ASSOCIATION OF BUSINESS TRIAL LAWYERS

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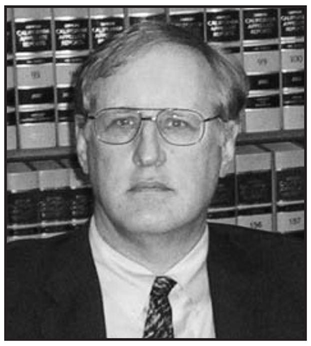
Attorney Fee Weirditudes

Congratulations — you won your civil case. Better yet, the case is covered by either a statute or a contractual clause authorizing the prevailing party to collect attorney fees. You draw up your fee motion so you can collect your bill, your client will be even happier than the average winning litigant, and all will be well in the world. Right?



Hon. Charles S. Treat

Most of the time, yes. But California law has some weirditudes in its statutes and rules for collecting prevailing-party fees. I have recently published a proposal to fix these anomalies. *See* Treat, Charles S., "A Proposed Revision of California's Procedural Statutes and Rules for Seeking Prevailing-Party Attorney Fees," 12 JFK L. Rev. 11 (2009). But rumor has it that the Legislature has more urgent matters on its mind these days, so my proposed amendments will likely vanish into the Great Abyss of Unheeded Good Ideas. Let's point out a few of the things you may need to watch out for in the meantime.

I not only won my case, but I beat the bums down so

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Prop. 64 Five Years Later: Has the "Shakedown Loophole" Been Closed?

In the fall of 2004, California voters were deluged with advertisements for a ballot proposition that would "close the shakedown loophole" that "allows private lawyers to file frivolous lawsuits against small businesses even though they have no client or evidence that anyone was damaged or misled." The voters overwhelmingly passed Proposition 64.

Of course, in California, a proposition's impact is rarely known until the courts interpret it. So now, five years later, it is appropriate to ask whether Proposition 64 has achieved its backers' goals. The answer is not a simple yes or no. On issues of retroactivity, "tester" standing, and virtual representation, defense lawyers and their clients have prevailed. But on more significant issues of "placeholder" plaintiffs, absent class members, and reliance, plaintiffs' lawyers have prevailed. The courtroom battles continue.

Trenton H. Norris

Proposition 64

Before 2004, California's Unfair Competition Law (UCL) and False Advertising Law (FAL) were unique in allowing "representative actions" by *anyone* against any business for any practice alleged to be unlawful, unfair, or fraudulent. Injunctions, restitution, and attorney's fees were available, all without the need for a class action. These laws' breadth led to abusive suits by plaintiffs' lawyers that were hard to defend. Nevertheless, the UCL and FAL repeatedly withstood legislative reform efforts. The business community eventually resorted to a ballot proposition to rein in these "non-class" class actions.

Proposition 64 made three major changes to the UCL and FAL. First, standing to sue is limited to "any person

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Proposition 64 Five Years Later

who has suffered injury in fact and has lost money or property as a result of" the challenged conduct. Second, a private claimant can pursue "relief on behalf of others" only by complying with the provision of California law that authorizes class actions. Cal. Code Civ. Proc. § 382. Third, and often forgotten, Proposition 64 dedicates the penalties obtained by public prosecutors' efforts to additional enforcement, as opposed to other governmental needs. These amendments were intended to bring California law into line with the laws of most other states and to combat the image of California as unfriendly to business. Whether they have succeeded is still an open question.

The Defense Bar's Victories

• *Retroactivity*. The first Proposition 64 battle was over whether the amendment applied to cases pending at enactment. After numerous rulings below, the California Supreme Court ruled that the amendments were "procedural" and not "substantive" and therefore applied to pending cases. *Californians for Disability Rights v. Mervyn's LLC*, 39 Cal. 4th 223 (2006). This distinction had significant consequences on arguably more important issues for the defense bar.

• *"Tester" Standing*. Another battle arose over whether a consumer advocate could obtain standing merely by purchasing a product whose marketing the plaintiff believed was misleading *other* consumers. The Court of Appeal, rejecting plaintiff's analogy to a civil rights "tester" who seeks a job only to test compliance with anti-discrimination laws, held that such a purchaser has not suffered any injury "as a result of" the challenged conduct and so lacks standing. *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798 (2007).

• *Virtual Representation*. A third battle, culminating in two recent Supreme Court cases, resolved the question of virtual representation. First, in *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009), plaintiffs had pointed out that Proposition 64 does not specifically require a plaintiff seeking to represent others to meet the requirements for a class action, but instead requires compliance with section 382 of the Code of Civil Procedure, an ancient law stating, in pertinent part: "…when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Reviewing evidence of the voters' intent, the Court found that this reference restricted UCL and FAL cases to conventional class actions.

On the same day, the California Supreme Court addressed the question of whether Proposition 64 allows an association to represent its members in a UCL suit, a common past practice. In *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 46 Cal. 4th 993, 1002, 1004 (2009), a union argued it had "associational standing" because its members had standing as individuals. Alternatively, the union argued that members could assign their claims to it. The Court disagreed, finding that Proposition 64 was not intended to incorporate the federal doctrine of associational standing, and so a union that did not have "injury in fact" and had not "lost money or property" could not sue.

The Plaintiffs' Bar's Victories

• *"Placeholder" Plaintiffs*. In a companion case to the retroactivity ruling, the California Supreme Court held that plaintiff's counsel should ordinarily be permitted to substitute a plaintiff who meets the standing requirements for one who does not. *Branick v. Downey Sav. & Loan Ass'n*, 39 Cal. 4th 235, 243 (2006). A subsequent Court of Appeal ruling held that such an amendment should be allowed so long as the defendant is not "required to answer a wholly different legal liability or obligation from that originally stated." *Found. for Taxpayer and Consumer Rights v. Nextel Communications, Inc.*, 143 Cal. App. 4th 131, 135-36 (2006).

Subsequently, state courts have permitted, with attention to privacy rights, pre-certification discovery of a business's records for purposes of identifying class members. *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360 (2007); *CashCall, Inc. v. Superior Court*, 159 Cal. App. 4th 273, 297-98 (2008). As a result, a plaintiff's lawyer may be able to sue on behalf of an individual who does not have standing, discover in the defendants' records the names of people who do have standing, and substitute them as named plaintiffs. Taken together, these cases present a practical conflict with Proposition 64's purpose of preventing litigation initiated by lawyers rather than by consumers who believe they have been harmed.

• *Absent Class Members*. The most important battle to date was recently decided in a closely watched and long-pending case. The plaintiffs' bar argued that Proposition 64 did not prevent an individual who *had* been harmed from suing on behalf of others who had not. By a four-to-three vote from which Chief Justice George was recused, they succeeded. *In Re Tobacco II Cases*, 46 Cal. 4th 298 (2009).

