

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

LOS ANGELES

WINTER 2018

THE STATE OF THE SUPREME COURT'S ANTI-SLAPP DOCKET



Jeff Raskin

In the last two years, the California Supreme Court has decided as many anti-SLAPP cases as it did in the prior seven years combined. In fact, these last two years account for nearly 20% of all of the Court's anti-SLAPP cases since the Legislature enacted the statutory protection in 1992. That is a substantial commitment of Court

attention to a procedural device that is applicable in a relatively small percentage of cases. But it also underscores the pace of recent developments in an area of the law that implicates substantial competing interests: the concern that meritless suits should not chill free speech and petitioning rights and the concern that plaintiffs' ability to pursue their

Continued on Page 10...

U.S. SUPREME COURT UPDATE: PENDING CASES OF INTEREST IN OCTOBER TERM 2017 (PART 1)



John F. Querio

The United States Supreme Court has granted certiorari and added several cases to its October Term 2017 docket that should be of particular interest to the ABTL membership. This two-part article summarizes cases that involve the most prominent issues of interest to civil litigators before the Court this Term. This first part discusses cases that have been argued so far.



Melissa B. Edelson

ARBITRATION/CLASS ACTIONS

Do the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement

requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis?

Epic Systems Corp. v. Lewis, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, No. 16-285 (Jan. 13, 2017); *Ernst & Young LLP v. Morris*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, No. 16-300 (Jan. 13, 2017); *National Labor Relations Board v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, No. 16-307 (Jan. 13, 2017).

The biggest arbitration case on the Supreme Court's docket this term is the so-called *Epic* trilogy, in which the Supreme Court granted certiorari to address a circuit split

Continued on Page 3...

— INSIDE —

The State of the Supreme Court's Anti-Slapp Docket

by Jeff Raskin.....p. 1

U.S. Supreme Court Update: Pending Cases of Interest in October Term 2017 (Part 1)

by John F. Querio and Melissa B. Edelson.....p. 1

President's Message.....p. 2

Ethical Screens in California: An Emerging Trend

by Michael McNamara and Elizabeth Capel.....p. 8

Young Lawyers Division Update

by Jeff Atteberry and Jen Cardelús.....p. 13

PRESIDENT'S REPORT



Michael P. McNamara

As we move into 2018, I wanted to take this opportunity to thank all the members of ABTL. I hope everyone had a safe and joyous holiday season.

Please give yourself a gift and renew your membership in the ABTL for 2018. Where else can you find a community of judges and lawyers coming together to enjoy truly great programs? To the extent you need convincing, please consider some of the highlights from 2017,

including, among other events:

- In February, we were privileged to host the Hon. Anthony Kennedy of the United States Supreme Court. It was a magical evening, as Justice Kennedy made an elegant case for the importance of having a civil discourse in our democracy.
- In September, Dan Petrocelli, the lead trial lawyer from the OJ Simpson civil case, treated us to a riveting evening, reflecting on the trial and reviewing much of the evidence from that case. While the trial was 20 years ago, this evening proved there is still tremendous interest in the OJ saga.
- In October, we held our 44th Annual Seminar at the Omni La Costa Resort & Spa in Carlsbad. In addition to enjoying the festivities at a wonderful resort, we learned from panels of distinguished judges, lawyers and other experts how to “manage the crisis event when the perfect storm hits.”
- In November, we were honored to have the Hon. Leandra Kruger of the California Supreme Court introduce a program featuring four former Solicitors General—Ted Olson, Seth Waxman, Don Verrilli and Ian Gershengorn—who captivated a sold-out Biltmore Bowl with their discussion.

These are just some of the events from 2017, which was full of other programs, activities and events.

2018 is also going to feature great programming and activities. Also, please do not forget that our Annual Seminar in 2018 is going to be in Hawaii.

So just say “yes” and renew your membership in ABTL. Your membership and participation helps make the ABTL (now in its 45th year!) a cornerstone of the Los Angeles legal community.

Onward and upward!

Michael P. McNamara
Jenner & Block LLP
ABTL President, 2017-2018

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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U.S. Supreme Court Update...continued from Page 1

concerning the interplay between the Federal Arbitration Act (FAA) (providing for enforceability of arbitration agreements, 9 U.S.C. § 2 (2012)) and section 7 of the National Labor Relations Act (NLRA) (providing for employees' right to collective action, 29 U.S.C. § 157 (2012)). The Second, Fifth, and Eighth Circuits have held that agreements requiring employees to arbitrate individually against employers are enforceable under the FAA and do not violate the NLRA; the Seventh and Ninth Circuits have found such agreements unenforceable.

