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E-Discovery in the Routine Case

Malpractice, spoliation, and sanction cases based on e-discovery shortcomings attract significant attention. *TIG Ins. Co. v. Giffin Winning Coben & Bodewes, P.C.*, 444 F.3d 587 (7th Cir. 2006); *Coleman (Parent) Holdings Inc. v. Morgan Stanley, Inc.*, 2005 WL 674885 (Fla. Cir. Ct. 2005) (\$1.4 billion judgment, rev'd on other grounds, based on discovery misconduct); *Wall Street Journal*, May 16, 2005 p.A.1 ("In court, Morgan Stanley said it is considering a malpractice suit against the law firm that represented it..."). But while such cases cannot be ignored, they represent the extremes. Ultimately, every litigator is concerned about handling routine discovery of electronic data on a daily basis, in a cost effective manner, without being overwhelmed by hyperbole or expense. As e-discovery gradually becomes the norm, we should evaluate how it has been incorporated into routine litigation and how organizations can assist their members



Hon. Richard E. Best (Ret.)

in the process.

Core Concepts of Discovery Remain the Same
Recent amendments to the Federal Rules of Civil Pro-

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Choosing Federal or State Court in Consumer Class Actions

A key decision to be made early in many business cases, whether by the plaintiff on where to file or by the defendant on whether to remove, is whether to have the case heard in state or federal court. The one-two punch of Proposition 64 — requiring class certification for cases under California Business & Professions Code sections 17200 and 17500 *et seq.* — and the Class Action Fairness Act ("CAFA") — authorizing federal court jurisdiction based on minimal diversity in any case with \$5 million in dispute and a defendant corporation outside California — means that more business litigators than ever before need to address this decision. This article describes some of the strategic considerations that go into making that choice.



Thomas Mayhew

Judicial Assignments

The traditional analysis of federal versus state court forum choice often turns on a perception about state court judicial reluctance to grant summary judgment.

Historically, California state courts have utilized a master calendar system. Unlike federal court, which uses a single assignment system (one judge hears all matters relating to the case, with the possible exception of discovery matters which some federal judges refer out to a magistrate judge), the master calendar system allocates tasks in the case to different departments. Motions — demurrers, summary judgment motions, and class certification motions — are heard by the judge who presides over the law and motion department. Discovery motions may be heard by the same judge or by a discovery commissioner or separate discovery motion department. The judge who will preside over the case for trial is not assigned until

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cedure concerning electronic discovery have focused attention on the issue. The concepts in the new rules, however, are not new. Judges applying California state law — with the significant exception of the initial disclosure requirement — will in most cases reach the same result using the basic rules of discovery that predate specific electronic discovery rules. Decisions in the discovery context are not driven by the medium or technical aspects of the issue (e.g., metadata, flash memory, or back-up tapes) but instead by the core principles that have always governed discovery disputes: preservation duties and orders, spoliation, discovery plans, case management conferences and orders, the concepts of “undue burden” and “not reasonably accessible data,” cost-benefit analyses, and cost-shifting.

Lawyers awaiting a set of e-discovery rules to chart their courses and resolve issues may be disappointed. Discovery rules and case law provide a framework but will never answer specific questions requiring analysis of unique facts and technology and the application of existing discovery concepts. In the *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002), and *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003), cases, courts were faced with requests to produce relevant communications, but the estimated costs of extracting e-mail from back-up tapes varied widely and were substantial. Both courts recognized that discovery of e-data raised new issues and that high costs required analysis beyond the normal discovery clichés and established practices. Both courts resorted to the well-established practice of cost-shifting based on protective order concepts and trial court discretion. Such factors are reflected in the California Discovery Act and case law. Code Civ. Proc. § 2017.020 (burden, expense, intrusiveness versus likelihood of discovery of admissible evidence); § 2019.030 (unreasonably cumulative/duplicative, alternative sources, less burdensome or expensive or more convenient, undue burden or expense; consider needs of case, amount in controversy, importance of issue to which relevant); § 2031.060 (unwarranted annoyance, embarrassment, oppression, undue burden and expense); *Toshiba America Electronics Components, Inc. v. Superior Court (Lexar Media, Inc.)*, 124 Cal. App. 4th 762, 769, 772, 773 (2004); *San Diego Unified Port Dist. v. Douglas E. Barnhart, Inc.*, 95 Cal. App. 4th 1400, 1404 (2002) (court’s power to exercise reasonable control over discovery did not permit ordering one party to pay for discovery it did not wish to pursue).

In *Toshiba America*, for instance, the Court of Appeal reviewed a trial court decision on cost-shifting of \$1.8 million for review of back-up tapes. The Court emphasized that such decisions turn on issues of reasonableness and the necessity for obtaining the documents. It did not mandate cost-shifting in all e-discovery and left most issues unresolved even when Code Civ. Proc. § 2031.280(b) (shifting cost of obtaining information from back-up tapes to demanding party) applies.

While *Zubulake* suggests a hierarchy and underscored

the qualitative approach, both *Rowe* and *Zubulake* pointed to a multitude of factors to consider in determining whether and in what proportions costs should be allocated. The factors are those normally considered in any cost/benefit or undue burden analysis. Those factors are not equal, may not apply to every case and do not provide a structure for a mathematical calculation or application. In *Rowe* the court noted that its eight factors were suggestions and that counsel may determine other factors are more important in that case. In both cases, and in subsequent cases throughout the country, courts have emphasized that facts and analysis provided by the parties are essential. Factors critical in one case may be of little or no importance in another or new factors may be more important. More recent cases illustrate how all factors can be trumped e.g., by a failure of a party to instigate a litigation hold which inaction results in the elimination of accessible sources leaving only more costly sources such as backup tapes. See *Quinby v. WestLB AG*, 2006 WL 2597900 (S.D.N.Y. Sept. 5, 2006); *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 2007 WL 1585452 (D.D.C. June 1, 2007).