The decision arose out of a putative class action against tobacco companies alleging a "decades-long campaign of deceptive advertising and misleading statements." The trial court certified a class of California smokers but, after Proposition 64 passed, decertified it because every member, to obtain standing, would be required to prove an injury resulting from the conduct, and these individualized issues would make class treatment inappropriate. The Court of Appeal affirmed, but the California Supreme Court reversed, ruling that the standing requirements apply only to named plaintiffs. The Court based this conclusion on the wording of the UCL and on the reasoning that Proposition 64 was intended to affect procedure and not substance.

As Justice Baxter wrote in dissent, this creates a brand-new animal: the "no-injury class action," in which an individual can be a member of a class even if he cannot bring a claim in his own right. Such a ruling is unprecedented.

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As the dissenting justices noted, it "turns class action law upside down and contravenes the initiative measure's plain intent." It violates the fundamental nature of the class action, which in every other jurisdiction is a purely procedural device designed to efficiently aggregate claims that could have been brought individually.

• *Reliance*. The *Tobacco II* Court did not stop there. It went on to hold that under the UCL's "fraudulent" prong, the requirement that a plaintiff have suffered a loss "*as a result of*" the claimed violation does not require even the named plaintiff to prove that she relied on any *specific* misrepresentation. Instead, in the case of a long-term advertising campaign, the named plaintiff need not "plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements." The challenged representation also need not be "the only cause" of the claimed injury or loss or "even the decisive cause," but merely the "immediate cause" and a "substantial factor."

• *Restitution*. The Court continued, *in dicta*, opining that, because absent class members did not have to show injury in fact or lost money or property, they can recover restitution (the only monetary relief available to private plaintiffs) "without individualized proof of deception, reliance and injury if necessary to prevent the use or employment of an unfair practice." It is not clear whether this language was intended to resurrect the standard of *Fletcher v. Security Pacific National Bank*, 23 Cal. 3d 442 (1979), but if so, it is at odds with *Korea Supply v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003), which established that a UCL plaintiff may not recover money that was not taken directly from him by means of the alleged unfair competition.

Fundamentally, it can be argued that *Tobacco II* conflicts with the intent of Proposition 64's supporters. Before Proposition 64, no claimant needed to have suffered harm and have a causal nexus to the challenged business conduct. Proposition 64's proponents believed it extended those requirements to *all* claimants. But after *Tobacco II*, a plaintiffs' lawyer need find only one named plaintiff who meets these requirements. That may discourage the more egregious practices publicized in the ballot campaign, but for more industrious plaintiffs' lawyers, it presents only a small hurdle.

The Ongoing Battles

• *Commonality*. *Tobacco II* was followed by decisions from the Second and Fourth Appellate Districts, each upholding the denial of class certification in UCL cases based on a lack of commonality among all class members. *Cohen v. DIRECTV, Inc.*, 2009 Cal.App. LEXIS 1728 (Sept. 28, 2009); *Kaldenbach v. Mut. Omaha Life Ins. Co., et al.*, 178 Cal. App. 4th 830 (2009). In each case, the court limited *Tobacco II's* holding to standing issues, which were not relevant for evaluating whether the court should certify a class of consumers who had been exposed to differ-

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Motions in Limine: *How Far Can They Reach?*

Motions *in limine* are potentially robust trial tools to control or preclude evidence altogether. They can target "any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial." *Clemens v. American Warranty Corp.*, 193 Cal. App. 3d 444, 451 (1987). In other words, there are few limits on the subject matter of a motion *in limine*.

To maximize their potential, however, they must be used effectively. Likewise, failure to make a proper motion *in limine* increases the risk of incorrect rulings and poor trial outcomes.

Diane Webb

Know Your Judge; Know the Rules

Despite their importance, there is no express statutory authority for motions *in limine*. In federal court, motions *in limine* are predicated upon the court's authority to control the trial process. *See e.g., Laitram Machinery, Inc. v. Carnitech A/S*, 908 F. Supp. 384, 387-88 (1995).

Similarly, the California Code of Civil Procedure contains no specific authority for motions *in limine*. *See Clemens*, 193 Cal.App. 3d at 450. Authority can be inferred from the California Rules of Court, which proscribe procedural and formatting requirements for motions generally and refer to motions *in limine* specifically. Cal. R. Ct. 3.112(d),(f) ("a motion *in limine* need not be accompanied by a notice of hearing. The timing and place of the filing and service of the motion are at the discretion of the trial judge."). Authority can also be inferred from California state courts' powers to control the trial process. *See* Cal. Civ. Proc. Code § 128(a)(3),(8); Cal. Evid. Code §§ 350, 352, 355, 402.

While local court rules that conflict with the California Rules of Court are generally prohibited, motions *in limine* are expressly exempt — each court is free to promulgate its own local rules governing such motions. Cal. R. Ct. 3.20(b)(1). As a consequence, rules governing motions *in limine* differ, which necessitates ascertaining each court's particular requirements, including the judge's standing orders, if any.

Timing can be everything, and the timing of such motions also differs court by court. In California state court, the time by which motions *in limine* must be filed is determined by local rule or the trial judge. *See* Cal. R. Ct. 3.112(d),(f). For example, unless otherwise set by the trial judge, the Los Angeles Superior Court requires that motions *in limine* be filed and served within the statuto-

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Motions in Limine

ry notice period to be heard at the time of the final status conference. Los Angeles Sup. Ct. L. R. 7.9(h) ("the parties shall file and serve any trial preparation motions and dispositive motions, other than summary judgment motions, including motions *in limine* or bifurcation motion, with timely statutory notice so as to be heard on the day of this final status conference."). In comparison, the San Francisco Superior Court requires motions *in limine* be served and filed no later than five days prior to trial, unless otherwise ordered by the trial judge. San Francisco Sup. Ct. L. R. 6.1.

The importance of local court rules should not be underestimated. They act as procedural and substantive gatekeepers. For instance, the Los Angeles Superior Court's local rules detail the showing that each party must make. Los Angeles Sup. Ct. L. R. 8.92(a)(1)-(3) ("(1) A clear identification of the specific matter alleged to be inadmissible and prejudicial; (2) A representation to the court that the subject of the motion has been discussed with opposing counsel, and that opposing counsel has either indicated that such matter will be mentioned or displayed in the presence of the jury before it is admitted in evidence or that counsel has refused to stipulate that such matter will not be mentioned or displayed in the presence of the jury unless and until it is admitted in evidence; (3) A statement of the specific prejudice that will be suffered by the moving party if the motion is not granted.").

These same rules also prohibit the use of motions *in limine* as a proxy for a motion for summary judgment or summary adjudication:

> [a] motion in limine shall not be used for the purpose of seeking summary judgment or the summary adjudication of an issue or issues. Such motions may only be made in compliance with Code of Civil Procedure section 437c and court rules pertaining thereto. A motion *in limine* shall not be used for the purpose of seeking an order to try an issue before the trial of another issue or issues. Such motions may only be made in compliance with Code of Civil Procedure section 598.

