the abtl REPORT

New Standards For Remote Proceedings Beginning In January 2022

By Adam Powell

During the COVID-19 pandemic, the legal profession has learned to work in new ways that many of us did not think were possible. Practically overnight, courts and law offices closed, attorneys and staff began working from home, and nearly all proceedings began occurring remotely. As pandemic restrictions lightened, the profession returned to their offices and began holding some proceedings in person. However, conflicts arose as some parties wished to proceed in person, while others wished to proceed remotely. The California Court Efficiency Act (the "Act") addresses many of these issues, including the standards for proceeding in person or remotely in California state courts. The Act will take effect in January 2022 and will remain in effect until July 2023.[1]

Among other things, the Act amends Section 367.75 of the California Code of Civil Procedure to provide a general right to appear remotely upon providing notice to the court and other parties.[2] The Act provides that courts ***may*** require in-person appearance if one of several conditions are present: (1) the court lacks the necessary technology, (2) the quality of the court's technology prevents effective management or resolution of the proceeding, (3) the court determines that in-person attendance would "materially assist" in resolving the disputes or managing the case, (4) the quality of the technology inhibits the court reporter's ability to prepare an accurate transcript, (5) the quality of the technology prevents an attorney from effectively representing their client, or (6) the quality of the technology inhibits an interpreter's ability to provide language access.[3] The Act also allows expert witnesses to appear remotely "absent good cause to compel in-person testimony."[4] The Act also provides that a court may conduct a trial or evidentiary hearing, in whole or in part, using remote technology "absent a showing by the opposing party as to why a remote appearance or testimony should not be allowed."[5]

While the Act provides some guidance, we will undoubtedly see disputes in how the Act is applied. Many embrace remote proceedings as an important tool to save time and reduce costs while others believe the shift to remote proceedings creates significant problems by diminishing a lawyer's ability to persuade the factfinder or test the credibility of a witness. While one would expect parties can frequently agree on the format of many routine proceedings, disputes are likely to arise for important depositions, evidentiary hearings, and trials.

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PRESIDENT'S LETTER:

How ABTL Promoted in the "Highest Ideals of the Legal Profession" in 2021

By Rebecca J. Fortune

On December 7th, I was honored to welcome Andrew Weismann as the featured speaker at ABTL SD's final program of 2021. And while meeting Mr. Weismann and learning about his experience in, and suggestions for, the Special Counsel's Office was definitely a highlight, for me the best part of the evening – *of the year* – was much simpler. Finally, *finally* we were all able to greet colleagues and friends, unseen above the waist in almost two years. For the first time since February 2020, a hundred and forty members of San Diego's bench and bar gathered (safely) in person in America's Finest City to carry out our mission: "to promote the highest ideals of the legal profession – competence, ethics, professionalism and civility – through uniquely relevant and interesting educational programs and frequent informal interaction with other members of the bar and bench who embrace these ideals." It sounds a bit silly to say, but the delight in seeing friends, even (and especially) opposing counsel, in person, face-to-unmasked-face, crystalized why membership in the ABTL is so profoundly invaluable. By the extraordinary turn-out, in less-than-ideal conditions, and the expression observed on members' faces the evening of the 7th, I'd say … Mission accomplished.

In addition to our return to "normal" programming, I'm pleased to report, despite the many challenges of the past twenty-two months, ABTL SD didn't just survive, it thrived. In 2021, we offered over 15 hours of MCLE credit; hosted a first-ever statewide program honoring the legacy of the late Supreme Court Justice Ruth Bader Ginsberg, complete with pre-program networking via ZOOM break-out; expanded the reach of our lunchtime programming through the use of virtual platforms, resulting in the highest-attended brown bag lunch in our Chapter's history; organized a three-round, in-person, mock trial competition for the three local law schools, as well as an all-day virtual trial skills seminar; locked down *all* ABTL evening programming through 2022, creating room for more creative planning in 2023; strengthened our financial position due, in no small part, to historically high sponsorship commitments; welcomed more than 450 members and their guests at the wildly successful Annual Seminar hosted by ABTL SD on the Big Island of Hawaii; and, as a consequence, added over a hundred members … all, during a pandemic.

Thanks to the efforts of our volunteer committee chairs and Executive Director Lori McElroy, 2021 proved successful by every measure. But, setting aside the work put into stewardship, this last year confirms more than ever that ABTL SD's success as a professional organization is born of its many attorney and judicial members' commitment to show up and, by our actions, carry out the mission of education, professionalism, and civility. It has been an honor to serve as your president this past year and I look forward to working with the incoming Officers and Board of Governors to assure ABTL SD's continued success.

