ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

NORTHERN CALIFORNIA

Volume 17 No. 1

FALL 2007

Business Litigation in the San Francisco Superior Court System

Located in one of the major commercial centers in California, the San Francisco Superior Court has a relatively high volume of business litigation on a per capita basis. The San Francisco Superior Court has addressed the needs of the business litigation community by implementing specific court systems. In this article, I describe the history and function of two of the major aspects of the San Francisco Superior Court that help deal with the caseload of business litigation: the recently expanded complex litigation departments, and the system for obtaining a single-assignment judge.

Hon. David L. Ballati

Complex Litigation

In March of 1996, then-Chief Justice Lucas appointed the Judicial Council Business Court Study Task Force to consider the merits of adopting some form of specialized court tribunal for business and commercial disputes. The Task Force conducted extensive study and analysis and recommended against implementation of a specialized court for business cases. Instead, the Task Force recommended that the Judicial Council consider and evaluate the use of complex litigation departments in

Continued on page 6

Also in this Issue

Krystal Bowen	Keeping Corporate Secrets: Whose Information Is It Anyway?	p. 3
Michael W. Sobol	*On* CLASS ACTIONS	p. 7
Howard M. Ullman	*On* ANTITRUST	p. 9
James Yoon	*On* PATENTS	p. 11
Ben Riley	Letter from the President	p. 12

Playing the § 3295 Card in Fraud Cases

Many experienced business litigators think of their sport as a leveraged negotiation. Client imperatives in business mandate a constant re-evaluation of every case through the prism of the cost and risk of proceeding through trial. Settlement value, while not empirically determined, is real enough to the litigants and therefore the litigators. Accordingly, counsel's stock in trade is to continually hone existing weapons, and to develop new ones which can be used to enhance leverage over their opponent. A motion pursuant to California Civil Code § 3295 for discovery of financial information belongs in the tool box of any counsel representing business plaintiffs.

Rich Vasquez

For both sides, but more commonly defendants, motions for summary judgment or summary adjudication provide the clearest way to raise risks to the other side. Whether or not such a motion has a high likelihood of allowing a pretrial exit for a party, it can be partially justified by the leverage it creates in settlement negotiations. However, such motions increase fees for clients and, particularly when brought in California state court, suffer from a number of shortcomings. Motions for summary judgment or summary adjudication now require a minimum of 75 days' notice. Cal. Code Civ. Proc. § 437c(a). The opposing party can often easily avoid summary judgment by identifying just a single triable issue of fact. *Id.* § 437c(c). And a party can always ask the judge for additional time in which to conduct discovery. *Id.* § 437c(h). Besides these procedural disadvantages, it is well understood by practitioners that California state court judges are typically more reluctant than their federal counterparts to grant motions for summary judgment.

Continued on page 2

Continued from page 1

Playing the § 3295 Card in Fraud Cases

There are a number of other tactics available to litigators, short of a motion for summary judgment, which can help increase leverage over one's opponent. A preliminary injunction motion, for example, forces an early evaluation by a neutral judge, who must determine the likelihood of success on the merits. Such a determination, independent of the remedy achieved, can be the death knell of a defendant's case, or at least force the commencement of serious settlement talks. A *Daubert* motion can gut the plaintiff's case if successful, by obtaining a ruling barring expert testimony which makes it practically impossible to establish liability, causation, or damages.

From the plaintiff's side, a seldom-used, but potentially devastating, tactic to increase leverage over a defendant in cases involving potential punitive damages is a motion establishing the right to pretrial discovery of financial information pursuant to California Civil Code § 3295 ("Section 3295"). Such a motion is technically a discovery motion, but like a motion for a preliminary injunction, it requires the Court to evaluate the merits of the plaintiff's case. Although the remedy is no more than an order establishing the right to take financial discovery, a finding in favor of the plaintiff on a Section 3295 motion more or less ensures that the issue of punitive damages will go to the jury. Therefore, the motion can be a potent weapon to bring a corporate defendant to the settlement table.

Steve Steinberg

California Civil Code § 3295

Section 3295, entitled "Protection of evidence of financial condition," provides as follows:

> (a) The court may, for good cause, grant any defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for damages pursuant to Section 3294 [providing for exemplary/punitive damages in cases of oppression, fraud, and/or malice], prior to the introduction of evidence of:
>
> (1) The profits the defendant has gained by virtue of the wrongful course of conduct of the nature and type shown by the evidence.
>
> (2) The financial condition of the defendant.
>
> . . .
>
> (c) No pretrial discovery by the plaintiff shall be permitted with respect to the evidence referred to in paragraphs (1) and (2) of subdivision (a) unless the court enters an order permitting such discovery pursuant to this subdivision…. Upon motion by the plaintiff supported by appropriate affidavits…the court may at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294.

Generally speaking, Section 3295 provides for pretrial discovery of a defendant's financial condition or wrongfully gained profits where a plaintiff can show a substantial likelihood of prevailing on its claim for punitive damages.

Note that such a motion does not suffer from the same deficiencies as a motion for summary judgment, cited above. As a discovery motion, a Section 3295 motion can be brought on just 16 court days' notice, and cannot be postponed by the defendant's asking for additional time in which to conduct discovery. Moreover, since the practical effect of granting such a motion is to simply permit certain discovery to take place, a judge can be expected to be much more willing to grant it without fearing a reversal on appeal, or that he/she has decided the case on the merits erroneously.

The Legal Standard Applied to a Section 3295 Motion

As cited above, Section 3295(c) requires a finding that there is a "substantial probability" that the plaintiff will prevail on its claim for punitive damages. In *Jabro v. Superior Court*, the California Court of Appeals interpreted this standard as follows:

> Before a court may enter an order permitting discovery of a defendant's financial condition, it must (1) *weigh the evidence* submitted in favor of and in opposition to motion for discovery, and (2) make a finding that it is *very likely the plaintiff will prevail* on his claim for punitive damages. In this context, we interpret the words "substantial probability" to mean "*very likely*" or "*a strong likelihood*" just as their plain meaning suggests. We note that the Legislature did not use the term "reasonable probability" or simply "probability," which would imply a lower threshold of "more likely than not."

95 Cal. App. 4th 754, 758 (2002) (emphasis added). The *Jabro* court's reliance on plain meaning is intuitive, but there is still room for enterprising plaintiffs to try to lower the showing required to a "prima facie" case, by arguing California Supreme Court precedent touching on the issue.