Id. 8.92(e)-(f); *but see Coshow v. City of Escondido*, 132 Cal. App. 4th 687, 701 (2005) ("Here, the motions *in limine*, although directed at particular items of…evidence, had the cumulative effect of an objection to all the evidence on the ground [plaintiff] failed to state any cause of action, entitling [defendant] to judgment as a matter of law.").

Nonetheless, anecdotal reports indicate that at least one Los Angeles Superior Court judge has been willing to hear and decide motions *in limine* well in advance of trial, which provides the successful moving party an enormous advantage. And, other judges reportedly are willing to schedule *Daubert* motions early on in cases. In other words, if you believe an early evidentiary hearing would be helpful, all you have to do is ask. Such early attacks on the evidence may result in something akin to summary adjudication of an issue or an element of a cause of action, thereby knocking out a claim or the action altogether or may foster settlement. Requests for early hearings may also provide the added benefit of allowing the court more time to consider your motion on a regularly noticed briefing schedule, rather than at break-neck speed on the eve of trial.

Do Not Waste the Court's Time

Given that it is not possible to know exactly what evidence opposing counsel intends to introduce at trial, many courts will not consider a motion *in limine* absent a showing the parties conferred. *See e.g.*, Los Angeles Sup. Ct. L. R. 8.92(a)(2).

Additionally, other jurisdictions frown upon perfunctory motions and preclude them altogether. They prohibit motions *in limine* to exclude clearly inadmissible evidence — evidence that can be dealt with easily and quickly at trial. San Diego Superior Court Local Rule 2.1.18, for example, provides the following motions will be "deemed granted at the time of the trial readiness conference if applicable" and that the following written motions should not be submitted: (1) motions excluding collateral source evidence; (2) motions excluding evidence of or mention of insurance coverage; (3) motions excluding experts not designated pursuant to California Code of Civil Procedure section 2034; and (4) motions excluding offers to settle and/or settlement discussions. San Diego Sup. Ct. L. R. 2.1.18. A word of caution, however, some courts will not entertain written motions *in limine* after the court-imposed deadline.

How Far is Too Far?

Simply stated, motions *in limine* target inadmissible and/or prejudicial evidence. *Clemens*, 193 Cal. App. 3d at 451; *Amtower v. Photon Dynamics, Inc.*, 158 Cal. App. 4th 1582, 1593 (2008). The purpose of a motion *in limine* "is to avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceedings before the jury." *Hyatt v. Sierra Boat Co.*, 79 Cal. App. 3d 325, 337 (1978).

Some courts, however, have held that motions *in limine* are no substitute for a timely, properly noticed, and fully briefed summary judgment motion. "Motions *in limine* address evidentiary questions and are inappropriate devices for resolving substantive issues." *Natural Res. Def. Council v. Rodgers*, 2005 WL 1388671 *1, n.2 (E.D. Cal. 2005) (citations omitted).

Illustrating this point is *C & E Services, Inc. v. Ashland Inc.*, 539 F. Supp. 2d 316 (D.D.C. 2008). In *C & E Services,* the court held that motions *in limine* cannot be used to preclude evidence on damages because the underlying claim lacks evidentiary support. In particular, the court stated:

> It is worth noting that a motion *in limine* should not be used to resolve factual disputes or weigh evidence. Nor should a motion *in limine* be used to argue…that an item of damages may not be recovered because no reasonable person could find that it was proximately caused by the defendant's acts. That is the function of a motion for summary judgment, with its accompanying and crucial procedural safeguards.

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Motions in Limine

C & E Services, 539 F. Supp. 2d at 323 (citations omitted and emphasis added).

Likewise, as the California Court of Appeal outlined in *R & B Auto Center, Inc. v. Farmers Group, Inc.*:

> [I]t is not uncommon to bring motions for summary judgment on the pleadings, for summary judgment, and for summary adjudication of issues in the guise of motions *in limine*. But, particularly in the latter cases, this practice removes all the protections afforded by the statute which prescribes the manner in which the court must handle such motions. To have the sufficiency of the pleading or the existence of triable issues of material fact decided in the guise of a motion *in limine* is a perversion of the process.

R & B Auto Center, Inc. v. Farmers Group, Inc., 140 Cal. App. 4th 327, 371 (2006) (J. Rylaarsdam, concurring); *accord* Los Angeles Sup. Ct. L. R. 8.92(e)-(f).

In other words, courts have expressed concern that motions *in limine* do not afford a party time to oppose the motion in the same manner as a motion for summary judgment or summary adjudication, namely, pursuant to a statute that includes a statutory notice period and well-developed burden-of-proof standards.

Nonetheless, other courts are willing to grant *in limine* motions that result in the determination of case-dispositive issues. *In re TMI Litigation*, 193 F.3d 613, 622, 628, 729 (1999), *amended by*, 199 F.3d 158, 159 (3d Cir. 2000), *cert. denied*, *General Pub. Utilities Corp. v. Abrams*, 530 U.S. 1225 (2000), and *Dolan v. General Pub. Utilities Corp.*, 530 U.S. 1225 (2000) (upholding summary judgment where *Daubert*-based *in limine* ruling excluded expert testimony); *Kelly v. American Heyer-Schulte Corp.*, 957 F. Supp. 873, 877, 884 (5th Cir. 1998) (granting motion to exclude and granting, in part, defendant's motion for judgment as matter of law where potential prejudice outweighed utility of plaintiff's expert's proposed testimony because expert could not testify as to causation and failed *Daubert* scientific evidence admissibility tests); *Amtower,* 158 Cal. App. 4th at 1597; *Coshow v. City of Escondido*, 132 Cal. App. 4th 687, 701-02 (2005) (dismissing action after construing motion *in limine* as motion for judgment on pleadings).

Amtower, in particular, made somewhat of a splash when it was first decided given the court's admonishments regarding attempts to use motions *in limine* as dispositive motions. In reality, it did not change the court's ability to decide motions *in limine* that may also implicate case-dispositive issues based on the court's power to control the trial process. *Amtower*, 158 Cal. App. 4th at 1588.

