

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

LOS ANGELES

FALL 2016

MAKING CACI WORK FOR YOU



Justice Martin J. Tangeman

Every trial lawyer recognizes the fundamental importance of jury instructions, but few attorneys realize how they can contribute to the creation and revision of the uniform jury instructions used throughout California.

CACI (pronounced “Casey”) stands for “California Civil Jury Instructions.” They are the official civil jury instructions approved by the Judicial Council of California for use in the state trial courts in California. CACI’s goal is to improve the quality of jury decision making by providing standardized instructions that accurately state the law in a way that is understandable to the average juror. (See Cal. Rules of Court, rule 2.1050.)

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TIPS FOR TAILORING DISCOVERY FOLLOWING THE AMENDMENT OF FEDERAL RULE OF CIVIL PROCEDURE 26



Janet Kwuon

We are fast approaching the one-year mark of the amendments to the Federal Rules of Civil Procedure, effective December 2015, and some trends are emerging with respect to Rule 26 regarding the role of the proportionality principle in discovery.



Erica Yen

To quote Chief Justice Roberts in his 2015 year-end report on the federal courts, “[t]he amendments may not look like a big deal at first glance, but they are.”

The scope of discovery under Rule 26(b)(1) has evolved with the goal of reducing overbroad discovery and excessive costs in a world where the volume of documents and data generated is ever-increasing. The recent amendment to Rule 26 furthers this goal by highlighting the role proportionality plays in placing reasonable limits on discovery. *See* Fed. R. Civ. P. 26(b)(1) (the appropriate scope of discovery includes information relevant to any party’s claim or defense and also “proportional to the needs of the case”). Although the Advisory Committee on Civil Rules and courts have noted that proportional discovery is “nothing new,” the explicit addition of uniform language on proportionality has resulted in the courts’ renewed focus on preventing the overreach of discovery. *See* Fed. R. Civ. P. 26(b)(1)

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PRESIDENT'S REPORT



Nancy R. Thomas

It is with equal parts enthusiasm and humility that I write my first President's Message for the ABTL Report. I am so honored to join a long list of Presidents who have made the ABTL the stellar organization that it is today. I also am honored to be serving with my fellow

Executive Board members, Mike McNamara (Vice President), Sabrina Strong (Treasurer), and Valerie Goo (Secretary). Together, we look forward to carrying out the core mission of the ABTL: promoting communication and interaction between the bench and the bar on business litigation issues.

ABTL's reputation for the highest quality programming is in great hands. Our co-chairs Sascha Henry and Jeanne Irving and vice-chair Manuel Cachán are hard at work planning interesting, educational, and entertaining programs. They've started off the year with a program featuring the lead trial lawyers on two high-profile privacy cases, the Gawker trial and the Erin Andrews peeper case. Our lunch program co-chairs Kevin Boyle and Erin Ranahan will be lining up terrific programs that will start in January.

Public Service co-chairs Susan Leader and Paul Salvaty plan to build on the Chapter's tradition of giving back to the community. We will award scholarships to students at each of the local law schools. These scholarships are based on financial need, public service, and an interest in business litigation. Susan and Paul will be contacting members to support our annual holiday toy drive, which provides funds to purchase toys for children in low-income families. They also will be putting together panels to make presentations to law students interested in business litigation.

This year, our Young Lawyers Division is ably led by co-chairs Rachel Feldman and Ben Williams, with assistance from vice-chair Jeff Atteberry. YLD events create an opportunity for junior lawyers to meet each other and members of the judiciary. Early involvement in ABTL is another way we are

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8502 E. Chapman Avenue, Suite 443
Orange, California 92869
(323) 988-3428 · Fax: (714) 602-2505
Email: abtl@abtl.org · www.abtl.org

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strengthening the organization.

All of these efforts, though, require you. I invite you to introduce yourself to someone at the next ABTL event. If you are a senior lawyer, I challenge you to invite a junior lawyer in your office to attend the event with you. If you are a junior lawyer, I challenge you to get involved in YLD, which is a great way to raise your profile and meet your peers. Join us in continuing ABTL's role as one of the premier bar organizations in Los Angeles. I look forward to working with all of you.

Nancy R. Thomas
Morrison & Foerster
ABTL President, 2016-2017

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All 2016 Memberships
Will Expire on
December 31st**

**The 2017 Membership
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THE INSIGHT INTERVIEW



R. Hewitt Pate

The Insight Interview features interviews with leading jurists, lawyers and business executives, focusing on practical, real-world advice for lawyers in their first 10 years of practice.

This installment features R. Hewitt Pate, Vice President and General Counsel for Chevron Corporation, the global energy company that was ranked 14th on the Fortune 500 list of the country's largest companies, with more than \$131 billion in revenues.



Steven Feldman

Before joining Chevron, Pate was a long-time partner at Hunton & Williams in Washington, D.C. Between 2001 and 2005, Pate served as the deputy, and then assistant, attorney general for the Antitrust Division of the U.S. Department of Justice. Earlier in his career, Pate served as a law clerk for U.S. Supreme Court Justice Anthony M. Kennedy, for retired Supreme Court Justice Lewis F. Powell Jr. and for Fourth Circuit Court of Appeals Judge J. Harvie Wilkinson III.

Before becoming VP and General Counsel, you were a partner at Hunton & Williams in Washington, D.C., where you headed the firm's global competition practice. What is your typical day like and how does your current role compare to your work as a law firm partner?

My job has three parts: one is providing leadership and management for our almost 400 lawyers who are located all over the globe; another is being a part of the business leadership team at Chevron, reviewing investments and decisions the company is making; and the third part is working on specific legal matters—the ones significant enough that they are concerns of the whole enterprise as opposed to just a specific business unit.

