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A Trial Judge's Thoughts On Jury Selection

"I was juror No. 11 and the foreperson. I wanted to take a moment to say how I was impressed with your performance as a judge and the professionalism of the attorneys. This was my first call to jury service. I must admit that I went to my first call for service with dread, anxiety and trepidation. I expected to be subjected to a balding, tyrannical and humorless judge (stereotypical I know, but true). I thought I would have to wait around the courtroom for hours and be subjected to endless, intrusive and irrelevant questions by the court and attorneys. Instead, I was pleasantly surprised to find you as the judge, and the attorneys to be thorough and respectful of our time.

Hon. Teri L. Jackson

"…Throughout the jury selection process, I felt the court and the attorneys were truly attempting to find jurors who could be fair and impartial. I like that you kept reminding all of the potential jurors that you not only wanted fair and impartial jurors, but you wanted jurors who were the right fit. In others words you wanted jurors who could be comfortable with the facts of the case and

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Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), went largely unnoticed when it was issued, being viewed initially as either a "tag-along" decision to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a "one-off" opinion refusing to allow claims against the Attorney General and the head of the Federal Bureau of Investigation arising out of the detention of Arab Muslims in the aftermath of 9/11, or both. In the months since *Iqbal* issued, however, some have called it "the most consequential decision" of the most recent Term (A. Liptak, *From Case About 9/11, Broad Shift of Civil Suits*, The New York Times, July 21, 2009 at A10 ("*NYT*")), and "the most significant Supreme Court decision in a decade for day-to-day litigation in the federal courts." *Id.* (quoting Thomas C. Goldstein). The wisdom and implications of *Iqbal* remain very much in question, and this article briefly examines both.

Ragesh Tangri

The Court's Opinion in Iqbal

Iqbal built upon *Twombly*, which had interred the oft-quoted statement that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" (*Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)), and instead required a plaintiff to plead sufficient facts to show that its claim was "plausible." Drawing on existing case law, *Twombly* noted that although factual allegations were presumed to be true, legal conclusions must be disregarded, and held that an allegation that competitors had agreed to act together to prevent competitive entry into, and not compete with each other in, a market was a "legal

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conclusion" to be disregarded.

Javaid Iqbal was a Muslim detained in the wake of 9/11, identified as a "high-interest" detainee, and placed in the "ADMAX SHU" of the Metropolitan Detention Center in Brooklyn, NY. After being charged with, convicted of, and serving a sentence for fraud in connection with his immigration papers, he was removed to Pakistan and then sued various federal officials, including FBI Director Robert Mueller and Attorney General John Ashcroft, in a *Bivens* action alleging that his designation as a "high-interest" detainee and subsequent brutal mistreatment in the ADMAX SHU were carried out because of his religion, race, and national origin. 129 S. Ct. at 1943-44.

The Supreme Court's opinion concerned only the motion to dismiss brought by Mueller and Ashcroft, which had argued that the allegations against those two men were insufficient in light of *Twombly*. Iqbal's complaint alleged that Mueller and Ashcroft "knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to the conditions of his confinement "solely on account of [his] religion, race, and/or national origin," that Ashcroft was the "principal architect" of the policy, and that Mueller was "instrumental" in adopting it and carrying it out. The Court found that because those allegations tracked the elements of a constitutional discrimination claim, they were "conclusory" and, therefore, not allegations that the district court was required to accept as true. *Id.* at 1951.

The Court went on to consider what it acknowledged to be factual allegations: that "the [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men…as part of its investigation of the events of September 11" and that "the policy [in question] was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001." The Court found that those allegations, although consistent with the claim that defendants took actions against plaintiff "because of [his] race, religion, or national origin," did not "plausibly establish" that conclusion, in light of what the Court decided were "more likely explanations," *viz*. that efforts to prevent another attack in the wake of 9/11 "would produce a disparate, incidental impact on Arab Muslims" because the 9/11 hijackers had been Arab Muslims and because Al Qaeda was an Islamic group headed by another Arab Muslim. At bottom, the Court concluded, the complaint did not allege facts "sufficient to plausibly suggest petitioners' discriminatory state of mind." *Id.* at 1951-52.

The Court also rejected three specific arguments made by Iqbal. *First*, the Court held that *Twombly* applied to "all civil actions," not just antitrust actions, because it was based entirely on an interpretation of Rule 8. *Id.* at 1953. *Second*, the Court held although *Twombly* had invoked the discovery burdens typically imposed by sprawling antitrust litigation as a justification for its holding, the question of whether the discovery burdens of a particular case could be cabined and minimized did not serve to alter the pleading standard in any particular case. *Id*. *Third*, the Court rejected an argument based on the distinction between Rule 8 and Rule 9 (which requires the circumstances constituting fraud or mistake to be pleaded with particularity, but makes clear that malice, intent, knowledge, and other conditions of a person's mind may be alleged generally), concluding that the "pleaded generally" standard of Rule 9 does not limit how much detail is required to be pleaded under Rule 8. *Id.* at 1954.

The Importance of *Iqbal*

Disregarding Conclusory Allegations – Not Just Legal Conclusions — Where *Twombly* had spoken of disregarding "legal conclusions" (550 U.S. at 564), *Iqbal* confirms that it is really any conclusion or "conclusory statement" that is to be disregarded. And a review of the allegations that were disregarded in both *Twombly* and *Iqbal* suggests that a "conclusion" may sometimes include issues that in other contexts are treated as matters of fact. For example, in *Twombly* itself, the Court disregarded the core allegation that defendants there had entered into an "agreement." 550 U.S. at 551. In other contexts, the question whether parties entered into an agreement is a question of fact, to be submitted to a jury. *See, e.g.*, CACI 302 (Contract Formation — Essential Factual Elements). Similarly, in *Iqbal*, the allegations the Court disregarded as "conclusory" were that Ashcroft and Mueller adopted policies for a particular reason, that one was the "principal architect" of the policy, and that the other was "instrumental" in carrying it out. 129 S. Ct. at 1951. Both points — the reasons for adopting or enforcing a policy, and the role of individuals in doing so — might typically be thought of as factual issues.

Consider for a moment how the *Iqbal* ban on conclusory allegations — even conclusory allegations about matters of fact — might be applied to a typical complaint for patent infringement, which might read:

- On August 1, 2009, United States Letters Patent No. 7,890,123 were issued to the plaintiff for an invention in an electric motor. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.
- The defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.

