the abtl REPORT

A Guide Through the Trust and Estate Litigation Minefield For Business Trial Lawyers

(Part I)

By Mark Mazzarella

At some point, every lawyer will get a call from someone with a problem involving a trust, a will, or the administration of a trust or probate. The caller probably will be a friend or client who doesn't know who else to call. You may just refer the client to someone whom you know specializes in trust and estate litigation. But if you decide to meet with the client and hear their story you probably will find that the issues don't seem much different than those raised in a lot of business or real estate cases you have handled—capacity, undue influence, fraud, the need for an accounting, breach of fiduciary duty.

The skills required to try trust and estate cases are no different than those required for general civil litigation. The discovery tools are the same. The same rules of evidence apply. The required witness preparation and examination skills are no different. However, many issues arise in trust and estate litigation which are unique to such litigation.

The purpose of this article, and Part II in the next issue of the ABTL-SD Report, is not to provide a primer on Trust and Estate Litigation. In this article, I will discuss a few of the most significant issues that distinguish trust and estate litigation from most civil litigation. In Part II, I will present the "Top Ten Tips about Trust and Estate Litigation for Business Trial Lawyers" offered by San Diego's top Trust and Estate Litigators.

Who is Your Client?

That is the first question you need to ask. Is your client the individual, or the individual as trustee of the trust, or both? Are you representing more than one beneficiary? These are common issues in trust litigation. This matters for a number of reasons, not the least of which is, who pays the bills? If a trustee is sued for personal wrongdoing, the trust is not responsible for paying for the defense. But if the trustee is defending the trust, and not the trustee's own actions, the trust is responsible. The problem is, you may not know whether the trustee is liable in the trustee's individual capacity until the final bell. If you allow the trustee to pay you out of the trust, you may do so at your own peril. If in doubt, I recommend you file a petition for instructions, asking the court for permission to have your fees paid from the trust.

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PRESIDENT'S LETTER:

Welcome to 2022

By Hon. Lorna Alksne

Welcome to 2022—the year when we hope to catch up with all of the cases that have been postponed for the last two years! (Is it really possible the pandemic has been around for two years?) As I begin my term as President of the San Diego Chapter of ABTL, I am mindful of the huge burden the pandemic has put on all industries, including the legal community. But rather than focusing on the difficulties we face with a backlog of cases and trials, I want to focus on the positive accomplishments of ABTL during the pandemic and remind everyone how being a member of this organization can help your practice.

In my view, there are three main benefits of being a member of ABTL: excellent programs, extensive networking, and community outreach opportunities. Here are just a few of example of our programs and networking last year. Multiple Nuts and Bolts, Specialty, and Judicial Brown Bag virtual MCLE's, during which civility, lawyering during COVID and legal writing were just some of the topics covered. The annual Judicial Mixer at which over 50 judges attended an outside event at the U.S. District Court, exclusively for socializing and networking purposes. Many of us traveled to Kona on the Big Island of Hawaii for the ABTL Annual Seminar, which not only provided informative panel presentations but also allowed lawyers and judges from all over California to discuss strategies for dealing with video court appearances, video depositions, trial advocacy, and easing the backlog of civil trials. Finally, in December we had an in-person dinner event at which former Deputy U.S. Special Counsel Andrew Weissmann discussed the role of the Special Counsel in our constitutional system, and offered some proscriptions for how to improve such offices and their activities.

As far as opportunities to volunteer in the San Diego legal community, ABTL held a fundraiser for our local law schools, and then sponsored and organized our annual local law school Mock Trial Competition at the Federal Courthouse. A total of six teams from our three local law schools participated, and based on the feedback we received, the event was a great success for both the law school students and the members of ABTL who volunteered their time to set up, score, and preside over the Mock Trials.

