fun and engaging programming. The Co-Chairs of the 2026 YLD committee are Katie Rosoff from Schilling Law Group, PC, and Michael Mosher from Stradling Yocca Carlson & Rauth, LLP. The 2026 YLD Vice Chair is Taylor Brown from Payne & Fears LLP. This year, the YLD instituted a Planning Committee composed of one young lawyer from every ABTL Orange County chapter board member firm to help develop programming for the YLD. A big thanks to all the members of the Planning Committee and their participation in this new endeavor.

ABTL's YLD introduces lawyers practicing ten years or less to their ABTL chapter and helps these lawyers develop relationships with other young lawyer members. Over the course of the year, YLD hosts events like Happy Hours, Judicial Mixers, Brown Bag lunches, and MCLE events, each of which are complimentary to 2026 ABTL YLD members.



In February 2026, the YLD Chairs hosted a Brown Bag lunch with the Honorable Karen Scott, Magistrate Judge for the Central District of California. The lunch was very engaging and well attended by YLD members. The YLD Chairs intend to host several more Brown Bag lunches this year with judges sitting on the local bench. Brown Bag lunches are a unique opportunity to learn from members of the Orange County bench in a small setting and receive insight and advice that will help you grow as an attorney.

Over the next few months, the YLD Chairs will host a happy hour on Thursday, May 14, at Puesto in Irvine, sponsored by Consilio. Look out for an e-invite in the

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Q: Your mantra "Opportunity for Greatness" is well known. In a courtroom context, what does it mean in practice—for lawyers, litigants, and the Court?

A: "Opportunity for Greatness" has equal application to everyone and it means being your best self and that you are the right person for the job at hand. It goes hand in hand with positive energy is positive results.

Q: How would you describe your judicial philosophy—and has it changed at all since transitioning from the state to federal bench?

A: My legal philosophy is to be prepared and engaged, ready to listen and learn from others, ask questions, and apply the law to the evidence.

Q: You've described seeing law as a *human* system serving real people. How do you bring that perspective to the bench?

A: The law is all about helping people, and helping people find justice and resolutions. I try to contribute to that by treating every case as equally important to all involved, being a great listener, and applying the law to the evidence.

Q: Early in your career, after your first hearing, you reportedly said, *"This is a real job—I can get paid to do this?"* What sparked your love of trial work—and in your view, what makes a great trial lawyer?

A: My grandmother taught me that if you have a passion for what you do, you never have to work a day in your life. What sparked my love for trial work was the chance to work with people, learn every day, resolve issues, and pursue justice.

As for what makes a great trial lawyer, there are so many outstanding trial attorneys with different strengths but the traits I see most consistently amongst them are preparation, adaptability, careful listening, and sound judgment.

Q: You've served as City Attorney, Assistant U.S. Attorney, Superior Court Judge, and now U.S. District Judge—what principles have stayed constant across those roles—and were there mentors, legal or otherwise, who particularly shaped your career and your approach to service?

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A: Across those roles, my core principles have stayed the same: be prepared and engaged; listen carefully and learn from others; ask thoughtful questions; and apply the law to the evidence. Each position has pushed me to keep honing those skills.
I've been fortunate to have many mentors, including outstanding lawyers that I have been grateful to work with—whether as office colleagues, opposing counsel, training instructors, or judicial officers. Staying open to learning and listening to different points of view has been one of the most valuable lessons, and it has served me well throughout my career.

Q: You're known for steady optimism and encouragement in a difficult, high-stakes profession. What practices help you sustain that positivity day-to-day without minimizing the gravity of the work?

A: I have found it most helpful to focus on solutions rather than problems.

Q: In federal practice, what behaviors most strengthen a lawyer's credibility with the Court—and what specific advocacy habits (e.g., in motion practice and civility) help cases move efficiently versus the common missteps that slow matters down or erode trust over time?

A: Credibility is strengthened by three things: accurate citations, honesty and respect toward the Court and opposing counsel, and being responsive to the Court's questions. Doing the opposite is not helpful to a lawyer's credibility.

Q: You're known as a builder of people and teams. What practical steps can law firms, public agencies, and courts take to develop lawyers?

A: I would encourage training, support, meaningful experience, ethics, and teamwork. Teamwork and encouragement are key. Just as important is embodying positive energy because it leads to positive results. I have never seen a case where negativity helps the situation.

Q: If you could give one piece of guidance to newer lawyers on being "prepared to win," what would it be?

A: Try new things. Don't be afraid to fail—or to succeed. And know that experience is the most valuable commodity.

Q: Outside the courtroom, what do you enjoy doing to recharge and stay grounded?

A: Spending time with family and friends, hiking, bicycling, going to the gym, listening to music, and watching sports. I don't necessarily have a favorite team. I just enjoy sports where you can see a real love and respect for the game. To me, that captures something wonderful about the human spirit.

♦ *Darian Nourian is an associate at Sheppard Mullin Richter & Hampton LLP and a member of the firm's Business Trial group.*

Want to Get Published?