Amtower involved securities fraud, breach of fiduciary duty, and misrepresentation claims brought by the former president of an acquired corporation against the acquiring corporation. *Id.* at 1587. Amtower claimed that he had been misled about the transferability of stock he had obtained through a merger transaction. *Id.* at 1588-90. A few days before trial was to begin, in a continued session of his deposition, the plaintiff admitted that in 1999 he had seen and read the statement that formed the basis of his § 11 securities fraud claim. *Id.* at 1592. In response, the defendants brought a motion *in limine*, among others, that sought to exclude all evidence that would have supported the plaintiff's § 11 claim. *Id.* at 1590. The trial court conducted what it "characterized as a 'mini-trial[]'" on the motion *in limine*. *Id.* at 1592. It granted the motion and excluded "all evidence pertaining to the § 11 claim on the ground that the claim was barred by the statute of limitations." *Id.* at 1592-93. In granting the motion, the trial court found, in light of his deposition testimony, the plaintiff must have been aware of alleged deficiencies in the offering statement in 1999. *Id.* at 1593. Yet, his initial complaint had not been filed until April 2001 — after the applicable one-year statute of limitations had run. *Id.* at 1590. As a consequence, the trial court found that the § 11 cause of action "was time barred." *Id.* at 1593. The plaintiff asserted it was unfair for the trial court to have granted an *in limine* motion that disposed of his claim and that by doing so the court had deprived him of his right to a jury trial on the § 11 claim. *Id.*

On appeal, the court expressed concern with "the proliferation of such short-cut procedures[,]" and cautioned, "The better practice in nearly every case is to afford the litigant the protections provided by trial or by the statutory processes." *Id.* at 1588. Nonetheless, the trial court's order granting the motion *in limine* was affirmed. *Id.* at 1595. As stated by the court of appeal, "we would have preferred that the statute-of-limitations issue be decided by a proper summary adjudication motion or motion for nonsuit, the trial court's unorthodox procedure does not warrant reversal because plaintiff could not have prevailed under any circumstances." *Id.* at 1588. "In spite of the obvious drawbacks to the use of *in limine* motions to dispose of a claim, trial courts do have the inherent power to use them in this way." *Id.* at 1595 (citations omitted). The court also recognized that there was "no evidence plaintiff could produce that would change this result." *Id.*

Despite *Amtower's* disapproving stance, it is thus in accord with other decisions that do not take issue with the use of motions *in limine* that raise evidentiary issues and in doing so test substantive issues as well. *See Coshow*, 132 Cal. App. 4th at 701-02.

Preserve the Record

It may seem obvious, but a motion *in limine* is only as successful as the resulting ruling based on arguments made and preserved. *See Hyatt*, 79 Cal. App. 3d at 337-40.

In *Hyatt*, the court of appeal upheld the trial court's grant of a motion *in limine* made during trial. *Id.* at 337-38. In so doing, the court of appeal noted, "Plaintiff's motion was in the nature of a motion *in limine*, and evidently the procedure was not objected to by defendant." *Id.* at 337 (emphasis in original and emphasis added). The court went on to state:

> It is apparent that the defendant's proffered evidence would have been speculative, conjectural and remote in nature and could very well have confused the jury.

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Motions in Limine

> Therefore the court properly rejected such speculation, and defendant's case proceeded. Other than adding that [the expert] would have testified that the speed, based on such assumptions, was in the areas of 60-62 miles per hour, defendant made no further effort to pursue any foundation or present any matter upon which the expert could render his opinion.

Id. at 338 (emphasis added). As *Hyatt* counsels, absent a well developed record, evidentiary issues raised by way of a motion *in limine* may be precluded on appeal.

Motions *in limine* can provide enormous benefits in preparing a case for trial or fostering settlement. To maximize their strategic potential, plan ahead and whenever possible provide the court with ample time to consider your motion.

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Proposition 64 Five Years Later

ent advertising. Although absent class members who did not see or rely on the challenged advertising have standing under *Tobacco II*, their class still may not be certifiable under *Cohen* and *Kaldenbach*.

• *Monetary Loss*. One major Proposition 64 issue remains under review. In *Kwikset Corp. v. Superior Court*, No. S171845, the question is whether the named plaintiff has "lost money or property as a result of" the challenged practice simply by purchasing a product that was falsely advertised or whether the plaintiff must also show the product is worth less than the price paid.

The Court of Appeal ruled that consumers who bought locksets that were falsely labeled as "Made in the U.S.A." had to allege that they paid more for those products than they would have paid for others. To consumer advocates, this ruling would close the courthouse door, barring claims by hypothetical purchasers of Girl Scout cookies who were really supporting an "al-Qaida terrorist training camp," or by consumers who rely on animal welfare and environmental claims that do not go to the intrinsic value of a product.

The ruling under review is not an outlier. The Court of Appeal has previously dismissed claims under the UCL and FAL that are premised on alleged misrepresentations of intangible characteristics. *See, e.g., Medina v. Safe-Guard Products, Inc.*, 164 Cal. App. 4th 105, 115 (2008) (lack of license by seller is not "loss of money or property"); *Animal Legal Defense Fund v. Mendes*, 160 Cal. App. 4th 136, 147 (2008) (moral injury is not capable of restitution). But courts can see the issue differently: the Ninth Circuit recently overturned its similar ruling in *Chavez v. Blue Sky Natural Beverage Co.*, 2007 WL 1691249 (N.D. Cal. Jun. 11, 2007), which, like *Kwikset*, had ruled that a plaintiff who relied on the misrepresentation of the origin of the product must allege that he paid a premium as a result of the misrepresentation. *Chavez v. Blue Sky Natural Beverage Co.*, 2009 WL 1956225 (9th Cir. Jun. 23, 2009) (unpublished).

Although Proposition 64 made "lost money or property" the touchstone for UCL standing, the meaning of that term is still under debate.

A Mixed Record

The pre-2004 UCL's delegation of enforcement authority to private individuals was unique to California, creating — for good or for ill — an incentive to litigate consumer protection claims here. Proposition 64 sought to change that by requiring individual plaintiffs to show "injury in fact" and loss of money or property resulting from the challenged conduct.

Undoubtedly, Proposition 64 corrected some of the more egregious practices of the past. It is no longer possible for plaintiffs' lawyers to challenge a business practice unless they can find at least one person who claims an actual monetary loss as a result. They cannot represent unnamed consumers without such a plaintiff, and they cannot sue on behalf of activist groups who have not been harmed themselves. Nevertheless, UCL and FAL claims have not subsided, and ironically — in light of Proposition 64's overriding goal — the continuing uncertainty surrounding these important statutes may have created more, rather than less, litigation.

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Attorney Fee Weirditudes

hard, they dismissed the case voluntarily during trial —with prejudice and apologies to the court for wasting its time. That's a lock for collecting my attorney fees, isn't it?

It depends. If you're relying on an attorney fee statute, you should be on solid ground. Each case depends on its own facts, but in general the courts have little difficulty in recognizing that when the plaintiff dismisses voluntarily (especially with prejudice), the defendant is the prevailing party for purposes of awarding attorney fees. *See Castro v. Superior Court*, 116 Cal. App. 4th 1010, 1018-21 (2004) (summarizing cases).