Wishing you all a happy and healthy holiday season,

Rebecca J. Fortune

Rebecca J. Fortune, ABTL President, is a partner at Kimball, Tirey & St. John LLP Business Real Estate Group. Rebecca has devoted her practice to general civil litigation with an emphasis in real estate, business and probate litigation.

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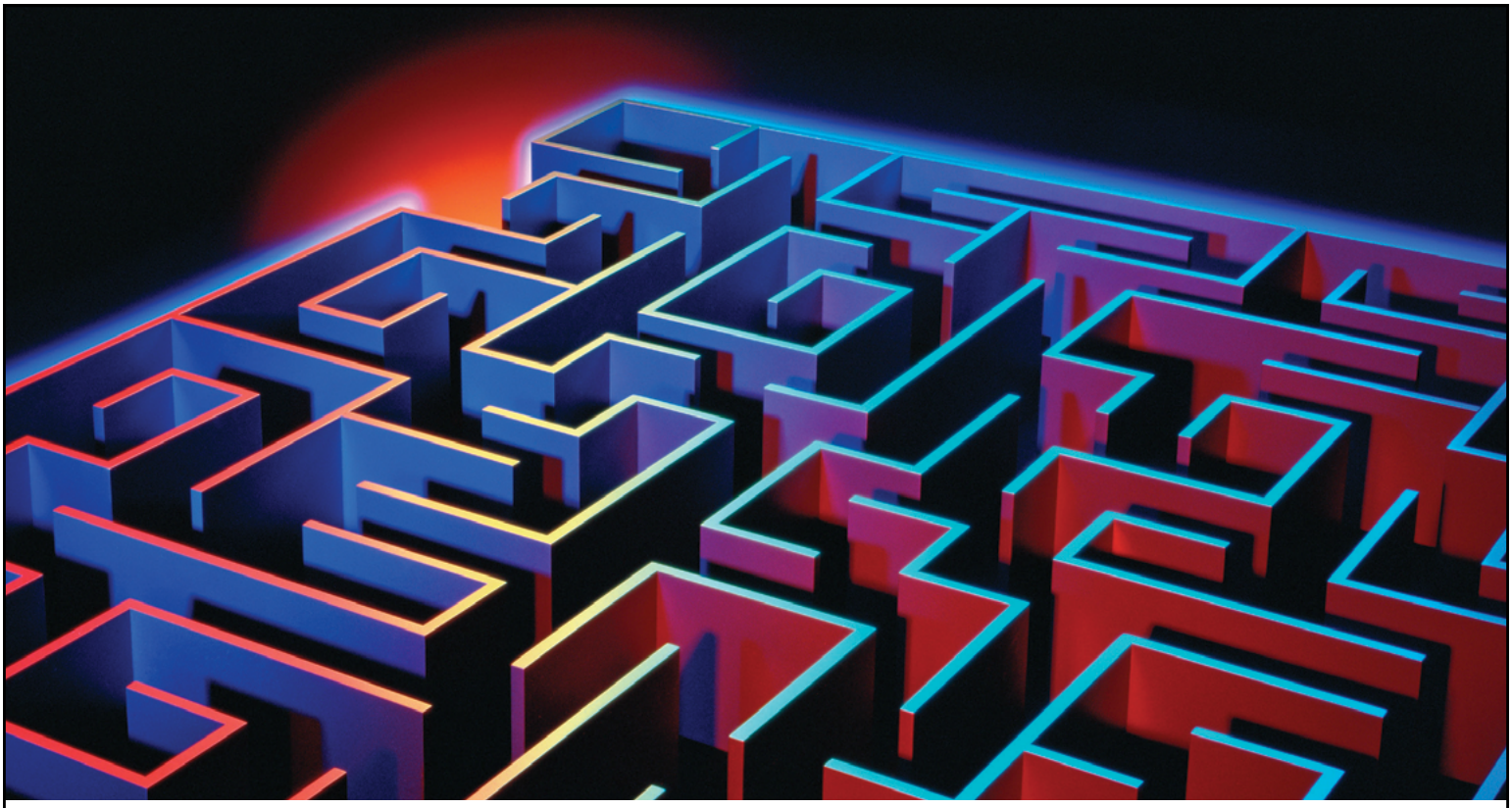

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NEW STANDARDS FOR REMOTE PROCEEDINGS | *Continued from cover*

Upon notice from one party, the Act provides the standard procedure will be to appear remotely. The burden then shifts to the opposing party to show why remote proceedings would be ineffective.[6] Parties wishing to proceed in person will need to familiarize themselves with the six conditions set forth above and the facts that could establish one of those conditions. It may be difficult to show that the court or court reporter lacks the necessary technology, particularly when many courts have invested significant resources in technology for remote appearances. Thus, many litigants will focus on the third category—that is, a showing that in-person attendance would "materially assist in the determination of the conference, hearing, or proceeding or in the effective management or resolution of the particular case."[7]