Looking to Contribute An Article?

The ABTL—OC Report is always looking for articles geared toward business trial lawyers.

If you are interested, please contact our Editor Andrew Wood at awood@allenmatkins.com

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in a wide range of products, workplaces, homes, and environmental settings. It has also spawned a cottage industry of bounty hunter private enforcers who file thousands of Notices of Violation and hundreds of lawsuits annually in efforts to obtain substantial attorney fee settlements.

At its core, Proposition 65 prohibits businesses from knowingly or intentionally exposing individuals in California to any chemical on the expansive Proposition 65 list without first providing a "clear and reasonable" warning. Since the law's adoption, the Office of Environmental Health Hazard Assessment (OEHHA) has identified more than 900 chemicals that trigger warning obligations under the statute. While the statute requires only that exposure warnings be "clear and reasonable," OEHHA has promulgated regulations establishing "safe harbor" warning language that, if used, is deemed to be "clear and reasonable" as a matter of law. A business required to provide an exposure warning but failing to do so is subject to a civil suit seeking injunctive relief, civil penalties of up to $2,500 per violation, and often substantial attorney's fees.

Proposition 65 is enforced through a dual public-private framework. Enforcement actions can be brought by the Office of the California Attorney General, any district attorney in California's fifty-eight counties, or any county counsel. In addition to public enforcement, Proposition 65 expressly authorizes private individuals to bring enforcement actions in the public interest. This structure has profoundly influenced how the statute operates in practice and is a central reason why Proposition 65 remains one of the most actively litigated consumer protection laws in California. Private enforcers must serve a written notice of violation at least sixty days before filing a lawsuit. The notice must identify the specific chemical involved, the products or exposures at issue, and the basis for the alleged violation. In addition to serving these notices on the alleged violators, private enforcers must also serve the Attorney General and other public enforcers to give those public enforcers the opportunity to take direct enforcement action if they so choose. These notices must be accompanied by a certificate of merit showing a reasonable case of exposure, often supported by laboratory testing or exposure assessments commissioned by the private enforcer. However, that information is typically shared only with the public enforcers and not the alleged violators.

January 1, 2025 Amendments

On December 6, 2024, OEHHA announced that it had adopted significant amendments to California Proposition 65 regulations, marking the most substantial changes in a decade. Importantly, there is a three-year grace period allowing products manufactured and labeled before January 1, 2028, to use the old warning language regardless of the product sales date. Strict compliance with the 2025 Amendments will be required for products manufactured and labeled on or after January 1, 2028. These changes include:

- Updates to "short-form" warnings on consumer products;
- New warning requirements for internet purchases; and
- New safe harbor warnings for passenger or off-highway motor vehicles.

Warning Language

The 2025 Amendments impact the short-form labeling content requirements for products that contain any chemical on the Proposition 65 list. Under the 2025 Amendments, the short-form warning must provide more detail than previously required. Most significantly, it must identify a specific chemical from the Proposition 65 list for each risk (e.g., cancer or reproductive harm). Also, the terms "CA WARNING" and "CALIFORNIA WARNING" can be used instead of "WARNING." Additionally, the new short-form warning must be placed on the product where it is likely to be seen and must be in a type size no smaller than 6-point.

These changes are significant because, before the 2025 Amendments, the regulations did not require identification of specific chemicals in short-form warnings. Furthermore, under the 2025 Amendments, at least one chemical name associated with each identified risk must be included on all short-form warnings.

Internet Purchases

The 2025 Amendments also include new warning requirements for products purchased online. Under the amendments, Proposition 65 warnings must be presented before the consumer completes the purchase and must be displayed in one of several prescribed ways: directly on the product display page; through a clearly marked and proximate hyperlink using the signal words "WARNING," "CA WARNING," or "CALIFORNIA

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WARNING"; or by another method that makes the warning prominently visible prior to checkout. These requirements are intended to prevent warnings from being obscured, buried in supplemental pages, or accessible only after purchase.

This new requirement reflects an increasing focus on e-commerce regulation by OEHHA. This guidance reinforces the expectation that Proposition 65 warnings appear before checkout and are not hidden behind hyperlinks or supplemental pages.

Motor Vehicles

Additionally, under the 2025 Amendments, warnings for exposures that occur during the purchase, handling, or installation of parts for a motor vehicle must comply with certain requirements. Motor vehicles include cars, SUVs, vans, pickup trucks, motorcycles, all-terrain vehicles, and other off-highway vehicles, as defined by OEHHA. These warnings may be provided on a sign no smaller than 5 x 5 inches and no smaller than 20-point type, placed at each retail point of sale or display for motor vehicle parts. Notably, passenger or off-highway motor vehicle parts include any part offered for sale for installation in, or servicing of, a passenger or off-highway motor vehicle. However, this change does not include packaged service chemicals, tires, parts containing asbestos, carpeting, or upholstery.

Updates in Proposition 65 Caselaw

Recent judicial decisions have continued to address the scope of Proposition 65 obligations, including the sufficiency of notice requirements and how the statute applies to businesses operating in online marketplaces.

