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abtl REPORT

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Tips for Civil Litigators In Bankruptcy Court

Speaking as a general practice federal civil litigator who by luck became a bankruptcy judge sixteen years ago, my experience is that competent federal civil litigators are fully competitive with bankruptcy specialists when it comes to bankruptcy litigation. They have the key skills for effective bankruptcy litigation, but at times tend to overlook significant litigation strategies opened up by the bankruptcy law and process. Nonetheless, civil litigators need not automatically abdicate to bankruptcy lawyers. Indeed, if I were organizing a law firm's litigation department, I would expect (after a hard-headed review of the overall economics of the situation) litigators to retain primary responsibility over matters that migrate into bankruptcy court and require that they coordinate with bankruptcy specialists as to bankruptcy-specific issues.

Hon. Christopher M. Klein

The reason for keeping the litigator on board is that bankruptcy does not necessarily change the dispute that underlies the litigation. The basic rights of the parties are determined by the same substantive law that governs non-bankruptcy cases. The methods

(Continued on page 2)

INSIDE

Class Action Fairness Act of 2005: The Defendant's View

The Class Action Fairness Act of 2005 (CAFA), which applies to civil actions commenced on or after February 18, 2005, introduced two significant changes to class action practice. One set of CAFA's provisions substantially expands the federal courts' diversity jurisdiction over state-law based class actions. The other set covers procedural and substantive changes to class action settlements. Although the first set of provisions protects defendants against forum shopping by plaintiffs in state courts and makes available various other benefits associated with federal court litigation (including the opportunity to coordinate proceedings under the MDL rules), other provisions of CAFA may make settlements more difficult by limiting the ability of class attorneys to earn fees (often the primary driver of such litigation), expanding the courts' oversight over settlements, and providing government regulators the opportunity to weigh in on class settlements.

Jeff E. Scott

Although generally considered a pro-defense statute, in fact CAFA may be more accurately described as an anti-plaintiffs' attorney statute. A side effect of CAFA's changes should benefit many potential defendants by limiting the number and type of class actions that are brought, as many cases will be more difficult to settle and less likely to generate substantial attorney's fees awards.

CAFA's provisions that now play an important role in the class action removal process are discussed below.

The Jurisdiction and Removal Provisions

The provisions related to original jurisdiction and removal jurisdiction over multi-state class actions are undoubtedly CAFA's most significant features. These provisions allow defendants the ability to defend many large class actions arising under state law in federal court. Before CAFA, class actions raising exclusively state law claims could be removed only if they satisfied the traditional diversity jurisdiction requirements of 28 U.S.C. § 1332.

Under the pre-CAFA complete diversity rule, all named class representatives and all defendants had to be citizens of different states. If at least one named plaintiff and one defendant were citizens of the same state, the defendants were precluded from re-

(Continued on page 10)

Continued from page 1

of proof are governed by the Federal Rules of Evidence. The basic procedure is drawn from the Federal Rules of Civil Procedure ("FRCP").

Bankruptcy affects remedies and procedures and may change litigation dynamics. By focusing on financial remedies, it accelerates the litigation process by opening the door to a prompt resolution on the merits through an early hearing. In such proceedings, the lawyers who do well are those who are able to marshal evidence efficiently in the manner used in federal civil practice for making out a case for a preliminary injunction, temporary restraining order or similarly fast-paced litigation.

Common Procedural Ground

The first point of commonality is the poorly-understood fact that the Federal Rules of Civil Procedure apply in bankruptcy. Although FRCP Rule 81(a)(1) says that the FRCP "apply to proceedings in bankruptcy to the extent provided by the Federal Rules of Bankruptcy Procedure ('Bankruptcy Rules')," the extent of incorporation is not readily apparent from the Bankruptcy Rules, which are vulnerable to the criticism that their structure operates as a barrier to entry to competent non-bankruptcy specialists. To assist the general federal litigator in surmounting this barrier, I have written an article that details the bankruptcy court's incorporation of 77 rules of the FRCP: Christopher M. Klein, *Bankruptcy Rules Made Easy (2001): A Guide to the Federal Rules of Civil Procedure that Apply in Bankruptcy*, 75 Am. Bankr. L.J. 35 (2001).

