

Letter from
the President

Two years ago, business litigators—including ABTL—missed the legislative boat. Prompted by complaints from the judiciary, the Legislature amended Code of Civil Procedure Section 437c(f), thereby sharply curtailing partial summary adjudication motions. Historically these motions were an important arrow in the business litigation arsenal. The Legislature severely limited that weapon, saying the intent of the revision of Section 437c was “to stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or a defense.”



Mark A. Neubauer

In revising the statute, the Legislature ignored the fact that, even if a cause of action or defense is not “completely” disposed of, adjudication of a key issue or fact can encourage settlement, frequently leading to the complete disposition of a case. A business case may settle, for example, if a court issues a ruling on a key contractual provision or determines that a particular investment vehicle is a “security.” In addition, motions for summary adjudication can provide an inexpensive discovery device that can be far more productive than costly and burdensome interrogatories and document requests.

We have just completed one year of practice under the revised version of Section 437c. In that year we have seen that, like any pendulum, Section 437c(f) has swung too far.

Section 437c(f) now permits partial summary adjudication motions only if a cause of action or defense has no merit, there is no legal duty, or there is no basis for punitive damages. The new

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Coping with *Lampf*: The Alchemy of Turning
Fraud Claims into Anything Else

The brief limitations period imposed under *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson* has prompted a scramble among plaintiffs’ lawyers to come up with ways to save stale claims. (See sidebar regarding *Lampf*, page 3.) In some cases, attorneys have argued that actual, as opposed to constructive, knowledge should be necessary to commence the one-year time period. However, this argument has been rejected by the courts. See *Anixter v. Home-Stake Production Co.*, 939 F.2d 1420 (10th Cir.), order amended on denial of reh’g, 947 F.2d 897, 1991 WL 209262 (October 21, 1991).



Richard Sheldon

In *Anixter*, the court held that the plaintiffs’ fraud claims were barred under *Lampf*. Thus, the action was dismissed after it had been pending for 18 years. That case may be resurrected under new legislation which attempts to eliminate *Lampf*’s retroactive impact. Plaintiffs seeking to bring new cases will not be aided by that legislation, however.

Alternative Causes of Action

Confronted with a newly shortened limitations period of one year after discovery or, at most, three years after the allegedly fraudulent conduct, plaintiffs have been forced to quickly develop alternative theories of recovery. Thus, the legacy of *Lampf* may be that causes of action traditionally thought of as secondary or ancillary to a Rule 10b-5 action may become the primary means of recovering for securities fraud. Such causes of action may include claims under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), Section 17200 of the California Business and Professions Code, common law fraud, and negligent misrepresentation.

Lampf may prompt an increase in the number of claims brought under RICO. The Supreme Court has held that the four-year statute of limitations applicable to civil enforcement actions brought under the Clayton Act, 15 U.S.C. §15(b), applies in civil RICO actions as well. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987). However, RICO may not be a satisfactory alternative to a Section 10(b) cause of action.

Initially, a plaintiff must establish standing to assert a RICO claim. *Reddy v. Litton Industries, Inc.*, 912 F.2d 291, 295-96 (9th Cir. 1990), cert. denied, 112 S. Ct. 332 (1991). In *Reddy*, the Ninth

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Circuit enumerated the standing requirements for claims under Sections 1962(a), (c), and (d). The *Reddy* decision demonstrates a reluctance on the part of the Ninth Circuit to liberally apply the requirements for asserting a RICO cause of action.

A cause of action under Sections 1962(a) - (c) must be alleged with particularity in conformity with Fed. R. Civ. Proc. 9(b). *Schreiber Distributing v. Serv-Well Furniture Co.*, 806 F. 2d 1393, 1401 (9th Cir. 1986); see *Morin v. Trupin*, 747 F. Supp. 1051, 1064-65 (S.D.N.Y. 1990). Where fraud is the basis of the RICO allegations, as will most often be the case where a plaintiff is suing for alleged misrepresentations or omissions in the sale of securities, Rule 9 (b) "requires [the] specification of the time, place, speaker and content of the alleged misrepresentations...a sufficient showing of fraudulent intent...and the use of the mails and wires." *Morin*, 747 F. Supp. at 1065-66, n.8.

In addition, in order to allege a RICO claim, a plaintiff must allege a "pattern of racketeering activity" which, according to 18 U.S.C. §1961(5), requires pleading at least two predicate acts of racketeering within the last ten years. *Connolly v. Havens*, 763 F. Supp. 6, 12 (S.D.N.Y. 1991); see *Schreiber*, 806 F. 2d at 1398. This might be difficult where the alleged misrepresentation was made in only one prospectus or where the plaintiff is otherwise unable to allege more than one predicate act.