Lee v. Amazon.com, Inc.

In the 2022 California Court of Appeal case *Lee v. Amazon.com, Inc.* (2022) 76 Cal.App.5th 200, the Court developed Proposition 65 caselaw by determining that mere constructive knowledge ("knowledge that one using reasonable care or diligence should have") that a product contains chemicals known to cause cancer or reproductive toxicity under Proposition 65 is sufficient to trigger Proposition 65 warning obligations for online marketplaces. The case involved a consumer who brought a private enforcement action against Amazon after purchasing a product sold by a third party on the Amazon marketplace that contained extremely high levels of mercury.

The Court of Appeal held, among other things, that constructive knowledge was sufficient to trigger Proposition 65 warning obligations. This is particularly notable as the Court's ruling established that actual knowledge is not required and businesses can be held responsible for what they reasonably should have known about toxic chemicals in products they help distribute.

Environmental Health Advocates, Inc. v. Pancho Villa's, Inc.

In the recently published case of *Environmental Health Advocates, Inc. v. Pancho Villa's, Inc.* (Cal. Ct. App., Feb. 20, 2026, No. D084705, 2026 WL 482553), the California Court of Appeal addressed the scope and sufficiency of the sixty-day notice requirement, a mandatory precondition for private enforcement actions under Proposition 65. The decision provides important guidance on how courts evaluate alleged defects in pre-suit notices and clarifies that technical precision is not always decisive.

Environmental Health Advocates, Inc. sued Pancho Villa's, Inc. for exposing consumers to acrylamide, a carcinogen, used in making Pancho Villa's tortillas. The trial court dismissed the case due to alleged defects in the notice. The court found that EHA provided contact information for its counsel instead of a responsible individual for the plaintiff, EHA itself, and that it attached an outdated summary of the Act. The appellate court, reversing the trial court, determined that substantial compliance with notice requirements is sufficient. The Court of Appeal explained that the purpose of the sixty-day notice requirement is to provide meaningful information to the alleged violator and public prosecutors—not to create technical traps that bar enforcement. Because the notice adequately identified the listed chemical, the products at issue, and the basis for the alleged violation, the court concluded that the statutory objectives were satisfied despite procedural defects. For businesses, the ruling signals that procedural challenges based solely on technical notice deficiencies may be less likely to succeed.

December 8, 2025 Information Letter

Additionally, on December 8, 2025, OEHHA published an information letter providing greater guidance regarding Proposition 65 compliance concerning items that accompany consumer products. The letter stated that, in addition to the new labeling requirements implemented by the 2025 Amendments, consumer product warnings must apply to items that accompany the

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purchase of consumer goods, such as receipts, labels, tags, product stickers, shipping materials, packaging, and instructions/manuals, whether the purchase is made in person or online. OEHHA's reasoning is that while such items may not themselves be consumer products, there can still be consumer product exposure from a person's acquisition or purchase of a consumer product.

However, because the consumer warning must be provided before any exposure occurs, the warning cannot be printed on the receipt or label itself. Rather, it is likely that Proposition 65 warnings will be seen more often near or at cash registers. This underscores the importance of evaluating how and where required Proposition 65 warnings are provided. As a result, businesses may need to reassess in-store and online purchasing frameworks to ensure compliance with the ever-evolving statute.

Conclusion

The recent developments surrounding California's Proposition 65 reinforce that the statute remains a living regulatory framework rather than a fixed set of compliance obligations. Amendments to warning requirements, evolving interpretations of existing rules, and continued additions to the chemical list demonstrate that businesses cannot rely on static compliance measures. Instead, effective Proposition 65 compliance requires ongoing awareness of regulatory activity and enforcement trends. As OEHHA continues to refine its regulations and guidance, even subtle changes may have significant implications for how warnings must be structured, displayed, or delivered.

As a result, businesses should closely monitor OEHHA rulemakings, regulatory amendments, and informal agency communications, including OEHHA letters, advisories, and public updates. Although these materials may not always have the force of law, they often signal enforcement priorities and provide insight into how OEHHA interprets its regulations in practice. Private enforcers frequently rely on these interpretations when issuing notices of violation, making them a critical component of risk assessment.

♦*Adam is senior litigation counsel at Allen Matkins where his practice focuses on real estate and environmental litigation. Arman is an associate at Allen Matkins where his practice focuses on real estate and commercial litigation.*

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business litigation. *See, e.g.*, *CNA Cas. of Cal. v. Seaboard Sur. Co.*, 176 Cal.App.3d 598, 608 (1986) (finding factual allegations in support of uncovered "antitrust" cause of action implicated potential coverage for piracy, unfair competition and idea misappropriation); *Pension Trust Fund, supra,* at 954 (concluding facts alleged in support of cause of action for "lender liability" could support a finding of coverage for breach of fiduciary duty); *Hudson Ins. Co. v. Colony Ins. Co.*, 624 F.3d 1264, 1268 (9th Cir. 2010) ("It does not matter that the NFL complaint . . . never listed slogan infringement as a cause of action."); *KM Strategic Management LLC v. American Cas. Co. of Reading PA*, 156 F.Supp. 3d 1154, 1160-1161 (C.D. Cal. 2015) (finding a "particular paragraph" in the underlying complaint created potential coverage for defamation despite the absence of causes of action for slander or libel).

