ASSOCIATION OF BUSINESS TRIAL LAWYERS

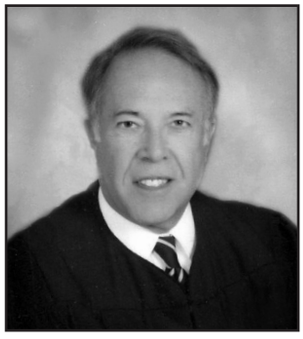
abtl REPORT

NORTHERN CALIFORNIA

Volume 21 No. 2

SPRING/SUMMER 2012

The Preliminaries of Preliminary Injunctions



Hon. James P. Kleinberg

In the daily routine of a law and motion judge a request for a preliminary injunction is rare. Such a request usually causes a heightened level of attention because the judge knows he or she is venturing onto an unchartered landscape which could have immediate and profound effects on the litigants. To make it even more stressful, this important decision is typically made early in the case, with either limited or no prior interaction between the court and lawyers which would help make any decision better informed, if not correct.

Thus, it is not surprising that preliminary injunctions are hard to obtain, even before the facts and law are presented. They typically arise from an immediate need that by its nature cannot wait for a judge or jury to award damages months or years in the future. But to obtain one, counsel is asking the court to act in haste, without the usual time to reflect. Therefore, to have any chance of success, the request must be prepared with great care.

This article is not intended to substitute for the

Continued on page 2

Also in This Issue

Lessons Learned from Reading Other People's Records

Jerome B. Falk, Jr.

Collectively, the four of us have been doing appeals for about 120 years. We often come to the case after the trial and, like the appellate court that will decide the case, learn about it by reading the pleadings, transcript, verdict form and judgment. Over the years, we've encountered numerous problems — and struggled to find solutions — arising from the various arcane rules about what trial counsel must do to preserve a point for appeal. And we've learned some other lessons from reading trial records — usually records made by very experienced and capable trial lawyers. As a result, we've gained a healthy respect for the burdens trial lawyers bear, and the challenges they face in making a proper record that ensures that every legitimate issue can be raised and resolved in the eventual appeal. As the readers of this article know very well, commercial trial litigation is not work for the faint of heart; truth be told, it is just too easy to make a mistake.

If you've read this far and wonder if you should stay with us, perhaps just one horror story will encourage you to read on. (Do have a supply of Maalox handy.) We might just help you avoid a controversy over whether an issue was properly preserved for appeal.

A few years ago, we were engaged by a company that had just lost a jury trial resulting in a $90 million judgment on a verdict finding promissory fraud. The trial court had instructed the jury that the applicable measure of damages was "benefit of the bargain." That would have been fine on a claim for breach of contract, but (as we knew from an earlier case) the correct measure of dam-

Continued on page 6

Continued from page 1

The Preliminaries of Preliminary Injuctions

detailed discussions contained in case law, Witkin, the Rutter Guide, or similar secondary authorities. With that significant caveat, here are some of the issues that are frequently ignored and doom a request for a preliminary injunction to failure:

Basic Pre-Filing Considerations

Is there jurisdiction over the defendant? Service of a TRO does not confer jurisdiction. *Caldwell v. Coppola*, 219 Cal. App. 3d 859 (1990). If representing a defendant be aware that any objection to in personam jurisdiction is waived by participating in the hearing.

Before filing a preliminary injunction, evaluate whether it is really the correct form of relief. Some parties file motions for preliminary injunction when what they really want is covered by these other statutory schemes. For example, check to see if a writ of attachment or claim and delivery are what you really seek; if so, the statutory scheme for those remedies should be followed. If the real point of the motion is to freeze assets in order to ensure that they will be available to satisfy a money judgment, then the right approach is to follow the requirements for a writ of attachment: show that the claim is on a contract, for more than $500, that the amount at stake is readily ascertainable by formula or calculation, and that the claim is unsecured. Not all preventive relief falls within the category of preliminary injunctions, and framing the request as a preliminary injunction instead of following statutory requirements that apply to other specific forms of relief will make it less likely that you remember to present evidence and argument on all of the required elements.

Timing

Preliminary injunctions move through the court quickly, and have specific rules governing continuances. The defendant is entitled to one continuance of the hearing of not less than fifteen days. But if the defendant wants a fast decision, the plaintiff cannot slow the motion down once it is filed: If the defendant has served opposing declarations at least two days before the hearing, the plaintiff is not entitled to a continuance. Note also that a preliminary injunction may issue in a putative class action prior to class certification. *Patterson v. ITT Consumer Fin'l Corp.*, 14 Cal. App. 4th 1659 (1993).

Trial Mind-set

Prepare on the assumption this is a trial by paper rather than a routine motion. A preliminary injunction is based on an evaluation of both the merits and the equities. Unlike the more common pre-trial motions of demurrer or summary judgment, the judge weighs the evidence and considers credibility.

Because of this, the memoranda and declarations should be of the highest quality. There is no room or time for rhetoric, adverbs, and adjectives. Avoid string cites and footnotes. Only a passing reference to the black-letter standards is necessary — the judge knows them. Concentrate instead on the facts. Edit, and edit some more. Put your strongest arguments first.

Your declarations must be as clear as you would hope a live witness would be. Think about how a direct examination would proceed, and then organize the declaration so that it makes the points based on the witness's personal knowledge. "Information and belief" is not good enough. Real evidence, not hearsay, is required. Declarations by counsel are typically of no value.

Some attorneys economize by using a verified complaint as a substitute for a declaration. The verified complaint as a basis for a preliminary injunction is only as good as the allegations in it. If the charging allegations are based on information and belief, they are not adequate to support the motion. And relying solely on the complaint is risky if the complaint is demurrable. The demurrer hearing may well be set at the same time as the preliminary injunction hearing.

Unlike a trial, the Court is not likely to hear oral testimony. This application will almost always be decided on the papers. *Eddy v. Temkin,* 167 Cal. App. 3d 1115 (1985). "Almost" means you should obtain confirmation from the Court — the judge, not a clerk — that oral testimony will or will not be allowed.

There are cases where the Court will want to hear oral testimony from the witnesses, but in those instances the inquiry tends to be focused rather than a full-blown evidentiary hearing on all of the issues. If declarations are conflicting and the judge wants to assess the credibility of the declarants, the Court may request that the witnesses testify live. Late-filed material for which a response is necessary is another circumstance where oral testimony may be called for, such as where the reply brief included declarations to deal with a new issue raised in the opposition brief and not anticipated in the initial moving papers. The court may also want to hear from experts and have them be cross-examined. All of these possibilities should be checked with the Court before you appear for the hearing.

Ask yourself how you will get documentary evidence admitted. Exhibits must be properly sponsored, with attention paid to how to satisfy the evidentiary foundation. Here again, attorney declarations are usually insufficient.

Many attorneys use requests for judicial notice to help make the evidentiary showing. Remember, however, that even if the request for judicial notice is granted, this does not automatically mean the contents are admitted as true.

Because the preliminary injunction motion is decided on evidence, either party may request to take discovery in order to develop the facts. The judge will usually allow discovery. The bottom line is that both sides will be given a fair opportunity to present their best evidence.

Often this discovery will take place on shortened time, in light of the asserted or apparent need for urgency. Claims of discovery "priority" or strategic jockeying for position with regard to the sequence of discovery will be especially disfavored here, because the point is to quickly obtain the facts necessary to evaluate the motion.

Continued next page

Continued from page 2

The Preliminaries of Preliminary Injuctions

The Two Factors

In deciding the motion for preliminary injunction, the judge must evaluate two interrelated factors: (1) the likelihood the plaintiff will prevail at trial, and (2) the interim harm — between now and the time of trial — that the plaintiff is likely to sustain if the injunction is denied versus the harm the defendant is likely to suffer if the injunction is granted. The plaintiff must prevail on both factors in order to obtain the preliminary injunction. It is common for judges to weigh the factors separately, but a strong showing of one factor may compensate for a lower showing of the other. *O'Connell v. Superior Court*, 141 Cal.App. 4th 1452 (2006).

Think about how to make a convincing case on the second factor, because even a strong case on the merits is not sufficient standing alone to justify injunctive relief. Will it be extremely difficult to ascertain the amount of compensation to afford adequate relief? Will irreparable injury or waste occur without the injunction? Will the injunction prevent multiple judicial proceedings? Will trade secrets be disclosed and/or used by the defendant, thus rendering them of no value?

As noted, and because this is such a rushed process, courts are not anxious to grant this relief. A frequent "out" for the Court is "why aren't damages sufficient?" It is essential that counsel have a good answer. The truth is there are relatively few situations where money isn't a satisfactory remedy. The purpose of the injunction is to maintain the status quo until trial. If it goes beyond that line it is inappropriate.

Another critical question frequently posed by the judge: "Why did you wait so long?" Delay in seeking the preliminary injunction can dramatically undermine the plaintiff's story that it needs immediate relief to prevent irreparable harm. A typical example is an injunction sought to block a corporate act, such as a shareholder vote, until the proxy statement is "corrected." Waiting until the eve of the vote when the facts have been known for weeks is laches and will likely defeat the requested relief.

The proposed order also should be carefully thought through, and not drafted as an afterthought. The phrasing of the preliminary injunction is important, and must be narrowly tailored to prevent the harm but not go too far.