Although the matters alleged are factual, could a defendant argue that the allegations are "nothing more than a 'formulaic recitation of the elements' of a" claim for patent infringement, and that "[a]s such, the allegations are conclusory and not entitled to be assumed true"? *Iqbal*, 129 S. Ct. at 1951, *quoting Twombly*, 550 U.S. at 555. If so, the allegations would be disregarded, and the pleading ruled insufficient. But even were the court to *consider* the allegations, how should it evaluate them? Could it not decide that although the allegations were "consistent with" an ultimate finding that defendant's motor infringed plaintiff's patent, there were and for years had been — in the court's

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"experience" — many electric motors which did not infringe the plaintiff's patent? And could the court's "common sense" therefore lead it to conclude that although infringement was "possible" on the facts alleged, the plaintiff had not "shown" that it was "plausible," and therefore the complaint should be dismissed on defendant's 12(b)(6) motion? *Iqbal*, 129 S. Ct. at 1950, *quoting Twombly,* 550 U.S. at 556. (Presumably it would come as no comfort to the plaintiff that he had taken his allegations of infringement verbatim from FRCP Form 18.)

The "Plausibility" Standard – At Least as Likely as Any Other Explanation? — Twombly was careful to speak in terms of whether a plaintiff pled enough facts to nudge a claim from "conceivable to plausible" (550 U.S. at 570) and to assert, at least, that it was not imposing a "probability" requirement (*id.* at 556) — though its holding could lead one to question that characterization. *Iqbal* was more direct in acknowledging that the allegations in both that case and *Twombly* were "consistent with" unlawful conduct (129 S. Ct. at 1950-51), but that merely alleging things "consistent with" unlawful conduct was not enough to establish "plausibility" if a court could posit "more likely" explanations. *Id*. From that it seems fair to conclude that "plausible" means "facts showing that unlawful conduct is no less likely than lawful conduct," or, put another way, that the inference of unlawful conduct that arises from the facts pled must be at least as strong as any competing inference of lawful conduct.

If that is what the Court intended, then it is worth pausing to consider the import of the Private Securities Litigation Reform Act (PSLRA), as interpreted by the Court in *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308 (2007). There, the Court considered what was meant by Section 21D(b)(2) of the PSLRA, which provides that, in securities fraud actions brought by private parties, a plaintiff must allege with particularity the facts constituting the alleged violation, but also must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Tellabs*, 551 U.S. at 314. Interpreting that provision, the Court held that "[t]o qualify as 'strong'…an inference must be more than merely plausible or reasonable — it must be cogent and at least as compelling as any opposing inference of non-fraudulent intent." *Id*.

It could be viewed as troubling if the same pleading standard imposed under a statute specially passed to create a heightened standard applicable to certain claims became, through judicial interpretation of Rule 8, the basic pleading standard governing every claim.

Pleadings Facts About Defendant's State of Mind — Perhaps the most striking feature of *Iqbal* is that it makes clear that the Court's new gloss on Rule 8 applies to allegations made about a defendant's state of mind. As noted, the Court considered and rejected the argument that its interpretation of Rule 8 was inconsistent with Rule 9, which allows state of mind to be pleaded "generally" in

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Determining Monetary Relief in Patent Litigation

Companies that generate revenue through patent enforcement, but do not manufacture or sell any products of their own, are the source of a great deal of controversy. Although a variety of terms are used to describe these entities (*e.g.*, aggressive patent assertors, patent aggregators, patent speculators, patent trolls, patent licensing and enforcement companies, etc.) and their business models and enforcement strategies vary, they all have one thing in common: they do not practice the patents that they enforce. To avoid the implicit judgment in some of these terms, they are referred to herein as non-practicing entities ("NPEs").

Jim Pampinella

Case law attempts to balance the rights of a patent holder with the economic hardship that a defendant may face upon a judgment of infringement. This article discusses unique economic considerations in determining pre- and post-trial damages, as well as awarding injunctive relief, in matters involving NPEs. (The views expressed herein are the author's alone; the author is a CPA, not a lawyer, and this article should not be construed as legal advice.)

Traditional Damages Remedies in Patent Matters

Two primary forms of damages are available to a patent holder: lost profits and/or a reasonable royalty. Cases such as *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152 (6th Cir. 1978), provide guidance on the elements that a patentee should establish in order to use a lost profits approach. Because NPEs, by definition, do not manufacture or sell products, they are unable to demonstrate that they possessed the sales/marketing capability and manufacturing capacity to meet market demand. Therefore, consistent with 35 U.S.C. § 284 of the patent statute, NPEs are entitled only to damages "adequate to compensate" for infringement, i.e., a "reasonable royalty."

Cases such as *Georgia-Pacific Corp. v. U.S. Plywood-Champion Papers, Inc.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), prescribe 15 factors that should be considered in determining a reasonable royalty. These 15 factors can be lumped into the following four general categories: (a) licensing/scope of the agreement (Factors 1, 2, 3, 4 and 7); (b) profitability/business considerations (Factors 5, 6, 8, 12 and 13); (c) technical/benefits of the claimed invention (Factors 9, 10 and 11); and (d) overall opinions of experts (Factors 14 and 15).

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Monetary Relief in Patent Litigation

Consider the following hypothetical scenario involving an NPE.

• In 2000, a patent claiming technology related to semiconductor functionality ("the '001 patent") issues to an individual inventor;

• In 2003, after failed attempts to commercialize or license the claimed invention, the inventor divests the '001 patent to an NPE for a non-refundable lump-sum amount of $1 million;

• In 2005, the NPE sues a computer manufacturer for infringement of the '001 patent;

• The defendant has been purchasing computer components that allegedly embody essential claims of the '001 patent from a semiconductor manufacturer located overseas since 2002; and

• In addition to injunctive relief, the NPE seeks damages based upon a reasonable royalty approach.

Some questions that arise are: (a) how do the *Georgia-Pacific* factors apply to this fact pattern; (b) what considerations could impact injunctive relief and the terms of a compulsory license; and (c) how could industry practice and the scope of the claimed invention affect the determination of a reasonable royalty?

Georgia-Pacific Considerations

Several *Georgia-Pacific* factors require particular attention in determining a reasonable royalty in matters involving NPEs.