Evaluating whether the duty to defend is triggered requires a liability insurer to conduct a rigorous investigation, filtering every factual allegation through the policy's myriad coverage grants to identify *any* potential for covered liability. It is not surprising, particularly in complex business litigation, that insurers often get it wrong.

When a wrongful denial goes unchallenged, the insurer incurs no penalty whatsoever - to the contrary, it profits. Meanwhile, the policyholder is left without the insurance protection it paid for, at times with devastating consequences.

Statute of Limitations

The limitation period for breach of the duty to defend is four years. *See* Cal. Code Civ. Proc. § 337. Recognizing the importance of the duty to defend, as well as its continuing nature, the California Supreme Court has held that this limitation period is subject to equitable tolling. *See Lambert v. Commonwealth Land Title Ins. Co*., 53 Cal.3d 1072, 1080 (1991). Specifically, even though the action against the insurer accrues upon the refusal to defend, the limitation period is tolled until resolution of the underlying action. *Id*.

This tolling rule has also been applied to a claim that the insurer's wrongful denial breached its implied covenant of good faith and fair dealing. *See McGranahan v. The Ins. Corp. of New York*, 544 F.Supp.2d 1052, 1063 (E.D. Cal. 2008) (finding "that the two-year statute of

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limitations for [the insured's] claim for bad faith and fair dealing was equitably tolled until entry of final judgment").

Damages For Breach Of The Duty To Defend

The potential damages recoverable for breach of the duty to defend include the defense fees and costs incurred, "bad faith" damages, and punitive damages.

While beyond the scope of this article, the insured may also be able to recover from its insurer the amount of any settlement it reached or judgment it paid.

Defense Fees and Costs

Where an insurer breaches its duty to defend, "the proper measure of damages is the reasonable attorneys' fees and costs incurred by the insured in defense of the claim." *Marie Y. v. General Star Indem. Co*., 110 Cal.App.4th 928, 960-961 (2003).

An insured should also be able to recover prejudgment interest at the annual rate of 10% from the date of each invoice. *See* Cal. Civ. Code § 3289(b); *Tradewind Prods., Inc. v. Hartford Fire Ins. Co.*, 2009 WL 10710831, at *4 (C.D. Cal. Mar. 30, 2009) ("[P]laintiff is entitled to prejudgment interest from the dates it received invoices from its attorneys until defendants tendered payment.").

Tort ("Bad Faith") Damages

If bad faith is established, *i.e.*, if the insurer's position is found to have been unreasonable, then in addition to its defense fees and costs, an insured may also be able to recover any "tort" damages it has suffered as a consequence of the insurer's breach. *See Campbell v. Superior Court*, 44 Cal.App.4th 1308, 1319-1320 (1996). Such damages may include the attorney's fees the insured incurred compelling its insurer to pay the benefits due under the policy. *See Brandt v. Superior Court*, 37 Cal. 3d 813, 817 (1985).

Punitive Damages

If it can be proven by clear and convincing evidence that the insurer, in denying a duty to defend, has been guilty of oppression, fraud, or malice, the insured may also be entitled to recover an award of punitive damages. *See* Cal. Civ. Code § 3294(a); *Tibbs v. Great American Ins. Co*., 755 F.2d 1370, 1375 (9th Cir.1985) ("[T]here is sufficient evidence to support a finding that Great American refused to defend Tibbs in bad faith and is guilty of oppression, fraud, or malice.").

***

This article hopefully leaves business litigators with two key takeaways. First, in light of California's broad, policyholder-friendly "potential for coverage" standard, be skeptical of a liability insurer's assessment that it does not owe your client a duty to defend. And second, given the generous statute of limitations in California, your client may still have time - *even long after the litigation has concluded* - to challenge an insurer's wrongful refusal to defend and recover back the losses it incurred.

♦ *Dominic Nesbitt's practice has focused exclusively on insurance recovery for commercial policyholders, with an emphasis on enforcing liability insurers' duties to defend and indemnify. Dominic co-founded Osborne & Nesbitt LLP and now is Of Counsel at Franklin Soto Leeds LLP.*

SAVE THE DATES

April 30th

Brown Bag Lunch with Hon. Nate Scott

(Limited to attorneys in practice < 10 years)

May 14th

YLD Happy Hour

(Limited to attorneys in practice < 10 years)

May 27th

Robert Palmer Wine Tasting Program

September 9th

Dinner & Program

November 18th

Dinner & Program

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I. Schedule A Litigation Primer

"Schedule A" litigation—primarily in the Northern District of Illinois but also in several other courts—has been a powerful tool to enforce trademarks, copyrights, and patents against foreign online retailers selling to U.S. customers on popular online marketplaces, such as Amazon.com and Alibaba.com. Fundamental to Schedule A litigation is filing the "Schedule A" under seal so that the defendants are not initially aware that they have been sued. The complaint is also typically filed under seal, further reducing the likelihood the defendants will be alerted.