The second point of commonality is that the Federal Rules of Evidence apply in bankruptcy cases. The presentation of evidence regarding disputed material factual issues, even in short-fused motion matters, generally must be in the same manner as trial of a federal civil action. The common reliance in bankruptcy court on affidavits as shortcuts reflects acquiescence by parties who elect not to interpose meritorious hearsay objections. When objection is made and testimony ensues, it can be entertaining to see the extent to which affiants are (or are not) familiar with facts stated in their affidavits. The pertinent considerations and techniques underlying the litigation decisions are well known to those skilled in temporary restraining order and preliminary injunction practice.

Effects On Pending Non-Bankruptcy Litigation

Non-bankruptcy litigation is affected by bankruptcy in two respects.

First, the automatic stay (11 U.S.C. § 362) applies to most pending civil actions against the debtor. (Although actions by the debtor are not ordinarily stayed, the trustee becomes the real party-in-interest.) The stay cannot be ignored. In the Ninth Circuit, acts in violation of the stay are void *ab initio*. *Schwartz v. United States (In re Schwartz)*, 954 F.3d 569 (9th Cir. 1992). Thus, if one wishes to continue to proceed in a non-bankruptcy court, relief from stay may be necessary.

Second, if the action by or against the debtor is pending in state court, any party may remove it, in whole or in part, to federal court (28 U.S.C. § 1452), although the removal is subject to an unusually liberal remand provision ("any equitable ground"). This affords an opportunity to proceed in a federal forum that is comparatively unclogged.

A removed action is automatically "referred" to the bankruptcy court (which is a "unit" of the district court), though the district court has the power to "withdraw the reference" on motion. Although withdrawal of the reference is generally discretionary, the district court must hear any personal injury or wrongful death action. As with any other removed action, discovery and the balance of pretrial and trial process will be governed by the FRCP (as adopted in bankruptcy).

Bankruptcy Trials

Trial probably will be to the bench. The debtor (by filing the bankruptcy case) and the removing party (by invoking bankruptcy process) probably will be deemed to have waived any jury demand, as will any party that has filed a claim in the bankruptcy case.

A bankruptcy judge may "hear and determine" any "core" proceeding within the meaning of 28 U.S.C. section 157(b)(2), which is a non-exclusive laundry list of matters that are central to the bankruptcy process, including case administration, claim allowance, obtaining credit, recovery of property, avoiding actions, discharge issues, lien status determinations, plan confirmation, sale/use of property, and other matters affecting liquidation or adjustment of debtor-creditor status (except personal injury and death claims).

A bankruptcy judge may also hear "non-core" proceedings (except personal injury and death claims). Although the statutes and rules regarding "non-core" proceedings prescribe an elaborate procedure for the bankruptcy court to submit reports and recommendations to the district court for *de novo* review, bankruptcy judges rarely are required to do so because the parties generally consent to have the bankruptcy judge hear and determine the "non-core" matter, which is then subject to ordinary appellate review.

If a jury trial is available, the case will be tried before the district court unless every party expressly consents that the bankruptcy judge may conduct the jury trial. In practice, jury trials in bankruptcy courts are rare.

Claims

Regardless of whether the non-bankruptcy litigation is removed to bankruptcy court, the bankruptcy proceeding cannot safely be ignored. An unsecured creditor that does not protect its interest by filing a proof of claim risks being left out in the cold with no recovery through the bankruptcy case and, because of the discharge, no further rights against the debtor.

The primary way to protect one's rights is to file a proof of claim, regardless of whether pending non-bankruptcy litigation is removed to the bankruptcy court. While, in Chapter 11 cases, a creditor's claim designated in the debtor's schedules as undisputed, non-contingent and liquidated is automatically "deemed" allowed, that will rarely be the case where there is pending litigation with the debtor. The best practice, almost always, is to file a proof of claim.

Failure to file a timely proof of claim can be catastrophic. In Chapter 11 cases, late claims are disallowed *per se* even though the debt may be discharged; in Chapter 7 cases, late claims are statutorily subordinated to timely claims. Case reports are littered with the bodies of creditors who were frozen out by not filing a timely proof of claim. The Supreme Court's leading case on "excusable neglect," *Pioneer Investment Services. Co. v. Brunswick Associates Ltd. Partnership*., 507 U.S. 380 (1993), is such a case.

The primary downside to filing a proof of claim is that the claimant loses the right to a jury trial on any counterclaim against it by the debtor. That should not, however, be much of an impediment. If the defense to a counterclaim turns on whether the trier of fact is a jury, instead of a judge, one wonders about its merits.