While no court has interpreted the Act, prior court decisions during the pandemic can provide some guidance. For example, some courts ordered in-person depositions later in the pandemic when credibility was an important issue.[8] Courts have also relied on the witnesses' actions outside of court in deciding whether to grant a request for a remote deposition. For example, one court denied a request to proceed remotely because the witness failed to show she was "complying with CDC guidelines," such as whether she "customarily is masked" outside her home or "tries to socially distance and avoid large crowds and unventilated areas."[9] Other courts have ordered remote depositions despite concerns about witness credibility, particularly early in the pandemic or when the witness has underlying medical conditions.[10]

Courts will undoubtedly interpret these standards differently over time. For example, while most courts were reluctant to order in-person appearances at the height of the pandemic, this resistance has begun to wane now that vaccines are available.[11] Some courts now default to in-person proceedings, while others are proceeding almost entirely remotely. And courts may remain reluctant to require in-person appearances for witnesses or counsel who have health issues or live with others who have such challenges. But courts may have less sympathy for a witness who is healthy and vaccinated, particularly if he or she is a key witness whose credibility is at issue.

Only time will tell if the Act causes more disputes than it solves. However, counsel should carefully study the California Court Efficiency Act and be prepared to argue why their case does (or does not) fit within the many exceptions provided in the Act.

Adam Powell is a partner at Knobbe Martens, San Diego. Adam has a broad practice that involves litigating all types of intellectual property cases, including patent, trade secret, copyright, and trademark matters.

FOOTNOTES

[1] California SB-241 (chaptered September 23, 2021, in Chapter 214, Statutes of 2021). *See* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB241.

[2] *Id.* (quoting amended Cal. Code Civ. P. § 367.75(a)).

[3] *Id.* (quoting amended Cal. Code Civ. P. § 367.75(b)).

[4] *Id.* (quoting amended Cal. Code Civ. P. § 367.75(c)).

[5] *Id.* (quoting amended Cal. Code Civ. P. § 367.75(d)(1)).

[6] *Id.* (quoting amended Cal. Code Civ. P. § 367.75(a) and (b)).

[7] *Id.* (quoting amended Cal. Code Civ. P. § 367.75(b)(3)).

[8] *Pruco Life Ins. Co. v. California Energy Dev. Inc.,* No. 3:18CV02280-DMS-AHG, 2021 WL 5043289, at *3 (S.D. Cal. Oct. 29, 2021) (ordering in-person depositions because there was "an exceedingly high level of distrust among all parties" and the "credibility of the parties is also a key substantive issue").

[9] *Dubuc v. Cox Commc'ns Kansas, L.L.C.,* No. 21-2041-EFM, 2021 WL 4050855, at *2 (D. Kan. Sept. 5, 2021).

[10] *Richmond v. Reefer Sys., Inc.,* No. CV 19-7940-SB (PLAX), 2020 WL 9074805, at *6 (C.D. Cal. Dec. 21, 2020).

[11] *Welsh v. Safeco Ins. Co. of Am.,* No. 2:21-CV-82 RJS, 2021 WL 5566009, at *2 (D. Utah Nov. 29, 2021) (citing four cases in 2020 that all ordered remote depositions and three cases in late 2021 that all ordered in-person depositions).

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Surfside Condominium Collapse Highlights the Importance of Corporate Directors' Fiduciary Duties and Education

By Elizabeth French

In the early morning hours of June 24, 2021, a condominium high rise in Surfside, Florida, suddenly collapsed, killing 98 people inside. It is arguably the worst, if not ***the worst*** residential building collapse in the history of the United States. Not unlike many other condominiums, the building was managed by a common interest development formed as a non-profit mutual benefit corporation named Champlain Tower South Condominium Association ("Association") that was governed by a volunteer board of directors. The tragedy has spawned numerous lawsuits, including lawsuits against the Association and its board of directors. This litigation has highlighted the importance of ensuring that corporate directors of both for-profit and non-profit entities understand their fiduciary responsibilities, as well as the associated liabilities and protections for their service as directors.