Similarly, in *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 432-33 (W.D. Pa. 2004), the court rejected routine orders “preserving the status quo” in view of the impact of such orders in an e-data world where a broad preservation order could be cost prohibitive, compliance impossible, or operations terminable. It suggested a three-factor balancing test including consideration of “the capability...to maintain the evidence sought to be preserved, not only as to the evidence’s original form, condition or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.” Cf. *Dodge, Warren & Peters Ins. Services v. Riley*, 105 Cal. App. 4th 1414 (2003) (affirming trial court injunction for court-appointed expert to copy computer hard-drives, recover lost or deleted files, and perform automated searches of the data; discussing factors to guide trial court discretion). Again, the court wanted facts and not conjecture or rhetoric to support the decision.

As reflected in *Rowe*, *Zubulake*, and *Capricorn Power*, e-discovery requires that we revisit and reconsider basic discovery concepts and theory to properly apply the rules to the media and technology as well as the facts of the particular case. It requires an understanding of both basic discovery concepts and the technology. For the lawyer’s analysis and argument it may be appropriate to revisit concepts like good cause, reasonable particularity, reasonable search, cost versus benefit, and relevancy versus burden. Even with the omnibus all-inclusive requests that seem to be the norm, no one should expect heroic efforts to find every conceivable bit and byte of e-data. Generally, and as reflected in Code Civ. Proc. § 2031.230, only a “diligent search and a reasonable inquiry” are required and that standard must be applied in context.

E-Discovery Advocacy

While e-discovery issues have changed, the fundamen-

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tal lessons from the early cases remain. Presentations made by lawyers make a big difference. Generalities and rhetoric, no matter how eloquent, are not enough. Overly optimistic or uneducated commitments by counsel can result in a loss of credibility and sanctions even when made in the utmost good faith. Courts are increasingly intolerant of conduct that resembles ignorance, evasiveness and “purposeful sluggishness.” *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002). Discovery concepts and rules are flexible enough to handle, and in fact have been used in recent years to handle any new discovery issues arising from new technology or electronic media. Facts, obtained through discovery or elsewhere, must be presented. Educating the court through a well-written and relevant expert declaration may be the determining factor.

While e-discovery has been included in judges’ continuing education curricula for many years, it is unlikely that the issue of “who pays how much for the e-mail” is at the top of anyone’s list of major social issues. Some judges, particular those who have an interest and background in complex civil litigation, will have more knowledge and interest in the subject, but they may not have sufficient time to devote to adequately handle many e-discovery issues when they arise. Courts want to make informed and fair decisions, but they need sufficient information to do so. A common observation of judges hearing e-discovery motions is that counsel failed to provide sufficient facts or information or to relate them to the issues before the court to enable them to make a proper decision. Judges who recognize the inadequacy may request further briefing, evidence, or meet and confer efforts; others may make decisions based on the burden of proof; some may even make improper decisions based on the inadequate information provided.

A critical aspect of a lawyer’s presentation is the educational component. In some cases, it may be in the interest of all parties to prepare jointly a tutorial on the e-discovery problems and technology affecting the case as a whole or the particular issues anticipated in the case. Even so, that presentation must be supplemented with the educational component of each issue when a dispute arises. Lawyers should not rely on personal knowledge of e-data in making presentations since they do not want to be witnesses and may not be qualified. Often the expert’s presentation, usually by declaration, is the most critical and determinative aspect. Demonstrate the expert’s familiarity with the subject, case, and particular issues. Discovery regarding the opponent’s system and practices may be a prerequisite. Then provide a detailed explanation of the party’s position with all conclusions fully supported by facts, figures and explanations of technology. Consider bringing your expert to any conference or hearing, or having him or her available by phone.

While courts are required to resolve many issues of significance, they expect compliance with rules that require

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Effective Use Of Rule 11 in Civil Litigation

Some legal rules are like certain celebrities, immediately recognizable by a single, short-hand name. For example, every litigator has heard of Rule 11. Like single-name celebrities, however, Rule 11 is not an ordinary acquaintance of most litigators. Indeed, most of us have (thankfully) never met the rule, nor had occasion to invoke it. Nevertheless, it is helpful to know a little something about Rule 11 (by which I mean of course Rule 11 of the Federal Rules of Civil Procedure), and its place and purpose among the federal rules, for the rare occasion when you might encounter or, better yet, make use of it.

Although Rule 11 is potentially applicable to any paper signed and submitted to a federal district court, this article will focus on a situation in which you believe you are defending against a frivolous complaint. (“The word ‘frivolous’ does not appear anywhere in the test of the Rule; rather it is a shorthand that [the Ninth Circuit] has used to denote a filing that is both baseless and made without a reasonable and competent inquiry.” *In re Keegan Mgmt. Co. Securities Litig.*, 78 F.3d 431, 434 (9th Cir. 1996) (emphasis removed).) What is the role of Rule 11 in a toolbox that also includes a Rule 12(b) motion to dismiss, a Rule 12(c) motion for judgment on the pleadings, and a Rule 56 motion for summary judgment?



Don Gagliardi

The Significance of a Signature

Rule 11 requires the signature of an attorney on every pleading, which amounts to a certificate that to the best of the attorney’s “knowledge, information and belief, formed after an inquiry reasonable under the circumstances,” (1) the pleading “is not being presented for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation”; (2) “the claims, defenses, and other legal contentions therein are warranted by existing law or by nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law”; and (3) “the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery.” Fed. R. Civ. P. 11(b). Sanctions are authorized pursuant to Rule 11(c) for violation of any of the provisions of Rule 11(b).

As the Ninth Circuit has observed, in view of Rule 11, “[f]iling a complaint in federal court is no trifling under-

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taking. An attorney's signature on a complaint is tantamount to a warranty that the complaint is well grounded in fact and 'existing law' (or proposes a good faith extension of the existing law) and that it is not filed for an improper purpose." *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002).

Rule 11's Purpose; Requisite Timing

Because Rule 11 allows for the imposition of sanctions for its violation, practitioners may be tempted to consider the rule as a stand-in for contractual attorney's fee shifting clauses for frivolous suits. Indeed, the shifting of attorney's fees is among the range of potential sanctions. See, Fed. R. Civ. P. 11(c)(2) (available sanctions include "an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation"). So the possibility of treating the rule as a substitute fee-shifting statute where its proscriptions have been violated certainly exists.