If the case was one for breach of contract and your fees rest on a contract clause, however, no dice. Civil Code section 1717 governs the award of contract-based attorney fees for contractual causes of action. Subdivision (b)(2) expressly provides that "[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purpose of this section." That means that, just as a plain-

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MICHAEL W. SOBOL

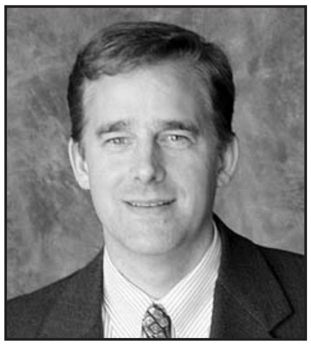
On CLASS ACTIONS

The Federal Arbitration Act (FAA) celebrates its 85th birthday next year as an enduring testament to our "national policy of favoring arbitration." However, the FAA's purpose of promoting arbitration has been employed by some companies to preclude the use of the class action device through "class action waivers," or to direct cases into unfairly one-sided forums. Fortunately, the landscape on this issue is changing fast — recent developments are curtailing the use of arbitration as a means of avoiding liability for wrongful conduct and ensuring that arbitration forums provide a fair alternative dispute mechanism.

Congress enacted the FAA "to overcome judicial resistance to arbitration," and to override the common law precedents prohibiting the enforcement of arbitration agreements. But recognizing their contractual nature, Section 2 of the FAA subjects agreements to arbitrate to state law contract defenses. In recent years, class action waivers in arbitration provisions facing state law challenges have had a somewhat mixed fate. *See, e.g., Caban v. J.P. Morgan Chase & Co.*, 606 F. Supp. 2d 1361, 1370-71 (S.D. Fla. 2009) (collecting cases on both sides); *Scott v. Cingular Wireless*, 160 Wash. 843, 850-51, 161 P.3d 1000 (2007) (same; "There is a clear split of authority."). Acknowledging the judicial embrace of consensual arbitration pioneered by the FAA, some courts have upheld class action bans and rejected arguments that, given the prohibitive costs of individual litigation, eliminating the class action vehicle effectively denies plaintiffs legal recourse. Other courts view such class bans as heavy-handed attempts to circumvent potential liability and therefore reject class waivers on state law unconscionability grounds. All of these decisions tend to limit themselves to the circumstances of each case, but nonetheless practitioners on both sides of the docket keep mental (and probably literal) checklists of the jurisdictions where such challenges are likely to fail or succeed.

The litigation over class action bans has now broadened beyond state law, resulting in an emerging body of federal substantive law on arbitrability under the FAA. Earlier this year, the Second Circuit in *In re American Express Merchants Litigation*, 554 F.3d 300 (2d Cir. 2009) invoked the federal "vindication of statutory rights" doctrine in rejecting Amex's attempt to enforce its class action ban against a group of small business merchants alleging violations of the federal antitrust laws. The court first noted that plaintiffs have a "right" to bring class actions in federal court under Rule 23 of the Federal Rules of Civil Procedure. Crucial to the court's analysis, therefore, was plaintiffs' ability to demonstrate that their claims could not reasonably be pursued as individual actions. Thus, the class action waiver constituted the "effective negation of a private suit," and was therefore void "as a matter of public policy." The "vindication of statutory rights analysis" was expressly distinguished from the line of cases rejecting class action bans under the contractual defense of unconscionability. In other words, though the FAA was enacted to give legal force to arbitration contracts, a doctrine has developed within the FAA's own confines that rejects arbitration contracts, despite their consensual nature, solely on public policy grounds. Under either analysis, the enforceability of a class action ban turns on whether it will provide "*de facto* immunity" from liability under laws designed to protect the public.

In another development affecting the enforceability of arbitration agreements, one arbitration forum has come under fire for allegedly providing *de facto* immunity for companies whose customer agreements designate the forum. Last year, the San Francisco City Attorney's Office sued the National Arbitration Forum claiming that in nearly 100 percent of all its arbitrations, the company — and not the consumer — prevailed. Earlier this year, the Minnesota Attorney General alleged the NAF was financially connected to credit collection companies and entered into a consent decree with the NAF in which it agreed to cease future consumer arbitrations. So far, at least one court has rejected the enforcement of an NAF arbitration clause altogether, including its class waiver provision, because of the selection of the NAF as the arbitration forum. In addition, the American Arbitration Association has suspended its services for credit collection proceedings, and some nationwide credit providers, such as J.P. Morgan Chase and the Bank of America, have instituted a moratorium of sorts on enforcement of arbitration provisions against consumers.



Michael W. Sobol

In light of abuses of the arbitration procedure, Congress is considering arbitration reform legislation that would significantly change the landscape of the FAA. Both the current House and Senate versions of the proposed Arbitration Fairness Act of 2009 would amend the FAA by making pre-dispute agreements to arbitrate unenforceable in consumer, employment, and franchise disputes and in civil rights cases. Legislative findings supporting the proposed amendments recognize that the FAA was originally intended to apply to parties of relatively equal bargaining strength. However, over the years arbitration has been imposed upon parties with significantly less bargaining strength and has proven to be a poor system for protecting the rights of those who have little choice over the content of the agreements they must sign.

Whatever amendments may befall the FAA, it will best accomplish its long-standing purpose of promoting arbitration by ensuring that it persists as a fair alternative dispute resolution device. Proponents of the legislation contend that the amendments will prevent the FAA from becoming merely a shield by which companies avoid liability. Regardless, looking to the FAA's original purpose and scope may provide clarification to an increasingly conflicting area of the law. But hey, who doesn't need a make-over after 85 years?

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tiff has the right to voluntarily dismiss his case at any time, he also has the ability to evade liability for contractual attorney fees by voluntarily dismissing. Even where the fee clause makes the defendant the prevailing party in this situation as a matter of contractual interpretation, the statutory command overrides the parties' contractual agreement. *Santisas v. Goodin*, 17 Cal. 4th 599 (1998).

Is there anything I can do about that?

No.

What if I have a contractual fee provision, but the claims in the lawsuit were torts? Does that make a difference?

It does if your contractual fee clause is broad enough. Section 1717 applies only to "any action on a contract." In *Santisas*, the Supreme Court held that section 1717 governs only contract-based causes of action. The section's bar on awarding fees upon voluntary dismissal, therefore, "applies *only* to causes of action that are based on the contract and are therefore within the scope of section 1717." *Id*. at 617. So if your fee clause is construed to cover tort causes of action and voluntary dismissals, then section 1717 will not stand in the way of a fee award as to the tort claims.

So I can rely on my contract to collect the fees incurred defeating a tort claim, but not the fees incurred defeating a contract claim? Isn't that kind of backwards?

Correct. And some might think so.

What if it's not a voluntary dismissal, but a settlement?

If you are going to settle your case, settle all of your case, including any issue of entitlement to attorney fees. If the settlement is a simple matter of one side agreeing to pay the other a set amount of money, then one would expect that any claim (or claims) for fees would have influenced the agreed amount, and the settlement should effectively subsume the negotiated value of fee claims. The release in the settlement agreement should include mutual releases of fee claims. If either side wants to segregate fee payments from other consideration in the settlement, though, they can do so. The agreement can provide as one of its terms that party X will pay party Y a stated amount as attorney fees — again, preferably, with an appropriate release. If party X then doesn't pay, section 1717 should not stand in the way of collection, because the money at issue would no longer be attorney fees awarded by the court to a prevailing party upon dismissal, but would instead simply constitute a contractual payment obligation under the settlement agreement.

