

Letter from the President

Dear Professor Miller:

Many thanks for taking time out from your busy schedule at the Law School to fly in from Cambridge. As usual, you were spectacular in your moderation of our panel of judges and lawyers discussing "hot" topics in business litigation at the Association of Business Trial Lawyers dinner meeting in February. Everyone agrees that the program was both enjoyable and highly provocative.

It is now a month later and I am sitting in a deposition with 14 other lawyers in a conference room (without windows) of the 46th floor of a Los Angeles-style skyscraper (unlike Boston's, they are earthquake-proof). The deposition is going into its fifth day; and, as I was daydreaming, it occurred to me that we may have omitted one of the "hottest" topics of all in business litigation today—the commercialization of business litigation. To put it mildly, old-fashioned litigation is going the way of carbon paper and thermofax. Let me give you a few examples.



Harvey I. Saferstein

Keeping up with the latest developments in substantive state and federal law as well as civil procedure is no longer sufficient. In addition, we now need to become actors and graphic artists. Videotape depositions, cameras in the courtroom, the television images projected by "LA Law," and advances in computer-generated graphics require many of us to take art lessons, dress lessons, and voice lessons before we can enter the courtroom of the '90's. And, of course, few corporate litigators would dare to venture into court without a reputable jury consultant. With batteries of trained psychologists and statisticians, jury consultants can tell us with graphs and charts how our case should be pitched and which jurors to select. The graphs and charts can move with computers attached to each mock juror if you pay for it. Indeed, with mock courtrooms and the availability of paid mock jurors to sit through extended mock trials (witnesses and all), you can predict your clients' results with frightening accuracy.

Of course, the '90's business litigator may never see the courtroom, or at least the actual one. Now we rent our judges and courtrooms. Once a novelty, the rent-a-judge system rivals the "real" system with its own courtrooms and growing panel of judges. They even have their own backlogs. The only difference is that they rarely complain that they are *both* overworked and underpaid—just overworked.

Nor are things much different back at the law office. We have learned (or relearned) to type, as well as become computer literate. When all the other lawyers in the office have their own computers

Continued on Page 8

ABTL Panel Faces 'Hot' Issues In Business Litigation

Editor's Note: On February 5, 1991, ABTL hosted a panel discussion regarding tort issues in business litigation. This article provides edited excerpts from a transcript of that panel discussion, a tape of which, together with program materials, can be obtained from the Rutter Group. The moderator was Professor Arthur Miller, Harvard Law School. Panelists included:

Justice David N. Eagleson, Supreme Court of California;

Judge Arthur A. Alarcon, Ninth Circuit;

Justice Miriam Vogel, California Court of Appeal;

Judge A. Wallace Tashima, U.S. District Court, Central District;

Judge Eli Chernow, Los Angeles Superior Court;

Patrick Lynch, a partner with O'Melveny & Myers;

Larry R. Feldman, a partner with Fogel, Feldman, Ostrov, Ringler & Klevens; and

Gerald M. Stern, Director, Executive Vice President and Senior General Counsel, Occidental Petroleum.

Prof. Miller: One of the hot cliches that you hear these days is "hardball litigation." What is a hardball litigator?

Mr. Feldman: A hardball litigator works at a firm that gets paid a lot of money on an hourly basis and that has five lawyers on every case who want to make it as hard as possible for the plaintiff to get to the end of the line.

Prof. Miller: If I were to believe you, the only hardball litigators out there are defense lawyers.

Mr. Feldman: It is not just defense lawyers. It is people who have clients that can afford the process of litigation better than their adversaries.

Prof. Miller: Does hardball litigation involve attrition, delay, harassment, just plain old meanness?

Mr. Feldman: It is getting papers delivered at 5:00, on a Friday before a holiday, on Christmas Eve.

Prof. Miller: You don't have to be wealthy to do that.

Mr. Feldman: You need to have a client that can afford to pay the bills for a lot of people to do a lot of work and to inundate the other side with a lot of work. You do need a wealthy client.

Judge Chernow: That's one part of playing hardball, but the plain meanness isn't limited to wealthy clients. It doesn't take money to serve motion papers when you know opposing counsel will not see them because he will be at a funeral.

Prof. Miller: Does it work?

Continued on Page 2

Judge Chernow: For a while.

Mr. Feldman: I think it works. If I know I'm up against a certain firm, and how much it's going to cost my client, then I may know that plaintiff will need to have a better case than if my defense firm were unknown...I'm not recommending it but it does work to some extent.

Mr. Stern: I am a customer and I can tell you it does not work. We have never hired a firm based on its reputation for having hardball litigators. It's a different thing if you are thinking of success in litigation. But if you are thinking of getting hired, it doesn't work.

Prof. Miller: You only hire nice people.

Mr. Stern: Absolutely. I'm in trouble to begin with because we are a target defendant. Hiring a nasty litigator would double the problems I already have.

Prof. Miller: Now Patrick [Lynch], you've been sitting here very quietly. Most of the blame Larry was shoveling out, he was shoveling at your feet.

Mr. Lynch: In the major leagues they play hardball. I think I'm a major league litigator and I don't play softball. I will take a deposition for eight days if that's necessary, given the merits of the case. I do not serve papers on Christmas Eve or any other holiday. And I do not wait until someone is leaving for a funeral to start a motion. I have had that happen to me and I have never met anybody who admitted doing it. So in that sense, there are no hardball litigators.