Soon after the Surfside collapse, multiple media outlets rushed to judgment regarding the potential failures of the Association's board of directors, speculating that these failures contributed to the collapse. Ultimately, and after a great deal of time, it seems likely that multiple causes of the collapse will be identified. But even at this early stage, media reports indicate that prior to the tragedy the board obtained critical information in engineering reports, which reports were presented to the membership in connection with requests to approve special assessments to fund needed repairs. Additionally, the Association was apparently in the process of making some repairs to the building prior to its collapse. However, it also appears that there were years of deferred maintenance, and the Association failed to properly fund its reserve account to be used to pay for long-term building repairs.[1] Moreover, the court overseeing the sale of the Association's land and weighing competing claims has observed that there will likely not be enough money available to satisfy all the claims.[2] With only $30 million in insurance proceeds, there is not enough money available to rebuild the condominiums, compensate the owners for the losses, and settle all the filed lawsuits.

This tragedy and the facts now surfacing beg the question of whether the directors breached their fiduciary duty owed to the Association members. The concept of fiduciary duty is arguably one of the most important aspect of corporate law when dealing with boards. The fiduciary duty is the highest duty owed under the law. Certainly, in the context of major corporations, the average director is quite savvy, and typically understands his or her fiduciary duty. However, in the context of smaller corporations or non-profits, such as the Association, directors do not always understand the importance of the director fiduciary duty, and how a failure to carry out that duty can result in liability for the corporation, as well as for the director herself.

Under California law, corporate directors owe a fiduciary duty to the corporation and its shareholders to serve "in good faith, in a manner such director believes to be in the best interest of the corporation and its shareholders." Cal. Corporation Code § 309(a). This duty to act with honesty, loyalty and good faith derives from the common law.[3] In its simplest form, the fiduciary duty can be broken down into two specific duties: the duty of care and the duty of loyalty.

The duty of care requires that a director educates himself or herself, not only about the role of a director, but also the business of the corporation, when appropriate.[4] Unfortunately, all too often, directors fail to fully grasp the importance of educating themselves about the director role, as well as the corporate business. The duty of loyalty—that is, the obligation to make all corporate decisions without personal economic conflict—is equally important. The duty of loyalty is most commonly breached when a director causes the corporation to enter into a transaction with an entity in which he or she has an interest, or takes a corporate opportunity for the director's personal benefit. While directors may seek or accept board positions to advance personal agendas, once they assume the duties and obligations of directorship, they may not act upon those personal agendas to the detriment of the corporation. "Single issue directors" that seek a director position to advance a single item (e.g. fiscal restraint) oftentimes are in breach of their duties right out of the gate.

When working with small corporations or non-profit corporations with a volunteer board, it is a good business practice is to insist that new directors, as well as veterans of

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SURFSIDE CONDOMINIUM COLLAPSE | *Continued from page 8*

the board, annually attend a "boot camp" class to educate themselves regarding director responsibilities. A typical board education class generally consists of ensuring that directors understand the business of the corporation, its governance (including the governing documents), applicable laws, their fiduciary duties, and the importance of consulting with experts when appropriate. While a one- or two-hour boot camp may not eliminate all governance head winds for boards, it does provide a baseline understanding that will help directors navigate basic issues and know when to reach out for additional assistance on more complicated issues.

We will not know for some time whether the Association's board members breached their fiduciary duty, and whether those breaches ultimately caused or contributed to the collapse of the condominium tower. However, the tragedy highlights the need for corporate counsel to make sure boards understand their responsibilities, so that they can act as educated fiduciaries and ensure their shareholders' or members' interests are protected. While the issues involved in governing smaller corporations or non-profits may seem smaller, the importance of board education is even greater. Tragically, the Surfside collapse illustrates this point. At this point, it does appear that the Association was underfunded in reserves and insurance, meaning that Association members and victims will not be fully compensated for their damages and there is no ability to rebuild. Had the directors been educated about their duties and taken a different path, one can't help but conclude that at least some of this story would have ended differently, and they might have avoided potentially significant liability for both the corporation and the individual directors.

Elizabeth A. French is a Partner in the law firm of Green, Bryant & French, LLP. For the last seventeen years her practice has emphasized the representation of community associations in all aspects of the law, including litigation and transaction matters.

ENDNOTES

[1] One reporter claimed that total reserves were only 6.9% funded. Tolan, Casey, *A 2020 report found Surfside Condo lacked funds for necessary repairs. One expert called it a "wake up call."* (CNN, July 8, 2021), available at http/cnn.com/2021/07/08/US/Surfside-Collapse-Condo-finance-invs/index.html.

[2] Allen, Greg, *A judge is weighing claims in Surfside Condo collapse* (NPR, Oct. 6, 2021), available at https://www.npr.org/2021/10/06/a-judge-is-weighing-claims-in-Surfisde-condo-collapse.

[3] *See Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App. 4th 1020, 1037, 100 Cal. Rprt. 3d 890-91.