There's never a dull moment.

I enjoy being a part of solving problems in advance, rather than handling them as they arise. That is perhaps the biggest difference between working in private practice, where you interact with a client on a matter-by-matter basis, and being a part of a company's law department, where you get a chance to think over a longer period of time about how to meet a company's needs in the best way possible. This gives you a deep understanding of the company's business that you do not get while at a firm.

What led you to leave your role in 2009 as a law firm partner to become VP and General Counsel of Chevron?

I never had Chevron as a client, so I did not have any

prior experience with the company, but my predecessor at Chevron was a friend and mentor for whom I worked at the Department of Justice and who succeeded me as head of the DOJ's Antitrust Division. He reached out to me, told me about the atmosphere at Chevron, the integrity of the people who work here, and why he thought it would be a good opportunity. While I had previous opportunities to leave and go in-house, I had not taken them. Unless you have a relationship with someone at the company you're considering, it's hard to make the leap and put all your eggs in one basket. You only have one client when you work in-house, so it had better be a client that you are happy to have. Needless to say, I am very pleased to have joined Chevron in this capacity.

Having served as a partner at a large firm and as the General Counsel of one of the world's largest companies, how would you compare the skill sets that one needs to be successful in those roles?

My job at Chevron probably has more in common with what I did as an assistant and deputy attorney general at the Department of Justice than the job of being a law firm partner. Both Chevron and the DOJ are very large, process-driven organizations, whereas a law firm partnership is entrepreneurial in terms of many smaller practice groups, developing clients and serving current ones.

Continued on Page 5...

The Insight Interview with R. Hewitt Pate ...continued from Page 4

Is there any “right time” for someone working at a law firm to consider making a move in-house?

I don't think there is a “right time.” To go in-house at a leadership level, you must have had opportunities that will give you credibility with the lawyers and executives in-house. You should also ensure you are the right fit for the company you are looking at—this is key to being successful. At Chevron, the culture places a very high value on being civil and respectful in personal interactions, and on running everything through a proper process, which makes sense for a company that places so much value on safety. A principle here is, “There is always time to do it right.” Other companies, on the other hand, might be in a line of business that emphasizes speed, have very little patience for process, and have an atmosphere of developing the best ideas by having people challenge or even sharply attack each other's ideas—and there are plenty of successful companies who operate this way. So, you want to make sure you are comfortable with the culture of the company you are considering.

Lawyers sometimes tell me they want “an in-house job,” and my advice is: be careful what you ask for. Because what you really want is a job at a company where you will be comfortable with the culture, happy with what you're doing, and adding value. And there is nobody who would fit in at every single place and be happy. So, you should learn as much as you can about a company beforehand.

What would you say to lawyers early in their careers, who want to remain at a law firm, about how to be successful?

The lawyers who really make a name for themselves tend to be people who break their back with hard work and who are available whenever and wherever they're needed to solve the problem the client is trying to address. They are people who are going to show up on the weekend to get a deal done or go the extra mile to locate a witness or a piece of evidence that is critical to a case. At the end of a matter, everyone knows who those people are, and they remember the names of the

people who do those things. That may not be clever advice, but in this business there is no substitute for really hard work to make a name for yourself.

How would you advise young attorneys on how to develop their litigation expertise?

The most valuable thing young litigators can do is to think about the things that they like to do and excel at. This is going to be different for different people. There are folks who will be desperate to get up on their feet to do oral arguments and handle witnesses in court, and don't care if they have to drop everything and jump on a plane to do it. And there are people who are much happier giving advice, developing a relationship over time, and having time to reflect and draft documents in a careful way. All of those things can be part of being a successful lawyer, but I don't know many people who like doing all of them.

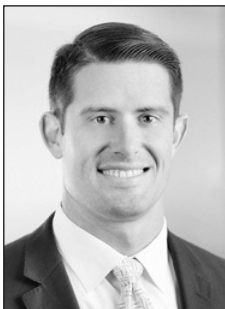
As someone who has been both a General Counsel and a law firm partner for many years, how would you advise young lawyers about the best way to interact with clients?

In your first 10 years, you are generally faced with the problem of being brought in once a problem has already arisen and the case has come to your firm. Once you get exposure to the client, you should put a news ticker alert for the company on your smartphone and should be on the lookout for news related to the company. When you begin reading legal papers in the case, read the company's annual report as well so you understand the company's business and know who the people are at the top of the company. You can be sure the in-house lawyers know who those people are, and they care about what they think. So, if you're on top of that, you'll make a deeper connection with the client, and you are more likely to think of better solutions. And that's what will make you look good.

THE IMPORTANCE OF ASCERTAINABILITY IN CONSUMER PRODUCTS CLASS ACTIONS



Amy J. Laurendeau



Matthew J. Smock

Federal courts have long recognized a two-pronged “ascertainability” prerequisite to class certification: (1) classes must be defined clearly; and (2) class membership must be ascertainable by objective criteria.¹ Circuit and district courts have employed vastly different standards for the second prong, and the Supreme Court has yet to resolve the conflict.² The Ninth Circuit has not yet weighed in, although—having recently taken an ascertainability case under submission—it likely will do so imminently. This article describes the latest rulings and discusses

Briseno v. ConAgra Foods, the Ninth Circuit case in which a ruling is impending. It explains why the Ninth Circuit and other federal courts should follow the Third Circuit’s lead in requiring, as a prerequisite to class certification, a reliable and “administratively feasible” method for determining class membership that does not require “individualized fact-finding or mini-trials.”³ It also explains why, in low-cost consumer products cases, permitting class members to self-identify through affidavits alone violates defendants’ due process rights and is not an administratively feasible method.