Prof. Miller: That's right. They don't exist.

Mr. Lynch: The papers have arrived in unmarked envelopes.

Judge Tashima: I believe there are a lot of hardball tactics. Most of it happens outside the courtroom. I believe judges can control it in the courtroom. I don't know what a judge can do to control it outside the courtroom.

Judge Chernow: There is no question that it happens outside the courtroom. I have just spent the last three years encouraging lawyers, telling them that they have to play hardball; that if they wanted to be a nice person, if they wanted to accommodate people's requests for extensions of time, they probably would wind up going to trial without discovery, because we had set time limits. If the lawyers continued to do what they used to do before fast track, their clients were going to be badly hurt. They [could] neither be accommodating nor understanding; they had to be very vigorous about getting the case ready for trial. That is part of an absence of civility that has to happen to move cases at a faster pace.

Justice Vogel: I don't think it is fair to blame it on the fast track. I sat on a fast track court, as did Eli [Chernow]. I saw more nastiness when I did nothing but law and motion in traditional kinds of cases than I did in six months with fast track cases.

Prof. Miller: What kind of nastiness?

Justice Vogel: We called it sandbox litigation because it was the kind of behavior you would expect from children, not lawyers.

Prof. Miller: Children? After 19 years of education, they behaved like children in a sandbox?

Justice Vogel: Yes.

Prof. Miller: What did they do?

Justice Vogel: They wouldn't share. They were abusive verbally. Rarely did it get to the point of exchanging blows, but they were

verbally abusive, they refused to share information the way they presumably refused to share toys as children. They refused to cooperate. They kept telling me what they thought was fair, as if somebody guaranteed them that life in litigation was going to be fair, which was something I never thought. They brought to the litigation arena a very unrealistic view of what was going on. There is a big difference between taking an eight-day deposition and the nasty, mean cold-heartedness that I have seen.

Justice Vogel: I think there is a difference between meanness and hardball. It's the tone. It's a firm or a lawyer who is always in court because somebody is saying he or she did something inappropriate, discourteous, without thought. Lawyers develop a reputation. Some clients seek out such lawyers. There was a firm, no longer in business, that made its reputation that way.

Prof. Miller: Larry says it pays off.

Justice Vogel: Sure, in a marginal case, the ones he described where he and his client don't have the economic incentive to stay with it.

Prof. Miller: Judge Tashima says he doesn't see it in his courtroom but you see it in your courtroom. Is that because he is in federal court?

Justice Vogel: Yes. They're nice to him. Lawyers are on better behavior in federal court than in state court.

Prof. Miller: Do you see more of this lately? People talk about this as if it is a contemporary phenomenon. I practiced law 30 years ago. We used to serve papers during the holidays. Do you see a difference?

Mr. Lynch: I think the field is more competitive. Clients are more involved in the process. They don't leave cases to the lawyers as they did in the past. A lot of firms that are still in business trade on their reputations as hardball litigators.

Mr. Stern: I would never hire them. You say there are corporations who want to hire attorneys for scorched earth tactics. I see more of that on the plaintiff's side, trying to depose directors just for harassment.

Judge Alarcon: On the Ninth Circuit, we don't see the hardball litigators. They have 15 or 20 minutes and they are polite to each other. At the trial court level, I wonder how the pressure to meet deadlines has impacted civility in court.

Judge Tashima: With these tougher deadlines on the fast track, the lawyers probably want to put extra pressure on their opponents to get an edge. That probably leads to more Rule 11 type problems. By and large, it is something that happens at depositions.

Prof. Miller: What about motion practice?

Justice Vogel: There are frivolous motions, unnecessary motions, motions that would have been resolved in the old days, 30 years ago, by a phone call, by lunch.

Prof. Miller: So your sense is that it's escalating. Is that your sense?

Judge Tashima: No. In the last two years, the number of frivolous motions has decreased substantially. Rule 11 probably has quite a bit to do with that in the federal courts.

Contributors to this Issue:

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Judge Chernow: I think the advent of sanctions in the state court has decreased that kind of abuse, the frivolous motion. I also think fast track has reduced very dramatically the kind of abuse we used to see on the eighth floor—people making you come to court to get the order that you're plainly entitled to just in hopes that they'll exhaust you or that you'll give up. I think individual calendaring in the state system has helped because that same lawyer will have to appear before the same judge and if it happens over and over again, there will be sanctions.

Justice Vogel: I wish I could agree but I don't see it. Most of the judges are still uncomfortable in imposing significant sanctions. I think when the risk is of an award of only \$500, \$750, or \$1,000, some corporations would consider that a cost of doing business. If their lawyer can get an edge by incurring some sanctions, it pays off.

Mr. Lynch: I have never worked with a client who would accept sanctions. I would not want to go back and report to any client I have ever worked with that the judge had imposed sanctions on me.