However, two points need to be considered. First, the purpose of the rule is not remedial, but instead to deter misconduct. Rule 11 is expressly "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2). Thus, while shifting fees may be an appropriate sanction serving deterrence, a district court is as likely to require payment into the court or other form of sanction, without any compensation to the party afflicted by the frivolous claim(s) at issue. In this fashion, Rule 11 arguably operates more effectively to deter Rule 11 motions than it does to deter the underlying frivolous claims.

Second, unlike an ordinary contractually-based fee petition submitted to the court by the prevailing party at the end of litigation, a motion for sanctions for violation of Rule 11 cannot wait until a prevailing party is determined. Under the current Rule 11, as amended in 1993, there is a 21-day "safe harbor" between the time the motion is served, and subsequently filed with the district court, during which the offending pleading may be withdrawn with impunity. See Fed. R. Civ. P. 11(c)(1)(A). Because a Rule 11 motion presupposes an opportunity to correct or withdraw an offending pleading, a Rule 11 motion must be brought before the merits of the pleading have been tested. *Safe-Strap Company, Inc. v. Koala Corp.*, 270 F. Supp. 2d 407, 413 & n.3 (S.D.N.Y. 2003), quoting Advisory Committee Note to 1993 Amendments to Fed. R. Civ. P. 11 ("Given the "safe harbor" provisions... a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention)."). See also *Barber v. Miller*, 146 F.3d 707, 710-11 (9th Cir. 1998) (Rule 11 motion disallowed where complaint already dismissed). Thus, a Rule 11 motion must be made in the heat of battle, when the merits of the claims have yet to be adjudicated.

Rule 11 v. Dispositive Motions

Because a Rule 11 motion is addressed to the viability

of a suit before trial, it is tempting to consider a Rule 11 motion as a substitute for a motion to dismiss, motion for judgment on the pleadings, or for summary judgment or summary adjudication. The standard for determining a Rule 11 motion seems to offer such possibility: "Where...the complaint is the primary focus of Rule 11 proceedings, a district court must conduct a two-prong inquiry to determine (1) *whether the complaint is legally or factually 'baseless' from an objective perspective*, and (2) if the attorney has conducted 'a reasonable and competent inquiry' before signing and filing it." *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) (emphasis added), quoting *Buster v. Greisen*, 104 F.3d 1186, 1190 (9th Cir. 1997).

A pretrial determination whether a complaint is objectively baseless sounds, at first blush, like a summary judgment determination. Indeed, a finding of a Rule 11 violation with respect to the bringing of a complaint should be the rough equivalent of summary judgment — and allow for an award of sanctions in the bargain — because a judicial ruling that a suit is frivolous or asserted for an improper purpose is surely a death-knell for such suit, foreshadowing its eventual dismissal. Yet, formally at least, the inquiry on a Rule 11 motion does not determine the merits of suit. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990) ("[T]he imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather it requires the determination of a collateral issue: whether the attorney has abused the judicial process..."). Thus, unless the district court is persuaded to dismiss the frivolous complaint as a component of the Rule 11 sanction, which it may (and arguably should) do, see Advisory Committee Notes to 1993 Amendments to Rule 11 ("The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper..."), the frivolous claims would otherwise continue to linger — albeit in critical condition.

Moreover, a Rule 11 motion attacking a complaint, while deceptively similar to a summary judgment motion, is more cumbersome. First, the safe harbor provision requires that the motion be fully prepared and served three weeks before it is filed, and therefore eight weeks must elapse before it can be heard in the United States District Court for the Northern District of California, which has a 35-day notice period after filing, see, N.D. Cal. Civil L.R. 7-2. Second, the second prong of the Rule 11 inquiry is highly difficult. As mentioned, to impose sanctions where the complaint is the primary focus of the Rule 11 motion, a district court in the Ninth Circuit must find not only that the complaint is objectively baseless, but also that the attorney failed to conduct a reasonable and competent inquiry before signing and filing it. *Christian*, 286 F.3d at 1127. The second prong thus requires an inquiry into territory usually cloaked in privilege — both the attorney-client privilege regarding communications with the client as a predicate to suit and also the work product protection regarding the attorney's investigation of the law and the relevant facts. Only rarely, it would seem, will admissible facts surface casting

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doubt on the quality of the pre-suit attorney investigation, thereby warranting a Rule 11 motion.

In the rare case where there exists both *disputed* evidence that a suit is baseless and evidence of the lack of a reasonable attorney investigation, Rule 11 might present an attractive alternative to a summary judgment motion, or even a motion to dismiss for failure to state a claim upon which relief can be granted. The moving party bears the burden of proof on the Rule 11 motion, but the nature of the burden is dramatically different from either a Rule 12(b)(6) motion to dismiss or Rule 56 motion for summary judgment. The material facts suggesting a violation of the rule need not be undisputed, nor need the allegations on the face of the complaint be accepted as true. The evidence of a violation of Rule 11 need merely satisfy the district court that a violation has occurred. Provided the court can be further convinced that appropriate sanctions include striking the offending complaint and reimbursement of the moving party's attorneys' fees and costs, a Rule 11 motion can serve in the rare case as a tremendously effective substitute for a dispositive motion.

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good faith efforts to resolve issues and do not favor evasive or abusive conduct in the meet and confer process. With some e-discovery issues, the adversary process may not even work. In contesting a preservation order, advocates tend to argue at the two extremes, neither of which is a satisfactory or even viable solution. Negotiation or mediation conducted by knowledgeable and practical lawyers is more likely to identify and resolve issues in a satisfactory manner. The lawyer's knowledge of e-data may be invaluable in protecting the client and obtaining strategic advantages during any resolution process. Of course, a backup position is required when it appears Plan A is failing. See *Hartbrodt v. Burke*, 42 Cal.App. 4th 168, 173 (1996) ("Appellant had the opportunity to review the transcript, to identify issues susceptible to preclusion, and to fashion and propose the orders he now divines would resolve his dilemma, but he nonetheless failed to take those steps. It was not the task of the trial court to extricate appellant by inventing solutions which were not proposed and not obviously available or acceptable."). Considering the less extreme position before the court forces the issue may be the place to start a good faith effort to resolve matters.