All three cases arose when an employee filed a class or collective action in federal court despite having entered into an arbitration agreement with his or her employer requiring him or her to pursue work-related claims on an individual, rather than collective, basis. In *Epic Systems* and *Ernst & Young*, the Seventh and Ninth Circuits concluded that the class waivers in the arbitration agreements were unenforceable because they violated the employees' right under the NLRA to engage in concerted activities. Those courts reconciled this outcome with the FAA—and in particular with *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which held that class waivers in arbitration agreements are enforceable under the FAA—by way of the FAA's saving clause, under which an arbitration agreement is enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. In *Murphy Oil*, an employee filed an unfair labor practice charge with the National Labor Relations Board (NLRB) after her wage and hour class action was dismissed because an employment arbitration agreement she signed contained a class action waiver. The NLRB invalidated the class waiver as an unfair labor practice that interfered with employees' right under the NLRA to engage in concerted legal activity. The Fifth Circuit reversed, holding that the NLRA does not override the FAA and that use of class action procedures is not a substantive right under the NLRA.

The Supreme Court heard oral argument on October 2, 2017. In a rare twist, different departments of the federal government argued on opposing sides, with the Solicitor

General supporting the employers' side and the NLRB supporting the employees' side. Justices Ginsburg, Breyer, Sotomayor, and Kagan seemed to be firmly with the employees and the NLRB, repeatedly questioning the employers' counsel and the Solicitor General about how their position could be reconciled with the NLRA's protections. However, Chief Justice Roberts and Justices Kennedy and Alito seemed to lean toward the employers, questioning the NLRB's counsel about what kinds of collective action are protected under the NLRA. In an exchange with the employees' counsel, Chief Justice Roberts noted that a decision in favor of the employees would invalidate employment arbitration agreements covering 25 million people. Moreover, while Justices Thomas and Gorsuch were silent during argument, Justice Gorsuch has a history of interpreting arbitration clauses in light of the federal presumption in favor of arbitration. *See, e.g., Chelsea Family Pharmacy, PLLC v. Medco Health Sols., Inc.*, 567 F.3d 1191, 1201 (10th Cir. 2009) (Gorsuch, J., concurring).

If the Supreme Court does indeed rule for the employers in these cases, employers will have much more leeway to foreclose employees' class and collective action lawsuits by requiring employees to sign arbitration agreements with class action waivers as a condition of employment.

CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

Does the Alien Tort Statute, 28 U.S.C. § 1350, which gives federal district courts jurisdiction over civil lawsuits filed by non-U.S. citizens for wrongful acts that violate international law, allow lawsuits against corporations?

Jesner v. Arab Bank, PLC, 808 F.3d 144 (2d Cir. 2015), *cert. granted*, No. 16-499 (Apr. 3, 2017).

A question that has recently split the federal circuit courts is whether the Alien Tort Statute (ATS) allows

Continued on Page 4...

U.S. Supreme Court Update...continued from Page 3

lawsuits against corporations. Adopted as part of the Judiciary Act of 1789, the ATS provides that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2012).

Petitioners—nearly 6,000 non-U.S. citizens who were victims of terrorist attacks in Israel, the West Bank, and Gaza between 1995 and 2005—brought lawsuits under the ATS in federal court against Jordan-based Arab Bank. They claimed that Arab Bank had knowingly facilitated terrorism through its New York branch by maintaining accounts for known terrorists—accepting donations that it knew would be used to fund terrorism and distributing millions of dollars in “martyrdom payments” to families of suicide bombers.

In the Supreme Court, petitioners contend that their ATS claims against Arab Bank are supported by the statute’s text, history and purposes. The ATS, they assert, confers jurisdiction upon federal courts to hear “tort” claims and, at the time Congress enacted the ATS, it was unquestionable that corporations could be held liable in tort. Moreover, while the ATS clearly limits the class of potential plaintiffs under the ATS—only aliens may sue—it does not do so for defendants, even though Congress limited classes of defendants in other provisions of the Judiciary Act of 1789. Additionally, petitioners argue the ATS’s history and purposes reinforce the propriety of subjecting corporations to liability because Congress enacted the ATS to ensure that federal courts have jurisdiction over lawsuits alleging violations of the law of nations. Basic fairness, they maintain, requires corporate accountability in this context.

Arab Bank contends that the Supreme Court has directed courts to “provide a cause of action” under the ATS only for violations of “norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of...18th century paradigms.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004). In other words, the Supreme Court

has limited federal courts to recognizing causes of action only for alleged violations of international law norms that are specific, universal, and obligatory. Arab Bank argues that there is nothing remotely resembling a specific, universal, and obligatory norm of corporate liability under international law, and that the international community has generally been reluctant to impose international law obligations on corporations. Arab Bank also notes that corporations may not be held liable in similar contexts under other U.S. laws, including the Torture Victim Protection Act and private suits seeking damages for domestic civil rights violations.

The Solicitor General filed an amicus curiae brief opposing Arab Bank’s argument that the ATS forecloses corporate liability. But the government also questioned whether the *Jesner* lawsuits should go forward, asserting that the mere fact that the bank may have routed foreign transactions in dollars through its New York branch does not establish the kind of connection to the United States that the Supreme Court has required to overcome the presumption against extraterritoriality.