Mr. Feldman: I think sanctions are the worst thing that has come down the pike with the bar. I think that it intimidates lawyers, it intimidates people from making motions they would otherwise make. I think it is just a way for the judges to keep lawyers out of their courtroom whether they should be there or not. I think it does have the effect of preventing people from making motions they might otherwise make. It does cause lawyers to reach compromises. I don't know if that's good or bad. But I think some judges impose sanctions if the wrong "i" is dotted or you don't cross the "t" exactly in accordance with some procedural thing. There may be a judge who routinely assesses sanctions because, in his judgment, there was not enough meet and confer. I think it intimidates. That is not what the system of justice is all about.

Prof. Miller: You mean you're scared?

Mr. Feldman: It is not a question of being scared. I think there is a professional pride in not being assessed sanctions. There is stigma attached. You don't want to tell the client that you were sanctioned so you wind up on appeal. You see appeals being brought over the issue of \$100 sanctions, \$500 sanctions, because somebody feels that they've been wronged by a court.

Judge Chernow: For the first time, the appellate courts are backing up the trial courts.

Justice Vogel: You take trial judges who have imposed sanctions at the trial level and put them on the court of appeal and they tend to be consistent.

Part of the problem in this whole discussion is that to talk about what O'Melveny & Myers or Larry's firm does is not representative of what judges see on the eighth floor or in fast track.

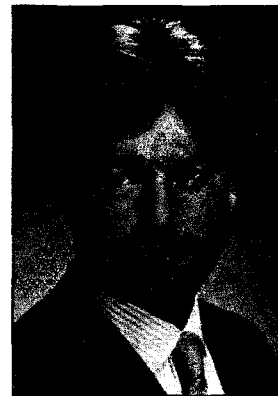
Justice Eagleson: We don't see it at all in the Supreme Court; I didn't see it on the Court of Appeals; I didn't see it as a trial judge. I agree with Judge Tashima, when they get to trial you can pretty well handle the problem there. They are all worn out by the time they get there. When I was in the law department back in the '70's, it was not a problem. I think conditions have deteriorated. But I would suggest that the hardball litigation is broader than just filing papers on Christmas Eve.

Judge Tashima: I have a theory. It is important to note that our district in the Central District of California imposes Rule 11 sanctions more frequently than any other district in the country. I think that is because our bar is so large. We must have about 50,000 lawyers in Los Angeles County alone. Nobody knows each other anymore. It is not a community. It is much easier to seek sanctions against a stranger, somebody you'll probably never come up against the next time around. And for that matter, it is much easier for a

Continued on Page 6

Decision May Change Construction Defect Litigation Strategies

A recent federal court decision may portend a dramatic shift in construction litigation in California. *New Hampshire Ins. Co. v. Vieira*, 1991 D.A.R. 3987 (Apr. 8, 1991), rejected the reasoning of a line of decisions construing the term "property damage" for purposes of the standard form comprehensive general liability ("CGL") insurance policy. The case may radically alter the pleadings and strategies of attorneys involved in construction litigation, which has long been fueled to a large extent by CGL insurance.



Mark A. Graf

Applying California law, *New Hampshire Ins. Co. v. Vieira* held that a common form of damage—diminution of value—did not constitute "property damage" for purposes of a standard CGL policy. In so holding, the court rejected cases which held that diminution in value was covered under CGL policies, in reliance on a 1954 decision by the Minnesota Supreme Court, *Hauenstein v. St. Paul - Mercury Ins. Co.*, 65 N.W.2d 122 (1954). There, the insured supplied defective plaster which cracked when applied to the interior walls of a residence. The court held the insurer

liable for the lesser of: (1) the reduction in the market value of the building resulting from the presence of the defective plaster; or (2) the cost of removing the defective plaster and restoring the building "to its former condition," plus damages for loss of use.

As recently as 1984, a California Court of Appeal relied on *Hauenstein* to hold that a CGL policy provided coverage for diminution in value. *Economy Lumber Co. v. INA*, 157 Cal.App.3d 641 (1984).

Ironically, *Hauenstein* was rejected by the Minnesota Supreme Court six years ago in *Federated Mutual Ins. Co. v. Concrete Units, Inc.*, 363 N.W.2d 751 (Minn. 1985). That court recognized that *Hauenstein* made no sense in light of changes in CGL policies dating back to 1966:

"The current definition of property damage requires 'physical injury to or destruction of tangible property..., or loss of use of tangible property which has not been physically injured or destroyed.' [emphasis added]." 1991 D.A.R. at 3988.

Prior to 1966, CGL policies provided coverage for "damages because of injury to or destruction of property, including the loss thereof." 1991 D.A.R. at 3990, n.1.

New Hampshire Ins. Co. observed that following *Hauenstein* and its progeny would mean treating the CGL policy as a performance bond, guaranteeing the quality of the insured's work. That was never the intended purpose of CGL insurance. As the court said in *Western Employers Ins. Co. v. Arciero & Sons, Inc.*, 146 Cal. App.3d 1027 (1983):

"The risk intended to be insured is the possibility that the...work of the insured, once relinquished or completed, will cause bodily injury or damage to the property other than to the product or completed work itself... The policy is neither a performance bond nor an 'all risk' policy." 146 Cal.App.3d at 1031 [citations omitted].