[4] California Corporations Code§ 309(a)

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Freeze Orders in the Federal Courts: An Overlooked Ally in Recovering Assets

By Joseph R. Dunn, Daniel T. Pascucci

The recent storm of press surrounding the Pandora Papers – leaked financial data revealing where billionaires and heads of state around the world hide their assets from creditors and tax collectors – shined a new light on the United States as an asset haven. As we previously have discussed [1], several western states have been leading a race to the bottom, offering robust combinations of privacy laws, trust vehicles and off-shore corporate structures to entice the large depositors into their cottage wealth defense industries. As attention turns to the hundreds of billions in foreign deposits sheltered through states like South Dakota, Nevada, Wyoming, Utah and Delaware, the U.S. District Courts are taking on a heightened role in multinational asset recovery efforts.

In recent years, sophisticated creditors have increasingly recognized the significant investigative value of invoking the long-arm jurisdiction of a U.S. District Court. Federal trial courts have defined their discovery reach very broadly.[2] Coupled with the broad party-driven discovery scope codified in Rule 26(b) of the Federal Rules of Civil Procedure, the courts' extensive long-arm jurisdiction arms creditors in federal court litigation with the tools to conduct global depositions, subpoena non-party testimony and documents, and often secure evidence from far corners of the world.[3] Based on extensive experience utilizing these procedures, we have long advised clients that there is no better ally in the investigation phase of asset recovery and judgment collection efforts than a U.S. federal court.

Unfortunately, many creditors will forego these considerable investigative advantages based on the faulty but commonly accepted conclusion that freeze orders to preserve assets pending litigation (commonly referred to as *Mareva* injunctions) are not available in the United States. While obtaining a preserving freeze order in the United States is a nuanced practice that requires proper pleading and, often, understanding and invoking an interplay of federal authorities and state law, freeze orders are indeed available. Their availability presents creditors with a best-of-both-worlds scenario, marrying the ability to secure a widely enforceable freeze order with U.S. long-arm jurisdiction to secure needed broad discovery.

The Supreme Court's Rejection of Mareva *Injunctions in Certain Cases*

Virtually all common law jurisdictions, including English, Australian and American courts, recognized a general presumption that a plaintiff alleging only a general claim of money damages is not entitled to a pre-judgment order restraining the defendant from disposing assets. *See, e.g., Lister & Co. v. Stubbs,* 45 Ch. 1, 13 (C.A.) [1890] (holding that the Court of Appeal could not issue an injunction restraining the defendant's use of assets prior to judgment). In 1975, however, the English Court of Appeal recognized an exception in *Mareva Compania Naviera SA v International Bulkcarriers SA,* 2 Lloyd›s Rep 509 [1975]. *Mareva* allowed for a pre-judgment injunction where "it appears the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment." Since 1998, *Mareva* injunctions have been codified into English civil procedure rules, and most common law nations recognize an analogous process.

In 1999, the United States Supreme Court, in *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.,*[4] reviewed the applicability of *Mareva* and held that U.S. federal courts lack the inherent power to issue such injunctions in money-damages cases under Rule 65. The Court found that the creation of such a power was best addressed by Congress, not the courts. Since *Grupo Mexicano,* conventional wisdom has been that freeze orders to preserve assets pending judgment are unavailable in the United States. However, since in 1999, federal courts have repeatedly confirmed that this conventional wisdom overstates the ruling in *Grupo Mexicano* and that, in fact, freeze orders are available with the proper pleadings and evidence. In doing so, courts have generally adopted standards for issuing an injunction that are similar to those found in other common law jurisdictions.

Three Cases When Freeze Orders Are Available

The Supreme Court held in *Grupo Mexicano* that courts do not have authority under Rule 65 to issue *Mareva* injunctions "pending adjudication of [a] contract claim for money damages." 527 U.S. at 333. Subsequent courts have faithfully applied this ruling while recognizing at least three important distinctions where freeze orders are available. *Grupo Mexicano* says nothing about cases where Rule 65 does not apply, cases involving equitable claims, or "mixed cases" where the plaintiff seeks both legal and equitable relief. With careful pleading, a creditor can avoid the crosshairs of *Grupo Mexicano* and obtain a preserving freeze order in federal district court.

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Injunctive Relief Under Rule 64

The first distinction from *Grupo Mexicano* concerns the issuing court's authority outside the context of Rule 65. Although *Grupo Mexicano* prohibits a court from issuing *Mareva* injunctions under Rule 65 in claims seeking purely legal relief, it does not prohibit a court from issuing these injunctions where it has authority from other rules or statutes. *Grupo Mexicano,* 527 U.S. at 330–31.