The Supreme Court heard oral argument on October 11, 2017. The Court was divided, with Chief Justice Roberts and Justices Kennedy, Alito, and Gorsuch appearing ready to hold that the ATS does not allow lawsuits against corporations for violations of international law. Chief Justice Roberts and Justice Alito seemed especially concerned with the potential international repercussions of providing a vehicle for corporate liability under the ATS. Justice Gorsuch repeatedly questioned whether petitioners’ interpretation of the ATS was consistent with Congress’s intent when it enacted the law in 1789. And Justice Kennedy appeared unpersuaded by petitioners’ efforts to distinguish between conduct violating international norms and those who can be held liable for such conduct under the ATS. On the other hand, Justices Ginsburg, Breyer, and Sotomayor seemed to be firmly on petitioners’ side, with Justice Kagan seeming to favor the approach advocated by the United States as amicus curiae—that corporate liability

Continued on Page 5...

U.S. Supreme Court Update...continued from Page 4

is not categorically prohibited under the ATS, but that Arab Bank should prevail in this case because its conduct failed to establish a sufficient connection to the United States.

If the Supreme Court does indeed rule for Arab Bank and hold that corporations cannot be held liable under the ATS, it may signal an end to human rights litigation under the ATS.

PATENT LAW/SEPARATION OF POWERS

Does inter partes review, an adversarial process used by the Patent and Trademark Office to reexamine the validity of existing patents, violate the Constitution by extinguishing patent rights through a non-Article III forum without a jury?

Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 639 Fed.Appx. 639 (Fed. Cir. 2016), *cert. granted*, No. 16-712 (Jun. 12, 2017).

In 2011, Congress established *inter partes* review in the Leahy-Smith America Invents Act (AIA), 35 U.S.C. §§ 311-318 (2012). *Inter partes* review reexamines the validity of a patent to determine whether it was properly granted. The AIA allows private third parties to remove patent cases from Article III courts and transfer them to the Patent Trial and Appeal Board (PTAB), an Article I tribunal within the Patent and Trademark Office (PTO). There, parties engage in motion practice, take discovery, examine witnesses, and proceed to a “trial” presided over by an administrative judge whose judgments are final and self-executing. Parties may appeal PTAB decisions only to the Federal Circuit. At issue before the Supreme Court is the constitutionality of this process.

Petitioner Oil States Energy Services, LLC filed a patent infringement suit against Greene’s Energy Group, LLC in federal court. Oil States owns a patent that covers apparatuses and methods of protecting wellhead equipment from the pressures and abrasions involved in hydraulic fracturing (“fracking”). Greene’s Energy

petitioned the PTAB to institute *inter partes* review, arguing that Oil States’s patent was anticipated by a previous patent application concerning an earlier invention. The district court proceeding and *inter partes* review proceeding continued in parallel, eventually reaching contrary outcomes as to whether the patent had been anticipated by the previous patent application. The PTAB concluded that the claims were unpatentable and denied Oil States’s application to amend its claims. Oil States appealed the PTAB’s final judgment to the Federal Circuit, challenging both the merits of the decision and the constitutionality of *inter partes* review under Article III and the Seventh Amendment. Before briefing closed, however, the Federal Circuit rejected the same challenges to the constitutionality of *inter partes* review in a different appeal, thereby foreclosing Oil States’s constitutionality arguments. *See MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284 (Fed. Cir. 2015). The Federal Circuit thus summarily affirmed the PTAB in this appeal without issuing an opinion.

In the Supreme Court, Oil States argues that *inter partes* review violates both the separation of powers enshrined in Article III and the Seventh Amendment right to a jury trial by allowing an administrative agency to extinguish private property rights. This process, Oil States argues, impermissibly removes the responsibility for deciding common-law disputes between private parties over private property rights from Article III judges and juries to administrative agency employees who are beholden to executive branch officials. In response, Greene’s Energy asserts that patents are quintessential public rights, rather than private rights, because patents confer rights that exist only by virtue of statute. Thus, Greene’s Energy contends, Congress may delegate the adjudication of patent validity to non-Article III courts in non-jury trials. And, because the administrative scheme comports with Article III, the Seventh Amendment is not implicated.

The Supreme Court heard oral argument on November 27, 2017. None of the justices appeared strongly in favor

Continued on Page 6...

U.S. Supreme Court Update...continued from Page 5

of invalidating *inter partes* review. Justice Breyer questioned Oil States’s counsel on the broader impact of finding *inter partes* review unconstitutional: “[I]t’s the most common thing in the world that agencies decide all kinds of matters through adjudicatory-type procedures often involving private parties. So what’s special about this one, or do you want to say it isn’t special and all the agency proceedings are unlawful?” Justices Ginsburg, Sotomayor, and Kagan pressed Oil States’s counsel on the specifics of why the PTO’s error-correction mechanism was unconstitutional: “there must be some means by which the Patent Office can correct the errors that it’s made,” stated Justice Ginsburg. “So what’s the line? ...[W]hat are the procedures that are here that you think make this essentially adjudicatory?” questioned Justice Kagan. Nevertheless, despite the Court’s apparent skepticism of Oil States’s position, it appeared equally hesitant to agree with Greene’s Energy’s assertion that Congress has almost plenary power to define the boundaries of patent grants. “[H]ow can you argue that ...the PTO, here has unfettered discretion to take away that which it’s granted,” challenged Justice Sotomayor. The heaviest criticism about the *inter partes* review process came from Justice Gorsuch, who drew parallels between the grant of a patent and other property rights and seemed to question whether administrative adjudication is constitutional in any case where the decisionmaker is not an “adjunct” to an Article III court.