Though the *Jabro* court distinguished it, plaintiffs can argue for the application of *College Hospital, Inc. v. Superior Court*, 8 Cal. 4th 704 (1994). There, the California Supreme Court interpreted language in Code Civ. Proc. § 425.13 that is identical to the "substantial probability" language in Section 3295(c), to require only a *prima facie* showing, or evidence of a *triable claim* for punitive damages. *Id.* at 719-20. This interpretation of the language in Section 3295(c) would also be consistent with Section 3295(a), which explicitly requires only a *prima facie* case of liability for punitive damages in order to introduce evidence of a defendant's financial condition or wrongfully gained profits at trial. Plaintiff's practitioners can argue "why would a plaintiff have to meet a higher burden to conduct pretrial discovery into a defendant's financial condition and profits than to present such information to the jury at trial?" Such a result would be inconsistent with the general rule that discovery is permitted regarding not only evidence that might be admissible at trial, but also of any matter "reasonably calculated to lead to the

Continued next page

Continued from page 2

Playing the § 3295 Card in Fraud Cases

discovery of admissible evidence." Cal. Code Civ. Proc. § 2017.010.

Jabro explicitly distinguishes *College Hospital*, but Weil and Brown questions the rationale for doing so. Compare *Jabro*, 95 Cal. App. 4th at 758-59 with The Rutter Group, California Civil Procedure Before Trial, ¶ 8:339.7 (2007). Given the conflict of authorities, it is not surprising that we have personally seen multiple instances of courts applying one or the other standard when considering a Section 3295 motion. If confronted with clear evidence of fraud, a court has little incentive to disallow financial discovery, and the plaintiff can reasonably hope for a fair assessment of that evidence in a ruling on the motion for financial discovery.

Potential Rulings/Fallout from a Section 3295 Motion

Regardless of the standard applied to a motion pursuant to Section 3295, if such a motion is granted, it can have significant ramifications for a case. A ruling in favor of the plaintiff virtually guarantees that the issue of punitive damages will go to the jury at trial, thus raising the stakes considerably higher. The Court's ruling on the motion must necessarily make an explicit finding that the plaintiff has established a "substantial probability" that it will prevail on a fraud claim or other claim for punitive damages. Whether interpreted to mean "very likely" or "a strong likelihood," or merely a *prima facie* showing, such a ruling can pierce through a defense counsel's underselling of a case to its client, and is sure to have an impact in the corporate boardroom.

Beyond the basic finding on the plaintiff's claim for punitive damages, a Section 3295 motion invites the court to make certain evidentiary findings concerning the elements of the claim. For example, in *Accton Technology Corp. v. Micro Linear Corp.*, the court not only found that there was a substantial probability that Accton would prevail on its punitive damages claim, but made affirmative findings of Micro Linear's intentional misrepresentations. While such findings do not constitute a determination on the merits, and cannot be used at trial, they can reasonably be expected to have a powerful influence on a defendant's decision-makers.

Upon winning a motion pursuant to Section 3295, the plaintiff will be permitted to conduct certain discovery into the defendant's financial condition and/or wrongfully gained profits, which may include deposing the CFO. The nature and extent of the discovery allowable will depend upon the aggressiveness of the litigators involved and the discovery adjudicator, which may be a judge, commissioner, or referee. There are no reported cases on limits having been imposed on plaintiffs after a grant of a Section 3295 motion.

Depending on the case, the discovery itself may arguably not be as important as the ruling to get such discovery, since it comes with the finding of a substantial likeli-

Continued on page 6

Keeping Corporate Secrets: Whose Information Is It Anyway?

When faced with a grand jury subpoena for documents, a corporation has a number of choices to make about what information, if any, to produce and when to produce it. But what happens to those documents (and who has control of the information contained therein) once the corporation has turned them over in response to a government subpoena? Understanding what can happen to information produced to the government is critical to any company's assessment of how closely its secrets will be kept — if at all. Because many large-scale civil cases now begin their lives as a spin-off from criminal investigations (particularly in securities and antitrust), today's business litigators need to have a working understanding of how grand jury secrecy rules affect their cases.

Krystal Bowen

Grand Jury Secrecy

The requirement of grand jury secrecy is set forth in Rule 6(e) of the Federal Rules of Criminal Procedure, which provides that grand jurors, government attorneys (and those who work with them) and grand jury personnel "shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules." Fed. R. Crim. P. 6(e)(2). Grand jury witnesses themselves are exempt from this requirement (though upon a showing of "compelling necessity" some courts have imposed limited restrictions on disclosure by grand jury witnesses).

This traditional policy of nondisclosure seeks to: (1) prevent the escape of prospective indictees, (2) ensure the freedom of grand jury deliberations, (3) prevent subordination of perjury and tampering of witnesses, (4) encourage candor of witnesses, and (5) protect those ultimately exonerated from unwanted publicity. *See U.S. v. Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958).

By its terms, Rule 6(e) only prohibits disclosure of "matters occurring before the grand jury." Although Rule 6(e) does not define the term "matters occurring before the grand jury," in the exercise of their discretion, courts have interpreted this phrase broadly to include any items what would "reveal the nature, scope, or direction of the grand jury. *In re Grand Jury Proceedings*, 851 F.2d 860, 867 (6th Cir. 1988). This secrecy extends to "not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations

Continued on page 4

Continued from page 3

Keeping Corporate Secrets

or questions or jurors, and the like." *Church of Scientology International v. U.S. Dept. of Justice*, 30 F. 3d 224 (1st Cir. 1994). In other words, disclosure is prohibited if it would reveal "some secret aspect of the inner workings of the grand jury." *U.S. v. Dynavac*, 6 F. 3d 1407, 1413 (9th Cir. 1993).

Transcripts. Almost by definition, grand jury transcripts necessarily reveal "matters occurring before the grand jury." Courts, therefore, are particularly protective of this type of information. Nonetheless, while courts are typically reluctant to allow the release of grand jury transcripts, the production of such material is not always proscribed, and rests, in large part, on the availability of one or more of the exceptions to Rule 6(e). Indeed, recognition of the occasional need for litigants to have access to grand jury transcripts led to the provision in Fed. Rule Crim. Proc. 6(e)(2)(C)(i) that disclosure of grand jury transcripts may be made "when so directed by a court preliminarily to or in connection with a judicial proceeding." Private parties and state and federal government litigants seeking grand jury transcripts (as well as other grand jury material) under Rule 6(e) must show that the material is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed. *Douglas Oil Co. v. Petrol Stops N.W.*, 441 U.S. 211, 222 (1979).