Courts place the parties in a hypothetical negotiation occurring at the time of first infringement in an effort to arrive at a reasonable royalty (Factor 15). In our hypothetical, where an NPE enforces patent rights that were allegedly infringed upon before it acquired the '001 patent, we have a dilemma. One could argue that the inventor should be the licensor in the hypothetical negotiation, because she/he owned the patent in 2002 when infringement first began. If so, the plaintiff would not be a party to the negotiation. Unless the court provides direction, in order to avoid selecting the wrong licensor, damages experts should consider placing both the prior and current patent holders in the hypothetical negotiation and/or consider two negotiations with potentially different outcomes.

In arriving at a reasonable royalty, courts also consider the royalties that the patentee has received by licensing the patent(s)-in-suit (Factor 1). Although the inventor failed to license the claimed invention in our hypothetical, the $1 million that the NPE paid may help determine a reasonable royalty. The $1 million may also be considered in connection with the "adequate compensation" criteria stated in the statute. If, for instance, the NPE seeks monetary relief that grossly exceeds the lump-sum payment, does that request represent adequate compensation to the NPE or an inappropriate financial windfall? Also, because infringement first began before the '001 patent was acquired by the NPE, should the parties consider the $1 million payment during a hypothetical negotiation? The answers to these questions, as well as other issues addressed below, may depend upon who "participates" in the hypothetical negotiation (the inventor, the NPE or both) and if the $1 million acquisition price is allowed into the record.

Also relevant to the analysis are the hypothetical licensor's established policy on licensing (*e.g.*, has the patent holder maintained its "patent monopoly" or licensed the claimed invention in the past?) (Factor 4) and the commercial relationship between the parties (*e.g.*, are they competitors?) (Factor 5). Unlike practicing entities, NPEs by definition do not have a patented product that would be affected by competition. Also, as addressed in more detail below, NPEs are unlikely to obtain injunctive relief; consequently, their ability to maintain a "patent monopoly" through an exclusionary order is limited. Therefore, an NPE's opportunity costs associated with licensing may be limited to the precedent established in litigation. For instance, in our hypothetical, because the NPE sued only one party, the outcome of the present litigation would likely impact future negotiations and lawsuits involving other alleged infringers.

Courts also consider the portion of product profitability that should be credited to the claimed invention as opposed to the contributions associated with other product characteristics and the commercialization risks assumed by the defendant (Factor 13). Again, given that NPEs do not manufacture products, product profitability will likely be attributable to a defendant's efforts. However, sometimes an NPE has not merely acquired a patent, but has invested significant research and investment in furtherance of developing the claimed invention(s). (Academic or research institutions, for instance, are NPEs that may fit this profile.) Further, although NPEs do not embody the patented technology in a product, market demand could be adversely affected absent access to the claimed invention(s). These dynamics should not negate the contributions of the defendant, but they may limit the downward pressure this factor could otherwise exert on the determination of a reasonable royalty.

Finally, courts consider the duration of the patent and term of the license (Factor 7). Design-around alternatives to the claimed invention(s) aside, the duration of the license would typically be a function of patent expiration or technological obsolescence, whichever occurs first. Therefore, the term of the license for purposes of the hypothetical negotiation may extend beyond the date of trial. For instance, assume in our hypothetical that the useful life of the patent extends to 2013 and that trial occurs in 2009. The timeframe of the hypothetical license would be from 2002 (the date infringement began) to 2013. If the competitive landscape and market conditions are similar in 2002 and 2009, the royalty resulting from the hypothetical negotiation could be relevant in determining a post-trial royalty if the defendant is not enjoined.

Injunctive Relief and Compulsory Licensing

NPEs are unlikely to obtain permanent injunctions. In *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006),

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the Supreme Court ruled that upon a liability finding in favor of the claimant, the patent holder is no longer automatically entitled to injunctive relief. Rather, a plaintiff must satisfy the traditional four-factor equitable test to enjoin a defendant. Although the fact that an entity does not practice its asserted patent(s) may not itself negate its ability to obtain injunctive relief, the competitive relationship between the parties does weigh heavily in the assessment of the four-factor test. Where a patent holder is a direct competitor, it is more likely to obtain injunctive relief. NPEs do not directly compete, thereby greatly diminishing their ability to obtain an injunction against a party found to infringe their patent rights. Indeed, since eBay, very few NPEs have been granted a permanent injunction. Therefore, in our hypothetical, it is unlikely that the NPE would be able to enjoin the computer manufacturer upon a finding of infringement.

When a patent holder is denied injunctive relief, the infringer is typically granted a compulsory license if it wishes to continue to practice the patent(s)-in-suit after trial. As addressed above, the royalty resulting from the hypothetical negotiation could assist in the determination of a post-trial royalty. However, in *Amado v. Microsoft Corporation*, 517 F.3d 1353 USPQ 2D (Fed. Cir. 2008), the Court of Appeals ruled otherwise, reasoning that prior to judgment, liability and validity are uncertain, whereas after a judgment has been entered, "the calculus is markedly different because different economic factors are involved." Damages experts typically assume that a patent is valid, enforceable and infringed. If these conditions are not established and liability is not found in favor of the plaintiff, a quantification of damages is irrelevant. However, damages experts may need to consider differences in the relative bargaining positions of the parties before trial (where there is a presumption of liability) as opposed to during the compulsory licensing phase (where there is an actual liability finding).

In addition, if there are differences between the information considered by the negotiating parties at the time of hypothetical negotiation and the information available after a verdict of infringement, then a disparity in pre-trial and post-trial rates could logically follow. As a result, it is important to understand what information was considered during the hypothetical negotiation (*e.g.*, did the damages experts consider events after the date of first infringement?), and whether the facts and circumstances at the time of the negotiation are similar to those at the time a compulsory license is being determined. Damages experts may wish to comment on the suitability or inappropriateness of applying a pre-trial royalty to a post-trial period during a damages study and should be mindful of the changes in the competitive landscape and market conditions that may have occurred since the date of first infringement.

Moreover, depending on industry practice, it may be appropriate for damages experts to determine a reasonable royalty based upon a lump-sum payment. As opposed to a running royalty, which is typically set at a fixed or varying percentage of sales or dollar amount per unit sold, a lump-sum payment is a monetary exchange that should be based upon the value of the patent(s)-in-suit discounted for time value of money and other considerations over a relevant period of time, such as the useful life of the claimed invention. A lump-sum payment may negate the need for injunctive relief because it typically allows a licensee the right to practice the subject property through patent expiration. However, caution should be used when employing this approach in order to avoid providing the licensor with a potential financial windfall if, for instance, actual sales and profitability of the product under license are dramatically less than anticipated at the time of the hypothetical negotiation.