The phrasing of the order can also make all the difference on whether the preliminary injunction becomes effective immediately. Be clear about whether you are seeking a prohibitory versus mandatory injunction. The latter — compelling someone to *do* something rather than *not* do something — is immediately appealable and the filing of an appeal stops the injunction in its tracks. *Agricultural Labor Relations Bd. v. Tex-Cal Land Mgmt.*, 43 Cal. 3d 696 (1987). Have the order ready to be promptly revised as necessary and submitted within a day.

Continued on page 6

Consenting to Magistrate Judge Jurisdiction in the Northern District of California

One of the first decisions parties face in a federal case is whether to consent to magistrate judge jurisdiction for all purposes. Most attorneys who practice in federal court have both consented and declined to consent in various cases for different reasons. But few people talk about the pros and cons of doing so when not behind closed doors. So, what are the advantages and disadvantages and the procedural consequences of consenting or declining jurisdiction?

Procedures for Consenting to Magistrate Judge Jurisdiction

Robert J. Nolan

With the parties' consent, a magistrate judge may hear all matters in the case pursuant to 28 U.S.C. section 636(c). In the Northern District of California, for those cases assigned to a magistrate judge, all parties must either file written consent or request reassignment to a district judge by the deadline for filing the initial case management conference statement. In those cases that are initially assigned to a district judge, the parties may consent at any time to the court reassigning the case to a magistrate judge. If a new party is added to the case after the original parties consented, the new party must consent as well. If a new party declines, the reference may be vacated or the claims may be severed.

The Advantages of Consenting to Magistrate Judge Jurisdiction

Magistrate judges have a smaller civil caseload than district judges. Magistrate judges in the Northern District carry a civil caseload of approximately 150 to 200 consent cases. On average, a magistrate judge's caseload is approximately 30 percent of the civil caseload of a district judge. In 2010, magistrate judges completed over 1,029 civil cases in which they exercised consent jurisdiction. Although magistrate judges in the Northern District carry a smaller civil caseload than district judges in the Northern District, their civil caseload does not differ substantially from the civil caseload of district judges in smaller judicial districts.

If a party wants its case disposed of quickly, statistically it makes sense to consent to a magistrate judge. If, on the other hand, a party wants its case to proceed slowly, it might decline jurisdiction with the hope of a longer case, pushing out response times and increasing the time before the case gets to trial. In most cases, however, increased time also results in increased expenses for the client, par-

Continued on page 4

Continued from page 3

Consenting to Magistrate Judge Jurisdiction

ticularly in discovery.

The difference in pace can be substantial. In 2011, the average median disposition time in the Northern District was 264 days for civil cases assigned to active district judges and 151 days for civil cases assigned to magistrate judges. The median disposition time includes any type of disposition of a case, whether by settlement or judgment following a trial or dispositive motion. Magistrate judges also have fewer civil cases that have been pending for three years or more. As of September 30, 2011, district judges accounted for 94 percent of the 341 civil cases pending for three years or more in the Northern District; magistrate judges reported the remaining 6 percent. On a per judge basis, this amounts to approximately 16 cases per district judge compared to 2 cases per magistrate judge.

When parties consent to magistrate judge jurisdiction, that judge hears all matters in the case. Unlike district judges, magistrate judges cannot refer discovery or other motions to another magistrate judge. Thus, if the parties consent, all matters in the case, including discovery motions, are heard by a single judge. This may be particularly helpful in cases involving contentious discovery disputes, all of which will be heard by the same judge ruling on dispositive motions, pretrial submissions and ultimately overseeing the trial. When a district judge refers a discovery dispute to a magistrate judge, parties may take unreasonable positions, figuring that the district judge will not hear about it. Some district judges choose to hear all discovery disputes to avoid this result. Consenting to a magistrate judge accomplishes the same outcome. In addition, discovery is usually tied to the merits of the dispute, and it is often helpful to have the same judge who will be ruling on motions regarding the merits of the case also decide on the scope of discovery.

When the parties consent to magistrate judge jurisdiction, appeal is directly to the Ninth Circuit. If, on appeal, the case is reversed and remanded, the case returns to the magistrate judge.

Declining consent to magistrate judge jurisdiction can result in additional time and expense if the district judge then refers parts of the case to a magistrate judge. District judges have authority to refer matters to magistrate judges in non-consent cases for non-dispositive motions, including discovery motions, and for reports and recommendations on dispositive motions. *See* 28 U.S.C. § 636(b)(1)(A) and (B). However, in the Northern District, General Order 42 limits referrals of dispositive motions to magistrate judges. District judges may only refer dispositive motions if the parties consent to final disposition of the matter by a magistrate judge or the matter requires an evidentiary hearing which can be conducted by the magistrate judge without being repeated by the district judge.

Unlike the San Francisco and Oakland Divisions, in the San Jose Division cases are automatically assigned to both a district judge and a magistrate judge, who will likely handle discovery proceedings and other pretrial matters. In San Francisco and Oakland, a magistrate judge is not automatically assigned to the case. Rather, a district judge may make a general referral to a magistrate judge for all discovery in the case, or may refer specific matters to a magistrate judge.

Proceedings may be prolonged, and potentially more expensive, in non-consent cases where matters are referred to a magistrate judge. This is because such rulings are subject to further review by the district judge. For rulings on both non-dispositive and dispositive motions, the parties may object to the order of the magistrate judge within fourteen days of service of the order, which is then subject to review by the district judge. In the Federal Judicial Center's September 30, 2011 Civil Justice Reform Act Report, one of the primary reasons noted by district judges for delays in pending civil cases was a referral to a magistrate judge.

For referrals of non-dispositive motions, the decision is subject to further limited briefing before the district judge, who must make a decision regarding the parties' objections. The objecting party may file a five-page objection, exclusive of declarations. Magistrate judges' rulings on non-dispositive motions may be set aside or modified by the district judge only if found to be clearly erroneous or contrary to law. The clearly erroneous standard applies to findings of fact; legal conclusions are reviewed *de novo*. *United States v. McConney*, 728 F.2d 1195, 1200-1201 (9th Cir. 1984); *Perry v. Schwarzenegger*, 268 F.R.D. 344, 348 (N.D. Cal. 2010). Unless otherwise ordered by the assigned district judge, no response need be filed and no hearing will be held concerning the objection. An objection may not be granted without the other party having had the opportunity to respond. If no order denying the objection or setting a briefing schedule is made within fourteen days of filing, the objection shall be deemed denied.

For referrals of dispositive motions, the decision on the magistrate judge's report and recommendation is subject to *de novo* review by the district judge. The objection must specifically identify the portions of the magistrate judge's findings, recommendation or report to which objection is made and the reasons and authority for the objection. The parties may also file a motion to augment the record or for an evidentiary hearing, but unless granted, the determination of the district judge is based on the record before the magistrate judge. As noted above, however, referrals of dispositive motions are limited under General Order 42.

The Northern District attracts top talent, and, as a result has one of the strongest magistrate judge benches in the country. This is likely for a variety of reasons, other than just location. Magistrate judges in the Northern District are not relegated to solely handling discovery and drafting reports and recommendations. They handle a significant civil caseload, of both consent cases and referrals, which allows them to obtain experience in handling all aspects of civil cases. In addition, magistrate judges handle criminal matters and conduct settlement conferences. This results in a workload that more closely approaches that of a district judge, which in turn attracts more qualified candidates to the position. In addition, service as a magistrate judge in the Northern District has on a number of occasions led to appointment on the district court bench.

Continued next page

Continued from page 4

Consenting to Magistrate Judge Jurisdiction

Of approximately thirty judges currently on the bench in the Northern District, twelve are magistrate judges. The panel has been carefully selected by district judges on the basis of merit. The magistrate judge selection process begins with the selection of a panel of lawyers and other residents, including non-lawyers. The panel reviews resumes and interviews qualified candidates. Applications for a magistrate judge position in the Northern District can exceed 100 applicants. For each opening, a certain number of candidates is recommended by the merit selection panel to the district judges, all of whom are invited to participate in the interview process. Ultimately, the district judges select a magistrate judge to fill the seat for an eight-year tenure, subject to renewal for additional terms.

The Disadvantages of Consenting to Magistrate Judge Jurisdiction

Some attorneys and clients feel that if they have a particularly complicated case, such as one involving a constitutional question, an issue of first impression, or a complex securities case, they would rather have someone with life tenure decide their case. They express a concern that someone with an eight-year tenure is less likely to be able to make a hard decision. Some have even gone so far as to state that they want a "real judge" to decide their case. This antiquated thinking persists among some attorneys, despite the strong magistrate judge bench. It may also be more prevalent among attorneys from other districts where magistrate judges do not regularly handle significant numbers of civil consent cases.

Experience may be another concern. For example, if the case involves a particular area of expertise in which the magistrate judge has little or no experience, it may make sense to decline jurisdiction in hope of getting a district judge with greater familiarity with that area of law. However, there is no guarantee that will happen. Indeed, there are a number of new district judges who have been appointed in recent years who may have less experience with particular types of cases than some magistrate judges who have been on the bench for years. Parties should evaluate a magistrate judge's experience in the same way they evaluate experience of a district judge. The main difference is that if the case is initially assigned to a magistrate judge who a party believes does not have sufficient experience in the area of law related to the case, the party has the opportunity to decline jurisdiction in the hope that the case will be assigned to a district judge with more experience.