The Circuit Split

The Third Circuit’s ascertainability standard has been called “heightened.”⁴ Under this standard, affidavits from plaintiffs self-identifying as class members are insufficient, standing alone, to demonstrate ascertainability.⁵

Like the Third Circuit, the Second, Fourth, and Eleventh Circuits have recognized an administrative feasibility requirement and have articulated standards approaching the Third Circuit’s “heightened” standard.⁶

The Seventh Circuit, on the other hand, applies a “weak” ascertainability standard, requiring only that the plaintiff define class membership using objective, rather than subjective, criteria, and holding that certification should not be denied merely because the proposed method for identifying class members relies on affidavits.⁷ The Sixth and Eighth Circuits have adopted standards similar to the Seventh Circuit’s “weak” approach.⁸

The Ninth Circuit

On September 12, 2016, Judges Fletcher, Christen and Friedland heard oral argument and took under submission *Briseno v. ConAgra Foods*. Ascertainability was a major focus of the *Briseno* argument, and the panel appears primed to affirm the district court’s finding that the class is ascertainable.

In *Briseno*, Judge Morrow granted a motion to certify eleven statewide classes, each alleging that ConAgra misleadingly marketed its Wesson brand cooking oils as “100% Natural” because they contained genetically modified organisms (“GMOs”).⁹ ConAgra appealed pursuant to Federal Rule of Civil Procedure

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¹ *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 163 (3d Cir. 2015).

² See *Direct Digital, LLC v. Mullins*, 136 S. Ct. 1161 (2016) (denying certiorari).

³ *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013).

⁴ *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015), cert. denied 136 S. Ct. 1161 (2016).

⁵ *Carrera*, 727 F.3d at 309-12; *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012).

⁶ *Brecher v. Republic of Argentina*, 806 F.3d 22, 24-25 (2d Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 359-60 (4th Cir. 2014); *Karhu v. Vital Pharms., Inc.*, 621 Fed. App’x 945, 947-48 (11th Cir. 2015) (unpublished).

⁷ *Mullins*, 795 F.3d at 659, 662, 669.

⁸ *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525-27 (6th Cir. 2015) (declining to follow *Carrera* and determining ascertainability based on (1) whether the proposed class was defined by objective criteria and (2) whether class membership could be determined with “reasonable accuracy”); *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016) (concluding that a proposed class was ascertainable because membership under the proposed class definition could be determined using objective criteria).

⁹ *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 939, 1035-36 (C.D. Cal. 2015).

Consumer Products Class Actions...continued from Page 6

23(f), asserting Judge Morrow erred in five respects, including by finding the class ascertainable.¹⁰

Although consumer memory problems—implicating defendants’ due process rights—are always an issue with false advertising class actions involving low-cost consumer goods, the *Briseno* plaintiffs alleged that all Wesson oils included the misleading “100% Natural” representation throughout the class period, and the proposed class included all persons who purchased Wesson oils during that time. Potential class members would not be required to remember specifics of the products they purchased, but only that they purchased Wesson oils during the class period. Judge Morrow concluded, therefore, that self-identifying affidavits were sufficient.¹¹

Prior to argument, one might have predicted the Ninth Circuit would acknowledge that ascertainability includes an “administrative feasibility” requirement. Judge Morrow recognized such a requirement in her order, as did the Ninth Circuit in an unpublished opinion in a different case.¹² At the *Briseno* argument, however, Judge Fletcher made clear the unpublished opinion would in no way influence the court’s decision, and the panel’s comments and questions showed skepticism about ConAgra’s ascertainability arguments.

Judge Friedland questioned whether ascertainability should be required at all, noting it appears nowhere in Rule 23. Judge Fletcher suggested ascertainability is implicit in Rule 23’s other requirements, but the panel appeared receptive to class counsel’s argument that procedures to protect ConAgra from false or fraudulent claims could be implemented in the claims administration process and would not need to be resolved as a prerequisite to certification. The panel

also seemed doubtful that self-identification by class members would violate ConAgra’s due process rights where liability would be capped by known sales numbers. And it intimated concern that an administrative feasibility requirement—or at least one that does not accept self-identifying affidavits—would effectively preclude low-cost consumer products class actions.

Contrary to the panel’s suggestions, *Briseno* demonstrates why administrative feasibility should be a prerequisite to class certification and why self-identification alone cannot suffice to establish ascertainability. Even if many consumers are confident and correct that they purchased Wesson oils during the class period, others almost certainly are not. ConAgra should not have to accept at face value that a putative class member purchased Wesson oils in July 2008 rather than June 2008, or that she purchased a Wesson product rather than a Mazola or Crisco product. It is difficult to conceive of any class member who knows how many Wesson products she purchased during the multiple multi-year class periods applicable to her various claims.¹³ ConAgra’s due process rights are not lessened because the dollar value of each plaintiff’s claims is low; its rights can be protected only by a series of mini-trials that would not be administratively feasible.

Ascertainability Matters

The Ninth Circuit and other courts deciding ascertainability issues should follow the Third Circuit’s lead in requiring administrative feasibility and something more than self-identifying affidavits in order to certify low-cost consumer products class actions. This approach is supported by the text and purpose of Rule 23 and policy considerations.

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¹⁰ See *Briseno v. ConAgra Foods, Inc.*, No. 15-55727, Dkt. No. 13 (9th Cir.) (Appellant’s Opening Brief).

¹¹ *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 566 (C.D. Cal. 2014).