Although on its face this exception to Rule 6(3) applies to both private and government litigants, in practice, private parties are rarely given access to grand jury transcripts. The Supreme Court has held that "[n]othing in *Douglas Oil* requires…a district court to pretend that there are no differences between governmental bodies and private parties." *U.S. v. Sells Eng'g, Inc.*, 463 U.S. 418, 445 (1983). In weighing the need for disclosure, courts have noted that release of grand jury transcripts to government litigants likely poses less risk of further disclosure or improper use than would release to private parties. *Id*. In light of these differences, therefore, private parties face a greater burden when attempting to show need required for disclosure. Given the importance of maintaining grand jury secrecy, this showing must be made even when the grand jury whose transcripts are sought has been terminated. Similarly, the Rule also prohibits disclosure not only of the identity of former witnesses, but also materials that would identify future witnesses.

Documents. Unlike testimony, documents that are produced pursuant to a grand jury subpoena usually have a life of their own, independent of the grand jury proceedings. In other words, such documents exist likely because they are independent business records, and not because they were sought by a grand jury. As a result, in many courts documents are typically released with less scrutiny than is attached to the release of grand jury testimony. Courts have several different approaches to dealing with the release of documents produced in response to a grand jury subpoena.

Courts employing the per se approach in favor of disclosure hold that documents are never "matters occurring before the grand jury" and can thus be disclosed. *See, e.g., U.S. v. Weinstein*, 511 F. 2d 622, 627 n.5 (2d Cir.), cert. denied, 422 U.S. 1042 (1975). Courts employing the opposite per se approach hold that documents are always "matters occurring before the grand jury" and are always protected from disclosure. *See, e.g., Texas v. United States Steel Corp.*, 546 F. 2d 626, 629 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977). The Sixth Circuit has adopted a rebuttable presumption approach which presumes that documents are "matters occurring before the grand jury," but permits the moving party to rebut that presumption by showing "that the information is public or was not obtained through coercive means or that would be otherwise available by civil discovery and would not reveal the nature, scope, or direction of the grand jury inquiry." *In re Grand Jury Proceedings*, 851 F. 2d 860, 867 (6th Cir. 1988). Many courts have adopted the "effects" test which determines whether disclosure of a particular requested item will reveal some secret aspect of the inner workings of the grand jury. *See, e.g., In re Grand Jury Matter (Catania)*, 682 F.2d 61, 63 (3d Cir. 1982). A corollary to this approach, adopted by the Ninth Circuit, concludes that "if a document is sought for its own sake rather than to learn what took place before the grand jury, and if its disclosure will not compromise the integrity of the grand jury process, Rule 6(e) does not prohibit its release." *Dynavac*, 6 F.3d at 1413. In other words, business records independently generated and sought for legitimate purposes, do not seriously compromise grand jury secrecy concerns. *Id*. at 1412.

Exceptions. Like any good rule, 6(e) is not without its exceptions. While, in theory, Rule 6(e) would appear to make the transfer of grand jury material to interested federal, state, and private parties difficult, if that material falls within one of the Rule's six exceptions, it can be disclosed (even if it reflects "matters occurring before the grand jury"). *See* Fed. R. Crim. P. 6(e)(3). For example, the Rule allows for disclosure to "an attorney for the government for use in the performance of such attorney's duty," and to "such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." The term "attorney for the government" includes the Attorney General, Assistant Attorney General, a U.S. Attorney (and authorized assistant), and other Justice Department lawyers. Federal administrative attorneys, including SEC attorneys, are not included in this definition. Likewise, the Rule permits disclosure by an attorney for the government to another federal grand jury, and upon the appropriate showing, to state or municipality officials for the purpose of enforcing state criminal law. The Supreme Court has held, however, that absent a strong showing of particularized need (and a court order), civil attorneys within the Department of Justice are not entitled to automatically disclose grand jury material for use in a civil

Continued next page

Continued from page 4

Keeping Corporate Secrets

suit. *See U.S. v. Sells Engineering, Inc.*, 463 U.S. 418, 443 (1983). Interestingly, however, because Rule 6(e) only prevents "disclosure" of grand jury material — as opposed to continued use of such material — if the same government attorney involved in the criminal investigation wishes to use that material in the civil phase of the same dispute, such continued use is permitted. *See U.S. v. John Doe, Inc.*, 481 U.S. 102 (1987).

The Saga of Selective Waiver

"Selective waiver" is the term given to the concept that would allow a corporation, despite voluntarily providing confidential and privileged information to government agencies, to protect that same information from disclosure to third parties in other, related litigation: *i.e.*, to waive privilege only as to certain entities. In light of the government's increased emphasis in recent years on a corporation's "cooperation" in government investigations, the protection of confidential corporate information from third parties has become an increasingly prominent issue in the world of civil procedure. What happens to the privileged information that corporations produce in response to a grand jury subpoena?

Privileges. The attorney-client privilege is the oldest privilege protecting confidential communications. *See United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950) (setting forth the elements required for application of the privilege). The purpose of the rule is to "encourage full and frank communication between attorneys and their clients." *Id.* at 358-359. The privilege — which applies only to communications, not facts — is available to both individuals and corporations. *Id.* at 390. Moreover, in *Upjohn Company v. United States*, 449 U.S. 383 (1981), the Supreme Court ruled that the privilege applied to communications between a corporation's attorneys and all levels of corporate employees.

The work-product doctrine, created in *Hickman v. Taylor*, 329 U.S. 495 (1947), and codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure and Rule 16(b)(2) of the Federal Rules of Criminal Procedure, protects from discovery materials prepared in anticipation of litigation (or in connection with the investigation or defense of a case) whether prepared by a lawyer, a party, or an agent of a party. Although the doctrine does not protect discovery of the underlying facts of a dispute, it does provide protection of an attorney's conclusions, opinions, mental impressions and legal theories. In addition to being available in both civil and criminal actions, work product protection is also available in grand jury proceedings.

Despite the existence of these deep-rooted protections, in the face of ever-increasing pressure from the government, many corporations have sought to evidence their cooperation to those agencies by turning over attorney-client privileged information or attorney work product (such as the results of internal investigations and other "confidential" documents and information). That decision to voluntarily produce documents (*i.e.*, to waive) can, and often does, have consequences that extend far beyond the confines of a government investigation. Although the courts remain divided on this issue, the prevailing view in most circuits is that disclosure of privileged information to a government agency as part of a government investigation or proceeding is a waiver of the privilege for all future cases or proceedings and with respect to all third parties. Indeed, with the exception of the Eighth Circuit, all Circuits to have addressed the issue have held that disclosure to the government is a complete waiver and that selective waiver is not viable.