Early Attention

Ideally, e-discovery preparation starts years before potential litigation with a comprehensive records manage-

ment policy and program, including training, monitoring and enforcing compliance. A suspension of document destruction pursuant to otherwise valid practices may be required to preserve evidence when litigation appears reasonably probable. Each case requires an early assessment of litigation readiness including data mapping, access evaluation, collection strategies, and a clear assignment of responsibilities. Such efforts may be subjects of discovery. When lawyers are involved in the counseling on data preservation before or during the litigation, issues may arise as to attorney-client privilege and work product and, if claims of spoliation arise, the crime/fraud exception to the privilege is a probable issue. See e.g., *Samsung Electronics Co., Ltd. v. Rambus, Inc.* 2006 WL 2038417 (E.D.Va. 2006). It may be desirable to resolve such issues without risking a court finding that the exception applies.

Discovery disputes rarely improve with age especially with e-discovery where costs can spiral out of control. Despite concerns raised by the new federal rules about incurring excess or unnecessary costs early in the litigation, experience teaches that such early attention can be cost-effective and provide strategic advantages to counsel and parties who are well informed and prepared. Early actions and negotiations or lack thereof may impact the way issues such as spoliation, cost allocation or sanctions are subsequently viewed and resolved.

One result of the federal rule amendments has been the emphasis on early attention to e-discovery issues required at the parties' conference and the case management conference pursuant to Rule 26. Cal. Rules of Court Rule 3.721 *et seq.* contain the same requirements as Federal Rule of Civil Procedure 26(a) (other than mandatory initial disclosures).

Recent e-discovery programs for judges have emphasized the value of early and continual attention to such issues as part of the case management process. While opinions and practices differ on what and how matters are addressed in the case management process, lawyers can seize the opportunity to resolve issues informally, to provide notice to court and counsel of their intentions and their expectations of opponents, and to seek judicial guidance or rulings. Even if it is premature for agreements at the initial conference of counsel, serious discussions should occur where concerns, expectations and issues can be set forth for resolution at the next conference. Similarly, continuances or subsequent status conferences with the court may be necessary. California Rule of Court Rule 3.723 expressly authorizes additional case management conferences at a party's request or by court order.

Few if any e-discovery issues will be resolved by any binding case or rule. It may be necessary to seek court guidance in any given case, more in the form of clarifications than rulings. The case management process can be effective for such guidance. If available, an informal procedure of calling the judge to discuss issues informally often resolves matters immediately, inexpensively, without formal rulings and before they become major issues. Many lawyers seem to fear that judges will be irritated by discovery disputes. That may be true when the disputes

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are trivial or childish. However, legitimate disputes will have to be resolved by courts and the sooner the easier. Often, a judge's comments can assist in a quick and satisfactory resolution to everyone's advantage. Instead of spending megabucks on e-mail production and then going to court to determine the allocation of costs already incurred, an early informal discussion of the multitude of alternative approaches might result in a more predictable, less expensive, or more gradual process that enables parties to make informed decisions regarding whether to pursue or oppose discovery. When cost-shifting is discussed with the scope and burden of discovery early in the case, there is an incentive to find common ground.

In a world where almost all information is created and maintained in electronic form, e-discovery is discovery; e-evidence is evidence. Basic knowledge and continuing education of e-data is required. While applying the same legal knowledge, skills, and judgment that are applied to current forms of information, consider the validity of routine practices and assumptions. If lawyers know and understand e-data and properly apply traditional discovery concepts, the law will take care of itself and the litigation process will benefit from technological progress. If not, expect unnecessary costs, delays, inadequate discovery, satellite litigation, sanctions and malpractice claims.

The Honorable Richard E. Best (Ret.) was a Court Commissioner of the San Francisco Superior Court from 1974 to 2003. He now serves as a private discovery referee with ADR Services and publishes a web site on civil discovery law at California Discovery.findlaw.com. Best@Justice.com..



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Choosing Federal or State Court

shortly before the trial: three days before trial in Santa Clara County, for instance, or even the day of trial in San Francisco Superior Court.

The conventional wisdom is that the master calendar system discourages the granting of dispositive motions. The crass explanation is that the law and motion department has little to gain from granting a dispositive motion (because that judge will not need to do the work of hearing the trial) and much to lose (loss of prestige from being reversed on appeal).

A more subtle explanation could also be based on the simple difference in workloads. A busy state court law and motion department can often have a law and motion calendar of 15-25 cases per day. San Francisco Superior Court's two law and motion departments had a total of 130 summary judgment motions heard in June 2007 (52 in Department 301; 78 in Department 302). Alameda County Superior Court's law and motion department heard 43 summary judgment motions the same month. By contrast, a review of the federal court calendar shows

around six summary judgment motions heard per judge during the same period.

The decision to end a case is a major one. It requires certainty that the right result is being reached. If judges and their law clerks only have a few hours, or less, to determine whether to grant summary judgment, they may not be able to spend enough time thinking about the problem to feel that ending the case is the right thing to do. The summary judgment briefing may be the first time that the judge has ever heard about the case. Simply having more time to read cases, and to review the deposition testimony and declarations claimed to show material, triable issues of fact, before making a decision may provide the judge with the confidence to make a case-dispositive decision. This, combined with a state summary judgment statute that sharply limits the ability to get summary adjudications on particular issues in the case when the motion will not eliminate an entire cause of action (see Hon. Beth Freeman, "Increasing the Likelihood of Success on Summary Judgment Motions," *ABTL Northern California Report* Summer 2006 (discussing state court limitations on summary adjudication)), has led many practitioners to conclude that their legal arguments will receive a better reception in federal court.

Recent restructuring within the state court system may change the analysis. A number of counties are now on a single assignment system, just like the federal courts. Marin and Contra Costa Counties have long been on a single assignment system; in July 2007, Alameda went to a single assignment system as well.

Meanwhile, the Judicial Council established a "pilot" Complex Civil Litigation Program in 2000, which led to the creation of six complex litigation departments. There are now two judges in Alameda County, one judge each in Contra Costa, San Francisco, and Santa Clara, seven judges in Los Angeles County, and five judges in Orange County, all dedicated to hearing only complex litigation cases. These judges receive special training on how to manage complex civil cases, including class actions, and have additional funding to hire research attorneys.