Continued on Next Page

The Facts of the Case

New Hampshire Ins. Co. was a typical case in the arena of construction litigation. It arose from a dispute between a general contractor and a drywall company. The general contractor hired Vieira to install drywall. When the drywall was not properly installed, the property owners sued the general contractor, who cross-claimed against Vieira. New Hampshire Insurance Company paid \$300,000 on behalf of Vieira, while reserving its right to reimbursement.

Various repairs were made. Nevertheless, Vieira asserted that the value of the property had diminished by \$670,000 due to the increased fire risk caused by Vieira's defective work and the associated burden of maintaining an electrical fire monitoring system. Vieira contended that this diminution constituted property damage which was covered under its CGL policy with New Hampshire.

The court disagreed, holding that:

"The diminution in value to the housing projects does not constitute property damage as defined by the policy. Thus, New Hampshire is not liable for the settlement fees it advanced on Vieira's behalf."

1991 D.A.R. at 3989.

Consequences of the Decision

Of course, this decision is not binding on California courts. Nevertheless, it is a well reasoned case that appears likely to be persuasive. Assuming that California courts follow in the path illuminated by *New Hampshire Ins. Co.*, litigants in the construction arena will be forced to adopt new strategies as they seek out deep pockets to fund judgments.

It is self-evident that litigation tends to be driven by the plaintiff's desire to obtain money. As a result, plaintiffs target defendants with collectible insurance coverage. Until now, any defendant with CGL coverage has been fair game. A low-profile sub-contractor might have emerged as a primary target defendant, without regard for his culpability, if he had a CGL policy. Uncertainty in this area has provided an incentive for the CGL insurer to contribute to a settlement, even if the insurer did not believe the CGL policy should provide coverage.

After *New Hampshire Ins. Co.*, the posture of the CGL insurance carrier may change, at least where a case involves damages in the nature of diminished value. Consequently, plaintiffs may need to find new target defendants or new ways to characterize damages.

Continued Uncertainty Regarding Costs of Repair

In addition to holding that CGL insurance does not cover damages constituting diminished value, *New Hampshire Ins. Co.* held that there is no coverage for physical damage to tangible property if that damage arises from efforts to repair the insured's defective work. 91 D.A.R. at 3990. Vieira argued that, even if there was no coverage for diminution in value, there should be coverage for injury to tangible property in the form of holes that were cut in roofs to install drywall to correct Vieira's mistakes. The court disagreed, holding that such repairs could not "convert non-covered damage into covered damage." 1991 D.A.R. at 3990.

This portion of the holding conflicts with earlier cases which found coverage under similar circumstances. For example, in *St. Paul Fire & Marine Ins. Co. v. Sears Roebuck & Co.*, 603 F.2d 780 (1979), the insured installed a urethane foam roofing material over an existing tar roof coating. The foam roofing proved defective and had to be replaced. The foam roofing could not be removed without causing damage to the existent tar roofing. The court held there was coverage under the circumstances because repair or replacement of the insured's defective product would entail injury to or

replacement of property which was not the insured's product.

It is impossible to predict whether courts will follow the new rule established by this portion of *New Hampshire Ins. Co.* There may be continued confusion in this area.

Confusion Regarding Exclusions

New Hampshire Ins. Co. promises no relief from confusion surrounding the applicability of CGL policies where there clearly has been physical injury to tangible property and damages do not consist of diminished value. Under those circumstances, the question is how to apply standard exclusions for liability due to "property damage" to the insured's own "work" or "products." These exclusions are commonly lumped together and referred to as the "work product" exclusions.

CGL policies have been revised to not only clarify the scope of the term "property damage," as discussed above, but also to expand the scope of "work product" exclusions. California courts interpreting this revised language have continued to reach inconsistent results in construction defect cases, often due to judicial reliance on the early cases and attempts to extract a consistent rule from inconsistent decision.

Over the decades, courts and commentators have wrestled with different versions of these exclusions in a futile effort to achieve some consistent approach to their interpretation and application. These exclusions have been variously interpreted by California jurists in decisions characterized by incomplete analysis, broadly-phrased dictum and inattention to significant differences in policy language. The resultant uncertainty can be used to advantage by the informed litigator, whether representing a plaintiff, a defendant/insured or an insurer.

Counsel for the plaintiff will want to closely analyze case law construing CGL policy language so that he or she can develop theories of liability and causation that may increase the total amount of available insurance coverage. For example, a roofing sub-contractor's insurance policy may not provide coverage for defects in the roof itself. However, case law may support the proposition that the contractor's policy would cover damage to other parts of the building or its contents resulting from roof leaks. If, however, the defects in the roof were themselves due to defects in framing, there may be coverage for the roof defects under the CGL policy issued to the framing sub-contractor or possibly the general contractor.

At the same time, counsel for the insured contractor or supplier is usually motivated to seek liability coverage for claimed construction defects. However, the absence of such coverage can be useful to defense counsel in negotiating a favorable settlement because, as a practical matter, an impecunious and uninsured defendant will be unable to pay much money either in settlement or in satisfaction of any judgment. In such situations, the attention of plaintiff's counsel frequently shifts to the well-heeled or insured defendants. Typically, counsel for the insured defendant is required to press a claim of coverage against the insurer while attempting to persuade plaintiff's counsel that there is no coverage.