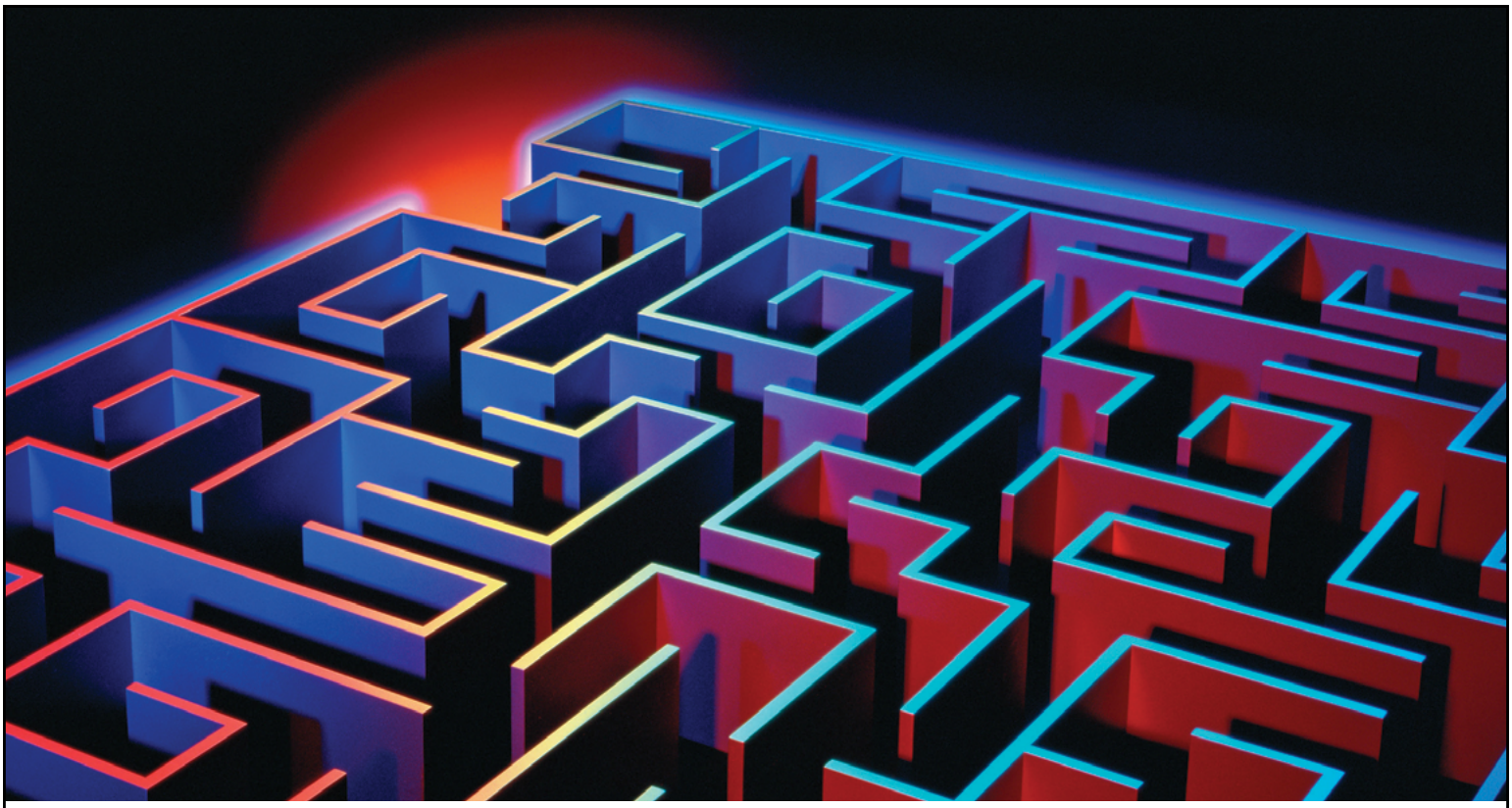
This year we will continue to provide you with excellent programming. Since the first of the year we have had a virtual dinner program on Cybersecurity, and a virtual lunchtime program on Cryptocurrency. In light of the relaxed guidelines for indoor gatherings, we are now planning for an in-person dinner meeting in June and the Judicial Mixer in July. And we plan to once again host the Mock Trial Competition in November 2022, which will provide numerous opportunities for ABTL members to teach and learn from the newest members of our legal community.

In sum, there is plenty to look forward to in 2022, and lots of reason to be upbeat about ABTL's prospects. Our membership numbers continue to grow, as does our ability to have a positive impact on the legal community. Please encourage your colleagues to consider joining ABTL and enjoy the times we can be together in person, whether at a meeting, a deposition, a hearing, or even a trial!

Wishing you all a happy and healthy 2022,

Hon. Lorna Alksne

Hon. Lorna Alksne, President ABTL San Diego Chapter
Judge of the Superior Court



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Whether you are communicating with a trustee in the trustee's individual or representative capacity can also impact the attorney/client privilege. For example, in a trust contest, communications by the lawyer with the trustee for purposes of the administration of the trust generally will be privileged after the decedent's death. However, communications with the trustee in other respects, for example with regard to the trustee's interests as a beneficiary, generally will not be privileged.

An especially tricky situation arises whenever you represent a trustee who is also a beneficiary in a case in which there is a dispute among the beneficiaries. Your client, as trustee, owes a fiduciary duty to all the beneficiaries. But your client as an individual also has individual rights. While it is possible for the lawyer to get through the mine field presented by representing a person individually and as trustee unscathed, that is not easy. Conflict waivers can get you only so far. If there is another beneficiary who has a similar interest in the trust as your client, it is best to get that beneficiary to carry the flag for the beneficiaries with separate counsel, while you represent just the individual as trustee.