In the summer of 2006, in an effort to quell the raging debate over the issue, the Supreme Court's Judicial Conference published for public comment proposed Federal Rule of Evidence 502, which would have codified a selective waiver doctrine: "[i]n a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client or work product protection — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities." The selective waiver provision of the proposed rule "proved to be very controversial" and response to it was "almost uniformly negative." *See* Report of the Advisory Committee on Evidence Rules, issued May 15, 2007. As a result, the selective waiver provision of the proposed rule was dropped. While it decided not to propose adoption of a selective waiver position, the Advisory Committee did prepare language for a statute on selective waiver should Congress want to proceed on the issue.

Where does all this leave a business organization contemplating production? Given the current state of the law, a prudent corporation must assume that if it produces privileged information pursuant to a grand jury subpoena, even with a confidentiality agreement in place with the government, any production of privileged documents and/or information will, at some point, wind up in the hands of third-party litigants looking to pursue independent action against the company.

Krystal Bowen is a partner in the San Francisco office of Bingham McCutchen LLP, and is on the ABTL Board of Governors. krystal.bowen@bingham.com.

January '08 ABTL Event

San Francisco Dinner Program:

"Tips from the Bench"

January 22nd

San Francisco Four Seasons Hotel

* * * *

Board Meeting: 5:30 p.m. • *Yerba Buena Room*

Networking/Cocktail Reception 6:00 p.m.

Dinner: 7:00 p.m. • *Veranda*

CLE Program 8:00 - 9:00 p.m.

Continued from page 3

Playing the § 3295 Card in Fraud Cases

hood of a plaintiff prevailing on punitive damages. Regardless of what discovery is obtained, in the vast majority of cases the ruling will effect a sea-change in attitudes, due to the following likely reactions or effects:

• Defense counsel must revise any evaluation other than a likelihood of the plaintiff recovering punitive damages;

• Summary judgment for the defense is no longer an option, and the defense must refocus its energies on limiting the amount of punitive damages;

• Public company defendants must consider whether an SEC Form 8K disclosure is necessary to either correct or add an item about the likelihood of punitive damages exposure;

• An otherwise quiet civil case may become pressworthy;

• Insurance coverage disputes may be colored by such a ruling, and company management must consider the substantial likelihood of an uninsured verdict and a recoupment action by the carrier under the *Buss* doctrine;

• The hurdles for the plaintiff to overcome certain stock pre-verdict defense motions, such as motions *in limine* and for a directed verdict, will be lower; and

• Any previous settlement demand from the plaintiff will undoubtedly be increased.

Conversely, the prospect of a *denial* of a Section 3295 motion creates little to no risk for the plaintiff. A denial has no impact on the merits of the case. It simply precludes certain pretrial discovery. It does not foreclose a plaintiff's fraud claim or other claim for punitive damages. It may force defendants to either show a significant portion of their defense or risk the adverse atmospherics of having the judge agree that the plaintiff's case has merit. And if there is a flaw in the plaintiff's proof, further discovery can try to remedy it.

Timing of a Section 3295 Motion

The only mandatory timing on a Section 3295 motion is the normal discovery motion timeline: 16 court days' notice. As a practical matter, the plaintiff needs to have a convincing case for punitive damages, so in the case of a fraud claim, discovery of the defendant's misrepresentations or omissions should be completed. Whether a deposition of the misrepresenting party is needed depends on the existence of corroborative proof. If there are emails or other written communications, plus foundational witnesses establishing the fraud, a decision will have to be made as to whether to let the defendant try to escape the written proof and corroborating evidence with self-serving testimony.

Most plaintiffs will want to make their move earlier rather than later, due to the mounting costs of litigation. Preempting a threatened motion for summary judgment makes sense, particularly since a well-organized presentation of the evidence and the plaintiff's strong belief in its case can be expected to color the judge's view of the case. On the other hand, the motion can be brought late in the discovery period (but in time to conduct the requested discovery), to drive home the point that the usual flurry of defense motions before trial and after the plaintiff rests its case will have little impact on the overall risk to the defendant.

Conclusion

Given the risks and rewards described above, plaintiffs with claims for punitive damages should always consider the value of bringing a Section 3295 motion. Besides the obvious benefit of a formal neutral evaluation of the case and the potential discovery than can be obtained, a successful motion can have a determinative, if not decisive effect, on the practical outcome of the case — which in business litigation is what clients are generally seeking.

Rich Vasquez is a principal in the firm of Morgan Miller & Blair, in Walnut Creek. Steve Steinberg is an associate at Morgan Miller & Blair, and a board member of the ABTL Leadership Development Committee.

Continued from page 1

Business Litigation in the S.F. Superior Court

the courts. The Judicial Council approved this recommendation and allocated funds to establish a pilot program in appropriate urban counties that would focus resources in a complex litigation department. The Administrative Office of the Courts (AOC) selected six Superior Courts to participate in the pilot program which began in January 2000. The participating courts are the Superior Courts of Alameda, Contra Costa, Los Angeles, Orange, San Francisco, and Santa Clara Counties.

In January 2000, the Superior Court of California, County of San Francisco established a complex civil litigation department on a pilot basis. The original pilot program required the San Francisco Superior Court to designate one judge and one staff member to represent the court on all matters relating to the pilot program. The San Francisco Superior Court agreed to assign complex civil cases to a single judge for all purposes. The judge was required to follow the Deskbook on the Management of Complex Civil Litigation, including managing all aspects of the complex civil cases assigned to the judge.

The Court participated in the pilot program on a year-to-year basis. The original term of the pilot program was two and one-half years, with an end date of June 30, 2002. Based upon the program's success, the AOC continued to fund the pilot program in each of the six counties until 2004.