Industry Practice

NPEs often sue downstream suppliers in the sales channel. The products of the company at the last stage of the supply chain command the highest prices, thereby maximizing the sales or royalty base on which an NPE can claim damages. Legal considerations regarding indemnification between suppliers, patent exhaustion and inducement of infringement should be soundly vetted when determining the appropriate party to target in a patent litigation. Also, one should determine the scope and reach of the patent(s)-in-suit and which supplier(s) allegedly infringe each of the essential claims at issue.

Although these issues are typically addressed by legal counsel and technical experts, damages experts should understand how these considerations may impact the determination of a reasonable royalty. For instance, issues regarding the entire market value rule ("EMV rule"), which permits the recovery of damages based on the value of the entire apparatus containing several features when the patented feature at issue is the basis for customer demand, may need to be addressed, because they may affect the selection of the appropriate sales or royalty base on which to calculate damages.

Industry practice should also be considered. For instance, if technology comparable to the patent(s)-in-suit has historically been licensed based upon the price of a component (*e.g.*, semiconductors), it may be necessary to reduce the royalty rate or apportion the royalty base downward if the accused product(s) at issue are sold further down the sales channel as part of another product that commands a significantly higher price (*e.g.*, a computer).

Although NPEs may contend that the worth of the patent(s)-in-suit should not be measured based upon the value of the component part, if the scope of the essential claims at issue is limited to functionality contained in said component, the component's sales price should typically reflect the appropriate economic value on which to calculate royalties. Also, component parts (*e.g.*, semiconductors) may be bundled with additional components and associated intellectual property to ultimately comprise a downstream product (*e.g.*, a computer). Damages experts may need to consider this dynamic because it could trigger issues associated with "royalty stacking," whereby

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each form of intellectual property may need to be accounted for in order to provide the licensee with a reasonable profit on the subject product(s). The confluence of patent exhaustion, the EMV rule and royalty stacking are issues that patent counsel and damages experts should jointly consider.

There are a variety of unique considerations in determining damages, injunctive relief and compulsory licensing terms in matters involving NPEs. Although case law and the proposed Patent Reform Act of 2009 may attempt to better define the playing field in this area, as unique developments occur — such as the emergence of NPEs — the legal landscape and its impact on determining patent damages will continue to evolve. In litigation involving NPEs, the ultimate goal is generally to place the parties in the financial position that they would have been if they had executed a license agreement. Towards this end, a damages expert may need to be mindful of industry practice and ensure that the correct sales base (i.e., the appropriate product in the sales channel) is used to determine a reasonable royalty.

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claims alleging fraud or mistake, concluding that the word "generally" in the second portion of Rule 9(b) did not prevent it from imposing whatever standard it concluded appropriate under Rule 8. The Court did not appear to address, however, the objection that what it was requiring under Rule 8 — the setting forth of enough specific, underlying, particularized facts (as opposed to "conclusory" factual statements) to make an allegation about defendant's state of mind "plausible" — could be seen as rather close to what is required under the first portion of Rule 9(b), *viz.* that "a party must state with particularity the circumstances constituting fraud or mistake" (especially in light of *Tellabs*), and that the familiar maxim of *expressio unius* might therefore militate against its conclusion.

Taking the conclusion as a given, though, suggests something about the potential impact of *Iqbal* in patent cases. It has long been established that Rule 9(b) applies to pleading an inequitable conduct defense in patent cases. *See, e.g., Xilinx v. Altera,* 1994 WL 782236 (N.D. Cal. Feb. 8, 1994). Inequitable conduct requires a showing that a material reference was withheld, and withheld with the intent to deceive the USPTO. *Praxair v. ATMI,* 543 F.3d 1306, 1313-14 (Fed. Cir. 2008). The withholding of a material reference alone may not give rise to an inference of intent to deceive, but a showing of a high degree of materiality, coupled with the absence of an explanation from the patentee, may give rise to such an inference. *Id.* Pleading facts sufficient to make a "plausible" allegation about a patentee's intent to deceive could prove challenging under *Iqbal*. *Cf. Exergen Corp. v. Wal-Mart Stores, Inc.*, 2009 WL 2366535, *15 (Fed. Cir. Aug. 4, 2009) (pleading alleging inequitable conduct must contain facts showing that specific individual knew of material information and deliberately withheld it from PTO). On the other side of the coin, pleading facts sufficient to make a "plausible" allegation that a defendant's infringement was willful could prove equally challenging.

Why (and Whither) *Iqbal*?

All of this raises the question of why the Court decided *Iqbal* as it did. One obvious speculation is that the underlying facts of *Iqbal* made it a "hard case" — that the understandable desire to shield Ashcroft, Mueller, and future high government officials from intrusive and disruptive civil suits perhaps factored into the decision. At least one fact cuts against that speculation: the Court previously had left open, in *Leatherman v. Tarrant County*, 507 U.S. 163 (1993), the possibility that the substantive doctrine of qualified immunity would require a heightened pleading standard in cases brought against individual government officials (*id.* at 166-167), and Judge Cabranes, writing separately in the Second Circuit's opinion in *Iqbal*, had invoked just such a possibility. 129 S. Ct. at 1945. The Court nevertheless declined Judge Cabranes' (and its own earlier) invitation, and articulated a general standard under Rule 8.

Another possibility is that Rule 8 is the new Rule 11. It is possible to view both *Twombly* and *Iqbal* as asking the question "Could plaintiff get to the jury based only on the facts alleged?" — and answering that question "no" in both cases. In the world according to *Conley*, that is the wrong question: it would be proper to allege, albeit in conclusory fashion, that the competitors *had agreed*, or that Iqbal was *targeted because of* his religion and ethnicity — the facts required to get to the jury could come along later. A robust (*i.e.*, pre-amendment) version of Rule 11, however, might require plaintiff's counsel to have such facts in her possession — or at least to have a fairly concrete reason to think certain, particularized facts existed, which discovery would bring to her in evidentiary form. But with Rule 11 weakened and in disfavor, the Court may simply have concluded that making the "conclusory" allegation has become too easy, and deterring the improper making of it too uncertain. *Iqbal* and *Twombly* can be viewed as giving courts the enhanced gatekeeping role that Rule 11 once might have provided, without presenting the issues in the difficult context of a sanctions motion.