¹² See *ConAgra Foods*, 90 F. Supp. 3d at 969 (“A class is sufficiently defined and ascertainable if it is administratively feasible for the court to determine whether a particular individual is a member.”) (quotation marks and citation omitted); *Martin v. Pac. Parking Sys., Inc.*, 583 Fed. App’x 803, 804 (9th Cir. 2014) (district court did not abuse its discretion in concluding proposed class was not ascertainable because “Martin has not demonstrated that it would be administratively feasible to determine which individuals used personal, and not business, credit cards to purchase parking”).

¹³ See *Briseno v. ConAgra Foods, Inc.*, No. 11-cv-05379, Dkt. No. 241-3 (C.D. Cal.) (Plaintiffs’ Statute of Limitation Appendix to Motion for Class Certification).

Consumer Products Class Actions...continued from Page 7

1. Rule 23(b)(3) requires that common questions of law or fact predominate over individual ones, and that the class action procedure be superior to alternative methods for adjudicating the claims at issue. Even in a class action, a defendant has a due process right to litigate all available defenses to individual claims.¹⁴ When class membership is established solely by affidavits, a defendant has a right to test the veracity of each and every affidavit, even where total liability can be ascertained: its due process right is not only about total liability but also about finality of the judgment.¹⁵ The mini-trials required to comply with these due process requirements would defeat the very purpose of Rule 23. Crucial questions of law and fact—whether each class member has a claim at all—would become individual, not common, and the class action procedure would no longer be superior to trying each case individually.

2. An administrative feasibility analysis should not be deferred to the claims administration phase of the case. It is critical that a plaintiff be required to show there is a reliable method for determining class membership before certification. Once a class is certified, potential damages and litigation costs increase dramatically, and defendants are often economically pressured to settle and abandon even the most meritorious defenses.¹⁶ Large settlements undoubtedly place upward price pressure on low-cost consumer goods,¹⁷ a result contrary to the aim of most low-cost consumer products class actions.

3. Although critics urge the “heightened” standard has the “effect of barring class actions where class

treatment is often most needed,”¹⁸ it is in this context that reliable methods for ascertaining classes are most crucial. Consumers make thousands, if not tens or hundreds of thousands, of low-cost purchases a year. It is unreasonable to assume consumers will be able to remember the specifics of any particular low-cost purchase, including the date of purchase, the version or type of the product, the size of the packaging of the product, the labels on the product, or the number of products purchased during the relevant period, even where consumers sincerely claim to recall the specifics.

4. Finally, a strong pre-certification ascertainability requirement will not deprive potential class members of their only hope for recovery. The lack of records linking purchased low-cost goods to purchasers does not foreclose plaintiffs from establishing an ascertainable class through other reliable methods. Even *Carrera* did not foreclose the possibility that plaintiffs can establish a reliable and administratively feasible method for identifying class members through self-identifying affidavits, coupled with a method for screening those affidavits.¹⁹ Moreover, the criticisms leveled against *Carrera* rest on the incorrect assumption that absent class members always benefit from class actions. Studies show that absent class members’ monetary recoveries in class action settlements are alarmingly low.²⁰

Amy J. Laurendeau is a partner and Matthew J. Smock is an associate in the Newport Beach office of O’Melveny & Myers LLP.

¹⁴ *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (a defendant has a due process right to present all available defenses); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (a class cannot be certified on the premise that a defendant will not be entitled to litigate defenses to individual claims).

¹⁵ See *Karhu*, 621 Fed. App’x at 948 n.3; *Carrera*, 727 F.3d at 310 (“If fraudulent or inaccurate claims materially reduce true class members’ relief, these class members could argue the named plaintiff did not adequately represent them.... When class members are not adequately represented ..., they are not bound by the judgment.”).

¹⁶ See, e.g., *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Studies 811, 812 (2010).

¹⁷ See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4 (Feb. 18, 2005) (recognizing “abuses of the class action device” and declaring that a purpose of the Class Action Fairness Act is to “benefit society by encouraging innovation and lowering consumer prices”).

¹⁸ *Mullins*, 795 F.3d at 658.

¹⁹ *Carrera*, 727 F.3d at 311-12 (“[W]e will afford *Carrera* the opportunity to submit a screening model specific to this case and prove how the model will be reliable and how it would allow Bayer to challenge the affidavits. Mere assurances that a model can screen out unreliable affidavits will be insufficient.”).

²⁰ See Mayer Brown LLP, *Do Class Actions Benefit Class Members?: An Empirical Analysis of Class Actions* (Dec. 11, 2013), available at <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf> (of six cases for which settlement distribution data was public, five cases resulted in distributions to miniscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%).

“MAKING CACI WORK FOR YOU”... continued from Page 1

The CACI Committee

The Judicial Council Advisory Committee on Civil Jury Instructions is one of 24 advisory committees to the Judicial Council. The committee is charged by rule of court to regularly review case law and statutes affecting jury instructions and to make recommendations to the Judicial Council for updating, revising, and adding instructions and verdict forms to CACI. (Cal. Rules of Court, rule 10.58.)

By rule of court, the CACI committee must include members from the following categories: (1) appellate court justices; (2) trial judges; (3) attorneys whose primary area of practice is civil law; and (4) law professors whose primary area of expertise is civil law. A majority must be judicial officers. (Cal. Rules of Court, rule 10.58.) All members are appointed by the Chief Justice and are selected based on their interest and expertise in civil litigation. The committee is supported by a full-time staff attorney.

The CACI Process

The committee’s staff attorney receives proposals from members of the bench and bar and also develops proposals based on emerging case law and new legislation. The staff attorney does the initial research, collects and compiles comments and suggestions, and makes a recommendation about each proposal. If the recommendation to add or revise an instruction or verdict form is favorable, the staff attorney prepares a draft instruction or verdict form.

The committee meets every six months, in January and July. The work product from each six-month cycle is called a “release.” The committee presents each release to the Judicial Council for approval. (The committee is currently processing Release 29.)