Most significantly, this includes Rule 64, which allows federal courts to issue preliminary injunctions to the extent permitted by the law of the state where the court is located. Many states, including New York [5], California [6], and Texas [7], allow plaintiffs to seek pre-trial injunctive relief under that state's attachment statute. *See United States ex rel. Rahman v. Oncology Assocs.,* 198 F.3d 489, 501 (4th Cir. 1999) ("[W]e conclude that the scope of Federal Rule of Civil Procedure 64 incorporates state procedures authorizing any meaningful interference with property to secure satisfaction of a judgment, including any state-authorized injunctive relief for freezing assets to aid in satisfying the ultimate judgment in a case."); *see also CBF Industria de Gusa v. AMCI Holdings, Inc.,* No. 13-2581-PKC, Order Confirming ***Ex Parte*** Order of Prejudgment Attachment and Granting Injunctive Relief, ECF No. 286 (S.D.N.Y. July 16, 2019) (granting plaintiff's New York state attachment order under Rule 64).

Likewise, *Grupo Mexicano* does not foreclose courts from issuing *Mareva* injunctions when another federal statute governs. 527 U.S. at 330–31. So, for example, courts have issued *Mareva*-style injunctions under the Bankruptcy Code because it affords the courts greater equitable powers. *See In re Dow Corning Corp.,* 280 F.3d 648, 657–58 (6th Cir. 2002) (finding that due to the statutory grant of power found in Section 105(a) of the Bankruptcy Code, "the bankruptcy court is not confined to traditional equity jurisprudence, and therefore, the bankruptcy court's *Grupo Mexicano* analysis was misplaced.").

Cases in Equity

When a plaintiff seeks equitable relief, courts also recognize a distinction from the prohibition of *Grupo Mexicano*. The Supreme Court's ruling in *Grupo Mexicano* was confined to cases in which the plaintiff is seeking purely legal relief, such as a contract claim for money damages. However, a court may grant a preliminary asset-freeze injunction based on claims for equitable relief. *E.g., Deckert v. Indep. Shares Corp.,* 311 U.S. 282, 288–89 (1940) (finding injunctive relief appropriate because plaintiff sought rescission and restitution); *New Falls Corp. v. Soni Holdings, LLC,* No. CV19449ADSAKT, 2019 WL 4015170, at *10 (E.D.N.Y. July 5, 2019) *("Grupo Mexicano* does not . . . preclude courts from entering asset-freezing preliminary injunctions in cases in which the movant seeks equitable relief . . . and the preliminary injunction is ancillary to the final relief.")

Cases of Mixed Law and Equity

Finally, courts interpreting *Grupo Mexicano* have confirmed that the mere presence of claims of money damages does not preclude a freeze order, opening the way to such orders in cases of mixed claims seeking both equitable and legal relief. Plaintiffs bringing mixed claims, however, must demonstrate that they are genuinely seeking equitable relief in good faith, not just as a means to defeat *Grupo Mexicano,* and must show "a 'nexus' between the injunctive relief requested and the equitable relief ultimately sought." *New Falls Corp,* 2019 WL 4015170, at *10 (citation omitted) (requiring a showing that the injunction "is reasonably necessary to preserve the status quo with respect to particular assets so that the court can grant the movant ultimate relief"); *Matrix Partners VIII, LLP v. Nat. Res. Recovery, Inc.,* No. 1:08-CV-547, 2009 WL 175132, at *5 (E.D. Tex. Jan. 23, 2009) (finding that for mixed cases, "a *nexus* between the *assets sought to be frozen* through an interim order and the *ultimate relief requested* in the lawsuit 'is essential to the authority of a district court in equity to enter a preliminary injunction freezing assets'" (emphasis in original)) ("[I]t may be incumbent on the court to determine on a case by case basis whether an action, considered in context, is truly equitable in nature or whether it is fundamentally an action at law with ancillary claims that merely sprinkle a bit of equity on a suit for money damages.").

Conclusion

As is the case in other common law jurisdictions, a freeze order is considered an extraordinary remedy. Courts thus hold creditors to a high burden before granting such relief. In any jurisdiction, securing such an order will require a well-prepared claimant who can demonstrate a high likelihood of success on the merits and the propriety of the relief sought. In the United States, establishing that propriety involves showing a strong basis under law other than the inherent injunctive powers of the court, or a real nexus to genuine equitable relief. But these requirements are far from an outright prohibition on freeze orders and, in cases where these burdens can be met, creditors invoking the jurisdiction of a U.S. District Court stand to benefit from a far-reaching freeze order and the extensive discovery uniquely available in the United States. Creditors should therefore consider calling upon this powerful ally to counteract the dishonest debtor's proclivity for secreting away assets and hindering enforcement.

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FREEZE ORDERS IN THE FEDERAL COURTS | *Continued from page 12*

Joseph R. Dunn is a member of the San Diego Mintz office and on the ABTL Board of Governors.