A properly-filed proof of claim is "deemed allowed" to the extent prescribed by 11 U.S.C. section 502(a)-(b), unless somebody objects. If the claim is contingent, unliquidated, or arises from a right to an equitable remedy for a breach of performance, it must be "estimated" under section 502(c). One trap for the unwary in a claims dispute is that a litigant whose claim has not yet been allowed (as when an objection to the claim is pending) is not permitted to vote on a plan of reorganization unless, under Bankruptcy Rule 3018(a), the court "temporarily allows" the claim.

(Continued on Page 3)

Tips for Civil Litigators

Continued from page 2

Claims litigation triggered by an objection to claim is a flexible process that is largely under the control of the court. The process typically takes its lead from the manner in which the parties frame the dispute. An objection to claim can be resolved in a summary procedure or may lead to full litigation either as a "contested matter" or an "adversary proceeding."

When it comes to actual distributions on claims, one of the most frequent problems is that the claimant has not kept the court informed of its current address. If you file a proof of claim, be sure to keep the claimant's address current.

Contested Matters

The vast majority of bankruptcy litigation is conducted as a "contested matter" under Bankruptcy Rule 9014. A contested matter is a foreshortened civil action that can be adjusted to fit the exigencies of the situation. A motion serves the function of the complaint (the motion must be served "in the manner" of a summons and complaint), but the other pleading and pretrial scheduling rules of the FRCP do not apply. Most of the rest of the FRCP, however, does apply in contested matters, including the civil discovery rules (except for mandatory disclosure).

Upon hearing the merits, unless the parties stipulate otherwise, Bankruptcy Rule 9014(d) requires that testimony be taken in the same manner as in an adversary proceeding. The court is required to make findings pursuant to FRCP Rule 52, and defaults are governed by FRCP Rule 55. Moreover, the order disposing of a contested matter is treated as a judgment under FRCP Rules 54 and 58.

The dynamics of a contested matter resemble those in a federal injunction case, where prompt relief is needed. The attributes that enable a savvy federal litigator to succeed in such practice in a district court enable the same litigator to successfully handle a bankruptcy contested matter. The key to success is proactive use of the procedural opportunities.

Adversary Proceedings

The bankruptcy adversary proceeding is fundamentally a federal civil action. Virtually all of the FRCP apply. Indeed, a federal district court that withdraws the reference of an adversary proceeding is required to proceed under the Bankruptcy Rules (most people ignore this technicality because it makes almost no difference).

Adversary proceedings are "different" primarily in the sense that the bankruptcy court will be focused on prompt resolution of the dispute. The median adversary proceeding pending in this author's court is concluded in about seven months; few are older than one year. Discovery is necessarily shorter, which leaves less time for gamesmanship. Discovery disputes are resolved by the trier of fact. Trials are conducted in the same manner as bench trials in district courts.

Preclusion

An understanding of the principles of *res judicata* (claim preclusion and issue preclusion) is vital to whomever is dealing with the effects of a bankruptcy. The outlines of the doctrine are precisely the same as the substantive law applicable in non-bankruptcy litigation and should be familiar to generalist federal litigators. Although this subject warrants treatment in separate articles, an example of the application of preclusion principles in bankruptcy is provided by *Alary Corp. v. Sims (In re Assoc'd Vintage Group, Inc.)*, 283 B.R. 549 (9th Cir. BAP 2002).

In short, bankruptcy litigation is garden-variety federal civil litigation. There is no reason, particularly in the instance of disputes to be determined by non-bankruptcy law, why a competent civil litigator should be afraid of the bankruptcy forum.

— Hon. Christopher M. Klein

Un Ballo Maschera: Remembering Those Unbillable Hours of Fun

When the editors asked me to write a piece to help launch The Report's 28th year of publication, I demurred. (Demur: A legal term meaning: "Even if I believe your facts, you still have no cause of action;" often misused, as here by the author, to mean "I could, but I won't.")

Then I read a quote in the Los Angeles Times where a gentleman said, "There are three world-class organizations in the musical life of Los Angeles: The Los Angeles Philharmonic, the Los Angeles Opera, and the Los Angeles Chamber Orchestra." This evoked nostalgia, a palliative I try to avoid since it seldom evokes pleasure without pain; just as the pleasant feeling of a hot bath leaves you with wrinkled skin.

Thomas J. McDermott

But in the past, I had had a marvelous time with all three: the Philharmonic, the opera, and the chamber orchestra; indeed, I was present at the creation of two of the three. How did this come about? Well, several friends and I formed the Los Angeles Opera Company. At the request of a high school friend, I incorporated the Los Angeles Chamber Orchestra and obtained its 501(c)(3) tax exemption. And I spent many years on the Board of the Music Center, home of the Philharmonic. All of this occurred, not because I had any particular expertise in the area of music, but because I was a lawyer. And it was all done for free, which is the point of this piece.