After the complaint, the plaintiff files—also under seal—an *ex parte* motion for a TRO. Because the motion is *ex parte*, the defendants do not have an opportunity to oppose. The TRO usually seeks, among other things, to enjoin the sale of the allegedly infringing products, freeze each defendant's assets, and permit service of the complaint on each defendant via an email address obtained from the relevant online marketplace. If the TRO is granted, the plaintiff notifies the online marketplace, and the online marketplace closes the product listings and freezes each defendant's financial account (for example, all the funds in the seller's Amazon Seller account). This is typically the first time the defendants learn of the lawsuit. In some courts, a plaintiff can obtain a TRO a mere few days after filing the Schedule A complaint and motion for TRO. This practice stems from concern that, if given advanced notice, foreign online retailers might transfer their U.S.-based assets outside a federal court's jurisdiction and create new listings under new names, escaping judgment. *See* Tommy Martin, *Schedule A Cases Can Provide Quick, Cost-Effective Relief Against Widespread Intellectual Property Theft on Online Marketplaces*, 36 Intell. Prop. & Tech. L. J. 1, 1 (2024); *see also InMode Ltd. v. DHGate Seller*, 8:24-cv-01803-MWF-ADS (C.D. Cal. Sept. 3, 2024), Dkt. No. 25 at 7.

The TRO remains in effect for fourteen days, unless extended for an additional fourteen days. Before the TRO expires, a plaintiff typically files a motion for a preliminary injunction to maintain the status quo, which a defendant may oppose. However, if a defendant does not answer the complaint, default judgment is typically entered against it, followed by entry of a permanent injunction.

II. The Proliferation of Schedule A Litigation

Over the past decade, the number of Schedule A cases has grown exponentially.

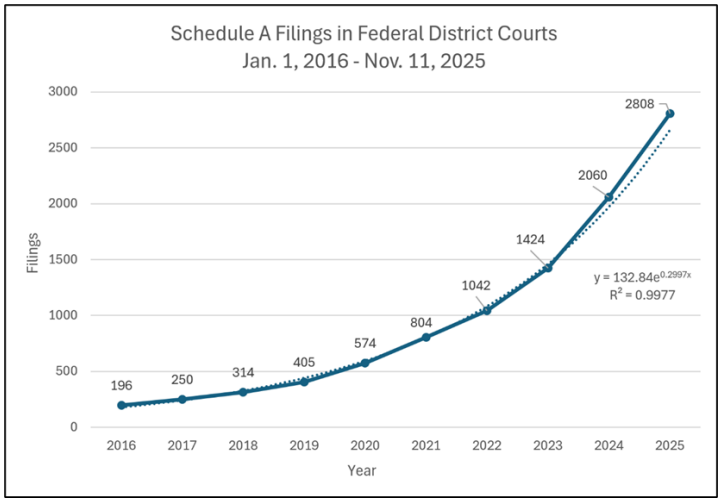

Fig. 1: Schedule A case filings in federal district courts over the last ten years.

Most Schedule A cases have been filed in the Northern District of Illinois ("N.D. Ill."), which accounts for 77% of filed cases. The Southern District of Florida ("S.D. Fla.") is the second most popular, at 15%, followed by the Southern District of New York ("S.D.N.Y"), at 2%, with the Western District of Pennsylvania ("W.D. Pa.") and the Eastern District of Virginia ("E.D. Va.") rounding out the top five, each with 1% of the filed cases.

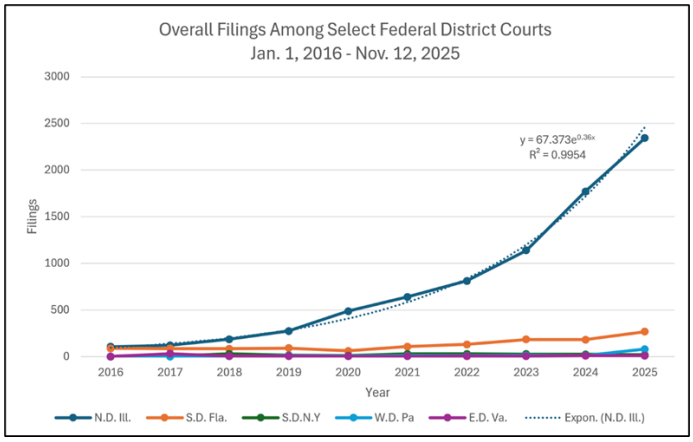

Fig. 2: Number of Schedule A filings in select federal district courts over the last ten years.