If the Supreme Court affirms, it will reinforce the AIA’s purpose of enhancing the efficiency of resolving disputes over patent validity via the *inter partes* review process. If the Court reverses, however, it will throw a wrench into the adjudication of patent validity akin to the disruption to bankruptcy court procedures that ensued after the Court decided *Stern v. Marshall*, 564 U.S. 462 (2011), which revolved around the same Article III separation of powers issues that are at stake here. The Roberts Court has been very protective of Article III courts’ powers against encroachment from Congress, but only time will tell whether it will continue to follow its

recent pattern by striking down the *inter partes* review process as unconstitutional.

DODD-FRANK ACT/WHISTLEBLOWER RETALIATION

Does the whistleblower anti-retaliation provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) protect individuals who have not reported alleged misconduct to the Securities and Exchange Commission (SEC) and thus fall outside the Act’s definition of “whistleblower?”

Digital Realty Trust, Inc. v. Somers, 850 F.3d 1045 (9th Cir. 2017), *cert. granted*, No. 16-1276 (Jun. 26, 2017).

Section 922(a) of the Dodd-Frank Act defines a “whistleblower” as an “individual who provides...information relating to a violation of the securities laws to the [Securities and Exchange] Commission.” 15 U.S.C. § 78u-6(a)(6) (2012). Under the Act, a “whistleblower” is protected from retaliation if he: provides information to the SEC; initiates, testifies, or assists in any investigation or administrative action of the SEC related to such information; or “mak[es] disclosures that are required or protected” under various other federal securities laws. 15 U.S.C. § 78u-6(h)(1)(A).

In his suit against petitioner Digital Realty Trust, Inc., respondent Paul Somers alleged that, shortly before being fired, he had complained to senior management that his supervisor had violated certain provisions of the Sarbanes-Oxley Act of 2002. He claimed that Digital Realty violated the Dodd-Frank Act’s anti-retaliation provision by firing him for internally reporting the alleged misconduct. Digital Realty moved to dismiss the Dodd-Frank Act claim, asserting that Somers was not a “whistleblower” under the anti-retaliation provision because he did not report a securities law violation to the SEC.

Continued on Page 7...

U.S. Supreme Court Update...continued from Page 6

The district court denied the motion. It found the language in the statutory definition ambiguous and thus deferred to the SEC's regulatory interpretation of "whistleblower," under which an employee who makes an internal report of a violation qualifies for protection under Dodd-Frank's anti-retaliation provision. Siding with a Second Circuit opinion (which disagreed with a Fifth Circuit opinion), the Ninth Circuit affirmed the district court's denial of the motion to dismiss. Deferring to the interpretation of the SEC, the Ninth Circuit reasoned that the anti-retaliation provision should be read to provide protections to those who report internally, as well as to those who report to the SEC, because a contrary interpretation would make little practical sense and undercut congressional intent.

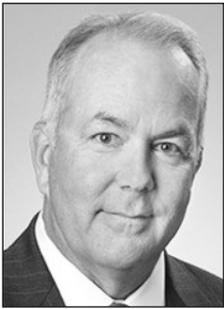
In the Supreme Court, Digital Realty contends that the Ninth Circuit erred by expanding the definition of "whistleblower" beyond what the statutory text allows. In response, Somers argues that the Ninth Circuit was correct to defer to the SEC's interpretation of "whistleblower" under the doctrine of *Chevron* deference. Congress, Somers notes, expressly charged the SEC to administer the Dodd-Frank Act's whistleblower retaliation provision, and the SEC invoked that authority in construing the statute to protect internal whistleblowing.

The Supreme Court heard oral argument on November 28, 2017. Several of the justices appeared highly skeptical of Somers's argument for a broad reading of "whistleblower." Indeed, pushback from Justice Gorsuch was immediate: "I'm just stuck on the plain language here, and maybe you can get me unstuck," the justice said. "How much clearer could Congress have been?" Even the Court's more liberal justices seemed unwilling to support a broad reading: "What's the big deal?" questioned Justice Breyer. "[H]e's protected under Sarbanes-Oxley, isn't he?" Justices Ginsburg and Kagan pointed to the statutory wording: "You have this definitional provision, and it says what it says. And it says that it applies to this section," stated Justice Kagan.