Adventure and Joy

Perhaps there could be something instructive in creating for today's lawyers a sense of the adventure and joy available to you just because you are a lawyer. And perhaps for the managers of law firms, there might be some interest in knowing how past titans of the law in Los Angeles (my bosses) treated billable hours.

I was a second-year associate. A law school classmate, Hugh Evans, called me and asked if I wanted to start an opera company in Los Angeles, which at the time was only the home of the visiting San Francisco Opera. Sure, why not! His brother-in-law, Tom Lockie, also a lawyer, had found a struggling entrepreneur named Frank Pace staging opera at the Wilshire Ebell Theater. Pace had been a clarinetist at La Scala, but was now making custom furniture in Los Angeles. He needed help, which meant money, and we were to raise it.

Minimal Operatic Knowledge

Evans, Lockie and I quickly rounded up Henry Duque, a banker; Steve Gavin, then a former assistant to Mayor Norris Poulson, now with Pacific Life; Bernie Greenberg, a lawyer classmate, and Bob Frogen, an advertising executive. We were all in our 20's, except Gavin. The extent of our knowledge of opera was, basically, we'd seen one. We were amateurs of the worst sort: Totally dedicated, absolutely unqualified, and wildly optimistic.

We staged 16 or 18 operas at the Ebell over three years with moderate success. If you think we had mediocre singers, you'd be

(Continued on page 4)

Continued from page 3

wrong. We had Marilyn Niska, Marni Nixon, Shirley Verrett, and Marilyn Horn, among others. Lofti Monsuri, who went on to head the San Francisco Opera for many years, did much of our directing. Keep in mind we were forming corporations, obtaining tax exemptions, drafting contracts and begging for money, all without pay. My senior partners, Bill Gray (later a Federal judge) and Morris Pfaelzer (later married to a federal judge), had no interest in opera, but they viewed *pro bono* work as part of a lawyer's responsibility to the community. Billable hours were important, but the community work was equal to, not beneath, them.

Somewhat amazed at our muted success at the Ebell, "the boys," as we were becoming known (probably to reflect a sort of "Our Gang" naivete) decided we should be in the Music Center, namely the Dorothy Chandler Pavillion.

Mrs. Norman Chandler, "Buff" to her friends, was the wife of the publisher of The Los Angeles Times and was the undisputed queen of the Los Angeles cultural and social world. Luckily, Steve Gavin, through his former political associations, was on a "Buff" name basis (the rest of us never got past "Mrs. C.").

We raised a lot of money, we went personally liable on approximately $100,000 of debt, we lined up Marilyn Horn and the Los Angeles Philharmonic to be conducted by Henry Lewis (then Ms. Horn's husband) and we convinced Mrs. C. to let us in the door. We staged "*Italian Girl in Algiers*" and it was a sensational flop.

Actually, it was quite good. Could Marilyn Horn ever be anything but good? I doubt it. However, Martin Bernheimer, a music critic for The Times, wrote his first review for the paper on *Italian Girl in Algiers*. He blasted it. Mrs. C., who had musical taste, had been home with the flu. Bernheimer's review was her only reference. We were out.

Mrs. C's Edwardian Mansion

A hasty meeting of the Performing Arts Council, which controlled The Music Center, was called at Mrs. C.'s Edwardian mansion in Hancock Park. We pleaded our case, she stated her case. Only Walt Disney stood up for us. "Let the boys have another chance," he said. (Probably thinking of how the critics early on told him to junk Mickey Mouse.) The vote, however, was unanimous with one dissent, Walt Disney. We were out.

With my five friends and $100,000 debt behind me urging me on, I told Mrs. C. we were going to sue her and the entire L.A. musical establishment because we had a promise of a season at the Music Center, relied on it, and went into debt because of it. Oh my. This would not do. So after weeks of dithering, she assigned Lew Wasserman to solve the problem. Lew was running MCA, which had just purchased Universal Studios. He was not quite yet "the most powerful man in Hollywood" but he was close.

Mr. Wasserman's Domain

After several more weeks of nothing, Lew called a meeting. We ascended to the top floor of the Black Tower in Universal City and entered Mr. Wasserman's domain. His expensive desk was clear, except for one document–the MCA/Universal financials. Where were our financials? We didn't exactly have financials, we were a nonprofit operation (a word Lew was just getting used to) but we knew we were $100,000 in debt. Lew exploded, "I know the exact financial status of MCA at the beginning of every day." I'm sure you do, but we're all volunteers, blah…blah…blah.