You also may be asked to represent more than one person, such as multiple beneficiaries. You need to carefully evaluate whether their interests are fully aligned. You also need to keep in mind that when two or more clients are jointly represented, confidential information is shared. Early on in a case, it may be difficult to assess family dynamics. Loyalties can change.

Is Competence an Issue?

I'm not just referring to a testator's or settlor's competence. I'm referring to yours, and maybe even your client's.

Because of the many procedural rules which govern trust and estate litigation, and because most trust and estate litigation spill over into trust and estate administration, most of us trial lawyers who take on trust or estate litigation should associate another lawyer who has experience with the administration of trusts and estates. This is one area of practice where it is almost always best to have two lawyers. Few of us trial lawyers have the expertise in trust and estate administration to go it alone without running afoul of Rule 1.1 of the Rules of Professional Conduct. The same can be said of most probate lawyers, whose trial skills may be lacking.

Most of us never have reason to consider whether our client is mentally competent to (a) enter into a fee agreement, (b) intelligently waive conflicts, (c) make informed decisions regarding filing suit, settling, etc. or (d) anything else that might come along during the case. But in trust and estate cases, you may find yourself representing a trustor, victim of elder abuse, beneficiary, or even a witness, with diminished capacity. After all, you will be dealing with old people a lot of the time.

A recent State Bar of California Opinion, Formal Opinion No. 2021-207, discusses "a lawyer's ethical obligations to a client with diminished mental capacity." It identifies issues such as the client's ability to consent to conflicts or the disclosure of confidential information, the lawyer's authority to take protective action on the client's behalf, and even the lawyer's duty to make judgments regarding the client's capacity. If you believe your client may have diminished capacity, I recommend you start your analysis of what to do with a careful reading of this Opinion.

But before you get there, you need to ask: "Is my client competent?" Definitions of "competence" or "capacity" vary upon the issue involved. The capacity needed to execute an enforceable will is less than that needed to execute a complex trust, which may be less than that needed to execute other contracts, including your legal services agreement, especially if it contains waivers of conflict. You will find some guidance in Probate Code Sections 810-813, with Section 812 being the most helpful.

It may seem logical that a lawyer faced with a question of his client's competence should be able to have the client evaluated by a neurologist, or even ask the court if a conservator should be appointed on the client's behalf, without concern of running afoul of the Rules of Professional Conduct. But disclosure of the client's confidential medical information will require informed consent. If your client is not competent, he cannot give informed consent. This problem was recognized in Opinion No. 2021-207: "When the lawyer reasonably believes that the client's diminished capacity exposes the client to harm, the lawyer may seek the client's informed consent to take protective measures. If the client cannot or does not give informed consent, the lawyer may be unable to protect the client against harm." At this point, the lawyer has several unappealing options. Consulting with a specialist in legal ethics or the State Bar of California's Ethics Hotline (800-238-4427 or 415-538-2150) is advisable.

What Are the Applicable Statutes of Limitation?

As civil trial lawyers, we generally think of statutes of limitation in terms of years. But the public policy in favor of the prompt resolution of decedents' affairs has led to time bars in trust and estate litigation which may come as a surprise to general civil trial lawyers.

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The statute of limitations to bring a claim against a decedent is one year from his death. California Code of Civil Procedure section 366.2. There are some exceptions. For example, Section 366.2 does not apply to a claim to title to property, since CCP Section 366.2 only applies to the liability of a person. Probate Code section 9000 defines "claim" for purposes of creditor's claims and excludes any dispute over a decedent's title to real property.

It does not matter if the creditor was unaware of the decedent's death. If a creditor's claims are not filed within a year of the decedent's death, they are barred. The courts recognize that this may be unfair in some circumstances. But they have held the public policy favoring prompt resolution of the decedent's affairs outweighs the potential that some valid claims may be lost. It also doesn't matter if no one has opened probate; in that case, the creditor must open the probate to raise her claims. If a claim is rejected by the executor or administrator, the creditor generally has ninety (90) days to file a lawsuit against the personal representative seeking a judgment for the rejected claim. However, the suit still must be filed within one (1) year of the decedent's death, which could reduce that ninety (90) days considerably.

Trust contests must be filed even faster. Within sixty (60) days from the decedent's death the trustee must mail a notice to all trust beneficiaries and heirs at law advising them, among other things: (1) that the trust has become irrevocable by virtue of the death of the settlor; (2) that they are entitled to a copy of the trust upon reasonable request; and (3) that no action to contest the trust can be brought after 120 days from the date of the trustee's notification or sixty (60) days following the date the trust is delivered to the beneficiary/heir, whichever is later. Once 120 days have passed, all trust contests are barred.

Beware of clients who have waited a while before seeking counsel. In your first contact with the client, ask when the decedent died and when the trustee's notice was sent. From the get-go you may be running up against a deadline.