A Recent Case Study—CACI 2334

Creating and revising jury instructions is a dynamic process. CACI 2334 is illustrative. It addresses a

claim for bad faith insurance practices when the insurer has rejected a policy-limits settlement demand and there is a subsequent judgment against the insured in excess of the policy limits.

The original version of CACI 2334 was drafted by the CACI task force and approved by the Judicial Council in 2003. It included an “unreasonably rejected” element in regards to the insurer’s rejection of a settlement demand:

2. That [*name of defendant*] unreasonably failed to accept a reasonable settlement demand for an amount within policy limits.

But the committee majority adopted a proposal to remove “unreasonably” from CACI 2334 in January 2007 after extensive debate. This revision was not in response to any case holding CACI 2334 was an incorrect statement of the law. It was in response to public comment.¹

Like its predecessor, the January 2007 revised instruction was not directly addressed by the courts. But it did not escape criticism.

In 2014, the instruction returned to the CACI committee in the form of a proposal to re-insert the controversial “unreasonably rejected” element. A working group recommended deferring any changes while closely monitoring the issue. At its July 2014 meeting, the full committee adopted the recommendation to defer.

The committee did not have long to wait because on October 17, 2014, the Fourth Appellate District published *Graciano*², in which the court stated:

A claim for bad faith based on alleged wrongful refusal to settle also requires proof the insurer unreasonably failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance.

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¹ A detailed history and analysis of the evolution of CACI 2334 is available in the committee’s report to the Judicial Council for its June 2016 meeting, at <https://jcc.legistar.com/View.ashx?M=F&ID=4496094&GUID=53DBD55C-AF07-498F-B665-D6BDD6DEFB28>

² *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 426, emphasis added.

“MAKING CACI WORK FOR YOU”... continued from Page 9

At its July 2015 meeting, the committee agreed that Graciano now compelled it to restore the “unreasonably rejected” element to CACI 2334. A revised CACI 2334 was drafted, approved by majority vote, and posted for public comment. Many comments were received, both opposing and supporting the proposed change. After reviewing the comments, the chair pulled the instruction from the release for further deliberation.

In the next committee cycle, an amendment to CACI 2334 was proposed to restore the “unreasonably rejected” element as follows:

3. That [*name of defendant*]’s failure to accept this settlement demand was unreasonable;

At its January 2016 meeting, the committee initially voted to adopt the controversial element.

But when the committee posted the proposed revision for public comment, numerous attorneys who represent plaintiffs in lawsuits against insurers objected to it. They argued: (1) no court had specifically stated that CACI 2334 was wrong or incomplete, so there was no reason to change it; and (2) the language from *Graciano* should be ignored because it is dicta.

As a result of these comments, the committee chose to reject the proposed change to CACI 2334. The instruction now contains no “unreasonably rejected” element.

However, the committee believed the bench and bar should be advised that CACI 2334 could be insufficient as currently written. It recently revised the Directions for Use to put CACI users on notice of the continuing

controversy: “[T]he committee has elected not to change the elements of the instruction . . . [until] there [is] a definitive resolution from the courts [T]he need for an additional element requiring the insurer’s rejection of the demand to have been unreasonable is a plausible, but unsettled, requirement.” Meanwhile, CACI users will have to decide whether CACI 2334 should be modified in each particular case, and the committee continues to welcome input.

Your Role as a Contributor

All comments and suggestions are welcome. As discussed above, CACI instructions and verdict forms are revised every six months. Committee staff collects proposals, contributions, and suggestions from lawyers and judges all year long. In the most recent cycle, the committee proposed revisions to more than 30 existing instructions (including CACI 2334), and eight new instructions. In recent years, entire new chapters have been added, including instructions and verdict forms on trade secrets, construction law and whistleblower protection.

If you think that CACI instructions or verdict forms can be improved or that new instructions or verdict forms are needed, you should submit your proposals to the committee for consideration. By expanding the reach of CACI, we can all contribute to the advances of CACI, to the benefit of all CACI users.

Proposals for changes and additions to CACI may be sent by e-mail to: civiljuryinstructions@jud.ca.gov.

Hon. Martin J. Tangeman is an Associate Justice of the Court of Appeal, Second Appellate District, Division Six, in Ventura.

*** * CALLING YOUNG LAWYERS * ***

***The ABTL Young Lawyers Division (YLD)
is Looking for New Members (practicing 10 years or less)
to Participate in the Planning of Young Lawyer Division Events.***

***If you are interested, please contact
abtl@abtl.org.***

“TIPS FOR TAILORING DISCOVERY”...continued from Page 1

Advisory Committee’s note to 2015 amendment (amendment “restores the proportionality factors to their original place in defining the scope of discovery”).

In considering proportionality, courts are to weigh several factors set forth in the statutory text, including (1) the importance of the issues at stake; (2) the amount in controversy; (3) the parties’ relative access to the information; (4) the parties’ resources; (5) the importance of discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefits.

So what has generally been the impact of the amendments on courts’ decisions on discovery issues?

First, many courts will now limit broad discovery requests even when they seek relevant information. As the Chief Justice’s comments highlight, a party is not entitled to receive every piece of relevant information. Many courts also take more active roles in adjudicating discovery disputes to limit potentially overbroad discovery. For example, in one multi-district litigation (“MDL”) proceeding, the court allowed the defendants to redact seven proposed categories of irrelevant information from responsive documents, because the information was “competitively sensitive,” but the court modified the defendants’ proposal to emphasize that the redactions should not involve airbags, which were a key issue in the litigation. The court also allowed the defendants to withhold irrelevant documents from responsive “families” of emails and attachments. *See In re Takata Airbag Prods. Liab. Litig.*, 2016 U.S. Dist. LEXIS 46206, *143-*145 (S.D. Fla. Feb. 29, 2016); *see also Bentley v. Highlands Hospital*, 2016 U.S. Dist. LEXIS 23539 (E.D. Ky. Feb. 23, 2016) (analyzing disputes over specific discovery requests and noting “[w]hile relevance is essential, a number of additional factors must also be considered....”).