"If the statute gives a definition, you follow the definition in the statute unless it would lead not merely to an anomaly, but to an absurd result," echoed Justice Ginsburg. The Court spent considerable time on the issue of *Chevron* deference, and, regardless of the outcome of this case, the contending positions are likely to set the stage for the next skirmish in the ongoing battle between the textualist and the purposivist wings of the Supreme Court, with some justices—notably including the Court's newest member, Justice Gorsuch—looking solely to the statute's text to interpret its meaning, and others examining Congress's intent in enacting the statute at issue to determine how it should apply to the facts of a given case.

John F. Querio is a partner and *Melissa B. Edelson* is an appellate fellow at Horvitz & Levy LLP in Los Angeles.

ETHICAL SCREENS IN CALIFORNIA: AN EMERGING TREND



Michael P. McNamara

In the old days, lateral hiring was rare. Lawyers commonly retired at the law firm where they started after graduating law school. Today the opposite is true: most large firms laterally hire both individual lawyers and practice groups. This increased mobility creates possible ethical conflicts whenever a firm engages a new lawyer who is or was adverse to a current client of the firm because, under the traditional rules, the new lawyer's knowledge is generally imputed to the entire new firm. This article explores the efficacy of using ethical screens as a possible solution to this issue in California.



Elizabeth Capel

While the emerging trend in California and many other states is for firms to employ ethical screens to avoid the imputation of conflicts where lawyers move laterally from one private firm to another, it is important to note that there is still some risk, given that California's rules of ethics do not yet explicitly state that ethical screens are effective against disqualification where conflicts are imputed among lawyers at the same firm. In fact, in 2010 the California State Bar Board of Governors Committee on Regulation and Admissions explicitly decided not to adopt a rule allowing ethical screens to guard against disqualification. It reasoned that the issue is better left to resolution by case law. So that is where lawyers must look for guidance.

The most significant recent California case on the issue of ethical screens is *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776 (2010). *Kirk* establishes that once a party seeking disqualification shows that the attorney at issue has confidential information that would support disqualification, a presumption arises that the attorney has shared that information with his or her law firm. Nonetheless, the presumption can be rebutted by evidence of an effective ethical screen. The Court of Appeal noted that the "typical

elements" of an effective screen include "[1] physical, geographic, and departmental separation of attorneys; [2] prohibitions against and sanctions for discussing confidential matters; [3] established rules and procedures preventing access to confidential information and files; [4] procedures preventing a disqualified attorney from sharing in the profits from the representation; and [5] continuing education in professional responsibility." *Id.* at 810-811. However, the court also stressed that the inquiry should not be simply whether each element is met; trial courts should undertake a case-by-case analysis of whether the conflicted attorney "has not had and will not have any improper communication with others at the firm concerning the litigation." *Id.* at 811. Thus, the timing of the implementation of the ethical screen is also critical. *Kirk* makes clear that ethical screens can be effective in California, but because the California Supreme Court denied review, the issue is still not completely settled.

A number of recent published and unpublished cases that have followed *Kirk* suggest that courts are trending toward allowing ethical screens to avoid disqualification. *See, e.g., State Comp. Ins. Fund v. Drobot*, No. SACV 13-956 AG (CWx), 2014 WL 12579808, at *5 (C.D. Cal. July 11, 2014); *Heller v. NBCUniversal, Inc.*, No. CV 15-09631-MWF (KSx), slip. op. (C.D. Cal. June 30, 2017). For example, the Central District of California denied a disqualification motion in *Tawnsaura Group, LLC v. Threshold Enterprises, Ltd.*, No. SA CV 12-01364-SJO (AGRx), 2012 WL 12892439 (C.D. Cal. Dec. 26, 2012), noting that the rule in *Kirk* was satisfied given the limited nature of the confidential information shared and the seriousness and thoroughness with which the firm had established and maintained its screen. *Id.* at *11. Several recent trial court orders from the California Superior Court cite *Kirk* favorably and appear to be integrating its rule into their regular decision-making processes. *Motion Point Corp. v. McDermott, Will & Emery LLP*, No. CIV521102, 2015 WL 4722326, at *9-10 (Cal. Super. July 9, 2015). On the whole, courts appear to view *Kirk's* reasoning in a positive light, and a look at cases referencing it suggests that lawyers can expect judicial approval of ethical screens if they can satisfy the criteria set forth in *Kirk*.

Continued on Page 9...

Ethical Screens in California...continued from Page 8

Nonetheless, some courts have cited *Kirk* in finding that a particular ethical screen is inadequate to avoid disqualification. These cases do not suggest any disagreement with the holding of *Kirk*, but rather clarify what is necessary to have an effective ethical screen. For example, the Central District of California took a hard line on “belated ethical walls” in *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, 98 F. Supp. 3d 1074, 1090 (C.D. Cal. 2015) when it disqualified a firm that had not acted quickly enough. And the California Court of Appeal cited *Kirk* in underscoring the rule that no level of screening can negate an imputed conflict “in cases of a tainted attorney possessing actual confidential information from a representation, who switches sides in the same case.” *Castaneda v. Superior Court*, 237 Cal. App. 4th 1434, 1448 (2015).