Is the Client Aware of the Risks Presented by a "No Contest" Clause?

The vast majority of trusts and wills contain no-contest clauses. Their purpose is to put at risk the inheritance of anyone who challenges the trust or will. While recent appellate decisions have made it more difficult to effectively assert a "no contest" clause, it is critical that any client who is considering challenging a will or trust with a "no contest" clause is informed—in writing preferably—of the potential impact of the clause.

Get Your Ducks in Order Early

Most of the pleadings we trial lawyers file are not verified. Generally, factual errors in unverified pleadings are either overlooked altogether or corrected in subsequent amendments to the pleadings without impacting the case. But virtually all the pleadings filed in the Probate Court are verified. This means you need to get your facts right the first time or expose your client to unnecessary and damaging cross-examination.

In view of the short statutes of limitation applicable to trust and estate litigation, you may have relatively little time to gather and verify your facts. If you cannot verify your allegations, don't make them. Allege only the facts that you are certain are correct and supportable and file an amended pleading to add additional facts once you have been able to do a proper investigation.

Get Familiar With the Probate Court's Policies and Procedures

Trust and estate litigation is filed in the Probate Department of the Superior Court. The Probate Court also handles elder abuse matters that fall within the context of a Trust, Probate, or Conservatorship. The Probate Court has many policies, rules, and procedures which are unique to it. There are California Probate Rules (Rules 7.1-7.1101); Superior Court Probate Rules (e.g., Division IV of the San Diego County Superior Court Local Rules); and Policies and Procedures for each of the Probate Court Departments 502, 503 & 504.

In contrast to other Departments in the Superior Court, the Probate Court employs Probate Examiners who prepare summaries for the Probate Judges after reviewing the parties' Petitions. The Probate Examiner's notes will identify any deficiencies in the pending pleadings and are made available to the parties in advance of hearings. This practice gives the parties the opportunity to respond to pleading defects by drafting a supplement, amendment, or otherwise addressing any issues raised by the Probate Examiners.

Today, will and trust contests are tried to a judge, not a jury. When I first started trying will contests in the early 1980s, we tried the cases to juries. However, in 1990, the legislature passed Probate Code Section 8252, which states that "the court shall try . . . [will contests]. "Plaintiffs in elder abuse cases, however, are entitled to jury trials. But there is no constitutional right to a jury trial in will contests cases.

Because the Probate Court Departments must handle a steady stream of hearings and short cause matters, any trial longer than a day or two will be sent to one of the Civil Departments

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for trial. A one or two-day trial may be tried in the Probate Court in piecemeal fashion, one half-day at a time, often with considerable time between sessions.

Conclusion

The foregoing is by no means an exhaustive list of the issues common to trust and estate litigation that most civil trial lawyers do not encounter on a regular basis. But they are the issues that I believe present the most risk to typical civil trial lawyers who venture into this arena. Next quarter, in Part II of this article, I will provide the most valuable tips for trust and estate litigation that experienced attorneys have given me over the years.

Mark C. Mazzarella is Owner/Founder of Mazzarella & Mazzarella LLP. Over the past 42 years, he has tried over 90 cases from San Diego to Washington D.C., mostly before juries, but also before judges and arbitrators

The Art & Neuroscience of Remote Oral Advocacy

by Rupa G. Singh

Neuroplasticity is a field within neuroscience focused the brain's ability to change in response to experience. Research shows that our thoughts can force our brains to alter their structure and function, and even generate new neurons to adapt, heal, and renew after disability or trauma. If this pandemic was the disability that crippled our world, and its aftermath is the collective trauma we endure, here are ten takeaways to force our brains to adapt.

First, force your brain to embrace this era of video arguments. Learn your court's tech platform. Do not miss a practice session. At a Blue Jeans practice session preceding argument in the First Appellate District two years after my first virtual argument, I learned that you can check how you look to the court even when your video is off, which allows you to optimize your camera angle before your case is called. No matter how many times you use a platform, keep looking for ways to improve the experience.

Second, use recorded arguments as another data point about your judge's courtroom management. When I appeared remotely for post-trial motions in Alameda Superior Court, I learned from recorded hearings that the judge found interruptions of any kind personally insulting. So, I waited five seconds after the judge spoke before answering a question. While we didn't prevail, I did make a killer record for the appeal I am now handling.

Third, do not be seduced by the seeming informality of remote hearings. Behave as if you are appearing in a majestic courtroom despite all evidence to the contrary. Dress well. Mute your phone. Use a plain background, or, as in my case, let your pre-tween children introduce you to the world of virtual or out-of-focus blurred backgrounds.

Fourth, stand if you can, even if at a makeshift podium. Or, if you worry about anxiously pacing back and forth while actually standing, at least angle your camera so it is impossible to know if you're standing or sitting. Going the extra mile to show respect for the court never goes out of style.