Finally, things settled down and Lew proposed a solution, which, to simplify, amounted to our debt being paid off by the musical establishment.

As we walked out the door, Steve Gavin turned around and said, "Lew, suppose Mrs. C. doesn't agree?" "Don't worry boys," Lew replied, "She'll agree."

She didn't.

After more months of posturing, staving off creditors and drafting a complaint, Mrs. C. called Steve Gavin at 3 a.m. one morning and said she just had a dream. And it resolved the entire problem.

Mrs. C's Dream

It (the dream) amounted to keeping our board together, but doubling it in size with the new members to be "heavy-weights" including Mrs. C. herself, in order to create a "real" opera company with "real" money.

Done.

There would be a Los Angeles Opera Company. There would be no personal liability for the debt. Mrs. C. picked John McCone, who had just resigned as head of the CIA, for the Chair. The rest of the new members represented about half the wealth of Los Angeles at the time. If Los Angeles had been a country, it could have declared war on San Francisco at an Opera Board meeting. That's the L.A. power-base Mrs. C. delivered.

Philharmonic Goes on Strike

Our first event was a fund raising gala starring Joan Sutherland; at great expense, I should add. The L.A. Philharmonic went on strike just before the gala and, although we had another orchestra, some pickets started parading in front of the stage door at The Music Center, a practice forbidden by United States labor law. This was on the day before the concert. They would have barred Ms. Sutherland and our orchestra from entering. I, some volunteers from O'Melveny & Meyers, and the local Labor Relations Board, stayed up all night working together to draft a complaint and a request for a temporary restraining order. We obtained the order from the federal court in Los Angeles at 9:30 on the morning of the concert and I served the papers on the pickets and the local AFM myself.

Success. The concert produced funding and some credibility. The all-star board performed, although it could not raise enough money to produce original opera, so the New York City Opera Company became the "Los Angeles Opera Company" for many years. Finally, the Los Angeles Opera Company started to produce its own operas, and is celebrating its 20th anniversary this year.

There is, of course, much more to the story than this. Hundreds, if not thousands, of people contributed to the growth of the Los Angeles Opera Company. Much of the credit for its current success goes to Bernie Greenberg, a lawyer, its chair for many years, and one of the original "boys;" the only one who stayed with the company throughout the years. And, Mrs. Norman Chandler, despite some eccentricities, probably contributed more to the cultural growth of a city (ours) than any single person has ever done in history.

'You Will Do the Work'

As for me, Mrs. C. asked me to come on the Performing Arts Council Board, where I spent many years with some very interesting involvement in all the music and drama that goes on there. When Mrs. C. put me on the board, she said, "We have two types of people on these boards. Those who give the money and those who do the work. You will do the work."

But all of this was for free. Gasp! No billable hours? No, and no one cared. Particularly my bosses and then my partners. Most of them were contributing comparable services to the community. Each of us was doing something, small, but tangible, to contribute to the overall growth of the community where we lived and worked. Did this ride with the rich and famous produce a lot of profitable legal business? No. But it did produce an opera company…and was it fun!

— Thomas J. McDermott

Younger Abstention Appropriate for Subsequently Filed State Court Action

In *M&A Gabaee v. Community Redevelopment Agency*, 419 F.3d 1036 (9th Cir. Aug. 17, 2005), the California Redevelopment Agency ("CRA") filed an eminent domain action in state court a month before M&A filed federal lawsuit to enjoin the CRA's acquisition of property through eminent domain. The CRA successfully moved to dismiss the federal suit on abstention grounds. A month later, M&A filed a separate action to enjoin the CRA from acquiring another property through eminent domain. The next day, the CRA filed an eminent domain action against that property in state court and, subsequently, moved to dismiss the federal suit on abstention grounds. The federal court granted the motion. M&A appealed both orders.

The Ninth Circuit affirmed, rejecting M&A's argument that the federal courts need not abstain from a case involving an ongoing state court action because no substantive proceeding on the merits had yet occurred. The court reasoned that the principle of deference to state courts would be subverted if the federal courts proceeded to adjudicate matters of state court concern simply because the state court had not yet reached the merits.

It also noted that the determination of whether state court proceedings are "pending" is based not by the commencement of the proceedings, but whether state proceedings were initiated before any federal court proceedings of substance. Thus, federal abstention based on later-filed parallel state action may be appropriate when there have been no proceedings on the merits in federal court.