Even if the fees turn out to be the last obstacle to settlement, you can write a provision into your settlement agreement stipulating that party Y is the prevailing party for purposes of the fee clause in your underlying contract, and providing that that party's fee claim will be litigated in court. That practice was approved in *Jackson v. Homeowners Assn. Monte Vista Estates-East*, 93 Cal. App. 4th 773, 785-86 (2001), though it took some fairly fancy judicial footwork to reach that sensible result under the present statute.

What you should not do, however, is ignore the subject of attorney fees in your settlement, figuring that once the ink is dry you can just file a motion asserting that your client is the prevailing party. That approach will run squarely into section 1717. Even without the statute, moreover, you may have difficulty persuading your judge that you have "prevailed" in a settlement, if the other side does not stipulate in the settlement that that is so.

A vendor sued my client on a balance. We beat the suit by proving that the goods were no good. Their form sales contract provides that the vendor would recover its expenses of collection including attorney fees, but makes no provision for the buyer to get fees if it wins. Can my client recover its fees?

Yes. Civil Code section 1717(a) says that when a contract provides for attorney fees, the prevailing party is entitled to fees even if the contract purports to limit recovery to the other side. The statute thus operates to convert a one-way contractual fee clause into a bilateral clause. Further, even if the clause purports to be limited to certain issues (such as "collection"), the clause must be "construed" [*sic*] to apply to the entire contract (with an exception not applicable here). So your opponent gets bitten by its own form contract, and your client gets to collect its attorney fees.

That's good news, thanks. And I assume that applies also to the tort cross-complaint that we also won?

Probably not. That's because, again, section 1717 applies only to "any action on a contract." Your tort claim probably doesn't qualify. So as to that non-contract claim, the statute doesn't help you and your client is stuck with the unilateral fee clause in the contract. *See Moallem v. Coldwell Banker Commercial Group*, 25 Cal. App. 4th 1827 (1994). Don't give up too fast, though, because the courts will often stretch to conclude that a claim, not formally sounding in contract, nevertheless rests on contractual duties — bringing the claim within section 1717's forced bilaterality. *See, e.g., Kangarlou v. Progressive Title Co.*, 128 Cal. App. 4th 1174 (2005).

Proving the defects in the goods required a couple of high-priced experts. I assume I can recover their fees too?

Whether your client has a valid claim for expert fees depends on the statute or contract that provides for a fee award. Courts generally don't read attorney fee statutes as including expert fees unless they say so expressly. *See, e.g., Olson v. Automobile Club*, 42 Cal. 4th 1142, 1156-57 (2008). The result is likely to be the same for contract clauses. If your contract is sufficiently broad or clear to include expert fees, however, that agreement is substantively enforceable. There's no statutory prohibition on private parties agreeing that the prevailing party recovers expert fees. *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 47 Cal. App. 4th 464, 492 (1996).

Good. The client was really fussing about those

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JAMES YOON

On PATENTS

There are few patent defenses that courts like less than inequitable conduct. Courts dislike the liberal manner in which inequitable conduct is pled and wish attorneys would exercise more care before asserting the defense in response to claims of patent infringement. Multiple judges have indicated their belief that too many litigators assert inequitable conduct as a boiler-plate defense. These judges believe that many patent litigators are too quick to assert that members of the bar (*e.g.*, patent prosecution attorneys) have made false statements and/or representations "with intent to deceive" the United States Patent and Trademark Office ("PTO") during the prosecution of the patent asserted in the lawsuit. The judges believe it is a serious matter to accuse an attorney of making false statements and that such accusations should not be made lightly. The judges are right. Defendants should resist the urge to accuse patent attorneys of deception absent substantial evidence of improper conduct. A recent Federal Circuit decision should go a long way to eliminating meritless charges of inequitable conduct.

In *Exergen v. Wal-Mart Stores, Inc.*, 575 F.3d 1312 (Fed. Cir. 2009), the Federal Circuit raised the bar for pleading inequitable conduct as an affirmative defense. Traditionally, the Federal Circuit had ruled that, pursuant to Fed. R. Civ. P. 9(b), the defense of inequitable conduct had to be pled with "particularity." The traditional "particularity" rule required a patent defendant to make more than a general allegation of inequitable conduct. The rule required a defendant to provide the patent holder with sufficient detail to understand the basis of the inequitable conduct defense. The defendant in *Exergen* met the traditional application of the "particularity" rule. The defendant's proposed inequitable conduct pleading expressly identified the specific prior art references that it alleged were improperly withheld from the patent office and the specific false statements that the defendants alleged were made by the patent holder to the patent office. Despite the defendant's relatively detailed allegations of inequitable conduct in its proposed pleading, the Federal Circuit ruled that the district court properly exercised its discretion to reject the pleading for failure to comply with Fed. R. Civ. P. 9(b).

In *Exergen*, the Federal Circuit ruled that "to plead the 'circumstances' of inequitable conduct with the requisite 'particularity' under Rule 9(b), the pleading must identify the specific who, what, when, where, and how of the material misrepresentation or omission committed before the PTO." The Federal Circuit found that the defendant in *Exergen* failed to meet the requirements for pleading inequitable conduct because (1) it failed to identify a specific individual who specifically withheld the prior art and/or made the misrepresentation (the "who"); (2) it failed to identify the specific patent claims and limitations that were impacted by the allegedly withheld prior art (the "what" and "where"); and (3) it failed to explain "why" and "how" the withheld prior art would have impacted the decision of the PTO examiner. The Federal Circuit further ruled that while pleading on "information and belief" is permitted under Fed. R. Civ. P. 9(b), it is only permitted where the pleading provides specific facts upon which the belief is reasonably based.

The Federal Circuit's decision in *Exergen* will likely embolden district courts to strike pleadings that assert the defense of inequitable conduct absent a very detailed basis for asserting the defense. District courts are unlikely to be sympathetic to the typical "where there is smoke, there is fire" arguments asserted by defendants. District courts will require defendants to set forth substantial evidence in support of any proposed inequitable conduct defense. While the reduction of frivolous inequitable conduct allegations is a positive development, *Exergen* puts patent defendants on the horns of a dilemma. At the start of a case, defendants will rarely have sufficient information to meet the pleading requirements for inequitable conduct. To the extent it exists, the information necessary to support an inequitable conduct defense is likely in the possession of the plaintiff/patent holder and can only be obtained by a defendant during discovery. Do defendants spend thousands of dollars to determine whether an inequitable conduct defense exists? Or do defendants forgo pursuing inequitable conduct (typically a defense that has a low possibility of success) and spend their litigation dollars on defenses that offer more "bang" for their litigation dollars (*e.g.*, prior art searches for invalidating art)?