Additionally, to recover under RICO, the harm to the plaintiff must have been caused by predicate acts of racketeering. See *Reddy*, 912 F. 2d at 294. "Racketeering activity" includes acts of 'fraud in the sale of securities.'" *Securities Investor Protection Corp. v. Vigman*, 908 F.2d 1461, 1466 (9th Cir. 1990), cert. granted in part, *Holmes v. Securities Investor Protection Corp.*, 111 S. Ct. 1618 (1991). However, it is unsettled whether a plaintiff bringing a RICO claim based on predicate acts of securities fraud must be a purchaser or seller of securities as required by Rule 10b-5. In *Vigman*, the Ninth Circuit held that "the purchaser or seller standing limitation that applies to 10b-5 actions does not apply to RICO claims based upon predicate acts that are alleged to be securities fraud under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder." *Id.* at 1467. The Supreme Court granted *certiorari* on this issue, and its decision is expected soon.

Other requirements for pleading a RICO cause of action vary according to the particular subsection of Section 1962 relied upon by the plaintiff. See generally *Reddy*, 912 F. 2d 293-96. However, it is clear that most circuits are strictly construing the pleading requirements for RICO claims. Consequently, plaintiffs attempting to rely on RICO as a substitute for Section 10(b) and Rule 10b-5 may find it difficult to survive a defendant's motion to dismiss.

Another potentially appealing alternative to Section 10(b) and Rule 10b-5 is a claim for unfair or fraudulent business practices under Section 17200, et seq. of California's Business and Professions Code. Section 17200 provides:

"As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

Section 17200 has a four-year limitations period. Cal. Bus. & Prof. Code §17208.

"An 'unlawful business activity' includes 'anything that can properly be called a business practice and that at the same time is

forbidden by law.'" *People v. McKale*, 25 Cal. 3d 626, 632 (1979). Determining whether a business practice is unfair requires "an examination of [the practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Motors, Inc. v. Times-Mirror Co.*, 102 Cal. App. 3d 735, 740, 162 Cal. Rptr. 543 (1980); Stern, *Litigation and Practice Under Calif. Bus. & Prof. C. §§17200 & 17500*, p. 21 (1989) ("Stern"). The test for fraudulent business activity is whether "members of the public are likely to be deceived." *Committee on Children's Television v. General Foods Corp.*, 35 Cal. 3d 197, 211 (1983); Stern, *Supra*, at 25.

Although the scope of Section 17200 covers a wide spectrum of prohibited conduct, the remedies available under the statute are limited. For example, compensatory damages are not recoverable for violations of Section 17200. See *Dean Witter Reynolds v. Superior Court (Abascal)*, 211 Cal. App. 3d 758 (1989). Remedies under the act are limited to an injunction or the equitable remedy of restitution. *Id.* at 773.

For plaintiffs alleging misrepresentations or omissions in connection with a public offering, restitution may be a viable and satisfactory basis of recovery. In such cases, restitutionary relief would involve returning the money invested in the offering to the aggrieved plaintiffs. However, restitution is not a practical alternative for plaintiffs purchasing securities on the open market because "undoing" such a transaction presents numerous logistical problems. The investment will have probably passed through several hands, and in most cases the party who made the misleading statement or omission will not have received the price paid by the aggrieved party.

Another unsettled issue for plaintiffs looking to assert claims under Section 17200 is whether restitutionary relief is available in the absence of an injunction. In *Fletcher v. Security Pacific Nat'l Bank*, 23 Cal. 3d 442 (1979), the California Supreme Court determined that Business and Professions Code Section 17535, a statute similar to Section 17200, authorized restitutionary relief in class actions. *Fletcher*, 23 Cal. 3d at 452-453; Stern, *supra*, at 62. However, a federal district court opinion, interpreting the same statute as the court in *Fletcher*, found that restitutionary relief was permissible only as an ancillary remedy to an injunction. See *David K. Lindemuth Co. v. Shannon Financial Corp.*, 637 F. Supp. 991, 994-95 (N.D. Cal. 1986). The *Lindemuth* rule could virtually eliminate the use of Section 17200 in securities litigation, since injunctive relief is unwarranted in most cases.

Common Law Fraud

Plaintiffs barred by the new *Lampf* limitations period may try to assert claims for intentional fraud under the common law or Civil Code Section 1709. Such claims are governed by a limitations period of three years from discovery. Cal. Civ. Proc. Code §338 (d). However, one element of a fraud claim—justifiable reliance—may prove to be the death knell for class actions based on a fraud theory. A California court recently refused to apply the "fraud on the market" presumption of reliance in a class action based on common law fraud. *Mirkin v. Wasserman*, 227 Cal. App. 3d 1537, review granted, 282 Cal. Rptr. 840 (1991).