In 2003 the Complex Litigation Subcommittee of the AOC's Civil and Small Claims Advisory Committee evaluated the pilot program and made a report to the Judicial Council. The subcommittee made the following recommendations:

1. In the existing pilot program courts, complex litigation departments with the following principal characteris-

Continued on page 8

MICHAEL W. SOBOL

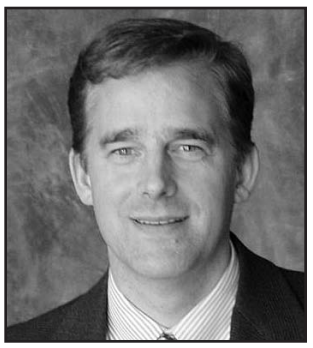
On CLASS ACTIONS

Who knew? When voters passed Proposition 64 in November 2004 to amend the Unfair Competition and False Advertising Laws, weren't they reacting to a perceived threat of so-called shakedown lawsuits brought by unscrupulous attorneys in the name of "unaffected" persons who didn't claim to suffer any actual harm? The text of the proposition seemed to say so, the State's Legislative Analyst described it that way, and the preamble to the measure itself claimed its purpose was to prohibit the filing of lawsuits by persons who had not "been injured in fact under the standing requirements of the United States Constitution." As one California newspaper put it around the time of the vote: "A big beef with businesses: 17200 didn't require a plaintiff to be harmed before suit is filed."

Since it passed, however, Prop 64 has been interpreted as changing not only the standing requirement, but also the basis for liability under the UCL. This interpretation arises from the phrase in the new standing provision added by Prop 64 that "injury in fact" and "lost money or property" must be "as a result of" the alleged wrongdoing. The Second District Court of Appeals cited the phrase as grounds for ruling that the UCL now also requires a showing of *actual* deception and reliance for each class member. *Pfizer, Inc. v. Superior Court*, 141 Cal. App. 4th 290, 306-07 (2006). *See also In re Tobacco II Cases*, 142 Cal. App. 4th 891 (2006) (holding same).

Pfizer's interpretation of Prop 64 would revoke the established rule that plaintiffs need only show that members of the public are "likely to be deceived." *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992). It represents a shift from an objective "reasonable consumer" standard of reliance inferable to classes of consumers to a subjective reliance standard requiring individualized proof. *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 512 (2003). It sets a high, often insurmountable, hurdle to class certification by demanding individualized proof of deception, which was not previously required. *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 209 (1983). It substitutes the transactional nexus standard for recovery (which requires proof only that a consumer bought goods or services in a transaction that violates the UCL) with a more stringent proximate cause requirement. *Fletcher v. Security Pacific Nat'l Bank*, 23 Cal. 3d 442 (1979). As the *Pfizer* court noted, even though Prop 64 was "promoted as adding a standing requirement," it nonetheless has "had the effect of dramatically restricting…consumer protection measures."

The Third District Court of Appeals reached the opposite conclusion, holding that an "inference of common reliance" survives Prop 64's amendments to the UCL. *McAdams v. Monier*, 151 Cal. App. 4th 667, 684 (2007). It drew from a long line of state Supreme Court cases concluding that such classwide inferences are appropriate under the Consumer Legal Remedies Act, which also provides that harm be "as a result of" the alleged wrongdoing. "[I]f the principle of inferred reliance is sufficient to satisfy the element of reliance/causation as to a CLRA fraud-based class action…it certainly is sufficient to satisfy that element for a similar UCL class action." Perhaps for this reason, or recognizing the UCL's long-standing transactional nexus requirement (which has in fact been expressed as allowing restitution of profits earned "as a result of" the unfair business practice), other courts, post-Prop 64, have continued to cite pre-Prop 64 law on reliance and causation standards without explicitly addressing the effect of Prop 64. *Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116, 126 (2000). *See also, e.g., Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 682 (2006); *Wayne v. Staples, Inc.*, 135 Cal. App. 4th 466, 484 (2006).



Michael W. Sobol

The California Supreme Court has granted review of *Pfizer, McAdams*, and *In re Tobacco II Cases,* and presumably will resolve the conflicting decisions in the coming year. The Court may have effectively decided the issue in *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223 (2006), by ruling that Prop 64 closed a "loophole" in the standing requirement, but changed *nothing substantive* in the UCL. The application of Prop 64 to cases filed before its enactment was not "retroactive," the Court reasoned, because the measure did not alter the UCL's liability landscape. "Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted," it stated. The holding suggests that the Court will not interpret Prop 64 as having negated the existing causation and reliance standards that facilitate class actions under the UCL, as class actions are "often inextricably linked to the vindication of substantive rights." *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 161 (2005).

The Court's anticipated decision will have a far-reaching effect on class actions. The UCL embodies California's fundamental policy of protecting consumers by deterring unscrupulous practices and ensuring a trustworthy marketplace. By mandating that claimants meet a federal court-style standing requirement, Proposition 64 has curbed the abuses of the UCL, as intended. But did the plan to stem frivolous lawsuits include reversing the long line of California appellate jurisprudence effectuating the essential purpose of the UCL? If voters — the very California consumers the UCL is designed to protect — knew what was at stake, would they have voted the same way? Did they know?

Michael Sobol is a partner at Lieff, Cabraser, Heimann & Bernstein, LLP. msobol@lchb.com.

Continued from page 6

Business Litigation in the S.F. Superior Court

tics should be permanently established as part of the court's core operation:

• Assignment of each complex case to a single judge to handle all aspects of the litigation;

• Use of only those judges who have experience, interest, and expertise in handling complex civil litigation;

• Use of innovative case management techniques, including those described in the Deskbook on the Management of Complex Litigation;

• Participation in specialized training and educational programs related to the management of complex cases; and

• Use of appropriate case management technology and other technology designed for complex cases.

2. The operation of complex litigation departments in California courts should be expanded to the optimal level, determined by evaluations of the caseloads and staffing levels in pilot program courts and by the needs of courts outside the program.

3. The AOC should continue to provide support, training, and coordination of complex litigation departments.

In 2004 the pilot program ended, but based upon the recommendations of the Complex Litigation Subcommittee's report to the Judicial Council, the AOC continued to fund the complex civil litigation departments in the six pilot program courts on a year-to-year basis pursuant to a written Memorandum of Understanding (MOU) with each court.

Since the pilot program's inception, the San Francisco Superior Court has operated its complex civil litigation department in compliance with the MOU; however, a growing caseload made it increasingly more difficult for the complex judge to handle a case for all purposes. Jury trials were assigned outside the complex civil litigation department and in some cases a discovery referee was appointed. One member of the San Francisco bar commented that the San Francisco Superior Court's complex civil litigation department functioned primarily as a "complex law & motion" department. He observed that it had been impossible for a single complex judge both to manage the pretrial aspects of the cases and to conduct a significant trial in those cases that needed to be tried. His observations and comments were accurate, and they led to an internal evaluation of the potential need for a second complex civil litigation department.