Second, arguments on burden and expense alone may not suffice to show that the requested discovery is not proportional—if the requesting party has a reasonable need for the information and the information cannot be obtained elsewhere. For example, in one design and manufacturing defect case, in support of their burden

argument the defendants claimed that gathering the requested information would require more than 4,000 hours of lawyer review time over several months. But the court still ordered the discovery produced because it was directly related to the plaintiffs’ claims, the plaintiffs could not obtain similar information elsewhere (the defendants had not proposed alternative methods of discovery), “Defendants’ corporate resources vastly exceed Plaintiffs’,” and the amount in controversy was potentially very large given that the case involved a putative class action. *See Siriano v. Goodman Mfg. Co.*, 2015 U.S. Dist. LEXIS 165040 (S.D. Ohio. Dec. 9, 2015) (granting the plaintiffs’ motion to compel in part despite the defendants’ objections on the basis of burden and expense). The court was “mindful that Defendants’ discovery costs could be significant” but noted that limiting discovery was only appropriate where compliance “would prove unduly burdensome.” *Id.* at *18 (emphasis in original). *See also Vay v. Huston*, 2016 U.S. Dist. LEXIS 48534, *15 (W.D. Pa. Apr. 11, 2016) (comparing resources and finding the defendant had comparatively greater resources than the plaintiff and her counsel); *LaBrier v. State Farm Fire and Cas. Co.*, 314 F.R.D. 637 (W.D. Mo. May 9, 2016) (requiring the defendant company to comply with the plaintiff’s discovery requests even though it would require the development of software to access information stored in separate databases, because the defendant had refused direct access to the databases).

Third, in cases involving text messages and social media—particularly given the massive amounts of rapidly-generated data—courts have been reluctant to grant broad requests unless they are limited in terms of content, specific parties, and time scope. For example, in one wrongful death case, the defendants requested a “full archive” of the social media accounts of the decedent and her family members with no time limit, arguing that this information was relevant to analyzing the plaintiffs’ pecuniary loss and mental suffering. The court noted that Facebook archives could contain relevant information, but found the request overbroad and disproportionate because, “although almost

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YLD UPDATE



Rachel Feldman



Ben Williams

The Young Lawyers Division of the ABTL is looking forward to another exciting and event-packed year. The YLD started off the season in Style. On August 18, 2016, the Hon. Gail Standish hosted a brown bag lunch, and the topic was “A Lunchtime Dressed Like a Daydream: Insight into Becoming a Quickly Well-Known Federal Magistrate.” Judge Standish discussed the process of becoming a federal magistrate judge, the types of cases she sees in her courtroom, and her notorious Taylor Swift opinion. Needless to say, the lunch was informative, entertaining, and there was not a Blank Space in the

room. YLD member Brady Freeman, who both planned and attended the event, said, “Never in my Wildest Dreams would I have expected every lawyer who RSVP’d to attend, but Judge Standish Shook Off the unusually large turn out and welcomed more than Fifteen of us into her chambers Fearlessly and without Bad Blood.”

The YLD hosted its first Advisory Committee meeting on September 28, 2016. Among other topics, the Advisory Committee will discuss potential panels, pro bono events, judicial mixers, social events, educational programming, and brown bag lunches. “We are really excited to meet with the team, hear their ideas, appoint committees, and get some great events planned for our young layers,” said Rachel Feldman, co-chair of the YLD. If you are interested in joining the Advisory Committee, or have any ideas for events you would like to see the YLD host, please contact

Rachel Feldman (rfeldman@whitecase.com),
Ben Williams (bwilliams@mofocom), or
Jeff Atteberry (jatteberry@jenner.com).

Rachel Feldman is a partner at White & Case LLP in Los Angeles and Co-Chair of the Los Angeles ABTL YLD.

Ben Williams is an associate at Morrison & Foerster LLP in Los Angeles and Co-Chair of the Los Angeles ABTL YLD.

“TIPS FOR TAILORING DISCOVERY”...continued from Page 11

everything that is posted on social media can reflect a person’s emotional state of mind, that does not mean that Defendants can inquire into every conversation and interaction the decedent and her next of kin ever had *with anyone in the world.*” See *Ye v. Cliff Viessman, Inc.*, 2016 U.S. Dist. LEXIS 28882, *7-*10 (N.D. Ill. Mar. 7, 2016); see also *Elliott v. Superior Pool Prods., LLC*, 2016 U.S. Dist. LEXIS 293, *20-*21 (C.D. Ill. Jan. 4, 2016) (denying the defendant’s motion to compel production of all text messages and emails between the plaintiff and another party for a period of three years without limiting the subject matter); cf. *Rhone v. Schneider Nat’l Carriers, Inc.*, 2016 U.S. Dist. LEXIS 53346 (E.D. Mo. Apr. 21, 2016) (granting the defendant’s motion to compel the plaintiff to provide a “Download Your Info” report from her Facebook account from the date of the accident to the present, which included comments and photos regarding the plaintiff’s physical activity, where the plaintiff may have deleted postings).