The fraud on the market presumption of reliance is routinely applied in federal securities class actions following its approval by the U.S. Supreme Court in *Basic, Inc. v. Levinson*, 485 U.S. 224, 241-42 (1988). Under the theory, "plaintiffs who never heard the alleged false representations may nevertheless bring Rule 10b-5 actions if they reasonably relied on the integrity of the open and

developed securities market in purchasing the securities." *Mirkin*, 227 Cal. App. 3d at 1545.

The *Mirkin* court concluded that "it would be improper to draw an inference of class-wide reliance when the misrepresentations were not uniformly made to each class member." *Id.* at 1548. The court distinguished such cases as *Vasquez v. Superior Court*, 4 Cal. 3d 800, 814 (1971) and *Varwig v. Anderson-Behel Porschel Audi, Inc.*, 74 Cal. App. 3d 578, 581 (1977), on the grounds that, in those cases, plaintiffs alleged a common set of misrepresentations in face-to-face conversations with each member of the class. *Mirkin*, 227 Cal. App. 3d at 1548-1549, 1551. However, where there is no common set of misrepresentations made directly to each member of the class, "there is no basis for drawing a class-wide inference of reliance." *Id.* at 1549.

The issue now rests with the California Supreme Court, which has granted review of the *Mirkin* decision. Affirmance of the appellate court's decision would be another disappointing blow to securities fraud plaintiffs.

Negligent Misrepresentation

Plaintiffs may also assert statutory claims for negligent misrepresentation under Cal. Civ. Code Section 1710. In California, such claims are a species of fraud governed by the three-year limitations period of Code of Civil Procedure Section 338(d).

However, negligent misrepresentation claims are not viable in most securities class actions. Only plaintiffs to whom the representation was actually made and who relied on the representation have standing to sue. See *Christensen v. Superior Court (Pasadena Crematorium of Altadena)*, 230 Cal. App. 3d 798, 817 (1990), modified on other grounds, 1991 WL 252845 (Cal. Dec. 2, 1991). Moreover, if the state Supreme Court upholds *Mirkin*, the fraud on the market presumption of reliance would likely be unavailable.

The Liability of Accountants and Attorneys

The extent to which professionals can be joined as defendants in a fraud action under state law is not clear. In *Bily v. Arthur Young & Co.*, 230 Cal. App. 3d 835, 858, review granted, 274 Cal. Rptr. 371 (1990), the court held that the "foreseeability rule" governed the duty of an independent auditor to third parties. Under the foreseeability rule, an independent auditor will be liable to those third parties who "reasonably and foreseeably rely" on negligently prepared and issued financial statements, regardless of whether the third parties were in contractual privity with, or their reliance was actually foreseen by, the auditor. *Id.* at 842. The court rejected Arthur Young's argument that adoption of the foreseeability rule would lead to "unlimited potential liability." *Id.* at 856.

The California Supreme Court has granted review of the *Bily* decision. Whether the court will place greater limits on the duty professionals owe to third parties remains to be seen.

Conclusion

Although there are several possible alternatives available to securities fraud plaintiffs who may find themselves thrown out of court on the basis of the *Lampf* holding, none of the alternatives appears to satisfactorily replace Section 10(b) and Rule 10b-5. Although Congress enacted legislation to save cases pending on June 19, 1991, the day before the *Lampf* decision, from the impact of the shortened statute of limitations, the effect of that legislation is not clear. Furthermore, in newly filed cases, plaintiffs will have to scramble to develop new and creative theories to keep their securities fraud cases before the courts.

—Richard Sheldon

Retroactive Application of *Lampf*?

New uncertainty has been injected into the arena of securities fraud litigation with legislation that purports to eliminate the retroactivity of a recent U.S. Supreme Court decision. That decision, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, (June 20, 1991), changed the limitations period governing actions under Section 10(b) of the 1934 Securities Exchange Act and Rule 10b-5, holding that:

1. "Litigation instituted pursuant to Section 10(b) and Rule 10b-5...must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Lampf*, 111 S. Ct. at 2782; and
2. Tolling principles do not apply to either the one-year or three-year periods provided for by the new rule *Id.*

Perhaps the most important, and controversial, aspect of the decision, at least for plaintiffs involved in pending litigation, was the Court's application of the newly shortened limitations period to the case before it. Thus, the new rule of law was applied retroactively.

Lower courts followed suit, concluding that retroactive application of the new limitations period was required under *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. at 2439, (June 20, 1991). Handed down on the same day as *Lampf*, that case held that a rule of law applied to the litigants in one case must also be applied "to all others not barred by procedural requirements or res judicata." 111 S. Ct. at 2448. "Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application." 111 S. Ct. at 2447-48.

In reliance on *Beam*, lower courts applied *Lampf* retroactively. See *Hastie v. American Agril-Corp.*, 774 F. Supp. 1251 (C.D. Cal. 1991) and cases cited therein; see also *Bank of Denver v. Southeastern Capital Group, Inc.*, 770 F. Supp. 595 (D.C. Colo. 1991). New legislation, S543, signed into law on December 19, 1991, purports to change this result. It provides that litigation pending on June 20, 1991 must be governed by the statute that was in effect in the particular jurisdiction on that date. Litigation dismissed pursuant to *Lampf* must be refiled within 60 days after the statute was enacted.