Evaluating whether to remove a CAFA-eligible case from one of these counties involves a more complicated decision. In the Central District in Los Angeles, for instance, there are 37 federal judges and 24 magistrate judges, including a number of recent appointments. By contrast, in Los Angeles Superior Court, there are only seven state court judges hearing complex cases. In San Francisco, the choice is even more stark: the complex litigation department is Judge Kramer, or on removal the parties will be assigned to one of the 15 federal judges or magistrate judges in Oakland or San Francisco. The relative inexperience of federal judges with consumer class actions (because jurisdiction was only recently vested in them by CAFA over the small dollar amount claims under the Consumer Legal Remedies Act (Civ. Code §§ 1750 *et seq.*) and the Unfair Competition Law (Bus. and Prof. Code §§ 17200 *et seq.*)), combined with uncertainty about which judge will be assigned, will sometimes drive the decision not to push for removal.

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PETER BENVENUTTI

On CREDITOR'S RIGHTS

It is common knowledge that the number of cases decided by the Supreme Court has dwindled substantially in recent years. And only a small handful of those decisions have presented bankruptcy law issues or originated in the bankruptcy courts. So it is quite a coincidence that two of the Court's opinions during the 2006-2007 term involved decisions by bankruptcy judges in the Northern District of California: *Travelers Cas. & Surety Co. of America v. Pacific Gas & Electric Co.*, ___ U.S. ___, 127 S. Ct. 1199 (2007), and *Jeffrey H. Beck, Liq. Trustee of the Estate of Crown Vantage, Inc., v. PACE International Union*, ___ U.S. ___, 127 S. Ct. 2310 (2007).

In both cases, the Ninth Circuit was reversed by a unanimous Supreme Court, continuing a trend which is hardly new. One case — *Beck v. PACE* — dealt with the termination of a defined benefit pension plan and turned on statutory interpretation of ERISA law, so it likely holds little interest for any who do not practice in that highly specialized field. The other decision, though, could be significant for any party who litigates against a bankruptcy estate representative (the trustee or debtor in possession) concerning a pre-bankruptcy contract which provides for the recovery of attorneys' fees. This is particularly so in the Ninth Circuit, because the Supreme Court's *Travelers* decision reversed Ninth Circuit precedent — the so-called "Fobian rule" (based on *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991)) — which had prohibited the recovery of such attorneys' fees whenever the litigation involved "issues peculiar to federal bankruptcy law," such as the automatic stay or (as in *Travelers*) treatment of the creditor's claims or other rights under a proposed Chapter 11 plan of reorganization.

The facts in *Travelers* are fairly straightforward, though not all that common. Pre-bankruptcy, Travelers issued a bond to back-stop PG&E's potential liability on its self-funded workers' compensation plan. PG&E never defaulted on its workers' comp obligations and no call was ever made on the bond, but Travelers incurred legal fees in the bankruptcy court in disputing the PG&E Chapter 11 plan's proposed treatment of the contingent claim that Travelers had asserted on its possible *future* liability on the bond. Travelers sought to recover those legal fees as a non-priority, pre-bankruptcy claim based on the terms of the bond and related pre-bankruptcy agreements with PG&E. PG&E objected to the fee claim. The bankruptcy court disallowed it and the district court and Ninth Circuit both affirmed, in each instance in reliance on the *Fobian* rule.

The Supreme Court granted certiorari to resolve an arguable conflict between circuits. See *In re Shagra-La, Inc.*, 167 F.3d 843, 848-849 (4th Cir. 1999). The unanimous Court made short shrift of the *Fobian* rule, concluding

that the absence of "textual support" for the rule in the Bankruptcy Code was fatal in the face of the general presumption "that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed." 127 S.Ct. at 1206. The Court was no doubt aided in this conclusion because the respondent made no effort to defend the *Fobian* rule, 127 S.Ct. at 1207, but instead advanced arguments which had not been litigated below (where, of course, the *Fobian* rule, as established and controlling Ninth Circuit law, made such argument superfluous) and which were not encompassed within the certiorari question. The Supreme Court declined to consider these additional arguments, narrowly limited its holding to a rejection of the *Fobian* rule, and left a host of unanswered questions regarding the recoverability of fees. Here are some of them:

- Is the recovery of fees barred by other provisions of the Bankruptcy Code? PG&E argued that § 506(b), which explicitly permits a fully-secured creditor to recover its post-petition fees from its collateral, operated to exclude recovery of fees in other situations. One local bankruptcy court has rejected this argument in a post-*Travelers* decision. See *In re QMECT, Inc.*, 2007 WL 1463846 (Bankr. N.D. Cal., May 17, 2007).

- Does the introductory clause to Bankruptcy Code § 502(b), which directs the bankruptcy court to fix the amount of a claim as of the petition date, limit or preclude a fee claim based on post-bankruptcy litigation?

- Is there a "reasonableness" limitation on the amount of fees recoverable and, if so, how will the bankruptcy courts enforce it?

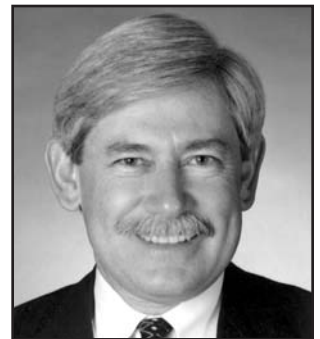
- Are fees routinely recoverable for litigating contract claim objections?

- How will the bankruptcy courts enforce reciprocity provisions such as California Civil Code §1717? The logic of *Travelers* is that the fees are a pre-bankruptcy claim and hence not entitled to any priority, but rather payable at the same pro rata percentage as other pre-bankruptcy claims. But look for trustees and debtors to argue that, if the estate representative prevails in the litigation, it should recover fees payable in 100-cent dollars.