At all events, by one account *Iqbal* already has been cited over 500 times by the lower federal courts. *NYT* at A10. It has also been targeted for legislative reversal. On July 22, 2009, Senator Arlen Specter introduced a

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PETER BENVENUTTI

On CREDITOR'S RIGHTS

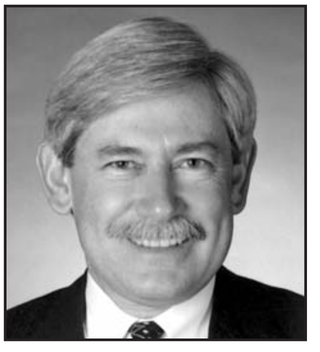
Finality — the principle that a dispute once resolved cannot be relitigated even if it was incorrectly decided the first time — is a very important policy in bankruptcy. Far more than traditional litigation, bankruptcy cases can implicate the interests of dozens, hundreds or even thousands of parties (and non-parties) that must rely on bankruptcy court decisions in a wide range of matters, like the approval of asset sales or settlements and the confirmation of reorganization plans, with confidence that the court's action will not be undone by later collateral challenge.

The recent decision in *Travelers Indemnity Co. v. Bailey*, 1295 ct. 2195 (June 18, 2009), underscores the significance the Supreme Court places on finality in bankruptcy proceedings. *Travelers* considered the enforcement of terms of a 1986 bankruptcy court injunction issued as part of the Chapter 11 plan of Johns-Manville Corporation. Manville, a Fortune 500 manufacturing business, was driven into bankruptcy in 1982 by a tidal wave of asbestos personal injury lawsuits. The reorganization plan by which Manville emerged from bankruptcy years later featured a trust established to pay both existing and "future" (*i.e.*, not yet known) asbestos health claims, funded mainly by $770 million in settlement payments from Manville's liability insurers. In exchange for these payments, the Manville insurers were insulated from liability to present or future asbestos personal injury claims by an injunction that "channeled" those claims to the Manville trust and barred claimants from suing settling insurers on any claims "based upon, arising out or relating to" their Manville insurance policies. This injunction and the bankruptcy court's order confirming Manville's plan became final after direct appeals in 1988.

Fast forward about 15 years. The Manville trust's funding proved inadequate to pay all the claims channeled to it. Creative plaintiffs' lawyers brought many new claims against the settling Manville insurers, including Travelers (which had been Manville's primary liability insurer for decades before the Chapter 11 case). The plaintiffs asserted that these new claims (inaccurately referred to by the parties and courts as "Direct Actions") were not enjoined by the Manville channeling injunction because they did not seek to recover, even indirectly, based on the Manville insurance policies or Manville's conduct, but were instead based on alleged primary wrongdoing by Travelers and the other insurers — for example, in failing to disclose the dangers of asbestos. Travelers asked the Manville bankruptcy court to enforce the injunction. After proceedings too lengthy and convoluted to describe here, the bankruptcy court ruled that the original 1986 channeling injunction barred the post-confirmation Direct Actions and "clarified" the injunction to that effect.The district court affirmed.

The Second Circuit saw things differently. *In re Johns-Manville Corp.*, 517 F.3d 52 (2nd Cir. 2008). The Court of Appeals reasoned that the bankruptcy court had lacked bankruptcy subject matter jurisdiction to enjoin the Direct Actions, because they were claims by non-debtor third parties (the plaintiffs) against non-debtor third parties (Travelers and other settling insurers) that were not derivative of Manville's insurance policies or related to protecting the debtor's property. Therefore it held that the channeling injunction could not be applied to prohibit either the plaintiffs' Direct Actions or rights for contribution and indemnity asserted against Travelers by Chubb, an insurer that was also named as a defendant in the Direct Actions but had not settled with Manville in its bankruptcy case and so was not protected by the 1986 channeling injunction.

The Supreme Court granted *certiorari*. Bankruptcy practitioners expected the high court to clarify a bankruptcy court's authority to enjoin these kinds of third party claims, an important subject on which the courts of appeal and other lower courts have expressed a range of divergent views. Clarification was not forthcoming. In a 7 – 2 decision that the majority opinion described as "narrow," the Supreme Court reversed the Second Circuit on finality grounds. The Supreme Court found that the 1986 injunction "clearly" applied to the Direct Actions (a proposition not quite so clear to this observer or the two dissenting Justices, who reasoned that ambiguities they saw in the 1986 order should be construed consistent with the limits of bankruptcy court jurisdiction). The majority concluded that finality trumped any possible defect in the bankruptcy court's subject matter jurisdiction. Thus, even if the bankruptcy court had exceeded its jurisdiction in issuing the 1986 injunction as applied to Direct Actions (a matter on which the Supreme Court expressed no view), no party to the original proceeding, or anyone in privity with such a party, could dispute the bankruptcy court's subject matter jurisdiction after all direct appeals were concluded.



Peter Benvenutti

Because the Court declined to decide whether any specific party was bound by the 1986 injunction, it left open the distinct possibility that Chubb — which had not been a party to the Manville bankruptcy case — could still raise a challenge. On the other hand, "future" asbestos bodily injury claimants whose claims manifested years after the Manville bankruptcy case will likely be considered bound because they were represented in the Manville case by a specially appointed personal representative.

The lesson for litigators is the importance of considering with care the language of any order or judicial decree, and any conceivable future scenario in which it might apply, and deciding whether protecting your client's rights requires clarifying the language before it becomes final. Otherwise, years down the road, another court could construe the earlier order in an unanticipated manner, and decide that finality principles preclude any argument against that later construction, even the argument that such a construction exceeds the original court's subject matter jurisdiction.

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Notice Any Changes In Rule 8 Lately?

bill to enact the "Notice Pleading Restoration Act of 2009." If enacted, it would require the federal courts "not to dismiss a complaint under Rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*" (unless a specific statute or a subsequent amendment to the federal rules provided otherwise). Stay tuned.

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Trial Judge's Thoughts On Jury Selection

would not allow their biases or emotions to interfere with their ultimate decision. Throughout the process I did a lot of soul-searching to make sure that I could be fair, impartial and the right fit.

"I appreciated that our time as jurors was not wasted. I might add that the way the court and the attorneys conducted the selection process made me and most of the other potential jurors eager to serve.

"…Thank you and the attorneys for making my first jury experience a positive one. I sincerely hope to see you again one day…but there is no rush."