The California Court of Appeal for the Fourth Appellate District recently relied on *Kirk* in *California Self-Insurers’ Security Fund v. Superior Court*, No. G054981, 2018 WL 561707 (Cal. Ct. App. Jan. 29, 2018). Vacating the trial court’s ruling that automatically disqualified a law firm from representation based on an imputed conflict, the opinion rejected the trial court’s conclusion that “when an attorney switches sides, disqualification is mandatory; no amount of ethical screening can save the representation.” *Id.* at *3. Rather, “[w]e agree with [*Kirk*] that whether disqualification of the entire firm is automatic is an open question.” *Id.* at *7. The court instead required the trial court determine “whether confidential information was, indeed, transmitted.” *Id.* The court thus continued the trend of applying a context-based inquiry to determine whether a conflict should be imputed when a lawyer switches to a firm representing the other side.

Outside California, the ABA’s Model Rules of Professional Conduct explicitly allow the use of ethical screens. Rule 1.10 provides that a firm can negate the imputation of conflicts where the conflict arises from the disqualified lawyer’s association with a prior firm, the disqualified lawyer is timely screened from any participation in the matter and does not receive any portion of the fee from the matter, and written notice and certification of compliance with the Rules are given to the affected former client.

But states do not always follow the Model Rules. Although Illinois and New York’s respective Rules of Professional Conduct essentially mirror the ABA’s Model Rules, New York Rules of Prof. Conduct, Rule 1.11(b); Illinois Rules of Prof. Conduct, Rule 1.10(e), Vermont is stricter. It does not allow any type of screening to cure an imputed conflict of interest to a firm where the disqualified lawyer participated personally and substantially in the prior representation. Vermont Rules of Prof. Conduct, Rule 1.10(a)(2). Nevada, like Vermont, allows screening only where the personally disqualified lawyer did not have a substantial role in the matter that causes the disqualification. Nevada Rules of Prof. Conduct, Rule 1.10(e).

Clearly, then, a range of positions exists on the issue of ethical screens. That being said, the use, acceptance, and legality of ethical screens appears to be growing and solidifying. For California, it is unlikely that ethical screens will become less commonplace or reliable in avoiding disqualification, and screening could at some point be codified as an unequivocally approved tool.

In fact, the California Supreme Court is currently considering whether the state should adopt a new version of Rule 1.10. The proposed text states: “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless...the prohibited lawyer did not substantially participate in the same or a substantially related matter; the prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and written notice is promptly given...” This language would align California with Vermont and Nevada: screening would be permitted so long as the conflicted lawyer did not “substantially participate” in the prior matter.

Although reasonable minds can differ on whether California should adopt the ABA approach or the narrower Vermont/Nevada approach, it would be best to have some rule formally adopted so as to end uncertainty in the bench and bar. Until that happens, firms hiring laterals would be well advised to proceed conservatively—and quickly.

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The Supreme Court's Anti-SLAPP Docket...continued from Page 1

claims should not be unnecessarily hampered.

The development of anti-SLAPP jurisprudence in the Courts of Appeal shows no signs of abating. Neither does the Supreme Court's interest in this area, with an additional nine anti-SLAPP cases pending on its docket.

The anti-SLAPP statute (Code Civ. Proc., § 425.16) is designed to deter lawsuits that chill the valid exercise of defendants' constitutional rights of freedom of speech and petition for the redress of grievances. It authorizes defendants to file a special motion to strike such claims. Anti-SLAPP motions are considered under a two-prong analysis. First, the defendant must make a threshold showing that the challenged cause of action arises from protected activity. The burden then shifts to the plaintiff to demonstrate a probability of prevailing on that claim, with the court accepting the plaintiff's evidence and deciding the probability of success as a matter of law. To further discourage meritless suits, a defendant who prevails on an anti-SLAPP motion is usually entitled to attorney's fees and costs.

A. Recent Developments

First prong analysis. In the last two years, the Supreme Court decided two cases involving first-prong issues.

The first case cautioned that anti-SLAPP protections extend beyond conduct that is directly protected by the First Amendment. In *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, a city sued its former council members, alleging that their votes to approve a public contract were tainted by a conflict of interest. The city sought to invalidate the contract and to force the defendants to disgorge campaign contributions received from the contractor. The Supreme Court held that the anti-SLAPP statute applied. The Court recognized that a legislator's vote does not constitute an exercise of his free speech rights. However, the Court found that the claim nonetheless arose from protected conduct because the anti-SLAPP statute protects not just exercises of free speech, but also conduct "in furtherance" of those rights—and a legislator's votes are made in furtherance of his advocacy for the legislation and her communication with constituents about the legislation.

The second case, *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, cautioned that there are limits in analyzing the requisite nexus between a claim and protected conduct. There, a professor claimed that a university denied his tenure application because of his national origin. The university argued that the claim arose from protected activity because the tenure denial resulted from an official proceeding and related communications. The Supreme Court disagreed. It held that the claim arose only from the decision to deny tenure, which was not itself in furtherance of the university's speech or petitioning rights. The communications (speech) and the official proceeding (petitioning) that led to the tenure denial were not themselves elements of the professor's claim, and thus did not give rise to the claim. That the speech and petitioning ultimately led to the tenure denial was not a sufficient nexus.