The actual effect of the new law in the Ninth Circuit is not clear. Defendants can be expected to argue that the U. S. Supreme Court's decision in *Lampf* expressed the appropriate statute of limitations as of June 1991, in reliance on Judge Aldisert's concurring opinion in *Davis v. Birr, Wilson & Co.*, 839 F.2d 1369, 1370, 1376 (9th Cir. 1988). Noting that the U.S. Supreme Court had sent signals that a uniform limitations period should be established nationwide for cases brought under Section 10(b), Judge Aldisert opined that the limitations period should be the rule articulated in *Lampf*—one year after discovery or, at the latest, three years after the transaction.

—Richard Sheldon

Proposed New Federal Procedures: Disclosure Instead of Discovery

Criticisms of existing discovery procedures are heard from virtually all perspectives. Clients abhor the costs and delays, judges despair of the imposition on judicial resources to resolve discovery disputes, lawyers are frustrated with the process and one another. Fingers are pointed at everyone involved.

As a result, pressures for reform have been building. Significant,



Nicole A. Crittenden

controversial proposals have now been developed which, if adopted, would dramatically alter the discovery process as we know it. The principal focus of these proposals is to shift the fact-finding process from "responding" to requests of an adversary to voluntary, mutual "disclosure" of information. The Judicial Conference Advisory Committee on Civil Rules has proposed amendments to the Federal Rules of Civil Procedure which were distributed for public comment in August 1991.

Public hearings on the proposed amendments to the Federal Rules of Civil Procedure were conducted on November 21, 1991, in Los Angeles, California. Written public comment must be submitted by February 15, 1992, to the Administrative Office of the United States Courts.

The following is a summary of proposed amendments to the Federal Rules of Civil Procedure:

Documents. A party must disclose a copy (or a description by category and location) of all documents "likely to bear significantly on any claim or defense" within 30 days of service of the answer. Alternatively, any party may trigger disclosure upon 30 days notice accompanied by their own disclosure. The Committee Notes state that documents must be described "sufficiently to enable opposing parties (1) to make an informed decision concerning which documents should be examined, at least initially and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests." Proposed Rule 26(a)(1)(B) and Notes thereto.

Witnesses. Parties must disclose individuals "likely to have information that bears significantly on any claim or defense" within 30 days of service of the answer or demand for disclosure. The Committee Notes provide that "counsel are expected to disclose the identity of those persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties." Proposed Rule 26(a)(1)(A) and Notes thereto.

Damage Computations. Parties must disclose the computation of damages claimed, making the relevant evidentiary material available for inspection and copying, within 30 days of the answer or a demand. Proposed Rule 26(a)(1)(C).

Discovery Permitted Only After Disclosure. Except with leave of court or upon agreement of counsel, no discovery from any source will be permitted before the required disclosures are made. Proposed Rule 26(d).

Limited Depositions. Except with leave of court or agreement

of counsel, depositions will be limited to 10 for each side and to six hours per deponent. Proposed Rule 30(a)(2)(A) and (d)(1). The number and length of depositions may be altered for particular classes of cases by local rule. Proposed Rule 26(b)(2).

Expert Reports. Ninety days prior to trial, parties must disclose any expert testimony to be offered in the form of a written report. The disclosure is to include a complete statement of the expert's opinions and the basis therefor. Proposed Rule 26(a)(2). An expert deposition may be conducted only after the required disclosure. Proposed Rule 26(b)(4). An expert will not be allowed to testify on direct examination as to any undisclosed matters. Proposed Evidence Code Rule 702.

Duty to Supplement. Counsel will have a continuing duty to supplement and correct all required disclosures. Proposed Rule 26(e). The continuing duty to disclose witnesses and documents is "the functional equivalent of standing interrogatories." The duty to disclose damage computations includes "the functional equivalent of a Standing Request for Production under Rule 34." Committee Notes to proposed Rule 26(a)(1).

Sanctions. Sanctions for inadequate disclosure may include orders to pay reasonable expenses, including attorneys fees, preclusion from discovery and preclusion from presentation of undisclosed evidence at trial. Proposed Rule 37(c)(1).

These new provisions raise questions regarding a lawyer's duties to investigate the existence of relevant documents and witnesses. The Committee Notes strongly caution against overinclusion of witnesses or documents. At the same time, the proposed rules require certification that a "reasonable inquiry" has been made. Proposed Rule 26(g)(1).