Although some clients might prefer it, parties are not entitled to select a different magistrate judge to hear their case. If a party declines magistrate judge jurisdiction, with limited exceptions, the case is put back on the wheel for assignment to a district judge. San Francisco and Oakland are considered the same division for purposes of case assignments. San Jose is considered a separate division. So, if the case is venued in San Francisco or Oakland, it is reassigned to a district judge in one of those courts. If the case is venued in San Jose, it is reassigned to a district judge there. However, the Executive Committee for the United States District Court for the Northern District of California has recently ordered that all civil cases assigned to District Judge Jeremy Fogel, who is currently on a multi-year leave to head the Federal Judicial Center, will be reassigned on a district-wide basis due to the fact that there are currently only two active district judges in San Jose.

Additional Issues

Several years ago, many counsel in patent cases were reluctant to consent to magistrate judge jurisdiction. The tide has since shifted. In 2011, the Northern District was among fourteen federal district courts that agreed to participate in a ten-year patent pilot project. The patent pilot program in the Northern District became active on January 1, 2012.

The project alters the ordinary method for case assignment of patent cases. Patent cases are initially randomly assigned in the same manner as other kinds of cases. But a judge who is randomly assigned a patent case and is not among the pilot program judges may decline to accept up to three patent cases per year. The case is then randomly assigned to one of the judges — including magistrate judges — designated to hear patent cases. There are seven magistrate judges in the Northern District who are in the program. The Northern District has taken the position that the patent pilot statute does not supersede statutes that allow magistrate judges to handle cases pursuant to consent by the parties. The parties thus have the usual opportunity to consent to the assigned magistrate judge for all matters, and if they do not, the case is reassigned to one of the pilot program district judges.

Questions have recently been raised about magistrate judges' authority in consent cases in light of the Supreme Court's decision in *Stern v. Marshall*, 131.S.Ct. 2594 (2011), which limited bankruptcy judges' authority to hear certain state law claims. In *Technical Automation Services Corp. v. Liberty Surplus Ins. Corp.*, 673 F3d 399 (2012), the Fifth Circuit U.S. Court of Appeals, addressed the issue of whether the holding in *Stern* applied to magistrate judges' authority to hear state law counterclaims in consent cases. The Court held that magistrate judges have constitutional authority to enter final judgment on state law counterclaims in consent cases. The Ninth Circuit has not considered this issue since *Stern*.

Given the exceptional quality of the magistrate judge bench in the Northern District, it makes sense for parties to seriously consider consenting to magistrate judge jurisdiction in civil cases. Clients need to be comfortable with that decision given that parties have the opportunity to decline. Consenting to magistrate judge jurisdiction also has the benefit of avoiding referrals, resulting in a quicker disposition, as the statistics make plain. In most cases, a quick resolution of a case will save the client unnecessary time and expense resulting from protracted litigation.

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Continued from page 3

The Preliminaries of Preliminary Injuctions

The Bond

Because a preliminary injunction interferes with at least some aspect of the defendant's business or other actions going forward, a bond or undertaking is generally required so that if the defendant later shows that an injunction should not have been issued — for example, by winning the case — the defendant can recover damages to compensate for the effect on its business. The undertaking should be set at the amount of damage the defendant may sustain because of the injunction. The undertaking is required for the preliminary injunction to become effective.

Since the opposing party doesn't want to admit that a preliminary injunction might be granted, the bond issue is often tossed in at the end of the opposition brief with limited thought or proof. The plaintiff similarly focuses on the merits and the equities, and devotes little attention to the amount of the bond. Both sides should consider focusing more attention on this issue, because a substantial bond requirement may mean that the plaintiff wins the motion but never actually obtains the relief because the business decides not to pay the expense. Because a high bond amount can stymie the request relief entirely, the plaintiff should consider taking the offensive and spell out in the moving papers what it thinks the bond should be, and why.

Both sides should include portions of their respective briefs and declarations that cover the bond issue. For example, from the opposing party's perspective in a trade secrets case, the financial consequences of an injunction to a start-up accused of using trade secrets would be devastating, as follows:… From the party seeking the injunction, consider a showing that the consequences are not as severe as argued, and that the size of the bond can be revisited when more is known of the facts through discovery.

Meanwhile, the client should understand the necessity of the bond, and with the lawyer's help make all the preparations in advance, so that a bond may be filed within hours of the hearing if the motion is granted.

Consequences

The good news for lawyers is the preliminary injunction process is at such an accelerated pace that you and your client know quickly where you stand, as the Court usually issues a decision the same day as the hearing or shortly thereafter.This is also bad news because the granting of a preliminary injunction may effectively end, or at least severely damage the case for one side. Therefore, it may be wise to try and reach a compromise — at least on the points of the injunctive relief — before your client learns of the Court's decision.

The Honorable James P. Kleinberg is a judge on the Superior Court of California for the County of Santa Clara, and is currently assigned to the Complex Civil Litigation Department. He is also a member of the Board of Governors for the Northern California chapter of ABTL.

Continued from page 1

Lessons Learned

ages for fraud in a case governed by Civil Code Section 3333 other than a case of intentional fraud by a fiduciary is "out-of-pocket." *See Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1240 (1995); *Lazar v. Superior Court*, 12 Cal. 4th 631, 646, 648-49 (1996); *Fragale v. Faulkner*, 110 Cal. App. 4th 229, 237-38 (2003). We were initially optimistic that an appellate court would say that the damages instruction was wrong. That meant that the judgment was highly vulnerable because in this case plaintiff had offered *no* evidence of out-of-pocket-damages.

But there turned out to be an awful problem: the issue had not been raised until late in the trial because defense counsel didn't realize that the applicable measure was out-of-pocket. In fact, the issue wasn't raised until the trial judge raised it *sua sponte*, causing the lawyers to head for the law library. They then briefed the issue thoroughly, arguing (correctly) that the appropriate measure of damages was the out-of-pocket measure. Eventually, the judge decided to instruct the jury to apply the benefit-of-the-bargain measure. Because defense counsel hadn't tumbled onto the issue until the judge drew it to their attention, they had said nothing earlier in the trial when the plaintiff's damages expert opined on what profits plaintiff would have earned had there been no fraud.

But, alerted by the trial judge and fortified by their own research, defense counsel objected to the benefit-of-the-bargain damages instruction. Moreover, under Section 647 of the Code of Civil Procedure, all instructions are deemed objected to. Unfortunately, plaintiff found a California Supreme Court case holding that a defendant who believes the plaintiff's claimed damages are based on the wrong legal standard must object *at the time the damages testimony is offered*. Failure to do so waives any objection as to the measure of damages. *Durkee v. Chino Land & Water Co.*, 151 Cal. 561, 569 (1907). We argued that this rule only meant that defendant couldn't complain of the admission of that damages evidence on appeal, but that defendant could still object to the erroneous measure-of-damages jury instruction. No luck: the Court of Appeal held that trial counsel's failure to object to the damages study waived both the right to object to the damages evidence and the right to challenge the measure-of-damages instruction on appeal. Judgment was affirmed because of the trial lawyers' failure to spot the problem in time to object to the testimony of the plaintiff's expert on the issue of damages.

The Overarching Concept. Protecting the record for appeal really isn't rocket science. There's an underlying principle that should guide you every step of the way: make sure you tell the trial judge — on the record — what your position is on every conceivable point of contention, ask the court to rule accordingly, and in all events make sure that the record reflects how the court ruled. To do that effectively, you need to think ahead — if you win the case, how will you defend it on appeal? And if you lose the case, how will you challenge the judgment

Continued on next page

Continued from page 6

Lessons Learned

on appeal? That kind of forward thinking shouldn't wait until after the judgment is entered; indeed, it shouldn't wait until the trial is under way. Your trial preparations should include constant thought about the eventual appeal in the case, what the issues will be when it gets to that stage, and what the record will look like to an appellate court that wasn't present and *only* knows what happened from the record on appeal. If you do that well, the necessary foundation will almost build itself.

Beware Of Appealable Orders. Most pretrial orders are not immediately appealable. But, in California, some are. One example is judgments that are final as to some but not all of the parties. For instance, if a plaintiff sues several defendants, and the litigation is terminated as to one defendant (such as by dismissal after a demurrer or summary judgment), the loser can immediately appeal, even though the plaintiff's action against the remaining defendants remains pending. *Millsap v. Federal Express Corp.*, 227 Cal.App. 3d 425, 430 (1991). Conversely, where two plaintiffs sue a single defendant, and the suit of one of them is terminated by a final judgment, the loser can appeal. *Justus v. Atchison*, 19 Cal. 3d 564, 567-68 (1977), *disapproved on other grounds*, *Ochoa v. Superior Court*, 39 Cal. 3d 159, 171 (1985). Similarly, an order denying class certification as to an entire class, or sustaining a demurrer to class allegations in a complaint without leave to amend, is an appealable order because it terminates the action as to the unknown class members. *See, e.g., Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000); *Wilner v. Sunset Life Ins. Co.*, 78 Cal. App. 4th 952, 957 & n.1 (2000). If no appeal is taken from this type of judgment — final as to some parties but not all — the decision will *not* be reviewable on appeal from a subsequent final judgment as to the remaining parties. *See Morrissey v. City & County of San Francisco*, 75 Cal.App. 3d 903, 907 (1977) (applying rule to denial of class certification); *see generally* Cal. Code Civ. Proc. § 906. (Note that in federal court, the general rule is that no appeal may be taken until final judgment is entered as to all claims and all parties. Fed R. Civ. P. 54(b).)