Second prong and attorney's fees. Of the Court's three recent second-prong cases, two focused on the method by which courts apply the second prong, rather than on a substantive legal issue that arose from a particular claim.

Baral v. Schnitt (2016) 1 Cal.5th 376 resolved a major conflict among the Courts of Appeal concerning how to analyze a cause of action that seeks relief both for protected and unprotected conduct—claims referred to as "mixed causes of action." The Court held that for anti-SLAPP purposes, such mixed causes of action must be treated as separate claims. If the plaintiff cannot establish the minimal merit of her claim regarding protected activity, the allegations of protected activity supporting the cause of action must be stricken. In other words, the plaintiff cannot avoid anti-SLAPP protections by linking claims of protected and unprotected activity and then demonstrating a probability of success on the merits of the unprotected-activity allegations.

Barry v. State Bar of California (2017) 2 Cal.5th 318 corrected a misconception that the second prong examines only the plaintiff's probability of success on the merits of the claim. The Court explained that the plaintiff can also lose an anti-SLAPP motion when his claim is procedurally or jurisdictionally barred. What's more, the Court held that trial courts are empowered to decide anti-SLAPP motions

Continued on Page 11...

The Supreme Court's Anti-SLAPP Docket...continued from Page 10

and award fees and costs even when they lack subject matter jurisdiction over the plaintiff's claim. In other words, the anti-SLAPP statute has teeth: Its purpose of discouraging suits that deplete a defendant's energy and resources will be honored regardless of whether the plaintiff's claim is substantively meritless or jurisdictionally defective.

B. The Path Ahead

The cases currently pending on the Supreme Court's anti-SLAPP docket focus largely on first-prong and procedural issues. Here are the highlights that most directly impact business litigators:

Relevance of motive allegations. The Court has thus far granted review in six cases that all pose a recurring issue on which the Courts of Appeal are split: Whether the mere allegation of a bad motive (discrimination, retaliation, etc.) for otherwise protected conduct is enough to defeat an anti-SLAPP motion on the first prong. Until recently, the Courts of Appeal had uniformly answered this question in the negative, holding that the anti-SLAPP statute applies to these claims and that whether the defendant discriminated or retaliated is exclusively a second-prong issue (i.e., whether the plaintiff can show probability of success). That changed in late 2016, when *Nam v. Regents of the University of California* (2016) 1 Cal.App.5th 1176 expressly disagreed and held that a discrimination claim arose from the defendants' alleged discriminatory motive rather than from protected conduct, meaning that the defendants could not satisfy the first prong. The issue has since arisen in other cases, with numerous published and unpublished opinions deepening the conflict.

This motive issue is now squarely before the Supreme Court in *Wilson v. Cable News Network, Inc.*, S239686, in which the Court of Appeal ruled that the defendant could not satisfy the first prong in the face of allegations of discriminatory motive for terminating the plaintiff's employment. At this writing, the case is being briefed. The decision may have far-reaching impact. The Supreme Court has granted review, with briefing deferred pending the *Wilson* decision, in multiple cases—cases where the motive issue is presented in the context of claims for

employment discrimination and harassment; for defamation; for the initiation and pursuit of the medical peer review process (proceedings that seek to limit a physician's hospital privileges); and that a contract for newsgathering and reporting violates the Government Code and involves self-dealing. But the question about the relevance of motive under the first prong presumably applies to an even broader range of claims and motives, including allegations of malice in a malicious prosecution claim and claims that seek punitive damages. And improper motive can be so easily alleged that an affirmance in *Wilson* could cripple the operation of the anti-SLAPP statute in a broad range of cases.

Commercial speech and the relevance of the speaker's audience and purpose. In *FilmOn.com v. Doubleverify, Inc.*, S244157, the Court confronts another significant question about the definition of protected speech. The defendant provides its clients—online advertisers—with ratings of online media sites to help the clients effectively use their advertising budgets in ways that do not harm their brand reputation. An internet content provider sued the defendant for slander and other business-related torts over the bad rating that the defendant provided to its clients. The Court of Appeal held that the anti-SLAPP statute applied because the claims arose from the defendant's protected speech. At issue before the Supreme Court is whether the website rating constitutes activity in furtherance of the exercise of free speech given the intended purpose of the speech (its commercial nature) and the identity of the audience (clients who pay to see the ratings of online media sites). This issue is somewhat different from, and should not be confused with, the commercial speech exemption to the anti-SLAPP statute. (Code Civ. Proc., § 425.17, subd. (c).) The Court of Appeal opinion did not address that exemption, which withholds anti-SLAPP protection from a defendant's representations of fact about its or its competitor's business operations, goods or services.