While N.D. Ill. continues to dominate, data from other federal district courts over the last two years hint at notable shifting trends. In 2024, the five most com-

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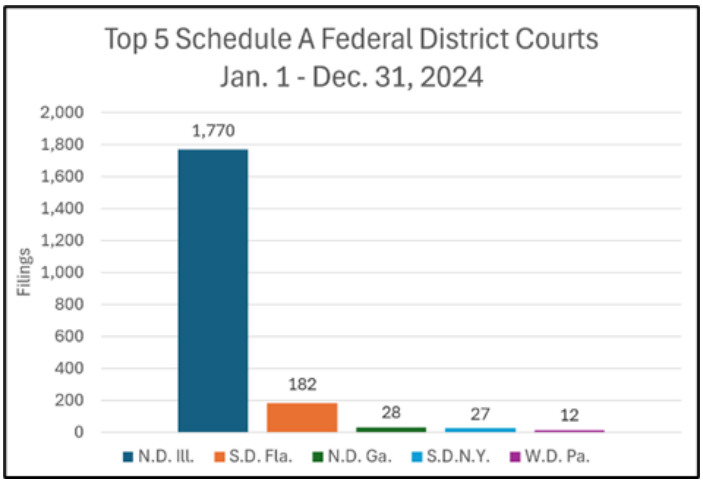
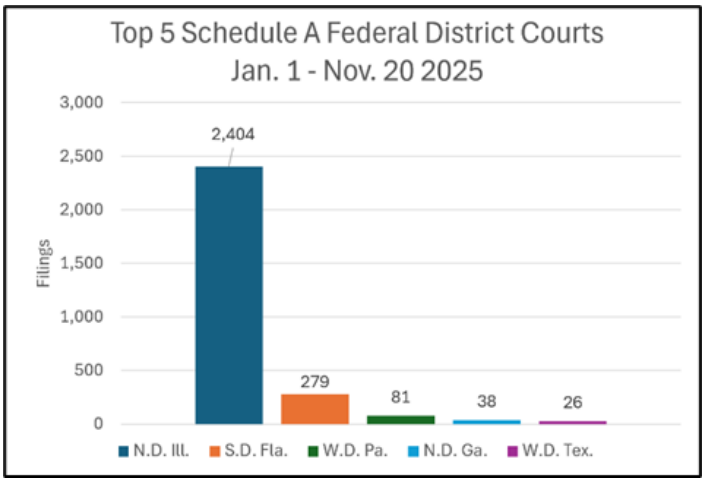
mon venues for Schedule A suits were: (1) N.D. Ill., (2) S.D. Fla., (3) the Northern District of Georgia ("N.D. Ga."), (4) S.D.N.Y, and (5) W.D. Pa. Last year, W.D. Pa. was the third most common Schedule A venue, the Western District of Texas ("W.D. Tex.") was the fifth most common venue, and S.D.N.Y. was not in the top five. The top five venues for 2025 were: (1) N.D. Ill., (2) S.D. Fla., (3) W.D. Pa., (4) N.D. Ga., and (5) W.D. Tex. E.D. Va. was not among the top five for 2024 or 2025.





Figs. 3A–B: Schedule A filings in the top 5 federal district court venues in 2024 and 2025.

Complaints asserting trademark and copyright claims comprise a majority of the Schedule A cases in the most popular federal district courts, but many cases involve patent claims, and the distribution of subject matter varies across districts. A chart showing the number and type of intellectual property claims comprising Schedule A complaints across the seven federal district courts discussed above over the last two years is shown below.*Fig. 4A*: Subject matter of 2024 and 2025 Schedule A filings among top federal district courts.

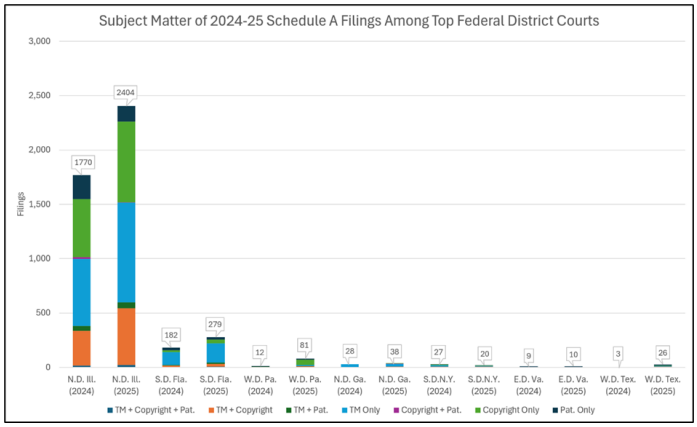


Fig. 4A: Subject matter of 2024 and 2025 Schedule A filings among top federal district courts.