Some interlocutory decisions, like orders pertaining to changes of venue or disqualification of a judge, are reviewable by pretrial writs pursuant to statute. *See, e.g.*, Cal. Code Civ. Proc. § 170.3(d) (orders pertaining to judicial disqualification); *id.* § 400 (venue rulings); *id.* § 437c(m)(1) (orders denying summary judgment and granting or denying summary adjudication). In some cases, such as venue rulings, the order may also be reviewable after a final judgment, although prejudice may be difficult to establish. *Calhoun v. Vallejo Unified Sch. Dist.*, 20 Cal.App. 4th 39, 42 (1993) (venue); *Waller v. TJD, Inc.*, 12 Cal.App. 4th 830, 835-36 (1993) (order denying summary judgment). In other cases, writ review is the exclusive remedy. Cal. Code Civ. Proc. § 170.3(d) (judicial disqualification). Each "statutory writ" is subject to its own unique and jurisdictional deadlines.

When In Doubt, Object. Trial lawyers often hesitate to make an objection for fear they will annoy the jury or the judge. That judgment can often be tactically sound; but there are consequences to consider. In general, a failure to object will preclude a claim of error on appeal. *See Doers v. Golden Gate Bridge, Highway & Transp. Dist.*, 23 Cal. 3d 180, 184 n.1 (1979); *Leonardini v. Shell Oil Co.*, 216 Cal.App. 3d 547, 584 (1989). Take, for example, the requirement of objecting to inadmissible evidence. The trial court may have denied your motion *in limine*; so when that evidence is offered, must you object again? If you don't, you can count on hearing from the opposing party that your failure to object waived the right to argue evidentiary error on appeal. Then there will be an argument that the ruling on the motion *in limine* was not definitive, and left open the possibility of a different ruling in the context of trial. Although you will be in the clear if the appellate court thinks the trial court's MIL ruling was conclusive (*see, e.g., City of Long Beach v. Farmers & Merchants Bank*, 81 Cal.App. 4th 780, 783-85 (2000), *disapproved on other grounds, Reid v. Google, Inc.*, 50 Cal. 4th 512, 532 n.7 (2010)), do you want to run that risk? *See, e.g., Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 688-89 (9th Cir. 2001) (objection must be renewed at trial if MIL ruling was tentative); *People v. Demetrulias*, 39 Cal. 4th 1, 20 (2006); Cal. Evid. Code § 353(a). Similarly, if you have objected to similar evidence earlier in the trial, do you need to object again? You probably do — unless the trial court has agreed that your original objection continues in force. *See United States v. Gomez-Norena*, 908 F.2d 497, 501 n.2 (9th Cir. 1990) (continuing objection obviates need for renewed objections on the same, rejected ground). But be careful: a continuing objection only preserves the objection *to like questions on the ground of the prior objection* that was overruled. *See Smith v. County of Los Angeles*, 214 Cal.App. 3d 266, 285 (1989); compare *C.P. Interests, Inc. v. California Pools, Inc.*, 238 F.3d 690, 696-97 (5th Cir. 2001).

Steven L. Mayer

Be sure that your objection includes the specific ground. *See McKnight ex rel. Ludwig v. Johnson Controls, Inc.*, 36 F.3d 1396, 1407 (8th Cir. 1994). This need not be a lengthy statement (evidentiary objections can usually be succinct), but it should be sufficient to fairly inform the judge of the objection's legal basis. If the evidence slips in before you can object, promptly make a motion to strike. Waiting until the witness has finished testifying may well be too late. *Terrell v. Poland*, 744 F.2d 637, 638-39 (8th Cir. 1984).

Frequently, a court will deny (or defer ruling on) an objection until after the testimony has been received, saying that it will entertain a motion to strike or otherwise revisit the issue when it has the full context. We've seen many instances in which the issue thereafter falls between the cracks and the objection is not renewed. *E.g., United States v. Dougherty*, 895 F.2d 399, 403 (7th Cir. 1990).

Continued on page 8

Continued from page 7

Lessons Learned

Misconduct by opposing counsel during the presentation of evidence or in argument to the jury *must* be met with an immediate objection. To be sure, it's awkward; and juries may not like the interruption. But there is a very high risk that if you do not object on the spot, the claim of misconduct will be foreclosed. *Moylan v. Maries County*, 792 F.2d 746, 751 (8th Cir. 1986) (a three-day delay in asserting an objection to inflammatory and bad faith opening statements rendered the objection untimely and insufficient to preserve the issue for appeal); *Cassim v. Allstate Ins. Co.*, 33 Cal. 4th 780, 794-95 (2004) (timely objection to improper closing argument must be made to preserve issue for appeal); *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1163 (1998) (claim of misconduct foreclosed on appeal absent a timely and proper objection at trial).

Make An Offer Of Proof. If the court has excluded evidence by ruling on a motion in limine, or during trial, make sure that the record reveals just what that evidence would have been. That usually will take the form of a formal offer of proof. These require care. The offer must include a statement of the "substance of the evidence" (Fed. R. Evid. 103(a)(2); Cal. Evid. Code § 354(a)), including the names of the witnesses, the substance of their testimony, the items of evidence, and any necessary foundational facts to establish admissibility. *See James v. Bell Helicopter Co.*, 715 F.2d 166, 174-75 (5th Cir. 1983); *Gordon v. Nissan Motor Co.*, 170 Cal. App. 4th 1103, 1113-14 (2009); *United Sav. & Loan Ass'n v. Reeder Dev. Corp.*, 57 Cal. App. 3d 282, 294 (1976); *In re Mark C.*, 7 Cal. App. 4th 433, 444-45 (1992). Don't be afraid to be detailed; this offer of proof will be the basis for an appellate showing not only of the error in excluding the evidence but the prejudice caused by that ruling.

Try To Get The Judge To State The Reasons For Every Adverse Ruling. Many decisions trial judges make are exercises of discretion, which means that appellate courts won't reverse unless the ruling was an abuse of that discretion. You have a much better chance of securing a reversal if the ruling was based on an erroneous legal ground, or if the court applied the wrong standard in exercising discretion. For example, if the court excluded material evidence because it was hearsay, that ruling could lead to reversal if the evidence wasn't hearsay (or if an exception applied) and its exclusion was prejudicial; conversely, if the judge excluded the evidence as an exercise of discretion under Evidence Code Section 352, an appeal from that ruling is likely to be problematic. So don't let the record leave ambiguity as to the reasons the judge ruled against you. Politely ask the court to state the reason for the ruling.

Make A Detailed Record On Instructions, Both Objected-To And Proposed. In federal court, erroneous instructions must be objected to, in sufficient detail as to fairly draw the court's attention to the ground for the objection. Fed. R. Civ. P. 51(d); *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010). As noted earlier, under Section 647 of the Code of Civil Procedure, erroneous instructions are deemed objected to, but reliance on that principle can be risky: if the proposed instruction is generally correct but objectionable because it is vague, overbroad or underinclusive, the objecting party needs to propose a legally correct alternative. *Metcalf v. County of San Joaquin*, 42 Cal. 4th 1121, 1130-31 (2008). And in order to preserve a failure-to-instruct claim on appeal, you must be sure that the record includes a well-drafted, legally solid proposed instruction. *Mesecher v. County of San Diego*, 9 Cal. App. 4th 1677, 1686 (1992). Trial lawyers may forget to do this after the trial judge has indicated (perhaps in chambers) that the court will not give an instruction on such-and-such a subject, or on a defense. You can argue on appeal that this ruling made submitting an instruction "futile" but, here again, why knowingly run this risk? Draft the instruction with care so that your appeal brief can describe with clarity exactly what you contend the trial court should have told the jury.

Be Careful What You Propose. Lead trial counsel usually has a lot on his or her plate, and it is tempting to assign the task of drafting instructions to a junior lawyer — perhaps one who has remained at the office during the trial. Get all the help you want and need, but before those proposed instructions are submitted to the judge, lead counsel needs to pay careful attention to what is being requested. (This advice applies equally to the proposed special verdict form, a subject discussed separately below.) In California, appellate courts generally apply very tough standards when passing on a claim that the trial court erred in refusing to give an instruction. In California, the proposed instruction must be entirely correct. Coming close doesn't count, and if the proposed instruction is wrong in any material respect, the trial court is not required to correct the errors: "A trial court has no duty to modify or edit an instruction offered by either side in a civil case. If the instruction is incomplete or erroneous the trial judge may…properly refuse it." *Boeken v. Philip Morris, Inc.*, 127 Cal. App. 4th 1640, 1673 (2005) (quoting *Truman v. Thomas*, 27 Cal. 3d 285, 301 (1980)). (The rule in federal court is different, and District Courts sometimes have an obligation to repair erroneous proposed instructions. *See Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1015-17 (9th Cir. 2007); 9C Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2552, at 28-31 & nn.20-21 (3d ed. 2008).) That means that if parts of the instruction are correct, but other parts are not, the court can reject the entire instruction. So where the instruction covers more than one point, consider breaking it up into two or more shorter instructions. The court is also not required to draft additional language to correct the omission of a necessary element of the rule covered by the proposed instruction; the instruction you proposed must therefore be complete as well as correct.