Fifth, try to make eye contact with your camera once in a while by not looking at your own or the other faces on your screen. It will help you read body language, such as when a judge needs you to pause to ask a question or signals with a facial expression that you should move to a more persuasive argument.

Sixth, speak slower and enunciate more. It will make up for lag time or a bad connection. The judge and the court reporter will hear you better, and your appellate counsel plus the Court of Appeal will thank you for a clean transcript.

Seventh, consider having in mind transition sentences to recover from predictable disruptions. If your video won't turn on, tell the court you can see the judges and will pause if you see that the court has questions. If you accidentally put yourself on mute, ask when you unmute what the last thing the court heard. If the judge starts talking while on mute, when he or she unmutes, repeat the question and ask if you understood it, thereby also giving you a few extra minutes to think of the best response.

Eighth, get right to the heart of an issue. Judges seem more backlogged and stretched for time due to court closures. One suggestion is to summarize what you believe the court might be skeptical of already and then make your strongest argument for ruling in your favor.

Ninth, have prepared remarks but resist the urge to read your argument. Unless you need to quote something, deliver your bullet points in a conversational tone. If the court is reticent in asking questions, use the rhetorical device of asking a question as a transition between points and to create an imaginary conversation.

Tenth, and finally, leverage the benefits of technology. Quickly look up a new case in Westlaw or Google that opposing counsel cites for the first time. Use screenshare to show a PowerPoint or few key exhibits instead of having to drag the equipment during a busy law and motion calendar. Surround yourself with as many post-it notes, devices, monitors, and screens as you need to have the answers to the court's questions at your fingers.

Adapting to drastic change is difficult. Let's use our gratitude for the freedom and flexibility that virtual arguments offer to force our brains to appreciate oral advocacy for the opportunity it presents. Let's grow the neurons that will help us be even more patient with glitches, even more civil to opposing counsel, and even more compassionate towards resource-strapped judicial officers and staff. And finally, let's use virtual technology and neuroscience to elevate the art of advocacy.

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Ripple Effect: How the SEC is Trying to Regulate Cryptocurrencies, DeFi, and NFTs

By Oliver tum Suden, Associate, Johnson Fistel, LLP, Georgia
Review and revisions by Frank Johnson, Managing Partner, Johnson Fistel, LLP, San Diego

Based on the number of Superbowl ads touting cryptocurrencies, one might mistakenly believe that the investing public generally understands crypto. The truth, of course, is that many people are still trying to understand how various cryptocurrencies work and their distinguishing characteristics. To add another layer of confusion, governments and regulators openly debate whether and how current laws and regulatory structures are equipped to address the legal issues that have arisen in this space. The U.S. Securities and Exchange Commission ("SEC") has pressed its case for bringing the industry under its oversight, with SEC Chairman Gary Gensler stating his belief that "very many [cryptocurrencies] are" securities and therefore cryptocurrency exchanges should register with the SEC as securities trading platforms. Thus far there has been a focus on the ***Howey*** Test to define securities—named after the seminal Supreme Court case defining an "investment contract," ***SEC v. W.J. Howey Co.***, 328 U.S. 293 (1946)—but the SEC may also rely on other definitions of securities under the 1933 Securities Act to bring cryptocurrencies under its ambit.

The SEC's position on cryptocurrencies is being played out in active litigation, with the results far from certain. As one example, the SEC is currently suing Ripple, the company behind the XRP cryptocurrency, alleging that Ripple was conducting an unending initial coin offering ("ICO") and flouting the ***Howey*** Test. The SEC argues that XRP is a security that should have been registered with the SEC and that Ripple's insiders (who also held a significant percentage of XRP) created an information vacuum with total unilateral control about what information should be disclosed about Ripple and XRP. Unlike Bitcoin and Etherium, which the SEC has not deemed to be securities, XRP allegedly exists wholly as a speculative asset, not a currency, and was marketed and sold as such. Ripple responded to these allegations by claiming that "XRP is a fully functional ecosystem and real use case as a bridge currency that does not rely on Ripple's efforts for its functionality or price." It is interesting to note that the SEC's action against Ripple was done in the waning days of now former Chairman Jay Clayton's tenure, with Ripple's CEO stating "Clayton did this with one foot out the door. Rather shamefully, he has decided to sue Ripple, and leave the legal work to the next chair." Empower Oversight Whistleblowers & Research, a nonpartisan organization dedicated to government oversight, has recently accused the SEC of bias against Ripple, helping shape investor opinions to believe that the Company will prevail against the SEC. Regardless of the outcome in this particular case, there is certain to be a ripple effect of ensuing cases challenging how cryptocurrencies fall under SEC regulation, if at all.