In early March 2007, Judge John E. Munter was asked to evaluate the San Francisco complex litigation department to assess the need for a second complex department. After completing the evaluation, Judge Munter along with Judge Richard Kramer (the sole complex litigation judge) recommended a second complex civil litigation department. They identified the following benefits of a second complex civil litigation department:

• San Francisco would be in line with Los Angeles, Orange, and other counties where the complex litigation departments handle their assigned cases through trial.

• Time in preparing for trial will be reduced because the judge will have handled the case for all pre-trial purposes and will be familiar with all prior activities.

• Recent commentary from the bar served by the complex litigation department strongly indicates that the lawyers would welcome the opportunity to have the complex litigation judge be the trial judge. This would assure consistency and reduce uncertainty for all stages in the life of a case, saving clients legal fees and making it easier to assess litigation risks.

• Two complex litigation judges could effectively use mandatory settlement conferences by hearing each other's cases.

• Two judges will free time for more frequent case management conferences, which are the key factor in cost-efficient litigation management. Similarly, the need for third-party assistance such as discovery referees, special masters for construction defect cases and the like will be greatly reduced.

Judge Munter's and Judge Kramer's rationale for having a second complex litigation department matched the goals of the original Complex Civil Litigation Pilot Program, i.e. to have two complex departments which would be responsive to the users of the court by providing judges who have the ability, interest, and experience in taking a case from start to finish "for all purposes." In late March 2007, after reviewing their recommendation and the Court's request for additional funding to fully staff a second complex litigation department, the AOC indicated its support to provide such funding.

On July 1, 2007, San Francisco opened its second complex litigation department: Department 305, Judge John E. Munter, presiding. The funding for both complex litigation departments continues on a year-to-year basis pursuant to a written agreement with the AOC. The agreement for fiscal year 2007-2008 is currently in negotiation. If approved as proposed, the San Francisco Superior Court and the Presiding Judge will acknowledge the importance of the following goals, and the benefits of accomplishing these goals:

• Complex cases assigned to the program judge should be assigned for all purposes (Cal. Stds. Jud. Admin., Std. 3.10). A program judge should have the ability, interest, and experience in handling complex civil litigation.

• Continuity of program judges is integral to the success of the program. The continuity of the program judge, during the fiscal year and from one fiscal year to the next, will be an important factor considered by the AOC in determining the Court's future funding for the program, if any.

• The Presiding Judge has the ultimate authority to make judicial assignments under California Rules of Court, Rule 10.603(c)(1). To realize the benefits of the program, however, a program judge should be replaced only when necessary.

• The Presiding Judge should notify the AOC's program manager as soon as possible if he or she intends to assign a new program judge.

• When a new program judge is to be assigned to the complex litigation department, there should be an adequate transition period before the outgoing program

Continued on page 10

HOWARD M. ULLMAN

On ANTITRUST

Last Term, the Supreme Court issued a remarkable number (four) of important, pro-business antitrust decisions. Last Fall's column discussed two of these cases pre-decision — *Twombly v. Bell Atlantic Corp.* and *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* Here, we visit briefly the Court's two other heavily-anticipated decisions: *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. ___ (June 28, 2007), and *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. ___ (June 18, 2007).

Resale price maintenance ("RPM") is the practice whereby a manufacturer agrees with its distributors on the prices the distributors can charge to their customers for the manufacturer's products. Resale price maintenance comes in two flavors: maximum RPM, which imposes a ceiling on distributors' downstream prices, and minimum RPM, which imposes a pricing floor. Almost a century ago, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), the Supreme Court held that RPM is illegal *per se* under the Sherman Act. Although over the past few decades the courts have freed most "vertical" (manufacturer-distributor) restraints from the *per se* rule and held them subject to a much more flexible rule of reason analysis (and although a decade ago the Court in *State Oil Co. v. Khan*, 522 U.S. 3 (1997), held maximum RPM subject to a rule of reason analysis), *Dr. Miles* has remained the law on minimum RPM, to the consternation of many commentators and economists.

In *Leegin*, the Court finally overruled *Dr. Miles*. The Court noted that *Dr. Miles* had relied upon an ancient common-law rule against restraints on alienation that had little connection to modern economics. The Court then noted that the economic literature is "replete" with pro-competitive justifications for a manufacturer's use of RPM. First, RPM may foster and encourage interbrand competition (competition among manufacturers) by reducing intrabrand competition (competition among retailers of the same brand). Retailers who enjoy RPM "protection" can afford to invest in promotional efforts that they otherwise might decline because competing retailers could undercut them on price or free ride on their efforts. (For example, a consumer might visit an expensive showroom to view products, and then purchase them at a no-frills, discount retailer.) Second, RPM, the Court observed, can increase interbrand competition by facilitating market entry for new firms and brands. Third, RPM can also increase interbrand competition by encouraging retailer services that would be provided even absent free riding, because a contract specifying all the various services the retailer must provide may be more difficult to make and enforce. The promotion of interbrand competition, the Court wrote, is the primary purpose of the antitrust laws.

The Court devoted significant attention to the *stare decisis* issue raised by its overturning of *Dr. Miles*. Because the issue was the scope of the Sherman Act, which has always been treated as a common-law statute, the Court felt freer to adjust its interpretation of the Act over time. The Court also found significant that both the DOJ and the FTC had urged replacement of the *per se* rule, and that the Court's non-price vertical restraint cases had moved away from *Dr. Miles'* strict approach and its rationales.

Credit Suisse found securities laws preclusion of antitrust claims. Plaintiffs invested in IPOs of technology-related companies and purchased shares directly from investment banks or indirectly on the aftermarket. They alleged an antitrust conspiracy involving underwriters' formation of syndicates to spread out the risk inherent in the IPO market. They alleged that the underwriters, *inter alia*, (i) made inquiries concerning the number of shares customers would be willing to purchase in the aftermarket, and the prices persons would be willing to pay, (ii) shared the identities of IPO allocants and divided responsibilities among members of the syndicate, and (iii) favored long-term investors over "flippers" of IPO shares (securities purchasers who sell the securities they buy after a short period of time). The plaintiffs also alleged that the underwriters conspired to impose "anticompetitive charges" in the form of "tie-in" (obligation to buy security X with Y) or "laddering" (obligation to buy securities in aftermarket at escalating prices) requirements. The IPO area is heavily regulated by the SEC.