Commercial speech and the analysis of issues of public interest. *Rand Resources, LLC v. City of Carson*, S235735, poses a somewhat different issue concerning the intersection of commercial conduct and anti-SLAPP

Continued on Page 12...

The Supreme Court's Anti-SLAPP Docket...continued from Page 11

jurisprudence. The City of Carson entered into a contract whereby the plaintiff would serve as the City's exclusive representative to negotiate with the NFL to relocate a football team to Carson. The plaintiff alleged that the City breached that agreement and engaged in fraud by allowing a third party to act as its negotiating agent. The Court of Appeal held that these claims did not fall within the scope of the anti-SLAPP statute. For instance, the court held that the breach of contract claim did not arise from the City's free speech or petitioning rights, but rather from the City's failure to carry out its contract obligations—the mere fact that some speech occurred in the course of the breach did not mean that the claim arose from that speech. The court's opinion expressed concern that “[t]o hold otherwise, would place the vast majority, if not all, of civil complaints alleging business disputes and a large portion of tort litigation within the scope of section 425.16.” (*Rand Resources, LLC v. City of Carson* (2016) 247 Cal.App.4th 1080, 1093.)

The appellate decision also went on to reject the City's argument that the claims alleged speech or conduct that was of substantial public interest. As the Court of Appeal saw it, analysis of whether speech concerns an issue of public interest must focus on the specific speech in question, not the broader topic that might be implicated by or provide background for that speech. Thus, the Court of Appeal recognized that a large-scale construction project and bringing an NFL team to the City were matters of substantial public interest, but it held that the complaint did not concern such broad subjects. Instead, the court construed the complaint more narrowly as involving the identity of the City's unpaid representative to negotiate with the NFL, and the court held that this is not a matter of public interest.

The City's briefs (and the amicus briefs supporting the City) focus primarily on the latter issue—whether the complaint involves an issue of public interest and the method by which courts should analyze that question. Given the Court's statement of the issues on review, it is difficult to predict whether the Court will consider the issue of whether the plaintiff's claim arose from speech as opposed to the carrying out of a contractual obligation.

Illegality. It is well settled that a defendant cannot establish the first prong of the anti-SLAPP analysis if her assertedly protected activity is criminal as a matter of law. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 312-320.) In *Sweetwater Union High School District v. Gilbane Building Co.*, S233526, a school district seeks to void contracts it entered into with three entities that allegedly engaged in a pay-to-play scheme with school officials. In response to the entities' anti-SLAPP motion, the school district presented evidence that school officials and some of the defendants' officers and employees had pled guilty or no contest to criminal charges. The school district sought to introduce written statements and grand jury testimony from the criminal cases to show that the factual basis for these pleas related to the assertedly protected activity raised by the anti-SLAPP motion. On review, the Supreme Court is considering the admissibility and use of such written statements in the anti-SLAPP context and whether Evidence Code section 1290 et seq. (governing the use of former testimony as an exception to the hearsay rule) has any bearing on that question.

Timeliness of anti-SLAPP motions. Absent relief from the court, anti-SLAPP motions must be filed within 60 days of service of the complaint. *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, S239777, examines the contours of that timing requirement. There, the defendant did not file an anti-SLAPP motion until after the third amended complaint. Then, it sought to strike both the newly-added claims and claims that had been pled in the prior complaint. The Court of Appeal held that the anti-SLAPP motion was timely only as to the new claims—the filing of the third amended complaint did not restart the 60-day clock on the defendant's right to seek anti-SLAPP relief on the preexisting claims. The Supreme Court granted review to resolve this timing issue and clarify the permissible scope of an anti-SLAPP motion directed at an amended complaint.

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YLD UPDATE



Jeffrey A. Atteberry



Jen Cardelus

The Young Lawyers Division held a brown-bag lunch hosted by the Honorable S. James Otero in his courtroom at the Central District courthouse on January 11. Judge Otero gave an informative and engaging presentation on the Patent Pilot Program, which is a ten-year program begun in 2011 designed to increase the efficiency and judicial expertise in federal patent cases. Judge Otero outlined the goals of the program, the results of the program's 5-year review, and his personal experiences as participating judge in the program. Judge Otero also provided the attendees with a number of very helpful pointers for young lawyers appearing in the federal

courts. The event concluded with a tour of the Judge's chambers. Thanks to Judge Otero's gracious hospitality, everyone in attendance found the event to be enlightening and entertaining. The YLD is presently organizing additional brown-bag lunches for this spring.

On February 17, the YLD is sponsoring a community impact project with the Los Angeles Regional Food Bank. From 8:30 am to 12:00 pm, volunteers will help prepare food packages for low income seniors, women with infants and children in Los Angeles County. The event is open to all ABTL members, and the YLD enthusiastically welcomes participation from across the organization. All interested volunteers must register with the Los Angeles Food Bank. A flier has been circulated to the ABTL membership with the required registration information. However, anyone interested in participating who has not received the flier should feel free to contact the ABTL at abtl@abtl.org or Jeffrey Atteberry at jatteberry@jenner.com.

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