This was a letter written by a former juror in an emotionally difficult and complex trial that lasted over five weeks. Because of this juror's positive experience, I am confident that he will serve again and possibly encourage others to serve in the future. Both the court and the parties have the basic goals of selecting jurors who can be fair, impartial and the right fit for a case. The court's definition of the right fit may differ from the parties' definition. For instance, the court's definition may mean that the jurors will not allow emotions or biases to interfere with their duties. In other words, they will be comfortable with the facts of the case and be able to reach a verdict objectively. The attorneys' definition of the right fit may mean that they want jurors to render a verdict favorable to their clients. These definitions are not necessarily in conflict with one another in the jury selection process. In fact, it should be the goal of the court and the litigants to allay the fears, dreads, anxieties and trepidations of potential jurors in order to select individuals who can be fair, impartial and the right fit.

Voir Dire and Jury Questionnaires

The overall goal of the *voir dire* process is to ensure a panel of impartial and indifferent jurors. *People v. Chaney*, 234 Cal. App. 3d 853 (1991). The right to *voir dire* a jury is not a constitutional right, but is merely a means to achieve an impartial verdict. *Voir dire* is usually performed in open court, by asking potential jurors a series of questions. It can be conducted by the court, and/or the parties. The Code of Civil Procedure provides for *voir dire* in civil cases, and states that "the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case." Code Civ. Proc. § 222.5. The trial judge is authorized to put reasonable limits on *voir dire*, based on, among other criteria, "any unique or complex elements, legal or factual, in the case and the individual responses or conduct of jurors which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case." *Id*. "Specific and unreasonable or arbitrary time limits shall not be imposed." *Id*. In addition, in California state court (unlike the practice in many federal courts) prior submission of *voir dire* questions is not required unless counsel engages in improper questioning. Improper questioning is "any question which, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law." *Id*.

It is not uncommon today that attorneys request the use of jury questionnaires. The Code of Civil Procedure provides for use of questionnaires to assist in the *voir dire* process. *See* Code Civ. Proc. § 205(d); *see also* Code Civ. Proc. § 222.5 (in civil cases, "[a] court should not arbitrarily or unreasonable refuse to submit reasonable written questionnaires, the contents of which are determined by the court in its sound discretion, when requested by counsel.").

I find written questionnaires to be extremely useful in dealing with sensitive or discrete issues about which a prospective juror might not be as forthcoming in open court, with a room full of strangers. Over the years I have allowed the use of written questionnaires. However, I have seen some problems with the practice. For instance, I have sometimes been presented with 15- to 24-page jury questionnaires. I have found that the last things prospective jurors want to be greeted with on the first day of trial are long and cumbersome jury questionnaires to complete. I have actually seen a juror write the following:

> "Filling out this questionnaire reminds me of a loan application. Where I am assured that I will be denied then I will have to serve!!!"

Further, jurors have responded to questions regarding favorite sports, last book read, and political affiliations by answering, "None of your business." I appreciate that these questions might have some relevance to issues involved in the case, but jurors sometimes find these questions intrusive and overwhelming. The longer the questionnaire, the more likely that the prospective juror may write anything just to finish it.

Therefore, I encourage and instruct attorneys to keep the jury questionnaires simple and relevant to the issues surrounding the case. The questionnaire should never take the place of actual questioning of prospective jurors in the courtroom. Attorneys need to see and hear from

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WALTER STELLA

On EMPLOYMENT

While most states permit non-competition agreements that are "reasonable" in scope, California rejects them outright. California Business & Professions Code Section 16600 states: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Courts interpreting Section 16600 have nevertheless permitted both "narrow restraints" on competition and restraints intended to protect trade secrets. After a ruling from the California Supreme Court last year, however, only those restrictions necessary to protect trade secrets remain potentially viable.

In *Edwards v. Arthur Andersen* LLP, 44 Cal. 4th 937 (2008), the California Supreme Court held that narrow or limited restraints on trade are unenforceable in California. However, the Court expressly avoided ruling on the applicability of what it termed the "so-called trade secret exception to [S]ection 16600." *Id.* at 946. This ruling leaves unclear whether contractual restraints are enforceable to protect trade secrets in California.

Raymond Edwards II, a certified public accountant, was hired by Arthur Andersen LLP as a tax manager. As a condition of his employment, Edwards was required to sign Arthur Andersen's standard non-competition agreement, which provided, in part, that "for eighteen months after release or resignation, you agree not to perform professional services of the type you provided for any client on which you worked during eighteen months prior to release or resignation." *Id.* at 942. It also stated, "for twelve months after you leave the firm, you agree not to solicit (to perform professional services of the type you provided) any client of the office(s) to which you were assigned during the eighteen months preceding release or resignation." *Id.*

After Edwards signed the non-competition agreement, Arthur Andersen sold its Los Angeles tax practice, of which Edwards was a member, to HSBC. When Edwards refused to sign a broad release of "any and all claims" against Arthur Andersen as a condition of employment at HSBC, Arthur Andersen terminated Edwards' employment. Edwards sued Arthur Andersen, alleging, among other things, intentional interference with prospective economic advantage. Edwards claimed that the non-competition agreement he was required to sign at the start of his employment with Arthur Anderson violated Section 16600. According to Edwards, by requiring him to sign an unenforceable agreement, Arthur Andersen committed a wrongful act, thereby satisfying one of the required elements of his claim for intentional interference with prospective economic advantage. The California Supreme Court agreed.

The Court found that the non-competition agreement violated Section 16600 because it restrained Edwards' ability to practice his profession. Rejecting the Ninth Circuit's interpretation of the statute as allowing "narrow restraints" on competition, the Court held that, unless a non-competition agreement falls within one of the statutory exceptions, it violates California's strong public policy against restrictive covenants. The Court found that Section 16600 was unambiguous and did not permit narrow exceptions. The Court reasoned that, had the Legislature intended to carve out an exception for narrow or limited restraints, the Legislature would have explicitly drafted such an exception as it had expressly done in other instances.

Despite unequivocally rejecting a judicially created "narrow restraint" exception, the Court raised but then declined to address the applicability of another judicially created exception: the "so-called trade secret exception to Section 16600." In doing so, the Court left intact the abundance of precedent — including its own — holding that contractual restraints necessary to protect trade secrets are enforceable in California. Nevertheless, in light of the *Edwards* Court's hostility toward judicial exceptions to Section 16600, the continued viability of the "so-called trade secret exception" is in doubt.