Be sure that the instructions you propose fit the facts of the case. Obvious as that point is, we had a case on appeal in which the parties stipulated to an instruction specifying the benefit-of-the-bargain rule in a fraud case

Continued on next page

Continued from page 8

Lessons Learned

governed by California Civil Code Section 3333. As mentioned above, that was a legally incorrect measure of damages, but the stipulation waived any objection to it. The bizarre thing about this case was that the plaintiff had not proven *any* benefit-of-the-bargain damages — the only damages claimed and proved were out-of-pocket damages, for which no instruction was given. Neither side's trial counsel seems to have noticed. Nor did the judge. Nor did the jury, which ignored the instruction and awarded out-of-pocket damages! (See what we mean when we say that lead counsel — not a junior lawyer toiling at the office who is not privy to the big picture — must pay careful attention to the instructions?)

Finally, if you are considering proposing an instruction that is not taken directly from CACI or the applicable federal model instructions (*see, e.g., Ninth Circuit Manual of Model Jury Instructions* — Civil (2007 ed.)) or at the very least well supported by precedent, be careful. To be sure, complex cases have a way of inviting instructions that have not found their way into the approved form books. But when you step outside the safe harbor of approved forms of instruction and precedent, the risk of reversible error goes up exponentially. Trial counsel needs to ask if that risk is worth running and to assess its magnitude.

Be Cautious About Stipulating. Good lawyers don't pick unnecessary fights. Indeed, there often are useful brownie points to be collected from both the trial judge and the jury for being cooperative and accommodative. It is often tempting to say, "That's fine, Judge." But there are consequences to stipulating. For example, although as earlier noted all instructions are deemed objected to in the California courts (Cal. Code Civ. Proc. § 647), a party's stipulation to the giving of an instruction (or a set of instructions) waives the right to complain of instructional error on appeal. If your objection to an instruction is overruled, you can subsequently stipulate that the form of the instruction is acceptable *in light of the court's ruling* (*see Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 212-13 (1991)), but you need to be clear that your stipulation does not amount to a withdrawal of your prior objection. There are many points in a trial in which counsel may, as a matter of courtesy to the court, agree that something may be done or not done given a prior ruling of the court; just be clear on the record that your agreement is based on respect for the court's prior ruling rather than acquiescence in it.

Pay Attention To The Special Verdict Form. There are many pitfalls for the plaintiff here, and many opportunities for the defendant. For one thing, where a special verdict form is used, the form must solicit a jury finding covering every element of each claim. *Trujillo v. N. County Transit Dist.*, 63 Cal. App. 4th 280, 285 (1998). In federal court, if the form does not cover a necessary element, the issue is deemed not to have been submitted to the jury, and the trial court may then make its own ruling on the omitted issue. If it does not do so expressly, on appeal the trial court will be deemed to have impliedly found in favor of the prevailing party on that issue. Fed. R. Civ. P. 49(a); Bradway v. Gonzales, 26 F.3d 313, 316-17 (2d Cir. 1994). If there are inconsistencies, ambiguities or questions about the special verdict form, the trial judge may be able to resolve them by submitting appropriate questions to the jury prior to discharge. *See Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1057-58 (9th Cir. 2003). Counsel for the prevailing party must be swift and vigilant, though, because juries are often discharged very quickly after the verdict is returned. In federal court, post-discharge objections are likely to be too late. *See DiBella v. Hopkins*, 403 F.3d 102, 117 (2d Cir. 2005). In California courts, if the inconsistencies are not resolved by pre-discharge inquiry of the jury or interpretation by the court, the judgment will be reversed. *Woodcock v. Fontana Scaffolding & Equip. Co.*, 69 Cal. 2d 452, 457 (1968); *Singh v. Southland Stone, U.S.A., Inc.*, 186 Cal. App. 4th 338, 358 (2010); *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1037 (9th Cir. 2003).

Sean M. SeLegue

One frequently observed problem concerns damages where there are multiple claims or theories of liability. In such cases, the special verdict form usually asks the jury to proceed claim by claim, and directs the jury to state what the damages are for those claims that have been sustained. When it comes time to convert the verdict into a money judgment, the court will have to determine whether the various amounts are to be "stacked" — *i.e.*, cumulated — or, alternatively, whether they are redundant or overlapping. There are many ways that this can be handled, but it requires anticipating the question and dealing with it in the language of the special verdict form or in the instructions. If there is uncertainty about the amount the jury intended to award, the appellate court may have to reverse the damages award if it cannot resolve the uncertainty by interpretation. *Hallinan v. Prindle*, 220 Cal. 46, 56-57 (1934); *Zagami, Inc. v. James A. Crone, Inc.*, 160 Cal. App. 4th 1083, 1093-94 (2008); *Demkowski v. Lee*, 233 Cal. App. 3d 1251, 1263 (1991).

Make Sure The Trial Judge Has Made A Ruling On Every Issue, And That The Ruling Is On The Record. Appellate judges are understandably reluctant to reverse trial judges for a ruling they never made. It is not enough to make a motion *in limine*, or assert an objection; parties also bear responsibility for securing a ruling. *See Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009). The presumption of correctness will fill any gap; the appellate court will therefore presume that the trial court denied the motion in limine (exercising whatever discretion it had) or overruled the objection — unless the record affirmatively shows the contrary. *See, e.g., Kemp Bros. Constr., Inc. v. Titan Elec. Corp.*, 146 Cal. App. 4th 1474, 1477 (2007).

Trial judges often conduct business in chambers, without a reporter present. This often causes enormous

Continued on page 10

Continued from page 9

Lessons Learned

headaches after the trial is over. Was evidence excluded as a result of something that happened in chambers? Was an instruction refused? Did the parties stipulate to something — the giving of an instruction, for example? The appellate court will not presume that you objected and that the objection was overruled. *See Boeken v. Philip Morris, Inc.*, 127 Cal.App. 4th 1640, 1671-72 (2009). We once had an appeal momentarily go south when the Court of Appeal *assumed* (in an opinion that was originally certified for publication) that defendant's trial counsel stipulated in chambers to a particular instruction. Although, fortunately, we were able to salvage the situation by a successful petition for rehearing that demonstrated the error of the court's assumption, the pain of the several weeks of uncertainty could have been avoided if the parties had taken the trouble of putting all in-chambers rulings and stipulations on the record. *See* L.A. Super. Ct. R. 3.132. There is an established procedure for doing this: either file a declaration setting out what occurred in chambers, or put it on the record in open court. *See People v. Pinholster*, 1 Cal. 4th 865, 922 (1992), disapproved on other grounds, *People v. Williams*, 49 Cal. 4th 405, 459 (2010); *Lipka v. Lipka*, 60 Cal. 2d 472, 480-81 (1963). Among other things, this process should yield a clear record as to what instructions were proposed, and the fate of each of them. If the parties stipulated as to the giving of particular instructions (or anything else), the record should make that clear; otherwise, it would be prudent to include a statement as to which instructions (again, or anything else) you objected.

Special Considerations In Cases Involving Contract Interpretation. If your case involves an issue of contract interpretation, you need to pay close attention to the issue of *how* and *by whom* the contract will be interpreted. Unless the contract interpretation you are advancing is implausible, you probably will want the judge to interpret it as an issue of law. But contract interpretation becomes an issue of fact, and a jury can interpret the contract, when there is a material conflict in the extrinsic evidence. *Parsons v. Bristol Dev. Co.*, 62 Cal. 2d 861, 865 (1965); *F.B.T. Prods., LLC v. Aftermath Records*, 621 F.3d 958, 963-64 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1677 (2011). In such cases, the appellate court does not apply the usual *de novo* standard of review applicable to issues of law; instead, it will uphold the jury's interpretation unless it is unreasonable. *Estate of Kaila*, 94 Cal.App. 4th 1122, 1133 n.6 (2001); *Morey v. Vannucci*, 64 Cal.App. 4th 904, 913 (1998).

If you want to avoid jury interpretation of the contract (and the consequent loss of meaningful appellate review on the interpretation issue), you need to persuade the trial judge that there are no material extrinsic fact disputes. Opposing counsel may claim that the material fact dispute is over the inference that should be drawn from historical facts that are themselves undisputed; that's not enough to convert a question of law into a question of fact. *Parsons*, 62 Cal. 2d at 865. Unless there is a real conflict in the parol evidence — such as who said what in the negotiations — the issue of interpretation is a question of law for the court. *See F.B.T. Prods.*, 621 F.3d at 963-64; *United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992)

If there *is* a genuine dispute of fact, you can urge the trial judge to submit that factual dispute to the jury by special interrogatory, while retaining for the court the responsibility of interpreting the contract in light of the jury's determinations on those factual issues. *See, e.g., Med. Operations Mgmt., Inc. v. Nat'l Health Labs., Inc.*, 176 Cal.App. 3d 886, 890-92 (1986). That approach preserves *de novo* appellate review on the ultimate question of the contract's meaning. Unfortunately, the trial court has discretion to reject such a request, and therefore to submit the whole question of contract interpretation to the jury. *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 395-97 (2008). That was the result in *City of Hope*, in which a jury was allowed to give a commercially strange — though evidently not wholly "unreasonable" — interpretation of a complex commercial agreement negotiated and drafted by counsel.