Howard M. Ullman

Credit Suisse held that, when a court decides whether securities law precludes antitrust law, it is deciding if, given context and likely consequences, there is a "clear repugnancy" between the securities laws and the antitrust complaint, or, put slightly differently, whether the two are "clearly incompatible." The *Credit Suisse* court articulated four factors to consider in analyzing whether there is "clear repugnancy," the key factor being whether there is a risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. In finding a conflict, the Court focused on the problems of legal line-drawing problems caused by the complexity of SEC regulation of the IPO process, the prospect that identical or overlapping evidence might tend to show both unlawful antitrust activity and lawful securities marketing activity, and the risk that courts in different parts of the country might reach different results on the same set of facts.

The Court's focus on line-drawing problems, overlapping evidence, and inconsistent court results — *i.e.*, on considerations of court administration — was very pragmatic rather than textual or theoretical and thus typical for a Breyer opinion. It is not clear that these pragmatic factors fully explain the Court's decision (*e.g.*, often there is a possibility of inconsistent results). It will be interesting to observe whether courts find them equally applicable to other contexts outside securities regulation — particularly in other regulated areas.

Mr. Ullman is of counsel with Orrick, Herrington & Sutcliffe LLP and is Co-Editor of the ABTL Northern California Report. hullman@orrick.com

Continued from page 8

Business Litigation in the S.F. Superior Court

judge departs to allow the incoming program judge to gain experience in and familiarity with complex case management techniques. The Presiding Judge or his or her designee should review the inventory of pending cases with the outgoing program judge. The Presiding Judge will determine which pending cases, where possible, will be retained by the outgoing program judge, in the interests of justice.

• If feasible, an outgoing program judge should retain complex litigation cases for which the judge has already expended significant time and effort and cases that are at an advanced stage until the cases are disposed to minimize disruption to these cases and potential delay in their disposition, in the interest of justice.

• The Court should provide educational opportunities in complex litigation to judges in addition to the program judge so that qualified and experienced replacement judges are available when a program judge is replaced.

• The program judge should use the Deskbook on the Management of Complex Civil Litigation as a resource in managing all aspects of complex civil cases.

• Each complex litigation department should have appropriate support staff, advanced technology, and case management infrastructure appropriate for complex cases.

• Both the San Francisco Superior Court and the Presiding Judge approve the proposed agreement to ensure funding for the continuation of the two complex departments.

When application for complex designation is now made by submission of a Civil Case Cover Sheet, Judges Kramer and Munter jointly review the application and jointly determine whether it meets the standards for complex designation set forth in Rule 3.400 of the California Rules of Court. If the standards are found to have been met, then the two judges assign the case to one of them for handling. The two complex litigation departments operate with the same philosophy of promoting flexibility and common sense in the handling of complex cases. Judges Kramer and Munter share the view that complex cases should be managed creatively so as to meet the particular needs of each case and to move it efficiently to conclusion. Applications for complex designation continue to be received on a regular basis, and the court continues to encourage the legal community to utilize its complex litigation program. For more information regarding San Francisco's complex litigation departments please check the court's website at http://www.sfgov.org/site/courts.

Civil Case Single Assignment

Not all cases which apply for complex designation with the San Francisco Superior Court satisfy the criteria for acceptance into the program. When a case is not accepted as complex, Judges Kramer and Munter regularly recommend to the Presiding Judge that the case be assigned to one judge for all purposes. Their recommendation for single assignment has always been followed. The Presiding Judge is given the authority under Rule 3.734 of the California Rules of Court, on noticed motion of a party or on the court's own motion, to order the assignment of any case to one judge for all or such limited purposes as will promote the efficient administration of justice.

Although not part of the complex litigation program, single assignment provides many of the same benefits as the complex litigation program: one judge from the time of assignment to conclusion, case management tailored to the specific case, thorough knowledge and familiarity of the pretrial issues and procedures by the same judge, flexibility in crafting creative approaches to efficient resolution of cases. The Presiding Judge makes every effort to match the type of case to a judge who has an interest and experience in single assignment civil cases.

How does a party request single assignment? Again, pursuant to Rule 3.734, a party may make a motion for single assignment to the Presiding Judge. Motions for single assignment are heard in the department of the Presiding Judge, department no. 206, every Tuesday (unless the preceding Monday was a holiday), Wednesday, and Thursday at 9:30 am. Rule 3.2 of the San Francisco Superior Court Local Rules of Court sets forth the procedure for single case assignment. Parties are encouraged to apply for single assignment in those cases where they believe it is warranted.

E-filing in Asbestos Cases

Essentially unknown to attorneys who are not members of the asbestos case bar, the San Francisco Superior Court mandated electronic filing and electronic service for all asbestos cases commencing August, 2006. Asbestos e-filings account for 26% of all civil case filings. Within the first year of e-file/e-service program, approximately 90,000 documents were e-filed into the court's case management system. This program is the result of two years of effort led by Judge Ernest H. Goldsmith and Judge Tomar Mason along with a committee of attorneys representing the entire asbestos case bar. The San Francisco Superior Court's e-file/e-service program is the largest e-filing program in California. It has created significant efficiencies and cost savings for the court and the litigants. For more information about e-filing in asbestos cases please check the court's website at http://sfgov.org/site/courts.

The Honorable David Ballati is the Presiding Judge of the Superior Court of California for the County of San Francisco.

Back Issues Available on Website!

Readers can browse the ABTL website for back issues of *ABTL Northern California Report*, covering the premiere issue in the Fall of 1991 through the current issue. *www.abtl.org*

JAMES YOON

On PATENTS

The last two years have dramatically altered the patent landscape. Recent decisions by the United States Supreme Court and the Federal Circuit have caused the value of patents to plunge and have changed the status of patent plaintiffs from "hunter" to "hunted." This article will briefly discuss the seismic shift occurring in patent litigation and how it impacts patent litigators.

In May 2006, the Supreme Court issued its decision in *Ebay, Inc. v. Mercexchange LLC*. This decision ended the rule requiring that permanent injunctions be entered against infringers in patent cases absent "exceptional circumstances." The Supreme Court replaced the old, pro-injunction rule with the equity test for an injunction used in the context of preliminary injunction hearings. This equity test requires, among other things, a demonstration that: (1) the plaintiff would suffer "irreparable harm" without an injunction; and (2) the plaintiff could not be adequately compensated with money. As a result, the *EBay* decision came close to eliminating the possibility that a patent licensing company (often called "patent trolls" by their critics) could obtain an injunction against manufacturers who produce products accused of infringement. A licensing company does not produce products and exists to collect royalties and, as a result, can be adequately compensated by monetary damages.