Copyright Owners Not Collaterally Estopped from Asserting Writer's Defeated Claims

In *Kourtis v. Cameron*, 419 F.3d 989 (9th Cir. Aug. 15, 2005), Filia and Constantine Kourtis developed an idea for a film entitled "The Minotaur" and commissioned a screenplay from William Green, which they shopped around to different producers. An agent who received the screenplay contacted the Kourtises and told them he would share it with film maker James Cameron. Cameron contacted the Kourtises and expressed interest in the screenplay, but ultimately passed. Two years later, Cameron released the film "Terminator II," which featured characters like those in "The Minotaur."

Screenwriter Green filed a copyright infringement action against Cameron and others associated with "Terminator II." The Kourtises did not intervene in Green's suit, but were deposed by Cameron. Cameron and the other defendants prevailed against Green on summary judgment.

The Kourtises subsequently filed their own copyright infringement, breach of contract, and breach of confidence action against Cameron. The district court granted Cameron's motion to dismiss on the grounds that the Kourtises were collaterally estopped from relitigating the copyright infringement issue and that their state law claims were barred by the statute of limitations.

The Ninth Circuit Court of Appeals reversed in part, holding that collateral estoppel does not attach merely because the same issue is raised in successive suits by a party who was not in privity with the first litigant. The court noted that privity has evolved beyond traditional relationships (co-owners, assignors/assignees, indemnitors/indemnitees) to "virtual representation" relationships involving a "close relationship, substantial participation, and tactical maneuvering" along with an identity of interests and adequate representation. However, there can be no privity, virtual or otherwise, between a non-party and its purported representative when there is a conflict of interest.

Thus, while Green and the Kourtises have an agency relationship and shared interest in establishing that "Terminator II" infringed upon "The Minotaur," there was no satisfaction of the adequacy-of-representation requirement because Green was not acting as the Kourtises' agent or at their direction when pursuing his own claim against Cameron, nor did the Kourtises have an interest in any recovery by Green. The court also concluded that the Kourtises' failure to intervene in Green's lawsuit did not expose them to the earlier proceedings' preclusive effects because the Kourtises had no duty of mandatory intervention.

Trial Court May Reconsider Orders *Sua Sponte*

In *Francois v. Goel*, 35 Cal. 4th 1094 (2005), the California Supreme Court held that Code of Civil Procedure §§ 437c and 1008 limit a parties' ability to file repetitive motions but do not limit the court's ability to reconsider its prior interim orders *sua sponte*. Section 437c restricts a party's ability to move for summary judgment on issues previously asserted and denied in a prior summary judgment motion absent newly discovered facts, circumstances, or a change of law. Section 1008 requires that any motion for reconsideration of an interim order be based upon new or different facts, circumstances, or laws. Section 1008 also provides that if a court determines that there has been a change of law warranting reconsideration of prior order, it may, on its own motion, enter a different order.

Pamela D. Deitchle

Francois appealed the trial court's granting of defendants' second summary judgment motion on the grounds that it was based on the same law and evidence as the first motion, which was denied. The Court of Appeal affirmed the judgment based on the trial court's inherent power to rule on the motion notwithstanding either sections 437c or 1008.

The California Supreme Court reversed, finding that the trial court erred by granting summary judgment. It concluded that sections 437c and 1008 properly restrict a party's ability to file repetitive motions and that unless those requirements are satisfied, any action to reconsider a prior summary judgment or interim order must begin with the court *on its own motion*. The Court reasoned that the Legislature was properly vested with the authority to regulate litigants' procedure, but that it could not enact statutes that materially impair the court's power to resolve specific controversies.

Thus, while the trial court could have reconsidered its first summary judgment ruling *sua sponte*, it could not consider a party's *written* motion for summary judgment after the first had been denied unless the written motion complied with sections 437c or 1008.

Trial Court Lacks Jurisdiction to Grant Summary Judgment Post-Settlement

In *Tire Distributors, Inc. v. Cobrae*, —- Cal.Rptr.3d ——, 2005 WL 2099899 (Sep. 01, 2005), the California Court of Appeal for the Second Appellate District addressed the issue of whether the trial court has the power to grant summary judgment after a dismissal without prejudice has been entered.