Make Sure Closing Argument Guides The Jury Through Instructions And Special Verdict Form. We were engaged to draft a petition for certiorari to the U.S. Supreme Court in an antitrust case. The trial court had severed the issue of liability from damages. Shortly before the case went to the jury in the liability phase, the court decided to submit a special interrogatory, asking the jury if it agreed that — in the event it found liability — the appropriate measure of damages (which would be determined in the second phase) would be a formula in which A is subtracted from B. Although that formula seemed intuitively plausible at first blush, in fact there were complications that should have led to a "no" answer to that question. We scoured the transcript of the closing argument to see how defense counsel — who had a reputation as one of the country's leading business trial lawyers — tried to explain to the jury why the seemingly obvious "yes" answer would be wrong. To our surprise (and horror), there was no such argument. Even though counsel knew that question was going to be decided by the jury — and even though a "yes" answer would result in a phase 2 damages award of about $1 *billion* — counsel did not devote one minute of closing argument to that crucial issue.

Surprising as this is, in fact we have seen many transcripts of closing arguments — usually in cases with highly qualified trial lawyers — in which counsel spends little or no time walking the jury through the special verdict form. Similarly, we have seen many closing arguments in which counsel fails to discuss key instructions in order to explain how those instructions, applied to the facts of the case, should lead to a verdict in favor of their client. Given the unfamiliarity of most jurors with the legal concepts embodied in jury instructions and special verdict forms, trial counsel should always seek to give the jury a little self-serving help.

Finally, counsel should use closing argument to clarify

Continued on next page

Continued from page 10

Lessons Learned

any ambiguity in the special verdict form. Not only is this good advocacy, but the failure to do so may waive a claim on appeal that the form confused the jurors. *See Bly-Magee v. Budget Rent-A-Car Corp.*, 24 Cal. App. 4th 318, 325-26 (1994).

In State Court Bench Trials, Request A Statement Of Decision If You Contemplate Appealing The Judgment. In California, when a case is tried to the court, the rule on appeal is that in the absence of a statement of decision, the judgment will be treated just as the court would treat a jury's general verdict. That means that the court will apply the doctrine of "implied findings" by presuming that the trial court found every fact necessary to sustain the verdict in favor of the prevailing party. *See, e.g., Michael U. v. Jamie B.*, 39 Cal. 3d 787, 792-93 (1985). If you lose and may wish to appeal, then to avoid the implication of findings you need to make a timely (*see* Cal. R. Ct. 3.1590) demand for a Statement of Decision so that the only findings attributable to the trial judge will be findings that the court actually made. The procedure is arcane and counter-intuitive. You need to ask twice: first, you must demand a statement of decision, and then after you have the tentative statement of decision, you must object to findings with which you disagree. *See Californians for Population Stabilization v. Hewlett-Packard Co.*, 58 Cal. App. 4th 273, 291 (19976). Failure to dance this "two-step" will trigger the doctrine of implied findings. *In re Marriage of Arceneaux*, 51 Cal. 3d 1130 (1990).

The prevailing party needs to pay careful attention here. If the other party has requested a statement of decision, and has identified particular factual issues on which it wants findings, the court's failure to make such a finding is reversible error if it is on a "controverted issue." Cal. Code Civ. Proc. § 634; *In re Marriage of Hardin*, 38 Cal. App. 4th 448, 453 & n.4 (1995). The prevailing party should be sure that the trial court makes clear findings on every material fact necessary to support the judgment, especially on issues for which the other party has made a specific request for a finding.

Make Objections To Jury Verdict Before Jury Is Discharged. If the jury's verdict is ambiguous, or if there are any other questions as to its legal sufficiency, raise the issue by an appropriate objection before the jury is discharged. Failure to do so may result in a finding that the objection was waived by failure to raise it when the problem might have been corrected before the jury was sent home. *See Keener v. Jeld-Wen, Inc.*, 46 Cal. 4th 247, 264-68 (2009) (failure to object to incomplete polling of jury prior to discharge waives issue); *Zagami, Inc. v. James A. Crone, Inc.*, 160 Cal. App. 4th 1083, 1092 & n.4 (2008); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1545 (10th Cir. 1993) (failure to raise verdict inconsistency issue prior to discharge waives objection to general verdict, but not to special verdict).

Post-Trial Motions (And Motions For Directed Verdict Or JMOL). As a general matter, issues of law do not have to be raised by motion at the close of the evidence, or by post-trial motion, *if they have been raised previously*. That qualification is important, because in some circumstances issues of law that have never been raised in the trial court may not be raised for the first time on appeal. (That's a complicated subject beyond the scope of this article; suffice it to say that you ought to make every effort, at the earliest possible time, to raise in the trial court every issue of law that might be raised on appeal, and be sure that the trial court has made a definitive ruling on each issue.)

In federal court, a different rule governs claims that the evidence is insufficient to support the verdict. Such claims cannot be made on appeal unless they are preserved by appropriate motions in the trial court. That means a motion for judgment as a matter of law ("JMOL") must be made at the close of evidence and before submission to the jury (Fed. R. Civ. P. 50(a)). If that motion is denied and the jury returns an adverse verdict, then the issue must be raised again by a renewed JMOL motion under Rule 50(b). Failure to file the appropriate JMOL motions pre-and post-verdict precludes appellate review for insufficiency of evidence (which of course would include a claim of insufficient or excessive damages). *Ortiz v. Jordan*, — U.S. —, 131 S. Ct. 884, 891-92 (2011); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400-01 (2006); *Nitco Holding Corp. v. Boujikian*, 491 F.3d 1086, 1089-90 (9th Cir. 2007). Any doubts as to whether JMOL motions should be filed should be resolved in favor of filing them, just to avoid possible disputes. We recently had a case in which there had been extensive pre-trial proceedings over the meaning of the contract at issue, and the trial court had (over our client's objection) decided to leave the question of contract interpretation to the jury. After the jury ruled against our client, trial counsel made a JMOL motion, but that motion did not include the legal issue of whether the court should have interpreted the contract and what the correct interpretation should be. Our appeal on the contract interpretation issue was straightforward and relatively easy, but we were met with a vigorous claim that trial counsel had forfeited the client's right to raise the contract interpretation issue on appeal by failing to include that issue in the JMOL motion. Fortunately, the Ninth Circuit held that the issue of contract interpretation was a question of law that could be raised even though no JMOL motion on that issue had been filed. *See F.B.T. Prods.*, 621 F.3d at 962-63 (failure to file a JMOL did not waive a challenge to a contract issue that presented a legal question and did not rest on the sufficiency of evidence presented to the jury). But much wear and tear could have been avoided had a JMOL been filed on that issue.

Maria Chedid

In California courts, no pre-verdict or post-trial motion need be filed to preserve a claim of legal error. *Tahoe Nat'l Bank v. Phillips*, 4 Cal. 3d 11, 21-24 (1971); *Estate of*

Continued on page 12

Continued from page 11

Lessons Learned

Barber, 49 Cal. 2d 112, 118-19 (1957). However, there is a significant exception: a motion for new trial *must* be made to preserve an appellate claim of excessive (or insufficient) damages. *Jamison v. Jamison*, 164 Cal. App. 4th 714, 719-20 (2008); *County of Los Angeles v. S. California Edison Co.*, 112 Cal. App. 4th 1108, 1121 (2003); Cal. Code Civ. Proc. § 657(5).

New trial orders in state court require special scrutiny. Where a motion for new trial has been granted, counsel should promptly review the order to be sure that it meets the statutory requirements. Section 657 of the Code of Civil Procedure requires an order granting a new trial to specify the ground(s) of the ruling *and* the court's reason(s) for granting the new trial upon each such ground. If the court fails to do this, the appellate court cannot affirm the order granting a new trial on either the ground of insufficiency of the evidence to support the verdict or upon the ground of excessive or inadequate damages. *Id.* And in reviewing the other possible grounds on which the new trial order might rest, the appellate court will not apply the usual abuse of discretion standard, but instead will review the record independently and reverse the new trial order if the evidence is in conflict. *Oakland Raiders v. NFL*, 41 Cal. 4th 624 (2007). In that case, the trial court granted a new trial on the ground of juror misconduct, but failed to specify reasons. The Supreme Court independently reviewed the record and reversed the grant of a new trial because the "testimonial evidence [of misconduct]…is sharply conflicting on every material issue" and, as a consequence, the moving party "failed to discharge [its] burden to persuade us of jury misconduct warranting the grant of a new trial." *Id.* at 642.