Daniel T. Pascucci is a managing member of the San Diego Mintz office.

ENDNOTES

[1] See https://www.law360.com/articles/1401365/how-western-states-help-the-wealthy-avoid-taxes-creditors (last visited Dec. 2, 2021).

[2] See In re Ishihara Chem. Co., 121 F. Supp. 2d 209, 225 (E.D.N.Y. 2000) ("[T]he U.S. system of broad discovery is fundamentally different from that of most foreign countries . . . most other countries fiercely limit the scope of discovery to protect personal privacy and consider U.S. discovery to be a fishing expedition.") (Citation and quotation omitted); see also Lewis v. ACB Bus. Servs., 135 F.3d 389, 402 (6th Cir. 1998) ("The scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad.")

[3] See Zassenhaus v. Evening Star Newspaper Co., 404 F.2d 1361, 1364 n.1 (D.C. Cir. 1968) (discussing several permissible methods for taking depositions in foreign countries under Rule 28(b)); see also First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 21 (2nd Cir. 1998) (quoting Fed. R. Civ. P. 45, Advisory Comm. Notes ("Paragraph (a)(2) makes clear that the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served. The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34.")).

[4] 527 U.S. 308 (1999)

[5] N.Y. C.P.L.R. § 6201 et seq.

[6] Cal. Code. Civ. Proc. § 481.010 et seq.

[7] Tex. Civ. Prac. & Rem. Code Ann. § 61.001 et seq.

$137 Million Jury Verdict for Tesla Ex-Contractor in Race Bias Suit

by Kristen O'Connor

A federal jury has awarded $137 million to a former contract elevator operator who worked at Tesla's Fremont facility prior to his 2016 resignation. Following four hours of deliberation, the jury awarded ex-contractor Owen Diaz $6.9 million in emotional distress damages and $130 million in punitive damages.

Among a litany of other allegations that would precipitate one of the largest awards in a racial harassment case in the history of the United States, Diaz testified at trial that he was subjected to routine racial vitriol and graffiti, including use of the "n-word" by Tesla employees and workplace drawings of swastikas and nooses. Diaz, a former Tesla contractor who was directly paid by two staffing agencies rather than Tesla itself, cited Tesla's "progressive…facade" in "papering over its regressive, demeaning treatment of African-American employees."

The sizeable verdict marks yet another display of endemic discrimination blighting the U.S. workforce. It is also, perhaps, a shot across the bow to employers who are slow to take a comprehensive and prophylactic response to complaints of harassment or discrimination—including by contractors, who may enjoy a number of federal and state anti-harassment and anti-discrimination protections.

Kristen O'Connor is an associate in the San Diego office of Johnson Fistel and concentrates her practice on employment and complex securities litigation. Ms. O'Connor has particular expertise representing a diverse clientele in federal and state actions for sexual harassment and discrimination.

California Case Summaries: Monthly™

NOVEMBER 2021

By Monty A. McIntyre,
Mediator, Arbitrator & Referee at ADR Services, Inc.

CALIFORNIA COURTS OF APPEAL

Arbitration

Chambers v. Crown Asset Management, LLC (2021) _ Cal.App.5th _ , 2021 WL 4900096: The Court of Appeal affirmed the trial court's orders sustaining objections to an affidavit submitted by defendant in support of its motion to compel arbitration, and its order denying defendant's motion to compel arbitration. Plaintiff filed a putative class action for alleged violations of the California Fair Debt Buying Practices Act (CFDBPA; Civil Code, section 1788.50 et seq.). Plaintiff allegedly incurred the debt as a result of a consumer credit card account issued by Synchrony Bank (Synchrony), and Synchrony sold the alleged debt to defendant for collection purposes. Defendant filed a motion to compel arbitration, relying on an affidavit from an employee of the original creditor, Synchrony, who stated in part that "Synchrony's records" showed a credit card account agreement containing an arbitration clause had been mailed to plaintiff. The trial court properly denied the motion to compel, based upon its proper ruling that the affidavit lacked foundation and violated the secondary evidence rule and therefore did not provide admissible evidence showing the arbitration agreement had been mailed to plaintiff. (C.A. 4th, filed October 21, 2021, published November 12, 2021.)