Judge William W. Schwarzer, now Director of the Federal Judicial Center, suggests that a disclosure obligation should not require an investigation beyond that now required by Rule 11. *Slaying The Monsters Of Cost And Delay: Would Disclosure Be more Effective Than Discovery?*, 74 *Judicature* 178 (1991). That is, parties would be obligated to search for documents and information only in places and from persons under their control where they would ordinarily expect to be found. However, such a limitation is not set forth in the proposed new rules or the accompanying comments.

Given present Rule 56 practice, plaintiffs' attorneys may well be concerned that the new disclosure rules will be used to make motions for summary adjudication without adequate opportunity to conduct discovery. Although the proposed amendments do not enlarge the court's power to dismiss a pleading, this may be the practical effect.

Most significantly, the proposed revisions to the Federal Rules suggest a dramatic departure from traditional adversarial discovery. Lawyers will be expected to anticipate which documents an adversary "should examine" and which witnesses an adversary might "reasonably be expected to depose." Supporters of the measure tout it as the only way to restore professionalism and curb runaway discovery costs. Those who doubt whether attorneys can rely on their adversaries to make complete disclosures should remember that even the current adversarial model depends largely on the integrity of attorneys in conducting and responding fully to discovery requests.

Indeed, one can ask whether the proposed rules actually go far enough. The answer is unclear because the proposed rules contain an inherent contradiction. Once disclosure has been completed, the tables are turned; the parties are then free to resume discovery under the broader standard "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." This discovery would apparently go forward hand in hand with the ongoing duty to supplement and correct "disclosures."

In light of this discovery "safety net," the proposed amended rules may not accomplish true discovery reform. Several commentators, including Judge Schwarzer, have suggested that no discovery at all should be allowed under the disclosure system without a court order and a showing of particularized need. Since the current proposed rules do not go this far, they may simply create another vehicle for dispute and delay, thus increasing rather than decreasing the costs of discovery.

—Nicole A. Crittenden

(Editor's Note: This is an edited version of an article by Ms. Crittenden that appeared last November in the premiere issue of ABTL Report, Northern California.)

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P.O. Box 67C46
Los Angeles, California 90067
(213) 839-3954

□ OFFICERS

Mark A. Neubauer
President
(213) 451-8001

Richard R. Mainland
Vice President
(213) 312-3131

Bruce A. Friedman
Secretary
(213) 312-3784

William E. Wegner
Treasurer
(213) 229-7508

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Federal Discovery Rules: Kinder, Simpler Procedures

On December 1, 1991, amendments to several of the Federal Rules of Civil Procedure took effect. Among the more significant amendments are those to Federal Rule 45 governing the use of deposition and trial subpoenas. While certain of the amendments should simplify third-party discovery practice in federal court, others could prove to be traps for unwary litigants.

Subpoenas May Now Be Issued by Attorneys

Perhaps the most helpful amendment to Rule 45 from a practical standpoint is the provision allowing attorneys to issue subpoenas. Previously, a third-party witness could only be deposed pursuant to a deposition issued by the court under the seal of the court. If the case was pending in a different district, some court clerks required a copy of the deposition notice to be certified by the clerk of the court in which the case was pending. (2 Schwarzer, Tashima & Wagstaffe, *Fed. Civ. Proc. Before Tr.*, ¶11:216.1 p. 11-34 to 11-35). This procedure was rather cumbersome.



Mark Becker

Under new Rule 45(a)(3),
"[a]n attorney as officer of the court may...issue and sign a subpoena on behalf of

"(A) a court in which the attorney is authorized to practice; or

"(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice."

According to the Advisory Committee Notes, the revised rule authorizes attorneys in distant districts to issue commands in the name of any court in the United States. Even an attorney admitted *pro hac vice* has the same authority as a clerk to issue a deposition subpoena from any federal court for the district in which the subpoena is to be served and enforced.

Although it is no longer necessary for a subpoena to be issued by the district court, subpoenas *can* be issued by the court clerk. Clerks are now authorized to issue a subpoena upon request. It is no longer necessary to submit a proof of service of the deposition notice.



Vivian Rigdon Bloomberg

A Subpoena May Require Production of Evidence Alone and Inspection of Premises

Under amended Rule 45, a subpoena may require production of evidence alone, eliminating the need for a deposition of the custodian of documents. The Advisory Committee Notes

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February Dinner Meeting Features Jury Persuasion

Jury persuasion will be the topic of ABTL's next dinner meeting on February 11, 1992. Herbert J. Stern, former U.S. Attorney and Federal District Court Judge, author of "Trying To Win" and a practicing trial lawyer will head the program. Mr. Stern is considered to be the successor to the late Irving Younger as a leading speaker on successful trial advocacy. He will focus on opening statements and direct examination. His presentation will be reviewed and discussed by Federal District Court Judge Alicemarie H. Stotler, jury consultant Reiko Hasuiko and trial lawyer Marshall B. Grossman.

This ABTL activity is qualified for one hour Minimum Continuing Legal Education Credit by the State Bar of California. For further information, contact Marian Cerilly at (213) 683-9100, extension 3521.