Given these trends, here are a few practice tips based on these post-amendment limits on discovery:

1. In drafting discovery requests, carefully consider the proportionality factors in tailoring your requests to the information needed.
2. In responding to discovery, include in objections references to proportionality and provide detail related to burden or expense if applicable. If the information is relevant and necessary to the opposing party’s case and the information is not available any other way, be prepared to compromise or to provide an alternative method for producing the requested information.
3. Communicate with opposing counsel regarding discovery, and alert the court early about any discovery disputes. This includes discussion on the scope of discovery in developing the Rule 26(f) discovery plan and discussion about different types and formats of data, including social media and text messages.

Janet Kwuon is a partner, and **Erica Yen** is an associate, in the Los Angeles office of Reed Smith.

WILL YOUR INSURANCE POLICY COVER YOUR DATA BREACH?



Natasha A. Saggarr Sheth



Alexander J. Suarez

You've suffered a cybersecurity breach. Now you're faced with a host of potential costs—the expense of legal and forensic services, consumer-notification costs, business-interruption costs, regulatory fines and penalties, and litigation about the release of private, consumer information. A recent study revealed that the average response costs for a data breach in 2015 were \$7 million. Faced with potentially crippling costs resulting from the breach of your data network, your first thought may be, "Will my insurance cover this?" A look at case law from around the nation offers insight into some of the battlegrounds related to insurance coverage for data breaches.

Coverage Under Cyber-Specific Insurance Policies

Given the ubiquity of cyber breaches in recent years, many insurers have specifically excluded coverage for data breaches from their standard Commercial General Liability (CGL) insurance policies and instead require businesses to purchase separate cyber-insurance policies. While these policies are a new development, the few coverage cases involving these policies indicate that insureds must read their policies closely to determine whether a data breach will be covered.

Failure to Follow Minimum Security Standards

Before issuing a cyber-insurance policy, insurers typically require businesses to complete detailed applications, outlining technical aspects of their data-security measures and risk assessments. Insurers then add exclusions based on the representations made in the application. Recently, one insurer sued to rescind its entire policy arguing that its insured's actions fell within the policy's "Failure to Follow Minimum Required Practices" exclusion. In *Columbia Casualty Co. v. Cottage Health System*¹, the insurer filed a complaint denying all coverage for losses resulting from a data breach suffered by its insured, Cottage Health. Columbia Casualty is seeking

to nullify the policy based on its claim that the breach was a result of Cottage Health's failure to use encryption or other reasonable security measures to protect its data and failure "to continuously implement the procedures and risk controls identified in [its] application." The parties are currently in mediation, but similar cases will likely be filed in the future by insurers seeking to hold insureds accountable for the representations made in their applications.

Other Problematic Exclusions

Even seemingly innocuous exclusions may result in no coverage and huge losses for the insured. For example, in *P.F. Chang's China Bistro v. Federal Insurance Co.*², a district court held that a "contractual liability exclusion" barred coverage for the approximately \$1.9 million in assessments charged by MasterCard to the restaurant's credit card processing company after a data breach.

P.F. Chang's credit card processor entered into an agreement with MasterCard, pursuant to which the credit card processor was obligated to pay MasterCard certain fees and assessments in the event of a data breach. P.F. Chang's agreed to indemnify its credit card processor for any such charges imposed by MasterCard. When hackers disclosed tens of thousands of credit card numbers belonging to P.F. Chang's customers, MasterCard issued assessments to P.F. Chang's credit card processor, which the restaurant was contractually required to reimburse to the credit card processor. The insurer invoked, and the court upheld, a contractual liability exclusion to deny P.F. Chang's claim for insurance coverage for the MasterCard fees.

Other exclusions which may prove problematic for insureds in the cyber context include exclusions for "any loss caused by an employee." Data breaches are often caused by actions of current or former employees—whether deliberate or negligent. Also, given the international scope of cyber-attacks and the belief that at least some high-profile breaches have been the work of foreign powers, an exclusion for "acts of foreign governments" or "war or terrorism" could further limit coverage.

Coverage Under Traditional Insurance Policies

If you don't have a cyber-insurance policy, your CGL policy may provide coverage in the event of a cybersecurity breach causing "property damage" or "advertising and personal injury."

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¹ Case No. 2:15-cv-03432 (May 7, 2016), filed in the District Court for the Central District of California (dismissed to permit the parties to attempt to resolve the dispute via mediation).

² Case No. 2:15-cv-01322 (July 15, 2015), pending in the District Court for the District of Arizona.

"INSURANCE COVERAGE FOR DATA BREACHES"... continued from Page 13

What Constitutes Property Damage?

In *American Guarantee & Liability Insurance Co. v. Ingram Micro, Inc.*³, the court held that "physical damage," as defined in a property insurance policy which insured against certain business and service interruption losses, "is not restricted to the physical destruction or harm of computer circuitry but includes loss of access, loss of use, and loss of functionality." Thus, the court found in favor of the insured for coverage of costs resulting from the loss of programming information following a power outage.

Similarly, in *Eyeblaster, Inc. v. Federal Insurance Co.*⁴, after Eyeblaster was sued by a computer user who alleged that his computer, software, and data were damaged as a result of his visit to the company's website, the Eighth Circuit held that the "plain meaning of tangible property" included computers. Because the complaint in the underlying suit repeatedly alleged the "loss of use" of the plaintiff's computer, the court concluded the allegations were within the scope of the insured's CGL coverage.

Other courts, however, have defined "physical damage" more narrowly, finding no coverage for data loss under such traditional insurance policies. In *Ward General Insurance Services, Inc. v. Employers Fire Insurance Co.*⁵, the Court of Appeal found no coverage under the CGL policy at issue because the loss of the insured's database "with its consequent economic loss, but with no loss of or damage to tangible property, was not a 'direct physical loss of or damage to' covered property" under the terms of the policy.