Civil Procedure

Kremerman v. White (2021) _ Cal.App.5th _ , 2021 WL 5177428: The Court of Appeal reversed the trial court's order denying defendant's motion to vacate a default and a default judgment of $71,823.77 against defendant in an action for breach of contract by plaintiff landlord against his former tenant. The Court of Appeal concluded that service of process was defective and therefore the trial court never had jurisdiction over the defendant. First, plaintiff never undertook diligent efforts to locate defendant. Second, the service was defective because plaintiff attempted substituted service by delivering the summons and complaint to an employee of the Postal Annex, where defendant had a mailbox, claiming that the summons and complaint were left with "a competent member of the household (at least 18 years of age) at the dwelling house or usual place of abode of the party" but the Postal Annex employee was clearly not a member of defendant's household. Third, Code of Civil Procedure section 415.20(c) provides that substitute service can only be effectuated on an individual by leaving a copy of the summons and complaint with a certified mail receiving agency (CMRA), "if the only address reasonably known for the person . . . is a private mailbox" and that was not true for defendant. Finally, California law requires the CMRA to place a notice or copy of the documents in the customer's mailbox within 48 hours and to send the documents by first-class mail within five days after receipt to the customer's address (Business & Professions Code, section 17538.5(d)(1); see also Code of Civil Procedure section 415.20(c)), but the Postal Annex employee did not mail the documents to defendant until 20 days after she received them. (C.A. 2nd, November 8, 2021.)

Oakes v. Progressive Transportation Services (2021) _ Cal.App.5th _ , 2021 WL 5231688: The Court of Appeal affirmed the judgment of $8,754.22 in favor of defendants, following a jury trial. Although the jury had returned a verdict in favor of plaintiff for $115,000, and the action had been subject to a $256,631.76 worker's compensation lien, defendants had made a pre-trial Code of Civil Procedure section 998 offer of $200,000. While the trial court initially entered judgment in favor of plaintiff, it later properly concluded that defendants' 998 offer was valid. A party making a section 998 offer need not take into account a lien against the judgment when making the offer. The valid 998 offer subjected plaintiff to the statutory penalty because he recovered less at trial than the amount of the offer, and the trial court properly applied section 998 before determining whether plaintiff's counsel was entitled to attorney fees under Labor Code section 3856. Finally, the trial court erred in calculating the net judgment of $8,754.22 for defendants. The trial court should have entered an order awarding plaintiff $475.98 for his pre-998 offer costs. Plaintiff's total damage award should have totaled $115,475.98 ($475.98 + the $115,000 jury verdict). The court should then have deducted from the $115,475.98 award the $174,830.29 in defendants' post-998 offer costs awarded to defendants under section 998. A judgment in the resulting net amount of $59,354.31 should then have been entered in favor of defendants. While the trial court erred in its calculation, defendants did not cross-appeal, and they did not challenge the $8,754.22 final judgment entered in their favor. Absent such a challenge, the Court of Appeal had no basis for overturning the $8,754.22 judgment for defendants. (C.A. 2nd., November 10, 2021.)

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Evidence

Doe v. Superior Court of Los Angeles County (2021) _ Cal.App.5th _ , 2021 WL 5048205: The Court of Appeal denied a petition for writ of mandate seeking to overturn the trial court's pre-trial rulings, in an action by plaintiff for molestation by her fourth-grade teacher, that (1) Evidence Code section 1106 does not include evidence of sexual abuse that a plaintiff has been involuntary subjected to, and (2) under Evidence Code section 783, the probative value of the subsequent sexual abuse was not outweighed by the danger of undue prejudice. The Court of Appeal disagreed with the trial court as to Evidence Code section 1106, concluding that the term "plaintiff's sexual conduct" includes both voluntary and involuntary sexual conduct, and evidence of a plaintiff's sexual conduct—voluntary or involuntary—may not be admitted under section 1106 under any circumstances. Although the trial court also erred in concluding that Evidence Code section 783 was inapplicable to involuntary sexual conduct, and while the question was a close call, the Court of Appeal concluded the trial court did not abuse its discretion in performing the Evidence Code section 352 analysis and admitting a subsequent 2013 molestation for purposes of impeachment. The trial court was instructed to either assess any prejudice flowing from the empaneled jury's exposure to the mentioning of the 2013 incident during opening statements, or begin the trial with a new jury. (C.A. 2nd, October 29, 2021.)

Monty A. McIntyre is the publisher of California Case Summaries™ (https://cacasesummaries.com/) where he offers monthly, quarterly and annual civil case summaries. California Case Summaries: Monthly™ has short summaries, organized by legal topic, of every new civil and family law decision published each month for $50 per month per person. California Case Summaries: Quarterly™ has succinct summaries of every new civil and family law decision published each quarter, with the official case citations, for $200 per person per quarter. California Case Summaries: Annual™ has short summaries of every new civil and family law decision published each year, with the official case citations, for $900 per person per year. Monty A. McIntyre, Esq. is also Mediator, Arbitrator & Referee at ADR Services, Inc.

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