Obviously, CGL insurers seek to eliminate, limit or share with other insurers coverage for their insureds' liability for construction defects. The insurers' counsel will seek to limit the amount of damages covered under his client's policy by identifying discrete forms of property damage that are excluded from coverage. At the same time, counsel is likely to seek to share liability with other insurers. Toward that end, he or she will rely on case law which narrowly interprets the "work product" exclusions contained in a co-insurer's policy, while broadly defining the term "property damage" contained in that same policy.

The Exclusions

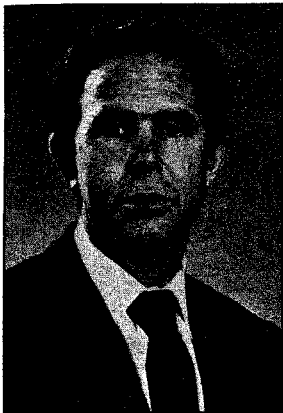
Whatever the goal of a particular litigator, he is likely to find

Continued on Page 8

Editor's Note: This new

column, *Cases of Note*, will publish decisions of interest to business litigators. The year already has produced a few important if not earthshaking decisions, a handful of which are summarized below.

Poster v. Southern California Rapid Transit Dist., 52 Cal.3d 266 (1990) (California Supreme Court): In *Poster*, the California Supreme Court held that, when one party makes a statutory settlement offer pursuant to CCP § 998, that offer will remain open for the period specified in CCP § 998 even if a counter-offer is made by the offeree during the acceptance period. The Court rejected the rule of general contract law that a counter-offer constitutes a rejection of the original offer. The decision was predicated on the social policy favoring settlement. Offeror litigators might consider routinely making counter-offers to CCP § 998 offers, since they maintain the advantage of being able to always relent and accept the original offer. Alternatively, offeree business litigators may want to routinely send opposing counsel a withdrawal of CCP § 998 offers as soon as they get counter-offers. This will offset offeree's advantage in the bargaining process.



Rex Julian Beaber

J.C. Penney Cas. Ins. Co. v. M.K., 52 Cal.3d 1009 (1991) (California Supreme Court): In *Penney*, the California Supreme Court held that insurers who issue homeowners policies are not required to indemnify their insured for damage they have caused by sexually molesting a child at their home. The holding was based on Insurance Code § 533 which excludes from coverage any wilful act of the insured. The Supreme Court held that child molestation is an inherently harmful act and therefore psychiatric evidence on the perpetrator's positive motives were not relevant to the coverage issue. Intending to do the act was sufficient to trigger the protection of section 533. *Penney* may trigger defenses by insurers, in other cases, based on an allegation that the insured's conduct was the intentional perpetration of an inherently harmful act. However, *Penney* appeared to be reasoned mostly on the special characteristics of child abuse and therefore its impact may ultimately be limited to its facts.

Lancaster Community Hospital v. Antelope Valley Hospital District, 923 F.2d 1378 (9th Cir. 1991): In *Lancaster*, the Ninth Circuit held that the California Health & Safety Code does not confer on defendant hospital districts in antitrust cases the state action immunity defense under *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). The Ninth Circuit held that the enabling regulations did not evidence an intent to displace competition with regulation, and therefore, hospital districts can be sued under Federal antitrust laws. Anyone contemplating raising a state action defense in an antitrust case might find the *Lancaster* review of Ninth Circuit decisions helpful.

Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991): In *Ellison*, the Ninth Circuit held that, when a woman makes a claim for sexual harassment under Title VII of the Civil Rights Act of 1964, claiming a "hostile environment," the female plaintiff states a prima facie case when she alleges conduct which a reasonable woman would

consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. The court adopted a reasonable woman standard because a sex-blind reasonable person standard would tend to be male-biased and would tend to systematically ignore the experiences of women. The Court noted that the reasonable victim standard classifies conduct as unlawful even when harassers do not realize that their conduct creates a hostile working environment. In *Ellison*, the Ninth Circuit refused to adopt the requirement, accepted in other circuits, that plaintiff suffered anxiety and debilitation sufficient to poison the working environment. The *Ellison* Court overturned a grant of summary judgment based on a finding that the defendant co-worker's oral pestering and love letters were too trivial to amount to a cause of action. *Ellison* will allow many more harassment cases to survive summary adjudication and may be an important precedent for California cases decided under state law. Attorneys who counsel corporate clients should familiarize themselves with the facts of *Ellison*; their clients might be surprised that the underlying conduct of the male co-worker, which the Ninth Circuit said could be portrayed as "modern-day Cyrano de Bergerac wishing no more than to woo Ellison with his words," could create liability.

Neft v. Vidmark, 923 F.2d 746 (9th Cir. 1991): In *Neft* the Ninth Circuit held that federal copyright laws, specifically 17 U.S.C. § 505, allow for sanctions for frivolous actions against the parties, not the attorneys. The court reversed a grant of sanctions of over \$100,000 jointly and severally against the losing party and that party's attorney. Unsuccessful copyright counsel should scrutinize sanction orders for improper awards against counsel.