James Yoon

The above dilemma is especially difficult for patent defendants sued by non-practicing entities ("patent trolls"). Non-practicing entity cases typically involve a patent plaintiff, represented by a contingency fee attorney, who has sued numerous defendants for infringement and has sought settlements from each individual defendant for amounts less than the expected cost of litigation. In such situations, does it make sense to undertake a fact intensive investigation to determine whether it is possible to assert the defense of inequitable conduct?

There are several things a defendant can do to help it make a decision regarding whether it should pursue an inequitable conduct defense. First, at the case management conference, the defendant should propose a specific date for asserting the defense of inequitable conduct. This date should be approximately half way into the fact discovery period. The proposed date will give the defendant ample time to obtain documents and discovery responses from the plaintiff before the deadline for pleading inequitable conduct. And second, early in the case, a defendant should focus its discovery efforts on "dual use" discovery (*i.e.*, discovery that could support multiple defenses in addition to inequitable conduct). Where the "dual use" discovery suggests the possibility of a strong inequitable conduct defense, the defendants should promptly serve focused discovery designed to meet the requirements of *Exergen* and support the defense at trial. Where the discovery does not suggest such a possibility, the discovery remains useful for other defenses.

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Attorney Fee Weirditudes

expert fees, but the fee clause expressly includes them.

Not so fast. I said your client was substantively entitled to recover expert fees. I didn't say your client would in fact recover them. If you have already been to trial, it won't.

Why the heck not?

Because under Code of Civil Procedure section 1033.5, attorney fees are technically classified as a subset of costs, even though they're sought by a different procedure from that used to seek ordinary costs. And section 1033.5 expressly excludes expert fees from "costs" (unless the expert was court-ordered). Hence, the courts reason, the statute prohibits recovery of expert fees as "costs," meaning that you can't seek them in your post-trial attorney fee motion. *Ripley v. Pappadopoulos*, 23 Cal. App. 4th 1616 (1994). And this rule applies to everything else the statute excludes as "costs," such as investigation expenses, telephone charges, and postage.

So my client is substantively entitled to collect those expert fees under the contract, but nevertheless has to eat them because of some procedural quirk in the statute?

That's one way of putting it. Another is that your client's lawyer missed the boat.

What boat?

You could have proved up your expert fees at trial and sought them as damages; that's what happened in *Arntz*. The same is true for your postage, investigation expenses, and so on, if your contract covers them. But only if you had the nerve to parade all this stuff before your jury.

Could I have gotten around that by paying the experts myself, and then including their fees as disbursements on my legal bill to the client?

Ripley thought of that, and rejected it. Said the court: "[A]ttorney fees and the expenses of litigation, whether termed costs, disbursements, outlays, or something else, are mutually exclusive, that is, attorney fees do not include costs and costs do not include attorney fees." 23 Cal. App. 4th at 1626. That's an odd way of putting it, given that the basis for *Ripley's* holding is a statute stating that fees are actually a subset of costs. But the court's underlying point is that putting something in a lawyer's bill doesn't transform that item into "attorney fees." (And, though not directly on point, you may want to consider that you'd be shifting the risk of the client's nonpayment from the expert onto yourself.)

What if I incur expert or copying expenses after trial? How could I have proved them up at trial?

Good question. Under the logic of *Ripley*, you may be flatly out of luck on those. But you should argue that you cannot be denied recovery for failing to prove at trial something that did not exist at the time of trial. The judge may or may not buy the argument.

What if we're in federal court on diversity?

I was hoping you wouldn't ask me that. It gives me a headache.

On the one hand, the *Ripley* problem is one of procedure, not substance, arising under the Code of Civil Procedure. In particular, it arises from state law's specification of recoverable costs, which is ordinarily a matter of procedure concerning which the federal courts apply their own rules. This reasoning suggests that you can use federal court procedures to enforce your client's substantive entitlement under *Arntz*. Federal Rule of Civil Procedure 54(d)(2) says that the federal procedure for seeking "attorneys' fees and related non-taxable expenses" is by motion. Expert fees would be "related non-taxable expenses."

But the catch is that the state court procedure for recovering these items is to seek them as damages. Under Rule 54, the motion procedure is not available if "the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial." So does "such fees" include "non-taxable expenses"? Probably. Is Code of Civil Procedure section 1033.5 "substantive law" and not just procedure? Good question.

I thought I was asking the questions. So basically, you don't know?

I think it's procedural, but the question could come out either way. I'll let the life-tenure folks figure that one out.

Just one last question. Can I recover the fees I spend litigating my fee motion?

It depends on the statute or contract providing for fee recovery, but probably yes. The courts generally construe fee statutes as allowing recovery of these "fees on fees." *See Estate of Trynin*, 49 Cal. 3d 868, 874-76 (1989) (collecting cases). The result will likely be the same for a contractual fee clause.

Never believe a lawyer who says "just one last question." How do I go about that — in my original motion or a later one?

The technically correct answer is that it is neither practical nor mandatory for you to try to include these "fees on fees" in your initial fee motion. It's not practical because you haven't finished incurring them and can't prove them yet. It's not mandatory because this is a post-judgment proceeding in the trial court, not subject to the usual 60-day motion deadline. *See Crespin v. Shewry*, 125 Cal.App. 4th 259 (2004). But don't count on the court sticking with the technically correct answer. The only known appellate case on point (unpublished) rejected a request for "fees on fees" because they should have been included in the first fee motion. No doubt the court had in mind the theoretically endless string of fee motions that might otherwise result — fees on fees on fees, and so on. Problems of proof were passed over somewhat lightly. I suggest you see if the other side will stipulate to a procedure, and if not, ask the court in advance for guidance. If neither of those helps, include your "fees on fees" in your first motion to preserve the claim, but argue that the issue ought to wait for a later, properly documented motion.

Charles (Steve) Treat is a judge of the Contra Costa Superior Court. "Weirditudes" is his own pet coinage.

HOWARD M. ULLMAN

On ANTITRUST

You represent a widget monopolist, which has achieved an 80% market share through much hard work. Unfortunately, your client's competitor has accused it of unlawfully monopolizing the market through predatory pricing — pricing widgets below some applicable measure of cost. The competitor files suit. The two parties engage in lengthy litigation, and now want to settle. The plaintiff proposes an agreement that bars your client from pricing below cost, and sets forth a general formula for how to measure costs and ensure that prices exceed costs by at least X%. The competitor seeks only a negligible amount of compensation.

"Great," you think. But can you settle? You face a novel problem at the intersection of Sherman Act Sections 2 and 1. Section 2, of course, generally prohibits monopolization, while Section 1 regulates competitor contacts and communications and outlaws price agreements. Third-parties (*e.g.*, downstream customers) might argue that the agreement unlawfully restrains trade and results in higher prices, injuring consumers. Worse yet, the government might contend that the settlement is a price-fixing agreement subject to the *per se* rule against price fixing and supports criminal jurisdiction.