Federal Discovery Rules

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state that the revised rule "makes clear that the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or...territory within which the subpoena can be served." The non-party witness is now subject to the same scope of discovery as a party under Rule 34. Further, the rule allows issuance of a subpoena to compel the inspection of premises in the possession or control of a non-party. Rule 45(a)(1)(C).

Form of Subpoenas

The amended rule requires that every subpoena set forth verbatim the provisions of Rule 45(c) and (d) regarding protections of third party witnesses and duties of such witnesses in responding to subpoenas. Fed. R. Civ. P. 45(a)(1)(D). This is in addition to the requirement that a subpoena set forth the name of the court from which it is issued, the title of the action, the name of the court in which the action is pending, and its civil action number.

Representing Third-Party Witnesses

Several changes to Rule 45 should be kept in mind by those who represent third-party subpoena recipients. The rule expressly requires that documents be produced as they are kept in the usual course of business, or organized and labeled to correspond with the

*Failure to obey may be
deemed contempt of court.*

inspection demands. The time within which to serve written objections to a document demand has been extended from 10 to 14 days. As a practical matter, because the previous 10-day period did not include weekends and holidays, the new 14-day period may not be much of an extension.

Furthermore, objections must be made expressly and supported by a description of the nature of the documents, communications, or things not produced "sufficient to enable the demanding party to

contest the claim." Vague privilege or work product objections may subject the objecting party to contempt sanctions under Rule 45(e).

Counsel should note that, although subpoenas are now issued by attorneys, a failure to obey without adequate cause may be deemed a contempt of court. Adequate cause exists if the subpoena purports to require attendance at a deposition more than 100 miles from where the witness resides, is employed or regularly transacts business. Rule 45(e).

Other Rule Changes

In addition to Rule 45, other federal rules have been revised. In particular, Rule 5(e) has been amended to provide for filing by facsimile where a procedure is provided under local rules. The rule has also been amended to prohibit the clerk from rejecting documents for filing solely because they do not conform with the federal rules or local rules.

Rule 35 has been amended to expand on the categories of professionals who may be authorized by the court to conduct physical or mental examinations. Under the revised rule, such examinations may be conducted by any "suitably" licensed or certified person—not just physicians and licensed clinical psychologists. District courts are now expressly authorized to assess the credentials of examiners, who may include dentists, occupational therapists, or other licensed professionals.

Rules 41 and 52(c) have been revised so that the latter rule now governs termination of a non-jury trial on the merits when the plaintiff fails to carry the burden of proof with respect to a key issue. Rule 52(c) now authorizes entry of judgment against any party who has been finally heard with respect to an issue in a non-jury trial.

Rule 50 has been revised to abandon the familiar term "directed verdict." Attorneys must now bring a motion for "judgment as a matter of law." The rule adopts the standard for a motion for a directed verdict articulated in long-standing case law. It authorizes the court to enter judgment as a matter of law at any time during the trial if a party fails to carry that party's burden with respect to an issue necessary to that party's case. However, the Advisory Committee Notes caution that a party must be apprised of the materiality of a dispositive fact and afforded the opportunity to present evidence bearing on that fact.

Rule 63 has been replaced with a new rule that permits substitution of a judge after a trial or hearing has started following a de-termination that the parties will not suffer prejudice.

Rule 72 has been revised to lengthen the time for objecting to a magistrate's action with respect to discovery motions. Previously, it was necessary to serve and file such objections within 10 days after entry of the order. Now, objections must be made within 10 days after counsel is served with a copy of the magistrate's order.

—Marc Becker and Vivian Rigdon Bloomberg

Contributors to this Issue

Alex R. Baghdassarian is an associate with Radcliff & West.

Marc Becker is an associate with Munger, Tolles & Olson.

Vivian Rigdon Bloomberg, editor of *ABTL Report*, is an associate with Radcliff & West.

Nicole A. Crittenden is a partner with Jackson, Tufts, Cole & Black in San Francisco.

Richard Sheldon is an associate with Mitchell, Silberberg & Knupp.

Time Limits at Trial: Cutting 'The Case' Down to Size

The prize for a litigator, after years of analyzing boring documents, drafting discovery responses, snoring through expert depositions and sparring with opposing counsel is the trial itself. That prize is increasingly rare and, by the time it is within reach, the typical litigator has spent months immersed in the most minute details of "The Case." Nothing seems more interesting than, for example, entries in 10-year-old audit work papers, the causes of soil subsidence, or the intricacies of arcane stock market regulations.



Alex R. Baghdassarian

Lost in a tangle of minutiae, the business litigator assumes that he will keep a jury spellbound through a day-long opening statement and six months of expert testimony. In the courtroom, the attorney's expectations often collide with those of judges who struggle to reduce a mounting backlog of cases by keeping trials short. For the judge, The Case is just part of a seemingly endless series of cases that trail each other.