One point is clear, though: a claim for fees must be based on a valid right to recover them under applicable state law. If the contractual fee language does not cover the particular dispute in issue, the contract — and hence the *Travelers* decision — will not support recovery of fees. Thus, a broadly-drafted attorneys' fee clause, which explicitly applies to any litigation in any forum, would seem advisable.

Disclosure: My firm represented PG&E before the Supreme Court in *Travelers*. I did not have an active role in the case.

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Peter Benvenuti



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Choosing Federal or State Court

Alternative Standards for Class Certification

Another significant consideration in selecting the state or federal forum is the difference in rules governing class certification. Frequently, class certification is the most substantial battle in the case: a denial of a class certification motion is properly called a “death knell.” See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 465 (1978). There are both real and perceived differences between federal and state court on these issues.

Post Proposition 64, the law governing class certification in California state court is unsettled, awaiting key decisions by the California Supreme Court. In the *In re Tobacco II Cases*, the trial court decertified a class action post-Prop. 64, holding that Prop. 64 required that each class member have proof of injury-in-fact, and that the required commonality was not present because of individual issues of reliance, “such as whether each class member was exposed to Defendants’ alleged false statements and whether each member purchased cigarettes ‘as a result’ of the false statements.” See <http://www.17200blog.com/TobaccoOrder.pdf> (trial court order, March 7, 2005). After the Court of Appeal affirmed, the Supreme Court granted review on the two key questions (1) whether every class member (or only the named plaintiff) must have suffered injury, and (2) whether every member of the class must have relied on the alleged misrepresentation. Cal. S. Ct. Case No. S147345. (Note: this case still has not been decided, although a companion case regarding preemption of other claims in the case, also titled *In re Tobacco II Cases* was decided August 2, 2007.) The same issue is presented in *Pfizer, Inc. v. Superior Court (Galfano)*, 141 Cal. App. 4th 290, 297, 305-06 (2006) (review granted), where the Court of Appeal held that individual issues about which class members saw which advertisements, or believed them (some, but not all of Listerine’s advertisements claimed that the product was “as effective as floss”; some customers didn’t see the alleged representation, or would buy the product independent of the representations because of brand loyalty or price), defeated class certification post-Prop. 64. The Supreme Court granted review here too, pending outcome of the *In re Tobacco II Cases*.

Meanwhile, in *McAdams v. Monier, Inc.*, 151 Cal. App. 4th 667 (2007), the Court of Appeal held that a “common inference of reliance” could substitute for actual proof of reliance and permit a case involving different representations to different customers — and in some situations, arguably no representation at all — to go forward as a class action. A petition for review is pending as of press time.

This lack of clarity in the law can be contrasted with more established federal precedent. The closest analogue to the *In re Tobacco II Cases* (alleging deception of consumers by cigarette manufacturers) is the Fifth Circuit’s 1996 decision in *Castano v. American Tobacco Co.*, 84 F3d 734, 745 (5th Cir. 1996). That case held that individual issues of reliance (also in a consumer versus cigarette

manufacturer class action) defeated class certification. Because the Federal Rules of Civil Procedure override any contrary state standard governing class certification, see *Hanna v. Plumer*, 380 U.S. 460 (1965), removing the case to federal court is a way to avoid hinging the outcome on the current uncertainty about how the California Supreme Court will decide the pending cases.

A recent nationwide survey conducted by the Federal Judicial Center found a perception that state court judges were more likely to certify class actions generally, but somewhat surprisingly found no empirical basis for the perception: class actions were equally likely to be certified in state or federal court in the sample studied. See Thomas E. Willging and Shannon R. Wheatman, “Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?” 81 *Notre Dame Law Rev.* 591, 635 (2006) (finding class certification granted in 22% of federal court cases, and 20% of state court cases; finding 50% of the certifications in each court were for settlement as opposed to trial and litigation).

Whether such general statistics will apply in California post-Prop. 64 remains to be seen. Ultimately, decisions about forum are best made with a more nuanced view of the differences in law and how they will apply to the facts of the individual case. Recent treatment of a “presumption” of reliance and “common inference” of reliance in federal and state court highlights why practitioners believe state court is more lenient in granting class certification. In *McAdams v. Monier*, 151 Cal. App. 4th 667, the California Court of Appeal held that a class action could go forward based on a “common inference” of reliance from non-disclosure of a material fact: that red roof tiles would fade to gray, where express representations had been made — lifetime warranty, permanent color, etc., and that reliance could be proven on a class-wide basis by showing that the non-disclosure was material. By contrast, in *Poulos v. Caesar’s World*, 379 F3d 654 (9th Cir. 2004), the Ninth Circuit held that class certification was properly denied in a non-disclosure case — plaintiffs complained that they thought the cards they would be dealt in video poker would be randomly distributed, as are cards dealt in real poker — because “some players may be unconcerned with the odds of winning.” The fact that the virtual “deck” was allegedly stacked against the players (even though presumably, every player would find this material) wasn’t enough: an individualized showing of reliance would be required.

Local Rule Variations

A separate consideration relating to class certification procedures arises from local rules. Compare the case management process in Los Angeles Superior Court with the federal district court for the Central District of California. In state court, the complex litigation department judges will call for an early case management conference where issues such as phasing of discovery (including discovery focused on class certification issues first) will be heard. Some of the state court judges automatically stay all discovery and even filing of demurrers

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WALTER STELLA

On EMPLOYMENT

Release agreements have meant an easier night's sleep for many in-house counsel facing employment claims from current or former employees. By ending or avoiding expensive litigation, a broad, enforceable release buys peace of mind.

Recent cases, however, have given employers less reason to feel secure. Provisions routinely used in release agreements have been questioned by courts. In several instances, agreements that would have been considered "standard" by many practitioners have been held unenforceable. These cases suggest valuable lessons for drafting enforceable release agreements.

One essential requirement for an enforceable release agreement is that it be "knowing and voluntary." IBM was recently and painfully reminded of this requirement. *Syverson v. IBM*, 472 F.3d 1072 (9th Cir. 2006). The Syverson court held that a form of release agreement, which IBM required laid off employees to sign in order to obtain a severance package, violated the knowing and voluntary requirement under the Age Discrimination in Employment Act (ADEA).