Protecting The Record Sometimes Means "Be Cautious." In the midst of the battle that is a trial, counsel understandably look for every edge. As zealous advocates, it is tempting to seek the exclusion of every bit of evidence that could sting, to push hard for the admission of everything that could help, to ask for an unprecedented instruction or to seek anything else that could assist your case. In the cold light of briefing an appeal, you may wonder whether some of those decisions were such a good idea. Again and again, we see instances of trial lawyers who created problems for their client by pushing too hard. There's a need to balance the value of the ruling you seek in the battle before the jury with the risk that an appellate court will think it was prejudicial error. Trial counsel ultimately has to make the call — and sometimes the risk is worth running; as one trial lawyer put it to us, "most of the time I just want to be sure I get a favorable jury verdict, and take my chances with the appeal." We don't necessarily disagree; the point here is that thought should be given to the possible appellate consequences of "winning" the point before the trial judge.

There may be collateral benefits in backing off. The message in a graceful withdrawal — "Your Honor, in light of counsel's objections to my proposed instruction, I think that this may be a gray area in the law and I would prefer not to run the risk that the appellate court would disagree with my position; so I withdraw the instruction" — is that the trial judge can rely on you to protect the record. That's a pretty comfortable position to occupy.

Avoid Or Explain Inconsistent Positions. Another common problem we see, particularly in long-running and fiercely fought cases, is lack of consistency in positions taken in the trial court. It does not bolster one's position on appeal to have taken inconsistent or even conflicting positions on issues (or even facts!) in the course of various skirmishes. Be mindful of this pitfall, particularly in substantial cases with large teams because lack of coordination can lead to an unflattering record. If you do take inconsistent positions, where possible make a record as to the reasons for the change so that on appeal, your explanation doesn't sound like a post hoc rationalization.

Don't Hesitate To Call On Your Appellate Partners Or Colleagues For Advice Before Or During Trial. Many of you have partners who specialize in appeals who may become involved in the eventual appeal. Others may work with an appellate specialist who will become involved down the road. If you wait until after the trial to involve them, you are missing an opportunity to get some good advice and help with shaping the issues on appeal and with preserving the record. Most appellate specialists will be only too happy to lend a hand to your trial preparations or trial work. We have to confess that being asked to participate before a verdict has, in our experience, been the exception rather than the rule, but it makes sense and we wish it happened more often. In one recent case, we consulted in the last couple of weeks of a very long trial, and were able to suggest certain instructions and an approach to a special verdict procedure that set the stage for interesting issues on appeal.

In other cases, we have been brought in just after an adverse verdict, in time to consult on — and sometimes even draft — the post-trial motions. Sometimes, issues that haven't been properly (or fully) raised during the trial can be raised, and thereby preserved for appeal, in the post-trial motions. So it's gratifying — and invariably productive — when we have the opportunity to participate in that important phase of the case rather than wait until the proceedings in the trial court have been concluded.

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TRENTON H. NORRIS

On ENVIRONMENTAL LAW

For our clients, the most satisfying victories are those that are won without litigation. In the environmental arena, there is much that is unavoidable — new rules, new interpretations, new science, and new public concerns. But surprisingly few of our clients control what they can control — the terms of their agreements with other businesses. That can lead to the least satisfying form of litigation — litigation that disrupts important business dealings.

Regardless of the industry, little is accomplished in the modern economy absent an interlocking network of business relationships. Consumer product companies develop and produce goods through a complex chain of design, manufacturing, assembly, quality control, distribution, and marketing. Real estate developers produce buildings by coordinating the products and services of other businesses. And this is nothing compared to the complexity of business relationships required in mining, transportation, or oil and gas development.

For most businesses, these are not mere purchases but relationships built over years, involving a multitude of transactions and a wealth of knowledge about the businesses, products, and services involved. These relationships are both complex — often crossing national and cultural boundaries — and critical to the success of the businesses involved, whether they are procuring or offering goods or services. When a problem blows up — sometimes literally — it is a problem for everyone in the supply chain.

It is therefore surprising how few of these critical relationships are governed by carefully negotiated agreements that acknowledge and allocate environmental risks. Large players tend to rely on their size as insurance: if an environmental problem arises, they figure they can force the smaller players in the chain to address it. But they can miscalculate, particularly in a crisis. For example, if a contaminant is found in a toy, just before the holidays, and the only factory with any capacity to fix the problem is also the one that caused it, you have no choice but to accept their terms. And even for next holiday season, you may find that there are few alternatives available that meet other important criteria for the business.

Instead, the time to make use of negotiating leverage is in negotiating the agreement that governs the relationship. Litigators can inform these negotiations. With a focus on consumer product supply chains, here are a few of the most common mistakes that lead to litigation:

Not Having an Agreement. There is very little law that applies to these business relationships in the absence of a written agreement, and it mostly relates to enforcement of commercial terms for delivery and payment. The "battle of the forms" is not a game that can be played effectively by dozens of non-lawyer employees contracting for goods and services, and even if it could be these deals are often made across borders with differing default rules. A standard master supply agreement, with employees trained in its use, is a necessity of modern compliance and risk management.

Not Customizing Compliance Requirements. When there is an agreement, it often contains a provision requiring the supplier to "comply with all applicable laws." But does the supplier know where the product is to be sold and what rules apply in that jurisdiction? What if it is sold in other jurisdictions? Does the supplier control the distribution? Unless the agreement is clear on these points, disputes will arise.

Not Determining Control of Defense and Publicity. Environmental claims are often brought by third parties such as governments and activist groups, and they are often debated in the public arena as much as in the courts. A perfectly reasonable legal defense for the supplier (e.g., "the chemical is legal and not all that toxic") may not serve the interests of the company whose brand reputation is at stake. Who controls the defense as well as public statements should be spelled out.

Trenton H. Norris

Not Considering Dispute Resolution. Supply agreements will often specify a U.S. court as the venue for resolving a dispute, but unless they also address jurisdiction over the parties, service of process, required travel to the U.S. court, and similar issues, they are not as useful. Similarly, some companies have a "one size fits all" alternative dispute resolution process that may be more bureaucratic than is merited for common disputes, or too perfunctory for more significant ones.

Not Investigating Security and Insurance. If something goes wrong, many suppliers either do not have the resources to back up their indemnity obligations, or what resources they have are beyond the reach of U.S. courts. Both simple and complex security arrangements can be negotiated. Likewise, in some situations third-party insurance may be available.

Not Providing Access to Information. Ready access to information — such as product formulations — is critical to solving product integrity issues. With appropriate protection for trade secrets, agreements need to require prompt sharing of information.

Environmental litigators not only win lawsuits — we can also help avoid them. And in today's interconnected world, compliance requires working through the network of business relationships on which the client depends.

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Andrew Leibnitz

On TRADEMARK

When a person searches for one company on Google — using the company's trademark as a "keyword" search term — but then another company's website comes up in the search result because Google has auctioned the trademark off as a search term — has Google violated the first company's trademark rights? In *Rosetta Stone, Ltd. v. Google, Inc.*, 730 F.Supp.2d 531, 540 (E.D.Va. 2010), the district court granted summary judgment for Google, finding no triable issue on "likelihood of confusion." But in April 2012, the Fourth Circuit reversed and remanded, putting the question back in play. 676 F.3d 144, 152-60.

Andrew Leibnitz

Like the district court, the appellate court found that three factors governed determination of the likelihood of confusion: Google's intent, evidence of actual confusion of users, and sophistication of the consuming public. *Id.* at 153-55.

Regarding intent to cause user confusion, the court found a triable issue in that Google had loosened its keywords policy in 2009 to permit trademarked terms in the title or body of a sponsored link despite internal studies from 2004 showing that "94% of users were confused at least once" by such usage. 676 F.3d at 155-56. However, critics may question the court's reliance of a 2004 study to prove intent in 2009 given the pace of change in internet practices. Critics may also question whether Google's intent regarding the sixteen other brand names studied properly evidences its intent regarding the trademarks "Rosetta Stone" and "language library" in particular. *Id.* at 158. In any event, Google may be wary going forward of promulgating studies opining on the risk of litigation without taking additional measures to garb the investigation in privilege.

Regarding evidence of actual user confusion, the district court had rejected Rosetta Stone's testimony from five individual deponents as *de minimis*. *Id.* at 157-58. On appeal, the Fourth Circuit noted that five was the maximum number of "actual confusion" depositions permitted by the district court — a point with which it is difficult to argue. *Id.* at 158. Nonetheless, the question remains whether five instances of confusion out of 100,000 impressions over six years properly justifies trial. *Id.* at 157-58. While Rosetta Stone also offered evidence of 262 complaints by customers in one year regarding counterfeit software, no evidence existed of any purchases from sponsored links at Google. *Id.* at 158.

The appellate court further found a triable issue regarding actual confusion on grounds that two of Google's own in-house trademark attorneys testifying under Rule 30(b)(6) could not determine which sponsored links were authorized resellers of Rosetta Stone products without additional research. *Id.* at 158-59. However, the decision does not reflect the information conveyed to Google's deponents. Confusion arising from a bare screenshot of a results page may warrant less credit in ascertaining triable issues of fact than a broader array of information available to internet users, absent reliance on the fraught doctrine of "initial interest" confusion.