Through an informal telephone survey of trial judges in federal courts, ABTL learned that jurists try to control their calendars by setting time limits on a case-by-case basis. They generally oppose the concept of imposing uniform or formal time limitations. Although they will often trust the judgment of experienced trial attorneys, the judges said there are limitations on their patience and their tolerance of trial estimates.

The judges agreed that it is desirable to discuss the scope of the matters at issue and specific time estimates for the various phases of a trial to ensure predictability and efficient caseload management.

Don't Count on a Six-Month Trial

When a *pro per* plaintiff said that he needed 142 days to present evidence in a civil rights case, Central District Judge William J. Rea offered a succinct reply: "Don't count on it."

Similarly, Judge Harvey Schneider of the Los Angeles County Superior Court does not hesitate to draw on his own experience and advise an attorney that a time estimate is inaccurate.

Some jurists ask counsel to estimate the time for the entire trial and permit the case to be presented within the proposed parameters, if they are reasonable. Other judges prefer to obtain time estimates for each phase of a lawsuit, such as percipient and expert witness examination, opening statements and closing arguments.

Generally, if the parties agree on reasonable time estimates before trial, judges said they will not interfere during the course of the trial to impose artificial time limits on the examination of a particular witness or group of witnesses. Sometimes, however, attorneys can get out of hand, making it necessary for the judge to step in.

With big cases, the Hon. Manuel L. Real, Chief Judge of the Central District, favors setting uniform time limits for each side to present its entire case. Cross-examination counts as part of the time allotted to the attorney conducting the cross-

examination. Judge Rea confirms that this approach works to maintain control and efficiency in multi-party, large scale litigation.

Uniform time limits are not always fair, however. Judge Real suggested that more time may be allotted to plaintiffs who usually have the greater burden.

Opening and Closing Arguments

Superior Court Judge William A. Masterson and District Court Judge J. Spencer Letts agreed that the time allotted to opening statements and closing arguments should be limited. These jurists ask counsel to provide accurate time estimates and demand that they stick to them. The times may be subject to negotiations between attorney and judge. Other judges said they impose strict limits on opening statements and closing arguments based on their experience, the parties involved in a particular case and their knowledge of the facts.

State court judges are confronted with implementation of the relatively new requirements of CCP §222.5, governing voir dire in civil cases. Under this code provision, judges must permit counsel to question jurors with "liberal and probing" questions calculated to discover bias or prejudice. The statute specifies that questioning may concern topics included in the judge's examination.

In this context, judges said they tend to be patient, perhaps even deferential, with respect to counsels' conduct of voir dire.

Nevertheless, even during voir dire, the judges said it is important to move a case along efficiently. Toward that end, Judge Byrne may ask counsel to approach the bench if voir dire appears to be going off on a tangent or is lasting too long.

Direct and Cross-Examination

Generally, judges expressed a reluctance to impose time limits on the examination and cross-examination of witnesses. They acknowledged that it may be necessary, however. Judge Schneider said that attorneys must recognize that neither the judge nor the jury appreciates it when a witness is asked the same question over and over again.

Although it was not enacted as a time-saving measure, Evidence Code Section 352 is used by Judge Masterson to limit testimony. This section precludes the presentation of repetitive, minimalistic evidence, and in effect, shortens the time of trial.

In more than 200 trials over which he has presided, Judge Masterson recalled only one instance in which he cut short the cross-examination of a witness, informing the attorney, "You have another thirty minutes or forever hold your peace."

If counsel persists in repetitious examination and "does not get the message," Judge Schneider will call them to the bench. When Judge Rea notices that a case is not gaining much ground, he tries to push the attorneys "into moving a little bit faster."

The single greatest complaint expressed by jurists is that attorneys simply over-try their case: the greatest sin and most time consuming waste of a court's resources and the jury's patience!

Repetition and excessive detail tend to be the twin vices of younger lawyers who lack trial experience. They obtained experience rising "through the deposition ranks," where detailed work is expected and encouraged. Jurists observed that such lawyers need to recognize the distinction between discovery and trial. Discovery may consume months or years and it is a tedious process of gathering facts. Trial does not involve disgorging all of those facts, but sifting out the best evidence and presenting it to the jury in a persuasive and logical fashion.

—Alex R. Baghdassarian

statute grew out of frustration with a plethora of frivolous motions that often dealt with minor factual issues." The motions were time consuming for the courts and rarely aided the parties in resolving or even limiting their disputes.

So, the Legislature has severely limited an important tool for business litigation. The result may be a lighter load for law and motion judges, or at least a shift to other legal haggling, while more cases wind up going to trial.