TDI sued A-Line Construction, Inc. for breach of contract and

(Continued on page 6)

Continued from page 5

fraud and also named Gary Cobrae and Darren Cobrae as defendants on an alter ego theory of liability. TDI and Darren Cobrae subsequently signed a handwritten settlement document which appeared to settle their dispute. Shortly thereafter, the Cobraes filed separate summary judgment motions. Believing that its agreement with Darren Cobrae settled the matter as to all parties, TDI brought a motion for specific enforcement of the settlement agreement along with an *ex parte* application for an order shortening time on the hearing on the motion. In TDI's opposition to Darren Cobrae's summary judgment motion, it argued that it had settled the case as to defendants Darren Cobrae and Gary Cobrae. TDI did not file a separate opposition to Gary Cobrae's motion for summary judgment.

The trial court denied TDI's motion for specific enforcement of the settlement agreement after finding that the writing was too vague to be enforceable. TDI immediately filed a request to dismiss Gary Cobrae without prejudice. It also filed a petition for a writ with the Court of Appeal, which stayed the proceedings before concluding that the writing was an enforceable settlement agreement.

After the stay was lifted, Gary Cobrae filed a motion to vacate TDI's request for dismissal of him and for an order granting his unopposed summary judgment motion on the ground that a plaintiff may not seek dismissal to avoid an inevitable summary judgment. The trial court granted the motion.

The appellate court reversed, focusing on the plaintiff's motivation and intent in dismissing the complaint; *i.e.*, whether it was in good faith or merely tactical to prevent a defendant from obtaining an otherwise inevitable summary judgment. It found that there was no evidence that TDI's request for dismissal was motivated by anything other than its reasonable belief that the dismissal was a term of the settlement agreement.

No Mandatory Relief from Unopposed Summary Judgment Motion

In *Prieto v. Loyola Marymount University*, 132 Cal. App. 4th 290 (Aug. 30, 2005), the California Court of Appeal for the Second Appellate District held that the mandatory relief provision of Code of Civil Procedure § 473(b) should be limited to the narrow class of cases in which a default judgment or dismissal has been entered.

After Loyola Marymount demurred, Prieto filed a first amended complaint. The court sustained Loyola Marymount's demurrers to a portion of the first amended complaint with leave to amend, but Prieto never filed a second amended complaint or responded to a motion to compel interrogatory responses. Loyola Marymount subsequently filed and properly served a motion for summary judgment, which the court granted. Prieto did not appear at the hearing or oppose the motion. Notice of the ruling, order, and entry of judgment were served on Prieto by mail.

Prieto filed a motion to set aside the summary judgment order based on section 473(b)'s mandatory relief provisions for attorney mistake, inadvertence, surprise, or neglect. The trial denied the motion.

The Court of Appeal affirmed, finding that although the granting of an unopposed summary judgment motion may be analogous to a "default judgment," the language of section 473(b) is expressly limited to the clerk's entry of default, not granting an unopposed motion for summary judgment. The court reasoned that applying the mandatory relief provision to any adverse judgment entered as a result of attorney "default" would "engender instability in litigation since orders, and judgments could easily be set aside, as long as the attorney filed an affidavit acknowledging fault."

Responding to OSC Re Preliminary Injunction Constitutes a General Appearance

In *Factor Health Management v. Superior Court*, 132 Cal. App. 4th 246 (July 29, 2005), the California Court of Appeal for the Second Appellate District held that a defendant makes a "general appearance" in connection with an order to show cause for a preliminary injunction if it takes steps to seek discovery in that case prior to making a motion to quash.

Real parties in interest Apex Therapeutic Care, Inc. and eBiocare.com filed a complaint against Factor Health Management and also filed an *ex parte* application for a temporary restraining order and order to show cause for a preliminary injunction. The trial court entered a temporary restraining order against Factor. Apex and eBiocare filed an *ex parte* application for early discovery, to shorten time on discovery, and for a protective order. The next day, Factor filed an *ex parte* application for an order setting the deposition of the affiants who supported Apex and eBiocare's application for a Temporary Restraining Order and OSC for a preliminary injunction. Approximately two weeks later, Factor filed a motion to quash service of summons for lack of personal jurisdiction. Apex and eBiocare opposed the motion.

The trial court denied the motion to quash, finding that because Factor sought affirmative relief in its *ex parte* application for discovery, it had made a general appearance and waived the right to challenge personal jurisdiction.