To be enforceable, a release agreement that intends to waive claims under the ADEA must be, among other things, "written in a manner calculated to be understood by...the average individual eligible to participate" in the termination program. The *Syverson* court found IBM's release to be confusing to the average person.

Notably, the language in those release provisions is commonly found in many release agreements: IBM's agreement included a general release of all claims and a covenant not-to-sue. The general release included claims under the ADEA. The covenant not-to-sue provision expressly excluded them in an attempt to comply with EEOC regulations voiding agreements that bar plaintiffs from cooperating or filing charges with the EEOC. The court found that this apparent inconsistency made the release agreement confusing and therefore void as a matter of law.

An initial reaction to the *Syverson* decision might be to avoid creating any inconsistencies by not addressing in the agreement an employee's ability to file a charge of discrimination with the EEOC. However, failing to address this point could compromise the enforceability of the agreement by making it overreaching. In *EEOC v. Lockheed Martin Corporation*, 444 F. Supp. 2d 414 (D. Md. 2006), the court struck a release agreement because its wording was broad enough to bar an employee from filing an EEOC charge. The challenged release included "all claims of any nature whatsoever" and any "charge filed with any court, federal, state or local agency." The release

also prohibited the pursuit of any "claims or charges against" the employer. The court held that the release language potentially barred the employee from filing charges of discrimination with the EEOC and was therefore invalid.

Likewise, in a recent appellate opinion under review by the California Supreme Court, a general release was held unenforceable because it was interpreted to encompass unenforceable claims. *Edwards v. Arthur Andersen LLP*, 142 Cal. App. 4th 603, *modified*, 2006 Cal. App. LEXIS 1488, *rev. granted*, 52 Cal. Rptr. 3d 86 (2006). The release language in *Edwards* was admittedly broad, but fairly typical. The agreement sought to release "any and all actions, causes of action, claims, demands, debts, damages, costs (and) losses...whether known or unknown" that arose out of the employment relationship. The employee challenged the release on the grounds that it was so broad that it encompassed his rights to indemnity under California Labor Code section 2802 in express violation of California law. The court agreed and found the release to be unenforceable as a matter of law.

Although the *Edwards* decision is under review, it serves as a wake-up call for California employers who have traditionally relied on broadly worded release provisions to extinguish employment claims. It reminds us of the possibility that broadly worded releases may be struck as over-reaching in certain instances.

The practical problem is coming up with an appropriate drafting solution to address the problem. Many claims besides indemnification claims under California Labor Code section 2802 are not waivable under California law. Attempting to create a laundry list of excluded claims from a general release presents its own problems. Some claims may be erroneously omitted, and the list could create a road map for future litigation. It remains to be seen whether a general statement excluding claims that cannot be waived as a matter of law is sufficiently understandable to the average individual to satisfy the "knowing and voluntary" requirement.

Recent decisions suggest that courts are taking an increasingly critical view of employer-drafted release agreements. In addition to ensuring that release agreements are understandable, employers must also ensure that they are not overreaching. Given the complexity of the legal issues and the quest for peace of mind through the broadest release allowed by law, it is no easy task. Those time-tested release agreements that many practitioners have come to rely upon without much concern should certainly be reviewed, lest these recent decisions become a source of insomnia for employers and their in-house counsel.

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Walter Stella

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Choosing Federal or State Court

or other responsive pleadings until the initial case management conference is held. This slows the process (preventing the plaintiff from moving the case forward too aggressively in the early stages), and provides time for class discovery. More significantly, many of the state court judges have already made up their minds about issues like whether to allow discovery in support of or opposition to a class certification motion, and have practices on the subject that can be determined by contacting other attorneys who have experience with the judge.

By contrast, in the Central District local rules, the federal court requires that a class certification motion be brought within 90 days of the filing of the complaint (or removal). See C.D. Cal. Local Rule 23-3. This means that class certification motions will be filed and often heard *before* the initial case management conference, and because of Federal Rule of Civil Procedure 26(a), that means they will be heard *before* any discovery has taken place at all. If a plaintiff or defendant believes that they need discovery in order to make or oppose the class certification motion effectively, they may decide that state court is a preferable forum based on this local rule variation.

Winning the Battle at the Cost of the High Ground?

Defense attorneys contemplating removal under CAFA have another key point to consider: how to prove the amount-in-controversy without sacrificing key ground on their theme that no damage was caused.

In a consumer class action, a key defense is that the alleged false labelling or advertising either wasn't material, or wasn't the cause of substantial damage. Even if the product didn't match the labelling or advertising, it nevertheless provided some level of value to the consumer. For example, in *Lamond v. Pepsico, Inc.*, 2007 U.S. Dist. LEXIS 42023 (D.N.J. June 8, 2007), the Court found no CAFA jurisdiction over a class action against Pepsi based on alleged benzene contamination of Diet Wild Cherry Pepsi, because people still received a tasty soft drink in a can and thus couldn't sue for a "full refund" (which would have meant that the \$5 million in controversy amount was reached). The Court explicitly noted "The irony here is that it is the Defendants who are seeking federal jurisdiction by claiming that the amount-in-controversy exceeds \$5 million. Yet, Defendants' entire defense, even assuming the veracity of Plaintiff's allegations, is that the beverages were fit for consumption and that the Plaintiff received the value of her bargain. In other words, there was no loss. This Court understands the 'Catch-22' that the Defendants are in: they want to establish jurisdiction via retail sales and yet are loath to concede that Plaintiff received no or a lesser value from their products." *Lamond*, 2007 U.S. Dist. LEXIS 42023, at *26 n.16.

Many consumer class actions will share this basic feature: the defendant claims that, even if there was a tech-

nical legal violation or arguably misleading statement, the plaintiff nevertheless received substantial value in the transaction or "got what they paid for." Trying to prove amount-in-controversy exceeds \$5 million under CAFA means acknowledging that plaintiff's damage theory (whether for refund, or some other substantial damage amount) has at least some level of merit.

Differences in Jury Composition and Unanimity Requirement

Differences in jury composition and voting may also influence the decision. California state court juries require only nine out of 12 jurors to reach a verdict, which means a weaker or closer case could lead to a plaintiff's verdict. Federal court requires juror unanimity, which means that a single holdout juror leads to a hung jury and mistrial.