Pacific Gas & Elect. Co. v. Superior Court, 227 Cal.App.3d 51 (1991): What is the power of a Superior Court to review an arbitration award following binding arbitration? *Pacific Gas*, in an eloquent, law-review like opinion-treatise, resolves all the ambiguities in the tortuous history of this area of the law. The bottom line: The rule of finality bars any attack that an award has exceeded the arbitrator's powers based on errors of law or fact, whether or not they appear on the face of the arbitrator's decision and whether or not the submission agreement requires the arbitrator to act like a law court, except that the arbitrator may not arbitrarily (not merely incorrectly) remake the contract in complete violation of the parties' expectations. "If the parties desire a different scope of judicial review they must specify that in the contract language." This opinion reads like the final word on the finality rule; it's a must-cite for cases involving a challenge to an arbitration decision.

Two recent decisions raise important questions regarding the definition of the term "damages" contained in standard form comprehensive general liability policies. *Bank of the West v. Superior Court* (1991) 226 Cal.App.3d 835; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 274 Cal.Rptr. 820.

Bank of the West stated that the term "damages" as used in comprehensive general liability policies is ambiguous in some contexts. *AIU Ins. Co.* rejected the argument that costs associated with an injunction should not be covered under an insurance policy which limited the term "damages" to "sums which the insured shall become legally obligated to pay as damages..."

Although injunctive relief is equitable and not legal, the Court held that the costs were covered under the policy, saying:

"Because California has generally abandoned the traditional distinction between courts of equity and courts of law...even a legally sophisticated policy holder might not anticipate that the term 'legally obligated' precludes coverage of equitably compelled expenses."

These cases may signal a trend toward interpreting the term "damages" more broadly than in the past.

—Rex Julian Beaber

judge to sanction the lawyer who is not going to be in his court again for years.

Mr. Feldman: I do not think all hardball litigation is because people are mean spirited. I think one of the things that drives hardball litigation is a fear of legal malpractice lawsuits. Law firms push every issue to the best of their ability for fear that if they don't and the case is lost, they will be sued.

Prof. Miller: It is a rather bizarre notion, isn't it, that a lawyer can be guilty of malpractice unless he is the meanest guy on the block.

Mr. Feldman: You don't have to be the meanest guy on the block to do what you need to do. You can be civil and still do everything that you need to do. But it can be perceived, whether you do it with a smile or not, that you are playing hardball, because you want every deposition. You want the plaintiffs in there for eight days. The plaintiffs' lawyer says, "What could take eight days to ask this plaintiff?" And somebody says, "If I don't cover A through Z, I'm going to be criticized some place by corporate counsel, or by the client, or someone."

Justice Eagleson: I think mechanization of the legal work product has led to over burdening [both] the other side and the courts. I recall, back when I was on the eighth floor, we talked about putting in a rule requiring every interrogatory and the responses to be handwritten, not by the secretary, but by the lawyer, to cut down on the proliferation of material. Word processing lets you pour this stuff out by the ton. Most of these cases turn on a couple of major points. The rest of it is surplusage.

Prof. Miller: I believe legal education is partially to blame. I think legal education has oversold the adversary model. The message that goes out in the law school environment is that the name of the game is to win. And the name of the game is to use the rules, too. Is there anything that can be done about this? Let's assume there is some element of mean spiritedness or taking advantage or pushing to the limit, can anything be done about this?

Mr. Feldman: Well, I don't think there is a quick remedy. Ultimately, the clients and the law school have a major responsibility to try to change what we have learned about the process of litigating. Lawyers will always want to win and nothing will change that. They will do what is necessary to win. They will work an extra hour, they will think about their closing argument, and that is why they win. It is not because they took 30 depositions.

Prof. Miller: You don't really expect me to believe that, do you? This one deposition stuff. I'm hearing you say that somehow we've got to retool, resocialize. Judge Tashima, you said you don't see it in the courtroom. Can you do anything about what is going on in your cases, outside your view?

Judge Tashima: Yes, and judges are trying. For instance, I know of one case involving hardball depositions. One lawyer asked to videotape the lawyers in a deposition. The videotape could be used against the lawyers on a Rule 37 motion. It completely changed the tenor of the depositions for the next two weeks. So I think there is something that can be done. But I think it is marginal.

Prof. Miller: What about the codes of conduct, like the guidelines published by the L.A. Bar?

Judge Tashima: It is a sad commentary that it is even necessary to publish those. They are only the rules of a civilized bar. Lawyers who knew each other would automatically do these things.

Prof. Miller: Let me flip. We have been talking about hardball

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litigation among lawyers. What about judges? Larry, do you ever get mad at the judge?

Mr. Feldman: Always, when they rule against me.

Prof. Miller: How about when they don't rule at all?

Mr. Feldman: I haven't had that problem, frankly, where they don't rule at all. But I can't stay "mad." Generally we think we're right and, at the heat of the moment, I think most lawyers walk out of court shaking their head, "How did this judge do this?...How could he rule this way?..." Then the next day or two you think about it and you see it in a much more objective way. So, I don't think it serves any purpose for lawyers to get mad at judges on a permanent basis.

Prof. Miller: On a permanent basis! What about some ability to talk back?

Mr. Feldman: I think you have to do it with respect and I think you have to assume that most judges want input from the bar and want input at the hearing. There is some ability to try to modify a judge's behavior with lawyer groups and their peers. I think you have a greater chance of that in the superior court than you do in the federal court.