The SEC is also facing significant pushback on other fronts. Stemming from the creation of decentralized cryptocurrencies or decentralized finance ("DeFi"), buyers, sellers, lenders, and borrowers can now interact peer-to–peer, or with strictly software-based middlemen. They have avoided the need to utilize a company or financial institution to facilitate the transaction. In other words, they have the ability to mint digital assets and transact business without involving regulated intermediaries because the existing framework of regulations does not appear to address these types of assets or transactions. The SEC has taken the position that individuals who mint non-fungible tokens, or NFTs, are doing the same thing as issuing securities. Recently, Terraform Labs ("TFL") -- a DeFi company led by a South Korean national residing in Singapore -- was served with an SEC complaint alleging that it had issued and sold unregistered securities. Despite significant jurisdictional issues at play, these recent events provide a glimpse at how the SEC intends to regulate DeFi. However, many argue that the SEC has not adequately explained how creating software enabling others to mint NFTs is the same as selling and issuing securities.

The outcomes for Ripple and TFL are unknown at this time, but the SEC has taken aggressive steps to declare that cryptocurrencies and DeFi companies are actually issuing securities subject to regulation under the federal securities laws. On one hand, the SEC could prevail and bring cryptocurrencies and DeFi under its regulation – causing enforcement problems due to decentralization. On the other hand, the SEC's gambit could implode, leaving this new asset class largely unregulated. Either way, many argue that the existing regulatory structure does not sufficiently address how, or even if, this new asset class should be regulated.

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ENDNOTES

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[9] See *id.*

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A Wrongful Denial of the Duty to Defend Can Have Surprising Value

by Gary Osborne and Dominic Nesbitt, partners at Osborne & Nesbitt LLP

It can be frustrating when a liability insurer refuses to defend your client in expensive litigation. However, according to an old adage, "What seems like a curse may be a blessing."

As discussed below, in several respects, a policyholder may actually be put in a better position as a result of a wrongful denial than if its insurer had agreed to defend in the first instance.

1. CONTROL

The duty to defend gives the insurer absolute right to control its insured's defense. *See Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G.,* 3 Cal. 3d 434, 449 (1970).

However, when an insurer breaches its duty to defend, it loses the right to control or manage its insured's defense. *Eigner v. Worthington,* 57 Cal.App.4th 188, 196 (1997) ("When an insurer wrongfully refuses to defend, the insured is relieved of his or her obligation to allow the insurer to manage the litigation and may proceed in whatever manner is deemed appropriate."). Thus, the policyholder whose insurer has breached its duty to defend has the right to control its own defense. It can select and hire its own defense counsel and experts, and can direct such counsel to litigate the action in a way that is designed to maximize the policyholder's interests.

2. RATES

A defending insurer can often control the hourly rates it pays to defend its insured by either (1) employing its own "panel" counsel, or (2) invoking the rate limitation provision in the *Cumis* statute. *See* Cal. Civ. Code §2860(c).

However, when an insurer breaches its duty to defend, "the proper measure of damages is the reasonable attorneys' fees and costs incurred by the insured in defense of the claim." *Marie Y. v. General Star Indem. Co.,* 110 Cal.App. 4th 928, 960-961 (2003); *see also* Hon. H. Walter Croskey, *et al.*, CALIFORNIA PRACTICE GUIDE: INSURANCE LITIGATION § 7:690, *et seq.* (The Rutter Group 2021).

Thus, the policyholder whose insurer has breached its duty to defend can not only choose its own defense counsel, but can also seek reimbursement of its defense counsel's reasonable fees and costs *at full rates.*

3. ALLOCATION IN A "MIXED ACTION"

In a "mixed action," involving both covered and non-covered claims, a defending insurer must defend the entire action. *Buss v. Superior Court,* 16 Cal. 4th 35, 49 (1997). Then, at the end of the case, a defending insurer that has reserved its right to do so can seek reimbursement from its insured for the costs of defending claims not even potentially covered by its policy. *Id.* at 50-51, 61, fn. 27.

However, a breaching insurer loses any right it might otherwise have had to allocate between the cost of defending covered and non-covered claims. *See, e.g.,* Hon. H. Walter Croskey, *et al.,* CALIFORNIA PRACTICE GUIDE: INSURANCE LITIGATION § 7:691.15 (The Rutter Group 2021) ("The insured may recover its defense costs, including attorney fees allocable to the defense of noncovered claims . . . unless the insurer can prove such fees were unreasonable or unnecessary.").

4. INDEMNITY FOR NON-COVERED SETTLEMENTS/JUDGMENTS

A defending insurer is only liable for amounts paid in settlement, or pursuant to a judgment entered against its insured, that are actually covered by its policy. The burden rests on the insured to prove what amounts fall within the scope of the basic coverage provided by its policy. *See Aydin Corp. v. First State Ins. Co.,* 18 Cal.4th 1183, 1188 (1998) ("The burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage.").