The elimination of the ability of licensing companies to obtain an injunction dramatically changed the nature of settlement negotiations in many patent cases. Prior to *EBay*, licensing companies could use the threat of an injunction to scare defendants into believing that the plaintiff could "shut down" the manufacture of the accused products. Such scare tactics often resulted in defendants paying a premium above the normal royalty for a patent to eliminate the risk of an injunction. The *Ebay* decision eliminated this premium. Today, defendants (confident that there will be no injunction) are more willing to fight patent cases.

In April 2007, the Supreme Court issued its decision in *KSR International Co. v. Teleflex, Inc.* The *KSR* decision reversed decades of pro-validity decisions by the Federal Circuit by substantially reducing the showing necessary to invalidate a patent claim as obvious. Prior to *KSR*, the Federal Circuit used the "teaching, suggestion or motivation to combine" (TSM) test to determine whether the combination of two or more prior art references invalidated a patent claim as obvious. Under the TSM test, a patent claim was valid over a combination of prior art references unless there was some teaching, suggestion or motivation to combine the references in a manner that would practice the invention set forth in the patent claim. The Supreme Court disagreed and ruled that the TSM test was at odds with its prior warning against patents "for a combination which unites old elements with no change in respective function." The Supreme Court believes that such patents are dangerous because they withdraw "what is already known" in the field of the patent and place such prior knowledge under the monopoly control of patent holders. The Supreme Court further suggested that combinations of known prior art elements were generally invalid as obvious in situations where the results of such combinations were predictable.

The *KSR* decision has had a sweeping impact on patent litigation. Virtually all patent claims are a combination of previously known elements. Thomas Edison's light bulb, Alexander Graham Bell's phone and the Wright Brothers' airplane were combinations of known elements. Prior to *KSR*, combinations of known elements were patentable unless they failed the TSM test. After *KSR*, actual and potential patent defendants now believe that patent claims comprised of known elements are invalid as obvious unless the patent plaintiff can demonstrate at trial why the combination should be viewed as novel. It will take several years to determine whether defendants' new belief in the obviousness defense is well founded. As a matter of practice, the *KSR* decision, like *EBay*, increased the willingness of defendants to litigate patent cases. Defendants believe that they can reduce the amount of settlements through litigation because they believe today's plaintiffs are afraid of having their patents invalidated.

James Yoon

In August 2007, the Federal Circuit issued its decision in *In re Seagate*. The *Seagate* decision virtually eliminated the ability of plaintiffs to prove willful infringement. The *Seagate* decision removed the legal obligation on companies to take affirmative, reasonable steps to avoid infringing patents. After *Seagate*, a plaintiff can only prove willful infringement in situations where a defendant acted with an objective, reckless disregard for its patent rights. The Federal Circuit ruled that a defendant's subjective belief about a patent is irrelevant to the determination of willful infringement.

Seagate has had two major impacts on patent litigation. First, it reduced the potential damages at trial. Willful infringement provides a court with the right to treble damages. Without willful infringement, there can be no treble damages. Second, it reduced the ability of patent plaintiffs to paint the defendant as a "bad guy" at trial. *Seagate* eliminated plaintiff's ability to argue that, because patents are important, the law imposes an affirmative duty on a defendant to take steps to avoid infringement, and that the failure to take such steps conclusively demonstrates a "bad" intent to willfully infringe the plaintiff's patent. The loss of the "affirmative duty" argument will be acutely felt by patent plaintiff trial attorneys. The argument provided a fantastic vehicle to gain momentum at trial by pointing out the many steps a defendant could have (and, under the old standard, should have) taken to avoid infringing the plaintiff's "constitutionally protected right" to a patent.

Mr. Yoon is a partner with the Palo Alto office of Wilson Sonsini Goodrich & Rosati. jyoon@wsgr.com.

Letter from the President

What a terrific year it's been for ABTL! We've set record attendance for our 2007 Dinner Programs, featuring the trial of our mock trade secret case, *Pfyzer v. Smerck*. Thanks to our wonderful panel lawyers and judges for expertly demonstrating jury selection, opening statements, and direct and cross examination, and discussing demonstrative evidence and effective public speaking. Our final 2007 program on December 4th featured the clash of titans John Keker and Jim Brosnahan giving the case's closing arguments. Cheers to our program Chair and Co-Chair, Larry Cirelli and Daralyn Durie!

Hopefully, you also attended our ABTL Annual Seminar at Silverado in October. Chair Rob Bunzel and his committee organized an exciting, informative and entertaining program on security and privacy issues, with Keynote addresses from Justice Sandra Day O'Connor and Dean Kathleen Sullivan. The seminar broke all records for a California ABTL seminar, with over 350 people attending, and also set the record for wine tasting! Nice job, Rob!

Ben Riley

Membership Chair Mary Jo Shartsis signed up over 1950 persons for membership in our Northern California Chapter this year — about 250 more members than 2006. Thanks to all our sponsoring firms for signing up all their Northern California litigators. We could not provide our dinner programs and ABTL Report without you.

Our Leadership Development Committee, focusing on members in practice 10 or fewer years, presented interesting programs on mediations, business generation and public speaking techniques. The LDC also joined with the ABTL Board to present a well attended lunch program in Oakland in May, featuring the Bay Area's complex litigation department judges. Thanks to Patty Peden for chairing the LDC, and to Morgan Tovey and Justice Mark Simons for chairing the East Bay lunch.

ABTL Report Editor Tom Mayhew and Co-Editor Howard Ullman have continued the tradition of presenting practical and timely articles, from highly respected judges and lawyers, helpful to all business trial lawyers. Thanks!

Finally, we took time to celebrate our Northern California Chapter's 16 years of service, with our Past Presidents and 2007 Board Dinner held on November 1. A good time was had by all, renewing our ties with our 14 illustrious Past Presidents.

Our ABTL officers, Vice President Steve Lowenthal, Treasurer Steve Hibbard and Secretary Sarah Flanagan, did superb work in their respective positions, plus assisted with other important Board business. And essential to everything we do is the fine work of our Executive Director, Michele Bowen.

I had the good fortune to join the ABTL Board in 2001, immediately assuming the mantle of Editor of the *ABTL Report*. My time since then as Editor and then as an officer has been challenging, but truly a labor of love and fun. We are privileged to have an energetic, growing and financially strong ABTL Chapter, offering great programs and tremendous dialogue between bench and bar. I thank you for the opportunity to serve on your ABTL Board and as President. I proudly leave you in the very capable hands of Steve Lowenthal and the other Officers and Board members. Stay active in ABTL, and help continue our Chapter's vibrance and growth.

Ben Riley is a partner with the San Francisco office of Howrey LLP. rileyb@howrey.com.