Walter Stella

One of the principal arguments for doing away with the trade secret exception is the adoption of the California Uniform Trade Secret Act, or CUTSA. The California legislature enacted CUTSA in 1985, 20 years after the California Supreme Court last recognized a trade secret exception to Section 16600. *Mugill v. Reuben H Donnelley Corp.*, 62 Cal. 2d 239, 242 (1965). In his briefing to the Court, Edwards argued that, with the adoption of CUTSA, a judicially-created trade secret exception to Section 16600 is no longer necessary or consistent with legislative intent. CUTSA provides the necessary protection for an employer's trade secrets, he argued. Indeed, the Court has held that a violation of CUTSA occurs when an individual uses a former employer's trade secret client list to solicit customers. *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1155 (2004).

California's rule against restraints on trade embodies a long standing public policy favoring employee mobility. Since the enactment of Section 16600's predecessor statute in 1872, courts have consistently declared Section 16600 to be the manifestation of California's strong public policy favoring an individual's right to pursue the employment or enterprise of his or her choice. *See, e.g., Kelton v. Stravinski*, 138 Cal App. 4th 941, 946 (2006). "The interests of the employee in his own mobility and betterment are deemed paramount to the competitive interests of the employer." *Reeves v. Hanlon*, 33 Cal. 4th at 1151.

Some commentators credit employee mobility as a key element of California's economic engine. Whether Section 16600 is partially behind Silicon Valley's success can be debated by business owners. However, the *Edwards* decision makes clear that employee mobility remains a cornerstone of California law that sets it apart from the majority of other states. After *Edwards*, California employment agreements containing anti-competitive restraints can be used, if at all, only for the purpose of protecting trade secrets.

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prospective jurors. Additionally, the attorneys have the opportunity to explain briefly why certain topics are relevant and being asked of a prospective juror. Such verbal explanations may address the concerns of prospective jurors that the questions are not meant to be intrusive or irrelevant. When used properly, questionnaires should be simple, relevant and supplement the actual jury questioning by attorneys.

Perceptions by Prospective Jurors

When 18 or 20 prospective jurors are called to sit in the box for the questioning process, the court and the attorneys should never forget about the other jurors sitting in the court gallery. The focus, of course, is on the responses of the jurors who are being questioned. However, the other jurors are captive observers of the process and they are forming their opinions of the parties and the court. They are watching the attorneys and forming their opinions as to why a particular juror was excused by a pre-emptory challenge. Sometimes these opinions may lead to a backlash against the attorney and the client.

For example, several months ago I presided over a jury trial where both attorneys were well-respected and experienced litigators. One of the attorneys exercised three pre-emptory challenges where the affected jurors happened to be of the same race. Of course, opposing counsel brought a *Wheeler* motion. Arguments were heard outside of the presence of the jurors. The attorney argued, however, legitimate reasons why the three particular jurors were excused. *Voir dire* concluded and a jury was selected. All of the other unseated jurors were excused.

A few weeks after the trial, I attended a friend's birthday party, and I was approached by a guest who happened to be one of the excused jurors. He was never questioned by the attorney but he was seated in the courtroom. He watched the entire jury selection. The excused juror told me that he and other jurors were offended by the attorney who appeared to excuse the three prospective jurors because of race. They felt that the attorney was trying to stack the jury with a certain class and race of people. In fact, the juror thought that the reason I called the recess was to admonish the attorney for his actions. I reminded the excused juror that I had given an admonishment that the jurors were not to speculate about or consider matters held out of their presence. The excused juror said he remembered the admonishment but that he was convinced that he knew exactly what was happening in the meeting outside of the presence of the jurors.

If this excused juror had been seated, he would have this negative impression of the attorney and possibly the client. It would have been in the juror's mind that the attorney was trying to stack the deck. It is debatable whether his feelings would have been revealed in *voir dire*. The important message to remember is that when you are engaged in jury selection, be aware of your conduct and the perceptions that may develop from all of the prospective jurors present in the courtroom, not just those whom you are addressing directly.

Do Not Engage

We have all experienced the prospective juror who will give responses that are outrageous, silly or possibly offensive. Now remember, the Court and the attorneys have requested that prospective jurors be completely honest in their responses to questions asked of them. The Court and the attorneys may disagree with some of the answers.

But *voir dire* is not the time to engage in intellectual or philosophical debates. I admit there are times when the court will engage in "teachable moments" to dispel misunderstandings about the legal system that a prospective juror may have learned from a television show.

The worst thing an attorney can do is to engage or argue with a prospective juror if a prospective juror says something outrageous or silly. Bear in mind that if the prospective juror's behavior is too offensive or outrageous, the Court will usually intevene to avoid offending other jurors and to maintain courtroom order. Nevertheless, jurors expect that the attorneys remain professional and above the comments made by the offending juror.

Years ago, when I was an attorney, I remember a prospective juror who blurted out:

> "I don't trust Black people. I don't trust the defense attorney and certainly do not trust the defendant. I believe that most of you people should go to jail."

The parties represented in the case were all African-American. I believed that this juror meant what she said and she was not trying to get out of jury service. I asked the juror whether or not the fact that the deceased, the witness and defendant were African-American would affect her ability to be a fair and impartial juror. She told me her truthful, albeit painful, response to the question asked. Needless to say, I was extremely offended by her response. The courtroom went absolutely silent and everyone waited to see my response. But rather than reciprocating her hostile remarks, I did not engage or argue with her. I remained professional and above the offensive remark. It was obvious that this juror would be excused for cause. It would not benefit the case for me to engage in a shouting match with her. In fact, other prospective jurors appreciated that I remained professional. Indeed, throughout the trial, I knew the selected jurors trusted and respected me which was beneficial to my case.

There are no magical formulas for selecting a jury. What is important is that we are able to assure an individual who is summoned for jury duty that he will be pleasantly surprised to find a judge and the attorneys thorough and respectful of his time. Then we will obtain fair, impartial and "the right fit" jurors.

The Honorable Teri L. Jackson is a judge on the San Francisco Superior Court.

John Green

On INSURANCE

The California Supreme Court recently issued its much-awaited decision in the *State of California v. Allstate Insurance Company*, 45 Cal. 4th 1008 (2009), in which the State of California sought insurance coverage for environmental remediation costs at the Stringfellow Acid Pits. The decision makes it clear that an insured can recover the *entire* liability it incurs as a result of covered conduct, even if other excluded causes contributed to the harm.