The demographics of the jury pool are also significant. State courts draw jurors only from the county, and the demographics of a particular county (e.g., San Francisco versus Contra Costa) will play a role in venue selection by the plaintiff. Federal court combines all the counties in the district, leading to a jury pool that dilutes whatever attributes a particular state court county has (whether urban, suburban, rural, liberal, conservative, etc.). Litigators taking such demographics into account should also consider the length of a likely trial (which skews juror demographics) and that in federal court, by standing order, individuals can be excused for "hardship" if they live more than 80 miles from the courthouse.

Coupon Settlements

A factor much discussed elsewhere is the new CAFA rule governing "coupon" settlements. (A "coupon" settlement is one in which class members receive some form of credit towards future purchases of the defendant's product or service; such settlements are considered favorable to defendants because they do not require a direct cash outlay, and because they can promote future sales). The federal rule under CAFA limits the availability of attorney's fees to plaintiffs' counsel when the settlement consideration is in the form of coupons, which in turn makes it less likely that plaintiffs' counsel will negotiate and agree to such settlements.

State court has no hard-and-fast rule on the same subject, though it appears that at least some judges in the complex litigation departments may be moving towards a CAFA-like state court practice. See "Coupon-Based Settlements Get Tougher," *Daily Journal*, May 29, 2007 (reporting trend of state court resistance to coupon settlements). Part of the evaluation here has to be whether a coupon-based settlement would be appropriate or accepted by a judge in state court under any circumstance (e.g., whether class members are readily identifiable and could receive direct cash payments or whether a "fluid recovery" would be justified). Nevertheless, in some circumstances defendants will want to leave the option of a coupon-based settlement open by remaining in state court.

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MARY McCUTCHEON

On INSURANCE

Lawyers may assume that a carefully drafted engagement letter protects them from liability arising out of matters outside the scope of the defined engagement. Such an assumption, however, may be ill-founded when it comes to failing to advise the client on insurance issues relating to the core engagement. A recent New York case held that a law firm's obligation to defend a lawsuit may include a duty to advise the client on insurance issues, even if such an obligation falls outside the scope of the engagement letter. *Shaya B. Pacific, LLC v. Wilson, Elser, Moscovitz, Edelman and Dicker, LLP*, 827 N.Y.S.2d 231 (2006).

Ironically, the *Shaya B.* ruling arose in the context of a lawsuit where the law firm was retained by an insurance company to defend its insured, rather than by the insured. Shaya B. was sued for a bodily injury claim. Its primary general liability insurer retained the firm to defend the company. The insurer advised Shaya B. in the retention letter that the primary policy was \$1 million. It further advised that in view of the severity of the claim, the insured should retain counsel to protect itself with respect to any excess judgment and should consult with its insurance agent regarding applicable excess coverage.

Differences Between California and New York Law

Apparently the insured did neither. Summary judgment on the issue of liability was entered against Shaya B. in the underlying action. Before trial commenced as to damages, the defense firm notified the excess carrier of the lawsuit and the potential for a judgment in excess of the primary limit. This was the first notice the excess insurer had received of the claim. While California law applies the "notice-prejudice" rule with respect to an insurer's defense of late notice, New York law was not at the time as kind to insureds. Consequently, the excess insurer denied coverage on the ground of late notice.

After a \$6 million judgment was entered against it, Shaya B. sued the defense firm for malpractice, for failing to timely notify the excess insurer of the claim. The firm contended that it had no duty to advise the client concerning coverage issues. Indeed, the insurer's letter informing Shaya B. of the firm's retention specifically advised the insured to explore the possibility of excess insurance.

The *Shaya B.* court held: "We cannot say, as a matter of law, that a legal malpractice action may never lie based upon a law firm's failure to investigate its client's insurance coverage or to notify its client's carrier of a potential

claim." The court explained that while the retention letter advised the client to explore the potential for excess insurance, it did not expressly advise the insured that the law firm would *not* undertake such efforts as part of its representation. The court placed the burden on the law firm to demonstrate that the allegedly negligent conduct fell *outside* the scope of the engagement, rather than on the client to show that the conduct fell within the scope of the engagement.

No California court has yet addressed the precise issue raised in *Shaya B.*, *i.e.*, whether the law firm bears the burden of proving that the alleged negligence involved matters outside the scope of the engagement. But at least one California court has assumed that a lawyer owes a duty to its client to advise on potential insurance coverage in a litigation matter. *See, e.g., Jordache Enterprises v. Brobeck Phleger & Harrison*, 18 Cal. 4th 739 (1998). In that case, Jordache retained a firm to defend it in a lawsuit. The parties did not discuss the potential for insurance coverage for the lawsuit. Eventually new counsel substituted into the case and began to investigate insurance coverage. While the opinion focused on when "actual injury" was triggered so as to commence the running of the applicable statute of limitations, the decision was premised on the assumption that the firm's failure to advise the insured regarding coverage was in fact actionable.



Mary McCutcheon

Keeping Up with Evolving Insurance Laws and Policies

Insurance law and policies are constantly evolving. Insurers may offer new types of coverage for corporate or intellectual property exposures. Such products may expand coverage for claims beyond what a litigator might otherwise assume. Further, many corporations obtain insurance under third-party contractual arrangements, either through additional insured endorsements or indemnification provisions. Throwaway allegations in a complaint may be sufficient to trigger coverage, or at least a defense, for what would otherwise appear to be an uncovered claim. Even if a claim has not yet matured into a covered claim, there may be contractual or strategic reasons to notify the insurer.

Litigators should be aware that clients (and courts) may assume that advice regarding coverage available for the claim is an inherent part of the defense of the litigation, and that failure to provide such advice can lead to a malpractice claim if coverage opportunities are lost, no matter how carefully the engagement letter is drafted.

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Choosing Federal or State Court

The decision of whether to fight a class action case in federal or state court is an important one: it makes a difference in ways both obvious and subtle. The best decision is one made with full consideration of all of the differences, and with a detailed examination of the competing factors, instead of a simple assumption that one forum is always better for plaintiffs and the other always better for defendants.

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