However, when an insurer breaches its duty to defend, the burden shifts to the insurer to prove what amount was paid to resolve non-covered claims. *See Gray v. Zurich Ins. Co.,* 65 Cal. 2d 263, 280 (1966) (holding that the insured will not be charged with the "impossible burden" of proving the extent of its loss caused by the insurer's breach where uncertain whether the judgment against the insured is rendered on a theory within the policy coverage). Once the insured has satisfied its initial burden of proving that at least a portion of the settlement or judgment involved compensation for damages attributable to a covered claim, the burden then shifts to the insurer to show what portion of the settlement or judgment is attributable to non-covered claims. If the insurer cannot satisfy this burden, then it must reimburse the entirety of the settlement or judgment. *See, e.g., Zurich v. Killer Music,* Inc., 998 F.2d 674, 679-

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680 (9th Cir. 1993) (stating that upon remand, "Zurich will have the opportunity to demonstrate that some portion, if not all, of the settlement amount is allocable" to non-covered matters); *see also Peterson Tractor Co. v. Travelers,* 2006 U.S. Dist. LEXIS 20050, *2 (N.D. Cal. Apr. 5, 2006) ("If [the breaching insurer] fails to provide evidence that demonstrates which portion of the settlement is attributable to covered claims, then the entire settlement is deemed to involve compensation for claims that were covered by the insurance policy.").

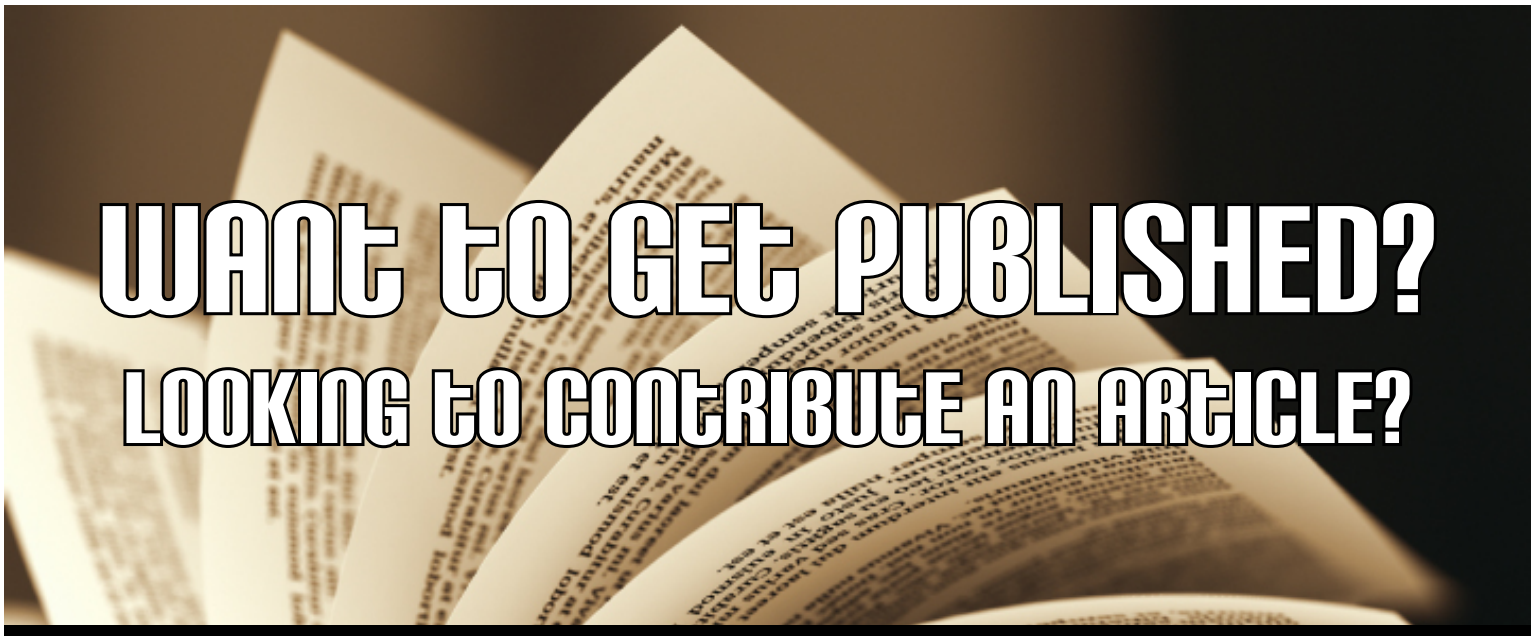
Depending on the circumstances of the case and the policyholder-defendant, these "benefits" of a wrongful denial can prove to be extremely valuable. So much so, in fact, that we have seen some policyholders identify a denial as wrongful at the front end of litigation, and then make the judgment call to refrain from challenging the denial until conclusion of the underlying lawsuit.