The Stringfellow Acid Pits were unlined evaporation ponds for liquid wastes. Pollution resulted from at least three sources: gradual seepage through the fractured rocks beneath the ponds; overflow of the ponds caused by a 1969 rainstorm; and controlled discharges made in 1978 during heavy rains to prevent a potential dam failure. The State could not distinguish the damage or costs caused by the 1969 and 1978 events from that caused by the seepage. The State was held liable for clean-up of the entire site. Its insurers denied coverage based in part upon the pollution exclusion in the State's policy.

The pollution exclusion at issue contained an exception restoring coverage for "sudden and accidental" discharges. The State asserted that both the 1969 overflow and the 1978 controlled releases were sudden and accidental, and that the contamination from each source was sufficient to render the State liable for the entire clean-up. The carriers argued that the relevant "discharge" was not the 1969 or 1978 release, but the initial placement of waste in the pond, which was neither sudden nor accidental.

The Supreme Court rejected the carriers' argument. Emphasizing that the policy covered *liability*, the Court looked to "the discharge that formed the basis for the insured's liability," and determined that the relevant discharge for both liability and coverage was the release from the ponds into the environment, *not* placement of the material into the ponds. *Id.* at 1018. This pragmatic approach, based on the underlying liability, was also supported by the Court's interpretation of the policy terms themselves, which included the terms "discharge, dispersal, release or escape." The Court held that these terms refer to a release from confinement, not placement of materials "into containment" by storing them in the pond. *Id.* at 1020.

Addressing the 1978 discharges, which would be covered if deemed "accidental," the court ruled that an "accidental" discharge is one that "the insured neither intended nor expected to happen," and is "expected" only when the insured "subjectively knew or believed it was highly likely to occur." *Id.* at 1024. The insurers argued that the 1978 releases were not accidental because 1) the State made them intentionally; and 2) the State had been warned that future heavy rains could cause additional releases, and had not capped the pond as recommended.

The court rejected the first argument because coverage exists for "an act undertaken to *prevent* a covered source of injury from coming into action, even if that act would otherwise not be covered." *Id.* at 1025. Since a dam failure would have been covered, actions to prevent such harm were also covered. The Court also rejected the insurers' second argument, finding that the State's failure to adopt the recommended preventive actions did not lead to "expected" injury, but was ordinary negligence. *Id.* at 1028.

Having resolved these threshold issues, the Court made its most significant holding in addressing how to treat a claim involving both covered and excluded causes. The pollution at the site was caused both by excluded gradual seepage and by the 1969 and 1978 events. The insurers argued that the State could not recover anything since it could not allocate specific damages to these covered events, relying on a 2001 California Court of Appeal opinion, *Golden Eagle Refinery Co. v. Associated International Ins. Co.*, 85 Cal. App. 4th 1300 (2001). The State maintained that it was entitled to indemnification of all its damages, since either or both of the covered sudden releases were sufficient to render the State liable for the entire scope of clean-up.

John Green

The Court agreed with the State, holding that "if the insured proves that multiple acts or events have concurred in causing a single injury…or an indivisible amount of property damage…such that one of more of the covered causes would have rendered the insured liable in tort for the entirety of the damages, the insured's inability to allocate the damages by cause does not excuse the insurer from its duty to indemnify." *Id.* at 1036. Stated another way, "[i]f the insured's nonexcluded negligence 'suffices, in itself, to render him fully liable for the resulting injuries' or property damage…the insurer is obligated to indemnify the policyholder.…" *Id.* at 1031. In so ruling, the Court expressly overruled *Golden Eagle* and its allocation rule.

Thus, as long as the covered event or damage is sufficient to render the insured liable for the entire amount of damage, there is coverage for the entire liability, regardless of whether uncovered events also contributed to the damage. This rule applies both when covered and uncovered events contribute to an indivisible damage, or when there are two or more causes of a single injury. In either case, the insured is entitled to full coverage for the liability.

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Letter from the Editor

Labor Day — the end of summer. The right time to get your summer issue of the ABTL Report. And the right time, if you haven't already, to sign up for the Annual Seminar.

This year's Annual Seminar is October 1-4, at the Broadmoor in Colorado Springs, Colorado. The program is "Lost in Translation: Cross-Border Considerations in California Litigation." At first blush, it sounds a little like a seminar for people who practice "international law" or participate in international arbitrations. But a closer look shows that this program is "required reading" for business litigators.

California's economy is highly connected to the rest of the world. But the geographic boundaries of the court system — both state and federal — impose procedural barriers to the discovery and litigation process that do not align with the business relationships that are the subject of the process.

Thomas Mayhew

In order to litigate cases effectively, a California business litigator needs to understand the tools that bridge the geographic boundaries of the world's parallel but distinct legal systems. A vivid example that comes up frequently is the issue of third party witnesses in Japan. Japan did not agree to the Hague Convention provisions for depositions. So when significant third-party witnesses reside there (think: trading partners, customers, manufacturing facilities, testing laboratories) the lack of deposition discovery will have a profound impact on the case. The impact of the deposition prohibition can be mitigated if the witness's cooperation can be secured voluntarily, but that in turn requires negotiating cultural differences about the role of litigation in society, and not disrupting your client's ongoing business relationship.

The Annual Seminar this year promises to equip us with the tools to manage these issues just as they become more prevalent in our practices. The first program, "Attitudes Across Latitudes: Cross-Border Litigation Challenges," will discuss choice-of-law, forum selection, and personal jurisdiction issues, along with international implications of the current economic crisis. A second panel, made up of in-house counsel, will discuss how companies with international reach select outside counsel, manage budgets, and try to obtain insurance coverage for international disputes. A third panel, "Parallel Proceedings: Through The Looking Glass," discusses whether U.S. courts are becoming the courthouse of the world, and will address issues such as *forum non conveniens*, comity, jurisdictional privileges, and the use of anti-suit injunctions and stays to manage cases where the parties are fighting about where to fight. On Saturday, the fourth panel will take up the discovery issues: how to obtain depositions in a foreign country, and conflicting standards of privacy and privilege. The fifth panel — "Cultural Considerations: Lost in Translation," will address issues including presentation of foreign witnesses and transnational parties at trial. And the final panel will address how to collect foreign judgments here, and California judgments elsewhere.

The programs are packed with judges and experts to share their thoughts with you. All that, and see the Rocky Mountains in autumn. A good plan for a long weekend now that summer is ending. Go to *www.abtl.org/ annualseminar.htm*.

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