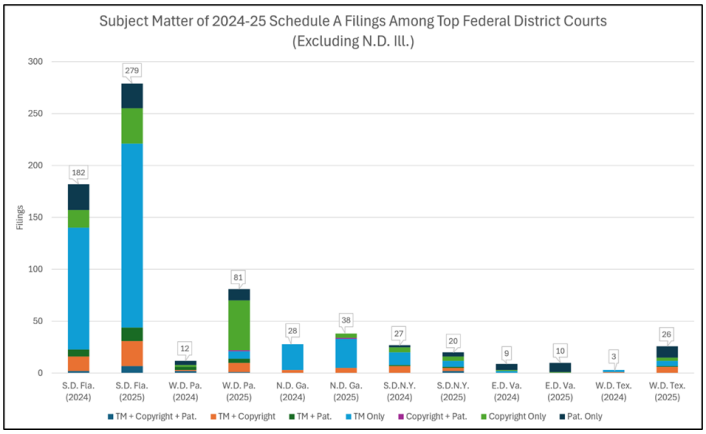


Fig. 4B: Fig. 4A reproduced without N.D. Ill. to more clearly highlight trends in other federal district courts.

III. Critiques of Schedule A Litigation Practice

Commentators have highlighted several due process concerns with the Schedule A litigation practice. Some argue that the secrecy afforded Schedule A plaintiffs has gone too far and that defendants have been deprived of fair notice under the Federal Rules. *See, generally,* Fed. R. Civ. P. 4. With some courts routinely granting motions to seal complaints and *ex parte* TRO motions, Schedule A defendants often do not learn about a lawsuit until after an asset freeze is already in place. *See* William Fisher, *Schedule A Litigation Targeting Foreign Sellers is Changing Online IP Enforcement but Not Without Controversy*, Potomac L. Grp. (Apr. 2, 2025). The Federal Rules limit *ex parte* TROs to narrow circumstances: specific facts must clearly show the movant will suffer immediate and irreparable injury, loss, or damage before the ad-

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-Schedule A: Continued from page 11-

verse party can be heard; the movant's attorney must certify what efforts were made to give notice and the reasons why notice should not be required; and the movant must post adequate security. *See* Fed. R. Civ. P. 65(b)(1), 65(c). These safeguards, however, are not always enforced. Indeed, many issued TROs restrain business and assets entirely unrelated to the allegedly infringing conduct.

Increased use of alternative service of process, such as service via email or instant message platforms, may exacerbate the risk of insufficient notice to some defendants. *See, e.g.*, *InMode Ltd. v. DHGate Seller*, 8:24-cv-01803-MWF-ADS (C.D. Cal. Feb. 25, 2025), Dkt. No. 42 at 3–5; *Xing v. P'ships & Uninc. Ass'ns Identified on Schedule A*, 2:21-cv-00588-RGK-RAO (C.D. Cal. Feb. 3, 2021), Dkt. No. 23 at 5–6. While such alternative service may expedite proceedings, Schedule A plaintiffs may have only incorrect or ineffective contact information. *See* Zhiwei Hua, *The Need for Reform in Schedule A E-Commerce Lawsuits*, NYSBA (Aug. 12, 2025).

The volume of defendants named in Schedule A lists may also raise concerns about demonstrating personal jurisdiction over each defendant, proving the merits of each claim on an individual defendant basis, and the sufficiency of a bond for each individual defendant. *See Viral DRM LLC v. Onyshchuk*, 3:23-cv-04300-JSC (N.D. Cal. Jan. 17, 2024), Dkt. No. 66 at 2–5; *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Babaria v. Blinken*, 87 F.4th 963, 976 (9th Cir. 2023) *cert. denied sub nom. Babaria v. Jaddou*, 145 S. Ct. 160 (2024); *Eicher Motors Ltd. v. P'ships & Uninc. Ass'ns Identified on Schedule "A"*, No. 25-CV-02937, 2025 WL 2299593, at *2. Commentators also raise judicial efficiency concerns. For example, one author estimates that misjoinder in Schedule A litigation practice could have cost the government over $250 million in filing fees as of 2023. Eric Goldman, *A Sad Scheme of Abusive Intellectual Property Litigation*, 123 Colum. L. Rev. F. 183, 191 (2023).

IV. Recent Court Decisions and Orders Restricting Schedule A Litigation Practice

Recent court orders curbing or condemning Schedule A litigation reflect growing concern among the judiciary. This is not simply sentiment; it is a trend. For example, in 2025, courts granted TROs in only 45.9% of Schedule A cases, down from 75.2% in 2024. As a result, courts granted fewer TROs in Schedule A cases in 2025 compared to 2024, despite 2025 having 63% more Schedule A cases. The data indicate that the number and rate of TRO grants will continue to decline in 2026.

In denying a motion for a TRO, one judge in N.D. Ill. recently held that "the Schedule A mechanism demands that the Federal Rules of Civil Procedure and principles of due process be unreasonably contorted for plaintiffs to receive the relief they seek. It is no answer to say that the ends justify the means." *Eicher Motors* at *10. He concluded that "the Schedule A mechanism should no longer be perpetuated in its present form" and explained that "the Court will exercise its discretion to deny requests for a prejudgment, ex parte asset freeze in this and other Schedule A cases." *Id.* at *8, *10.