The appellate court further discerned evidence of actual confusion based upon the customer survey evidence of Rosetta Stone's expert, which showed that 17 percent of consumers suffered actual confusion about the origin, sponsorship, or approval of the sponsored links generated on Google when queried using Rosetta Stone's trademarked terms. *Id.* at 159. The district court dismissed this evidence as bearing upon the "non-issue" of Google's endorsement of sponsored links. *Id.* The appellate court rejected this reasoning as fundamentally wrong-headed: given that trademark law protects against confusion not only as to source, but also as to affiliation, connection, or sponsorship, Rosetta Stone's evidence properly gave rise to a triable issue. *Id.* While a confusion rate of 17 percent may not appear overwhelming, especially given that a rate below 10 percent would "clearly favor[] the defendant," *id.*, the Fourth Circuit's opinion suggests the difficulty to defendants of obtaining summary judgment in trademark cases in the presence of unfavorable expert testimony. *Id.* at 153.

Regarding the final factor — sophistication of the consuming public — the evidence showed that Rosetta Stone charged $259 for a single-level package and $579 for a three-level bundle. *Id.* at 159-60. The district court found that these prices, together with the fact that consumers of Rosetta Stone products stood ready to invest the substantial time necessary to learn a foreign language using Rosetta Stone's products, indicated a sophisticated consumer unlikely to be confused. *Id.* The Fourth Circuit disagreed, citing the confusion of Google's own trademark attorneys, its internal study of confusion, and the deposition of five Rosetta Stone customers. *Id.* Ultimately, the appellate court repeated a criticism which became a motif in its opinion: the trial court improperly weighed evidence as a finder of fact instead of merely deciding whether sufficient evidence existed to proceed to trial. *Id.*

Further issues remain on remand, notably including whether Google uses Rosetta Stone's marks "in commerce" as required for infringement — an issue which the Fourth Circuit explicitly held open before citing the Second Circuit's rejection of Google's arguments on this point in *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 129-31 (2d Cir. 2009). Then, of course, a six-day trial remains to be scheduled. Questions may eventually be asked as to whether keyword controversies present facts best analyzed under a direct infringement theory as opposed to an indirect infringement theory, given the arguments that counterfeiters and not search engines are properly the targets of any direct infringement suits. Ultimately, like the artifact giving rise to this plaintiff's name, *Rosetta Stone* may take time to decipher, and may prove to have far-reaching impact.

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CHIP RICE

On LITIGATION SKILLS

Thinking Fast and Slow by Daniel Kahneman is must reading for lawyers who want to improve their own judgments and their understanding of the decision-making process of judges, juries, clients, opposing counsel and colleagues. Kahneman is a psychologist who won a Nobel Prize in economics for showing that people's economic decisions are often very different than what is expected of the "rational man" posited by classical economics.

The book explains that human brains have two systems for making decisions: Systems 1 and 2, which produce fast and slow thinking, respectively. System 1 is intuitive and relies on "rules of thumb" or "heuristics." It operates automatically and quickly with little or no conscious effort.

System 2 is slower and requires conscious effort and attention. It is ultimately in charge and can resist the conclusions of System 1, slow the decision process and impose logical analysis. Kahneman explains that "most of what you think and do originates in your System 1 but System 2 takes over when things get difficult and normally has the last word."

System 1 is a machine for jumping to conclusions and is generally very good at what it does. Jumping to conclusions is efficient if the conclusions are likely to be correct and the costs of making an occasional mistake are low. But System 1 has biases and is prone to make systematic errors that make it unreliable in certain circumstances. By contrast, System 2 is lazy and reluctant to invest more effort than seems necessary in a decision, so it often follows the path of least resistance and accepts the conclusions of System 1 without much scrutiny. As a result, System 1 sometimes makes mistakes that System 2 fails to correct.

System 1's decisions are based largely on the coherence of the story that it creates from the available data — often without sufficient attention to the amount or quality of that data. System 1 also does not keep track of alternatives that it rejects and sometimes does not even notice that there are alternatives. It is blind to its own blindness.

Even professional decision-makers frequently make flawed decisions by deferring to System 1 over System 2. For example, a study of parole judges in Israel, who spent entire days reviewing applications for parole, with three food breaks, showed that the likelihood of being granted parole depended heavily on the time of day when the decision was being made. Overall, only 35% of all applicants were granted parole. But right after a meal break, 65% of applications were granted. The percentage declined steadily until the next meal break. In other words, tired and hungry judges tended to fall back on the more common and less risky decision of denying parole. The lesson is to avoid difficult judgments when tired or hungry and therefore overly reliant on System 1. As one of my partners says, never make an important decision after 4 p.m.

Kahneman's explanations of decision-making will ring true with most trial lawyers. We know that, when people intuitively believe a conclusion is true, they tend to believe arguments that appear to support it. When System 1 is dominant, the conclusion comes first and the reasoned justifications follow. As a result, the key to convincing juries (and even judges) is often presenting a coherent and plausible story and a confident and pleasant persona. Once your audience wants to believe your arguments, you are more than halfway home because you have persuaded System 1.

Chip Rice

Most people — even experts — put too much faith in their intuitive judgments. Studies have shown that skilled intuitions are reliable only when an environment is sufficiently regular to be predictable and the expert has learned these regularities as a result of prolonged practice. Just like everyone else, experts have a tendency to jump to conclusions based on too limited practice or experience.

According to Kahneman, the "way to block errors that originate in System 1 is simple in principle: recognize the signs that you are in a cognitive minefield, slow down, and ask for reinforcement from System 2." But questioning your intuitions is unpleasantly hard work when you are stressed by a big decision, so it is usually wise to consult with others. As Kahneman puts it, "it is much easier to identify a minefield when you observe others wandering into it than when you are about to do so. Observers are less cognitively busy and more open to information than actors." In addition, organizations "are better than individuals when it comes to avoiding errors, because they naturally think more slowly and have the power to impose orderly procedures."

This column is too short to do more than scratch the surface of Kahneman's insights and recommendations, so everyone who cares about good decision-making should buy or borrow a copy of this book. Regardless of the pitfalls, lawyers will have to continue to think both fast and slow, so we should keep trying to do both as well as we can.

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Letter from the President

As the nineteenth President of ABTL of Northern California in its 20th year, a brief history seems to be in order. The first ABTL was organized in the early 1970's by lawyers in Los Angeles who recognized the need for an organization that would address the professional interests of business trial lawyers and provide not only educational programs but an opportunity for judges and lawyers to meet and exchange ideas in an informal, social setting. Eighteen years later, in June 1991, the Northern California "Chapter" was formally organized by San Francisco lawyers and reached 1600 members in its very first year through law firm group memberships. About 500 lawyers and judges attended its first program at the Palace Hotel in October 1991. Needless to say, that was a tremendous beginning. Following the success of ABTL in Los Angeles and Northern California, business trial lawyers in San Diego, Orange County and the San Joaquin Valley formed additional ABTL organizations.

Mary Jo Shartsis

Since it's beginning, our Northern California Chapter has had the largest ABTL membership, reaching its peak in 2008 with over 2000 members. The continuing support of Bay Area law firms through group memberships and the support of individual lawyers, alternative dispute resolution professionals and others interested in the health and efficacy of our legal system enables us to present the outstanding programs you expect and to provide an atmosphere in which business trial lawyers and judges can share their views, mingle socially and learn from each other. With Marshall Wallace and Stephen Schrey as Co-Chairs of our Membership Committee, we are in good hands. If your law firm or you haven't yet joined us with a group membership or individual membership, please consider joining now — don't wait.

2012 has gotten off to a very good start with your continued membership and program support despite less than booming times. Our first three programs each had over 400 registrations. At our first program, "Ten Things Judges Hate Most and Why," Judges Marilyn Hall Patel and Edward Chen of the Northern District Court and Judge Peter Busch of the San Francisco Superior Court aired their different perspectives. Moderator Arthur Shartsis, the founding president of ABTL of Northern California, kept the conversation focused and quick paced. Our second program in March, "Ten Most important Things About Opening Statements: What to Do and What to Avoid," was equally successful with Titans Joe Cotchett and Jim Brosnahan and jury consultant Carrie Mason. Northern District Court Judge Charles Breyer as Moderator was successful in getting a word or two in edgewise before the hour ended.

At our third program in May, we continued the theme with the "Ten Most Important Things About Selecting Preparing and Examining Expert Witnesses." Top trial attorneys George Riley and Nanci Clarence, joined by a seasoned economic expert, Robert Harris, provided a wealth of knowledge and experience in response to Judge Claudia Wilken's skillful questioning as Moderator. Our program Co-Chairs, Larry Cirelli and Michael Plimack, have done an outstanding job in organizing these programs and four additional programs: a dinner program on June 19 in the Silicon Valley, a luncheon program in the East Bay on July 24, and our two final dinner programs in San Francisco on October 30 and December 11. The "Ten Most Important" topic of each program is available on our website. We welcome your ideas for program topics that would be of broad interest to our members and encourage you to share your ideas with us.

Finally, all five ABTL Chapters will come together for our Annual Seminar in Kauai, Hawaii September 19 - 23 at the Grand Hyatt Kauai Resort and Spa. The program, "Trying the Social Media Case with Technology" in a mock trial format, will feature outstanding lawyers and judges throughout the state. Chief Justice Tani G. Cantil-Sakauye is our keynote speaker in a conversation with Justice Richard D. Hoffman of the Fourth District Court of Appeal. Please join us.

Ms. Shartsis is a partner in the San Francisco law firm of Shartsis Friese LLP, and is the President of the Northern California Chapter of ABTL for 2012.