It is disturbing to note that, while limiting the potential for summary adjudication, the Legislature, in an attempt to balance competing interests, ignored the federal summary adjudication standard under Rule 56 of the Federal Rules of Civil Procedure. A key difference between the federal and state court summary adjudication motions is the burden of proof.

Under California's Code of Civil Procedure Section 437c, the moving party has the burden of proof in a summary adjudication motion to establish "the evidentiary facts of every element necessary to entitle [it] to a judgment." *Vesely v. Sager*, 5 Cal. 3d 153, 169 (1971). Section 437c places the burden of proof on the moving party, even if the opposing party would have the actual burden of proof at trial. Therefore, summary judgment will be denied a defendant even where the plaintiff fails to file any opposing evidence.

Not so in federal court.

Under Federal Rule of Civil Procedure 56 as applied in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986), the burden of proof in a summary judgment motion is exactly the same as the burden of proof which the respective parties bear at trial. A defendant's motion for summary adjudication or summary judgment places the burden of proof upon the plaintiff. If the plaintiff fails to meet that burden, even though defendant does not negate each and every element of the case, the motion for summary judgment will be granted.

As the Supreme Court noted in *Celotex*, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" 477 U.S. at 327.

Most business litigators have been pleased with the *Celotex* standard. It forces the parties to show their evidentiary cards to quickly flush out frivolous lawsuits.

More importantly, adopting a *Celotex* standard for summary judgments does allow just, speedy and inexpensive determination of disputes. It would restore some balance to the state summary adjudication statute which was lost by the 1990 amendment.

Under the revised state statute, business litigators are limited in their ability to use this powerful and potentially successful procedural device. Adopting a *Celotex* standard for state summary adjudication motions would at least restore greater potential for using the summary adjudication device as a means of resolving litigation. It would no longer allow parties to merely delay ultimate resolution by relying upon an unfair shifting of the burden of proof, as under current state law, but rather would require litigants to put their cards on the table to determine which lawsuits truly involve disputes of law or fact and which are merely attempts to delay paying a monetary obligation duly owed.

ABTL is embarking on this new year looking for ways to improve the quality of practice for business litigators. Revival of summary adjudication motions seems to be one way to improve our ability to resolve our clients' disputes.

What do you think?

—Mark A. Neubauer

Discovery

Eureka Financial Corp. v. Hartford Accident & Indemnity Co., 136 F. R. D. 179 (E.D. Cal 1991). In a case that appears to set a disturbing standard for forthcoming discovery responses, the district court held that a responding party's failure to specifically identify documents withheld on grounds of privilege resulted in a waiver of any applicable privileges. Responses to interrogatories and document requests stated that the party would provide all relevant documents except those which were privileged. The court held that the assertion of such a blanket objection without specific identification of the privileged materials was improper and resulted in a waiver of the privilege.

Depublished Case

Pacific Living, Inc. v. Raging Waters, Inc., 91 DAR 12271 (Cal. Supreme Court) (Oct. 3, 1991). The State Supreme Court depublished this decision which had been published at 231 Cal. App. 3d 1388 and which appeared to set a new and frightening standard for excusable neglect, as reported in the September, 1991 issue of *ABTL Report*. The Court of Appeal upheld judgment on the pleadings predicated on deemed admissions where a verification form inadvertently failed to specify that a corporate officer had signed on behalf of the corporate entity. The trial court denied a motion for permission to amend the verification and, consequently, the corporation was deemed to have admitted the matters at issue in requests for admission served on the corporation.

Defamation

Dorsey v. National Enquirer, Inc., 91 DAR 15175 (C.D. Cal.) (Dec. 11, 1991). Engelbert Humperdinck could not maintain an action against the *National Enquirer* based on an article which reported allegations that the entertainer carried the AIDS virus. The allegations were contained in an affidavit filed in a court action. Although the newspaper's account included statements elaborating on the affidavit's allegations and failed to include statements that undercut the affiant's credibility, the court concluded that the article was a "fair and true" report of the affidavit and thus was absolutely privileged under California Civil Code §47(4). The court reasoned that the statutory "fair and true" requirement does not require a media defendant to justify every word of the alleged defamatory material that is published. The media's responsibility lies in ensuring that the substance is accurately conveyed.

Banking

Federal Deposit Insurance Corporation v. McSweeney, 772 F. Supp. 1154 (S.D. Cal 1991). In a victory for federal regulatory authorities, the court held that the FDIC could sue directors of a failed thrift for breach of fiduciary duty based on allegations of ordinary negligence. In so holding, the court refused to follow *FDIC v. Canfield*, 763 F. Supp. 533 (D. Utah 1991), which interpreted 12 U.S.C. §1821(k) as requiring that thrift directors be charged with gross negligence to ensure that tax dollars are directed toward culpable conduct—not ordinary negligence or simple breach of fiduciary duty. Moreover, the court held that such a negligence claim is governed by a four-year statute of limitations.

—Vivian Rigdon Bloomberg