Similarly, in *State Auto Property & Casualty Insurance Co. v. Midwest Computers & More*⁶, the court looked to the definitions in the policy to determine whether loss of data was covered as "property damage" to "tangible property" and concluded, after consulting dictionaries to determine the meaning of "tangible property," that the claim was not covered because "computer data cannot be touched, held, or sensed by the human mind; it has no physical substance. It is not tangible property."

Accordingly, whether your CGL insurance policy covers a data breach depends upon the definition of property damage in the policy and the case law interpreting those terms in the state in which the insured resides. So far, the courts have reached different conclusions.

What Constitutes Publication for Personal Injury?

Following the 2014 hack of Sony's data network, which exposed the personal information of tens of millions of users, Sony sought a defense and indemnification from its insurer, Zurich⁷. Zurich denied Sony's claim and prevailed on summary judgment. The court ruled that although there was a publication of personal information, the publication was perpetrated by third-party hackers, not Sony itself, as the policy required. The parties ultimately settled before the matter was decided on appeal.

By contrast, the Fourth Circuit recently ruled that insurance coverage was available for "personal and advertising injury" following a data breach that exposed patients' private medical records on the internet⁸. The court rejected the insurer's argument that there was no "personal injury" or "publication" because the records were not viewed by a third party and their release was unintentional. The court held that an unintentional publication is still a publication and that the definition of publication does not hinge on third-party access. "Publication," the court said, "occurs when information is 'placed before the public,' not when a member of the public reads the information placed before it."⁹

The courts have thus reached divergent results on the issue of whether a data breach involves a publication. The correct answer in any given case likely depends upon the definitions in the particular policy at issue.

The Bottom Line

You must read your insurance policies carefully and consider whether, given your industry and operations, you are left with any potential coverage gaps. The concerns of a restaurant like P.F. Chang's will differ substantially from the concerns of an entertainment firm like Sony. Consider carefully whether and how cybersecurity concerns might change the applicability and scope of exclusions in your policies. And it is always advisable to work closely with your insurance broker and coverage counsel to help guide you through the application process and to best ensure coverage should a data breach occur.

Nathasha A. Saggarr Sheth and Alexander J. Suarez are associates in the Los Angeles office of Nossaman LLP.

³ 2000 U.S. Dist. LEXIS 7299 (D. Ariz. Apr. 18, 2000).

⁴ 613 F.3d 797 (8th Cir. 2010).

⁵ 114 Cal. App. 4th 548, 556-57 (2003).

⁶ 147 F. Supp. 2d 1113, 1116 (W.D. Okla. 2001).

⁷ *Zurich Am. Ins. Co. v. Sony Corp. of Am.*, Case No. 651982/2011, 2014 WL 3253541 (N.Y. Sup. Ct. Mar. 10, 2014).

⁸ *Travelers Indem. Co. of Am. v. Portal Healthcare Sols., L.L.C.*, 644 F. App'x 245 (4th Cir. 2016) (affirming *Travelers Indem. Co. of Am. v. Portal Healthcare Sols., L.L.C.*, 35 F. Supp. 3d 765 (E.D. Va. 2014)).

⁹ *Travelers Indem. Co. of Am. v. Portal Healthcare Sols., L.L.C.*, 35 F. Supp. 3d 765, 771 (E.D. Va. 2014).

STORYTELLING

THE ESSENCE OF LEGAL ADVOCACY

December 6, 2016, 6:00 – 9:00p.m.
Millennium Biltmore Hotel, Los Angeles

Storytelling is not just the province of the successful trial lawyer. It is essential to all aspects of litigation and legal advocacy. As stated by Judge Alex Kozinski, in the forward to Jonathan Shapiro's book, "Lawyers, Liars and the Art of Storytelling" (ABA Publishing), "A good brief, like a good detective story, requires a compelling narrative, a roadmap, and the effortless synching of the wind-up and the pitch." In this dinner program, *Jonathan Shapiro* will demonstrate how to communicate legal information in an effective and convincing way that leaves the decision-maker with a clear answer to the question, "Why should I care?"



Following a decade as a federal prosecutor and as an adjunct law professor at Loyola Law School and the University of Southern California's Gould School of Law, Jonathan Shapiro spent the last 15 years writing and producing such notable television series as *The Blacklist*, *The Practice*, *Life and Boston Legal*. He is a creator and executive producer of *Goliath*, a legal thriller starring Billy Bob Thornton and William Hurt that has just launched on Amazon. He is also the author of "Liars, Lawyers, and the Art of Storytelling" (ABA Publishing).

A graduate of Harvard University and a Rhodes Scholar at Oriel College, Oxford University, Jonathan received his law degree from the University of California, Berkeley.

8502 E. CHAPMAN AVENUE
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CONTRIBUTORS TO THIS ISSUE:

Rachel Feldman is a partner in the Los Angeles office of White & Case LLP and Co-Chair of the Los Angeles ABTL YLD.

Steven Feldman is a senior associate with Hueston Hennigan LLP, in Los Angeles.

Janet Kwuon is a partner in the Los Angeles office of Reed Smith.

Amy J. Laurendeau is a partner in the Newport Beach office of O'Melveny & Myers LLP.

Nathasha A. Saggur Sheth is an associate in the Los Angeles office of Nossaman LLP.

Matthew J. Smock is an associate in the Newport Beach office of O'Melveny & Myers LLP.

Alexander J. Suarez is an associate in the Los Angeles office of Nossaman LLP.

Hon. Martin J. Tangeman is an Associate Justice of the Court of Appeal, Second Appellate District, Division Six, in Ventura.

Ben Williams is an associate in the Los Angeles office of Morrison & Foerster LLP and Co-Chair of the Los Angeles ABTL YLD.

Erica Yen is an associate in the Los Angeles office of Reed Smith.