Prof. Miller: You differentiated between state judges and federal judges; I assume that is because of lifetime venue.

Mr. Feldman: I don't want to say what motivates federal judges; they'll have to speak for themselves. But I think there is a general impression in the bar that there is a difference in appearing before federal judges at the district court level and in the L.A. Superior Court. There is a totally different feeling in the courtroom about your ability to deal with the judge. Early in my career, I remember winning a lawsuit. I was walking down the hallway two weeks later when the judge called me into chambers and talked to me about that very case while a motion for a new trial was pending before him. It was clear to me that this judge was doing something highly improper. The judge told me indirectly that I should resolve this lawsuit and not let it get to a motion for new trial, and what to do. It raised tremendous ethical problems.

The question became what do you do? This trial court judge was sitting in Los Angeles Superior Court, he was a trial court judge, he was a judge I appeared before many times, my law firm appeared before him; we were going to appear before him. How do you deal with this? Because if he could do it in my case, he could do it for the other side the next time. I think it would not be bad to have a system for reporting misconduct without fear of retribution.

Mr. Stern: I am greatly in favor of that.

Justice Eagleson: I don't think it is that complicated in Los Angeles. If anybody has a complaint against a judge, he should go talk to the presiding judge. I don't know any presiding judge in the history of the L.A. Court that wouldn't take your complaint seriously and take some remedial action.

Prof. Miller: And of the United States District Court?

Judge Tashima: One of the differences between the Superior Court and District Court is that the presiding judge of the Superior Court does have a powerful tool called assignment. That is not true in the federal court.

Judge Alarcon: It seems to me this is something the organized bar could put together very easily. When I sat as the presiding judge of the criminal courts in Los Angeles Superior Court, there was a committee that received complaints. Some members of the committee would observe the judge to determine if there was merit to the complaint. They would then go as a committee to the presiding judge, not talking about a specific lawyer's complaint, but talking

generally about the judge's behavior.

One of the problems that judges have, particularly trial judges, is that other judges don't watch us work. I think almost every judge thinks he is doing a good job. It may take somebody else saying "Do you realize that you're rude?"

Prof. Miller: Let me ask what may be the \$64,000 question in this room. What are you doing to get disputes resolved in this era of unprecedented court calendar congestion?

Mr. Lynch: I have not found it impossible to get a civil case to trial if it needs to be tried. But we do see the emergence of the alternative dispute resolution industry. I think that it diverts a great deal of revenue and talent that ought to be in the court system. It is obvious that a great many qualified judges are taking early retirement for that purpose. But they are filling a need and I don't have any criticism of the industry.

Mr. Feldman: The county bar brought a lawsuit contending there should be more judges. When that lawsuit was brought, we hired someone to do a survey to find out what the public's perception was. The survey showed people want access to the courts, want the courts to function and they don't want to wait five years for litigation. They did not want rent-a-judges, they did not want ultimate dispute resolution. They wanted a system of justice in which they could resolve their disputes in a timely manner and they were willing to pay for it.

Justice Eagleson: The public would support it, but that isn't where the action is. The action is in the State Senate and the State Assembly.

Prof. Miller: Does it bother you that people with money are creating private business courts?

Mr. Feldman: My position is that I encourage people to resolve disputes in any manner they want. If they want arbitration, that's healthy. What is unhealthy is to create a system that takes out of the public sector these civil lawsuits because we don't want to fund them, so that poor people wait in line for justice while the rich people go right to the head of the line. All this is done in some private back room deal that doesn't allow public access. If you keep going on this route, you are going to have a system of justice that ultimately does not work.

Justice Vogel: It doesn't work now. It is out of stalemate; it is at gridlock. Everybody's answer is that something won't work. Proposals such as user fees are rejected. Until it gets desperate enough, nobody is going to do anything because it seems to be indigenous to the process that we do nothing until we're backed against the wall.

Prof. Miller: Is there any reason why you would not recommend, as long as this dispute resolution tool is available, why you wouldn't use it? As a user, is there a down side to it?

Mr. Stern: We have been driven to the use of alternative dispute resolution. To this day I still don't voluntarily encourage our people to get into it. I still would rather stay in a court system. As a target defendant, I have greater protection, I believe, through the appellate system than I would in the hands of a mediator or an arbitrator.

Judge Tashima: I think there is another cost to the private judging system. Jerry [Stern] said that sometimes he is forced out of the public system because he just can't get justice. People like Jerry, who is a major user of the justice system, and others like him have the wherewithal to opt out of the system. They have the money to get the quickest justice; they can get the brightest judges. Aside from the cost of these good judges leaving the system, there is another cost: The group with the most powerful voice before the legislature to bring reform to the public system has no interest in advancing the protection of the system.

(they even take them on the plane and to a deposition), we have to discard our yellow (or, for the ecologically-conscious, white) legal pads. And I no longer call the library to pull a copy of an advance sheet—I simply dial Lexis or Westlaw via my computer modem.

The practice of law has also become more of a business. Law firms are growing at geometric rates. We now call the largest ones "mega-firms." And the growth is more often than not through mergers, lateral hires, and other transfers of lawyers from one firm to another. In Los Angeles, we almost need a pocket part in our telephone directories to keep track of the changing names, addresses, and affiliation of law firms and lawyers. Indeed, Los Angeles now seems to have branch offices of law firms from every major American city. Perhaps the law school should open up a branch in L.A. — it would certainly make recruiting and "fly backs" easier.