CONCLUSION

Thus, what seems like a curse *(i.e.,* a wrongful denial of the duty to defend) may be a blessing *(i.e.,* the benefits described above). To realize such benefits, however, a policyholder must first determine whether the insurer's denial was *wrongful.* For this reason, at the conclusion of expensive litigation, it is always worth taking a fresh look at whether the insurer's denial of a duty to defend was correct or incorrect. (Note: Many policyholder coverage lawyers will make such an assessment *at no cost* to determine whether they would be willing to pursue the insured's claim on a contingency fee basis.)

So the next time you conclude an expensive piece of litigation, ask this question: "Was the insurer's denial of a duty to defend incorrect?" If the answer to this question is "yes," then that denial could be transformed into a valuable business asset.

Gary Osborne (left) and Dominic Nesbitt (below) are partners at Osborne & Nesbitt LLP. Their practice is devoted exclusively to insurance coverage analysis and litigation on behalf of commercial policyholders, and their particular specialty is identifying and challenging wrongful denials of the duty to defend.



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California Case Summaries: Monthly™

MARCH 2022

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

CALIFORNIA COURTS OF APPEAL

Arbitration

Eminence Healthcare, Inc. v. Centuri Health Ventures, LLC (2022) _ Cal.App.5th _ , 2022 WL 321011: The Court of Appeal affirmed the trial court's order partially denying defendant's motion to compel arbitration. The parties agreed to arbitrate "any dispute, controversy or claim arising out of or relating to" their agreement, "[e]xcept for claims seeking injunctive or other equitable relief." The trial court properly concluded that plaintiff's causes of action seeking equitable relief were not subject to arbitration, determined that the resolution of the nonarbitrable equitable claims could make the arbitration unnecessary in accordance with Code of Civil Procedure section 1281.2(d), and delayed the arbitration of the other causes of action until after the equitable claims were resolved in the trial court. (C.A. 5th, February 3, 2022.)

Attorney Fees

San Luis Obispo Local etc. v. Central Coast Development etc. (2022) _ Cal.App.5th _ , 2022 WL 324988: The Court of Appeal reversed the trial court's orders awarding attorney fees of $172,850 to plaintiff/cross-defendant City of Pismo Beach (City) and attorney fees of $428,864 to plaintiff/cross-defendant Central Coast Development Company (Central Coast) after the trial court granted their motion for judgment on the pleadings regarding the cross-complaint filed by defendant/cross-complainant San Luis Obispo Local Agency Formation Commission (LAFCO) seeking its attorney fees under an indemnity agreement that LAFCO required City and Central Coast to sign when they applied to LAFCO to annex real property into the City. In an earlier appeal *(San Luis Obispo Local Agency Formation Com. v. City of Pismo Beach* (2021) 61 Cal. App.5th 595), the Court of Appeal determined that the indemnity agreement was not supported by consideration and that LAFCO had no statutory

authority to impose an indemnity agreement as a condition of LAFCO's statutory duty to consider Central Coast's application. In this appeal, the Court of Appeal concluded that a contract by a public agency that exceeds its statutory powers is void and will not support an award of attorney fees pursuant to Civil Code section 1717(a). (C.A.2nd, February 3, 2022.)

Civil Procedure

Ables v. A. Ghazale Brothers, Inc. (2022) _ Cal.App.5th _ , 2022 WL 326075: The Court of Appeal affirmed the trial court's order granting defendants' motion to dismiss the action for failure to bring the action to trial within five years as required by Code of Civil Procedure section 583.310. In November of 2019, plaintiff filed an ex parte application requesting the trial be continued for at least 6 months, and the trial court granted the request and continued the trial to March of 2021. The trial court properly granted defendants' motion because the March 2021 trial date fell five years and seven months after the action was

commenced, and was not timely under Emergency Rule 10(a) which provides that for civil actions filed before April 6, 2020, the time in which to bring the case to trial under Code of Civil Procedure section 583.310 was extended by six months for a total of five years and six months. (C.A.5th, filed January 12, 2022, published February 3, 2022.)

Employment

LaFace v. Ralphs Grocery Co. (2022) _ Cal.App.5th _ , 2022 WL 498847: The Court of Appeal affirmed the trial court's judgment for defendant, following a bench trial, in plaintiff's action under the Private Attorneys General Act (PAGA; Labor Code, section 2698, et seq.). The trial court properly concluded that the PAGA action was equitable and plaintiff was not entitled to a jury trial, and that defendant was not required to provide seating for its cashiers. (C.A.2nd, February 18, 2022.)

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CA CASE SUMMARIES | *Continued from page 16*

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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