Another judge in N.D. Ill. dismissed a Schedule A complaint naming only thirteen defendants for improper joinder. *See Tub Works LLC v. Individuals, Corps., Ltd. Liab. Cos., P'ships & Uninc. Assocs. Identified on Schedule A*, 1:25-cv-10259 (N.D. Ill. Sept. 8, 2025), Dkt. No. 6 at 1. The court instructed that "even if Plaintiff had satisfied Rule 20's requirements," the court would nonetheless "exercise its discretion to 'not allow joinder because it would undermine the fair and efficient resolution of the case.'" *See id.* at 4–5 (internal citation omitted). The court then implied that it would also deny joinder of multiple defendants in other Schedule A cases. *See id.* at 5.

Courts in other districts are also acting to curtail Schedule A litigation practice. In June 2025, in response to a Schedule A complaint, a judge in S.D. Fla. *sua sponte* issued an omnibus order outlining the court's many requirements for Schedule A cases. *See generally Genie-S Int'l Ltd. v. P'ships & Uninc. Ass'ns Identified on Schedule "A"*, 0:25-cv-61074-WPD (S.D. Fla. June 2, 2025), Dkt. No. 4. Failure to comply with the order results in dismissal. *Id*. at 5. Then, in July 2025, a judge in W.D. Pa. issued a restrictive "'Schedule A' Case Standing Order." *See generally In re "Schedule A" Cases*, No. 2:25-CV-927, 2025 WL 1906812 (W.D. Pa. July 10, 2025). And in September 2025, the Chief Judge for the District of New Jersey issued a substantially similar Schedule A case standing order, with failure to comply constituting good cause for dismissal. *See In Re: "Schedule A" Cases*, U.S. Dist. Ct. for the Dist. of N.J. (Sept. 25, 2025).

-Continued on page 14-

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V. Federal Courts in California Largely Reject Relief Requested in Schedule A Litigations

Few plaintiffs file Schedule A complaints in California, and the practice is unlikely to proliferate. Over the last ten years, 39 Schedule A cases have been filed in California federal district courts. The authors have not found California federal district court orders addressing the Schedule A litigation practice in general, but federal judges in California handling Schedule A cases have highlighted issues regarding joinder, *see Betty's Best, Inc. v. Facebook Advertisers Listed on Schedule A*, 3:23-cv-04716-JSC (N.D. Cal. June 9, 2025), Dkt. No. 106 at 2–3; notice, *see Derry Prods., Inc. v. Individuals, P'ships & Uninc. Ass'ns Identified on Schedule A*, 2:21-cv-02155-FLA-SK (C.D. Cal. Mar. 18, 2021), Dkt. No. 16 at 2–3, n.3, *Shenzhen Shisanlang Tech. Co. Ltd. v. Nancy Protectz*, 2:24-cv-03744-PSG-MAA (C.D. Cal. June 17, 2024), Dkt. No. 14 at 3–4; and personal jurisdiction, *see Viral DRM LLC v. YouTube Uploadeers [sic] Listed on Schedule A*, 3:23-cv-05594-JSC (N.D. Cal. Jan. 17, 2024), Dkt. No. 33 at 1–3, *Kinsely Tech. Co. v. Ya Ya Creations, Inc.*, 2:20-cv-04310-ODW-KS (C.D. Cal. May 18, 2022), Dkt. No. 188 at 5–12. California federal district courts have collectively denied two-thirds of all TRO requests in Schedule A cases over the last six years. In contrast, in N.D. Ill., that number is about two percent. Consistent with the trend in California federal district courts, one judge in the Central District of California rebuked plaintiff's counsel for filing, what it called, a frivolous TRO:

> When an ex parte motion is filed . . . the judge drops everything except other urgent matters to study the papers. It is assumed that . . . all will be lost unless immediate action is taken. Other litigants are relegated to a secondary priority. The judge stops processing other motions. Even hearings or trials—where a courtroom full of deserving users of the court are waiting—are often interrupted or delayed.
>
> ***It is rare that a lawyer's credibility is more on the line, more vulnerable***, than when he or she has created this kind of interruption. Lawyers must understand that filing an ex parte motion, whether of the pure or hybrid type, is the forensic equivalent of standing in a crowded theater and shouting, "Fire!" ***There had better be a fire.***
>
> *Derry Prods., Inc. v. My Lovely Store*, 2:21-cv-02556-AB-SK (C.D. Cal. Apr. 13, 2021), Dkt. No. 17 at 3 (first ellipsis in original) (emphasis added).

While the authors note the outcomes are more plaintiff-friendly after the TRO stage in California federal district courts, the heightened scrutiny at the TRO stage makes California federal district courts relatively unfavorable venues for Schedule A plaintiffs seeking immediate injunctive relief and asset restraints—linchpins of the Schedule A strategy. This, coupled with the comparative dearth of Schedule A cases in California only trending further downward, makes it unlikely the practice will proliferate in this state.

VI. Conclusion

While the Schedule A litigation practice may not be common or proliferating in California, and while courts around the country are increasingly attempting to rein in the practice, it remains a common and powerful tool for intellectual property owners to attempt to enforce their rights against foreign online retailers.

♦ *Jared Bunker and Marko Zoretic are partners and Oren Rosenberg is an associate in Knobbe Martens Orange County office.*

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