And within many large firms things are changing. Instead of asking about the Supreme Court's latest antitrust decision, partners want to know why their colleagues have not turned in their business plan and 5x7 glossy for the firm's brochure. (Simple black and white announcements in somber gothic script no longer do, having given way to colorful and lengthy brochures that tell you everything—but nothing—about the firm.) Instead of debates over pro bono policies, firm debates center on the newest branch office or whether lawyers should diversify into ancillary businesses and take in non-lawyer partners to generate more income. Along with our CCH and BNA advance sheets, we also receive our IBM or DEC computer printouts about accounts receivable and carrying charges for costs incurred. I wish I had paid more attention to the law school's accounting course.

I pity (or envy) the poor solo business practitioner with a single phone and no fax. How is he or she expected to survive without a car phone and voice mail? What litigator can hope for any respect if he or she has less than two telephone numbers to leave with opposing counsel? Of course, that lawyer at least has the old standard excuses for missed filings and continuances. With faxes and voice mail, gone are the excuses for missed phone calls. What judge is going to believe that opposing counsel did not receive notices, or possibly the entire brief, when there is voice mail and faxes. Indeed, you can even file by fax with the court.

To add to our busy schedules, the California Bar has passed rules requiring us to meet new requirements for continuing education. They finally discovered that surviving law school and the Bar Exam does not guarantee the perpetual ability to distinguish between a compulsory and permissive counterclaim. The Bar is also contemplating rules regarding "substance abuse" and "sexual relationships with clients." I don't remember any classes on those subjects at law school. Thankfully, the Bar also helps us with courses on how to cope with the stress of modern law practice.

Business litigation for business litigators is changing. For the better? That may be the "hottest" question of all. Only time will tell. But while I am waiting, I haven't thrown away my dial watch, magic markers, and dictating machine. After all, who thought wide flower ties would make a comeback? I also keep a copy of your treatise on my shelf—at least until it is published on a CD-ROM and can be retrieved on my home television.

I have to stop now. I'm being beeped. It is probably our firm's marketing consultant trying to reach me. I never turned in my business plan for fiscal 1992. I hope you receive this letter, since I am sending it via modem and I am not sure our word proceeding programs are compatible. (I would telecopy it, but the batteries on my portable fax wore out on the third day of the deposition.)

—Harvey I. Safenstein

support for his position among the varied decisions interpreting the generic "work product" exclusions contained in the standard CGL policy. The lack of consistency in this area is well illustrated by two decisions that came down in the late 1950's: *Volf v. Ocean Accident and Guarantee Corp.*, 50 Cal.2d 373 (1958) and *Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co.*, 51 Cal.2d 558 (1959).

In *Volf*, an insured general contractor applied defective stucco to the outside walls of a house. After cracks and other defects appeared, the insured was required to apply a second stucco coat over the first. The court held that the cost of applying the second coat of stucco was excluded under the subject policy's "products of the insured" exclusion, noting the lack of evidence that the house itself was injured by the application of the first coat of defective stucco or that the first coat of stucco had to be removed before applying the second.

One year later, in *Geddes*, the California Supreme Court held there was coverage for damages associated with replacing defective doors supplied by the insured, despite a policy exclusion for the insured's products.

Owens Pacific Marine, Inc. v. INA, 12 Cal.App.3d 661 (1970), held that a defective boat water heater, sold and installed by the insured, was not excluded from coverage. In so holding, the court refused to apply a policy exclusion for damage to "products sold... by the named insured, or work completed by or for the named insured, out of which the accident arises." In contrast, *Rafeiro v. American Employers' Ins. Co.*, 5 Cal.App.3d 799 (1970), held that the "work product" exclusion in a general contractor's CGL policy excluded coverage for numerous defects in two apartment buildings built by the insured.

In *Central Mutual Ins. Co. v. Del Mar Beach Club Owners' Assoc.*, 123 Cal.App.3d 916 (1981), the court adopted, without reference to specific policy language, a broad rule that damage to property other than the insured's products is "covered" under CGL policies. Portions of the opinion were directly contradicted two years later in *Western Employers' Ins. Co. v. Arciero & Sons, Inc.*, 146 Cal.App.3d 1027 (1983). That court flatly held that the general contractor's CGL policy provided no coverage for damage to the insured's work, giving literal effect to the policy's "work product" exclusion.

Will Inconsistency Continue?

Two other recent decisions upheld work product exclusions. *Maryland Casualty Co. v. Imperial Contracting Co.*, 212 Cal.App.3d 712 (1989), found no coverage for a general contractor due to the "work product" exclusions. To similar effect is *Diamond Heights Homeowners' Assoc. v. National American Ins. Co.*, 227 Cal.App.3d 563 (1991).

It is impossible to predict, however, whether these cases represent a trend, or whether courts will continue to render inconsistent decisions in interpreting these policy exclusions. Until there is greater certainty in this area, plaintiffs are likely to continue to turn to CGL insurance as the deep pocket of choice where there is a basis for arguing that a claim involves physical damage to tangible property.

—Mark A. Gra