You could counter that the agreement is not a "naked" agreement, but is ancillary to the Section 2 litigation settlement. Under case law dating back to *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), a restraint that is ancillary to a legitimate agreement or venture and "reasonably necessary" to achieve its pro-competitive purposes will not be condemned — at least not under the *per se* rule, and not without a full inquiry into the likely pro- and anti-competitive effects of the restraint.

In principle, this argument seems compelling. In practice, it meets two potential roadblocks. First, outside a narrow set of pharmaceutical patent cases, appellate courts have not squarely applied the ancillary restraint doctrine in the antitrust settlement context. Although cases such as *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), and *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997), are suggestive, they are not definitive, given the specifics of their fact patterns. However, the dearth of case law also means that the argument has not been *rejected* by the courts.

Second, even if the doctrine applies, one must ascertain whether the restraint is "reasonably necessary" to achieve the purpose of the agreement — which presumably is to restore lawful competition in the marketplace. Put another way, is the agreement "reasonably necessary" to achieve an outcome comparable to a judgment (and potential) post-trial injunction? Answering this question may require a complex analysis of the merits of the underlying litigation and its likely outcome.

Although little discussed generally, these issues have been litigated in the pharmaceutical industry, where a peculiar law called the Hatch-Waxman Act permits "pioneer" drug companies to list patents in the FDA's "Orange Book." A listing requires a response by a generic competitor wishing to manufacture an equivalent drug. If the generic manufacturer certifies that the patent(s) is/are invalid, then the pioneer manufacturer can file a patent infringement suit and, under the Hatch-Waxman Act's special statutory scheme, effectively keep the generic off the market for dozens of months. Sometimes the generic manufacturers settle these suits in exchange for relatively large "reverse payments" from the pioneer companies, with the effect of excluding the generics — and other potential competitors — from the market.

Most courts have found these arrangements are subject to some form of Rule of Reason analysis. *See, e.g., Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 344 F.3d 1294 (11th Cir. 2003); *Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187 (2d Cir. 2006), and *Ciprofoxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. 2008). The courts have generally declined to apply the *per se* rule even where the Orange Book-listed patent was held invalid by a lower court, because judgments can be overturned on appeal. *But see Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003) (reverse payment agreement unlawful *per se*). Note that in *Cardizem,* the agreement precluded the manufacture of non-infringing products as well, a fact which may distinguish the case. *See id.* at 902, 908 & n.13.

Howard M. Ullman

These patent cases suggest that an agreement to settle predatory pricing litigation would also not be subject to the *per se* rule, if the litigation is not collusive and there is at least some chance that the plaintiff might prevail and secure similar relief from the court. However, a patent either is valid (and thus would keep a competitor off the market anyway), or is not. As long as there is *some* chance it is valid, a reverse payment agreement is no more anti-competitive than the patent. In contrast, a Section 2 court's assessment of predatory pricing claims is less binary — it could find some pricing behaviors unlawful, while others not, and it could enjoin some, but not other, actions. These differences complicate the ancillary restraint analysis, which effectively asks: what legal outcome would obtain but for the settlement?

Although such considerations caution against simplistic pronouncements, the differences between the patent cases and the predatory pricing case do not seem fundamental. However, recent legislative activity (Senate Bill 369 would make reverse Hatch-Waxman payments presumptively unlawful, but allow exceptions), as well as the new administration's as yet inchoate but potentially somewhat more restrictive views, mean that, for now, the patent-type analysis can probably, but not definitely, be applied to other contexts.

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Letter from the President

Before closing the book on 2009 with its many challenges and financial difficulties and starting 2010 with a clean slate and a new horizon, I'd like to enjoy another look at Northern California ABTL 2009.

We presented six strong and well-attended dinner programs built around the theme of "Persuasion." The year began with an evening moderated by Barbara Caulfield with Judges Beth Freeman, Rich Kramer, Marilyn Patel, and Jeffrey White, each of whom shared stories from different phases of a trial — *voir dire*, opening statements, direct examinations, cross-examinations and closing arguments. I am sure many of you remember the story of Mr. Yu. In March, Dr. Mark Sobus presented a program titled "*Persuading Juries: Demystifying and Shaping How Jurors Decide*." The image of one filmed juror especially lingers: "Just tell me what you want me to know…" In June, for a record Silicon Valley audience, Michael Swartz offered a multimedia presentation, "*The Art of Oral Advocacy*," that featured clips of famous speeches. I was moved to see a speech I had only ever read — Robert Kennedy's haunting words in Indianapolis the night Martin Luther King, Jr. was assassinated: "…My favorite poet was Aeschylus. He once wrote: 'Even in our sleep, pain which cannot forget falls drop by drop upon the heart, until, in our own despair, against our will, comes wisdom through the awful grace of God.'"

Stephen Hibbard

September brought a statewide ABTL first: Supreme Court Justice Carol Corrigan joined our Board of Governors, and then enlightened and entertained us all as she and Justice Mark Simons displayed their wit and brilliance in talking about how to persuade an appellate court. Frank Rothschild, known to many as a tireless trial practice teacher, presented "*The Persuasive Use of Graphics — A Master Class*." Our final dinner program, one which will long be remembered, was closing arguments in "*The Trial of Hamlet, Prince of Denmark*." Chief Judge Vaughn Walker presided wittily as Cris Arguedas represented the Crown of Denmark and Allen Ruby defended Hamlet's innocence in the homicide of King Claudius. Brandishing a sword, or cradling poor Yorick's skull, Cris argued that Hamlet's own words of hatred and revenge compelled a guilty verdict; Allen memorably argued with equally persuasive force that Hamlet had acted solely in self-defense: "When someone kills you, you get to kill them back."

Beyond our dinner programs, we sponsored a well-attended East Bay Lunch program on "Civil Courts During the Budgetary Crisis — What You Need to Know." Justice Mark Simons moderated a panel featuring Judges Brick, Feinstein, Munter, Northridge, and O'Malley. Our Leadership Development Group also found its own voice and sponsored four programs of marked interest for lawyers in practice ten years or less. Finally, the ABTL Report, under Tom Mayhew's and Howard Ullman's leadership, continued publishing excellent, thought-provoking and relevant articles.

All of the work above reflects the committed efforts of many who believe in what makes the ABTL special. We are a bench-bar organization dedicated to promoting professional excellence in the courtroom and civility all around. In the fog of conflict, it is easy for civility to be one of the first casualties. Practicing civility is an obligation of our profession. Being civil raises us each up, and helps raise the public's estimation of attorneys. Thank you for the privilege of serving as President in 2009. Success, health and civility to all in 2010.

Stephen Hibbard is a partner in the San Francisco office of Shearman & Sterling LLP. He was the president for the Northern California chapter of ABTL for 2009.