The appellate court affirmed, finding that Factor's application for discovery took it outside the protection of Code of Civil Procedure § 418.11, which provides that an appearance at a hearing on an *ex parte* application for a provisional remedy does not constitute a waiver of the right to move to quash service of summons for lack of personal jurisdiction under section 418.10. While section 418.10(e)(1) allows a defendant to file an answer, demurrer, or motion to strike simultaneously with a motion to quash, a defendant may not "take action which constitutes a general appearance and then negate the effect of that action by a subsequent motion to quash." Because Factor sought discovery before filing its motion to quash, it made a general appearance that was not protected by Code of Civil Procedure §§ 418.11 or 418.10(e)(1).

— Pamela D. Deitchle

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Third in a Series

Judicial Advice...

from The Hon. Christina Snyder

This article is part of a series of articles being published by *ABTL Report* to provide members with information about the courtroom procedures of federal and state judges in Southern California. This article focuses on the Honorable Christina Snyder of the United States District Court for the Central District of California.

General Protocol and Technology

• Judge Snyder does not conduct trials on Mondays, which is generally reserved for law and motion matters.

• The first day of trial usually begins at 9:30 a.m. Thereafter, trial hours are normally from 9:00 a.m. to 5:30 p.m. with a lunch break.

• The judge advises counsel of time limits for trials approximately one month before the pretrial conference or at the time of hearing on motions for summary judgment.

• She requires counsel to stand at the lectern when speaking unless some condition prevents him/her from being able to do so.

• Counsel should contact the court's audio-visual coordinator prior to trial to arrange for equipment to be brought into the courtroom. Counsel may be allowed to present digitized exhibits through audio-visual displays and/or play portions of videotaped deposition testimony a trial.

Pre-Trial

• Judge Snyder generally does not conduct pretrial hearings to determine the admissibility of documents or to avoid foundational questions.

• She hears motions *in limine* at or before the pretrial conference. Such motions *in limine* are limited to five to ten pages, and reply briefs are not permitted.

• She encourages the submission of trial briefs.

• Also, Judge Snyder generally does not bifurcate liability and damages phases of trial.

Jury Selection

• Judge Snyder has no set formula for the allocation of peremptory challenges in multiple plaintiff/multiple defendant cases, but tends to increase the number of peremptory challenges by two for each additional unaffiliated plaintiff or defendant.

• She conducts *voir dire* by asking questions and occasionally permits counsel to follow up on a limited basis at sidebar.

• According to Judge Snyder, she permits the use of juror questionnaires when counsel agree on a reasonable questionnaire.

Opening Statements

• Judge Snyder generally allows opening statements in bench trials.

• She generally does not limit the length of opening statements.

• She requires counsel to exchange copies of all exhibits, timelines, or other materials that they intend to use during opening statements. Judge Snyder also requires that counsel reach agreement on the use of those materials during opening statements or else obtain a ruling from her in advance of the opening statement.

Presentation of Evidence

• Although witnesses are not required to be present at the courthouse at all times prior to their testimony, the court expects that there will not be any delays in the proceedings due to the absence of witnesses during trial hours.

• Judge Snyder does not allow counsel to present jurors with binders that contain copies of pre-marked, pre-admitted exhibits.

• She rarely examines witnesses during trial.

• The judge rarely allows for sidebar conferences for objections during trial.

• Jurors are allowed to take notes during all phases of trial.

• Judge Snyder generally does not allow jurors to submit written questions to be posed to trial witnesses.

• Exhibits should be marked for identification and admitted into evidence before the contents of those exhibits are shared with the jury.

• She does not have a preference as to whether direct testimony may be submitted in writing.

• She automatically provides a complete set of admitted exhibits to the jury.

Closing Argument

• Judge Snyder will limit the length of closing arguments if she feels that the estimates are excessive.

• In addition, she finds misstatements of trial evidence to be objectionable closing argument conduct.

Jury Instructions and Verdict Forms

• Judge Snyder instructs the jury after closing arguments.

• Moreover, she does not have any special rules regarding the preparation and submission of special verdict forms.

Post-Trial

• Finally, Judge Snyder normally receives post-trial briefs in bench trials.

— Raymond B. Kim

Waiver of Objections Revisited

By now it is well settled that when an attorney files written objections in connection with a summary judgment motion, he "must yell and scream and stamp his feet, or do whatever else it takes to force the trial court to rule on those objections" (*Gallant v. City of Carson*, 128 Cal. App. 4th 705, 714 (2005) [dissenting opn. of J. Vogel]) or he forever waives them. According to the courts, this result is compelled by the summary judgment statute, Code of Civil Procedure section 437c, which states that objections not made at the hearing are waived. Section 437c also states that the court must consider all evidence submitted in connection with the motion "except that to which objections have been made and sustained by the court."

Carolyn Oill

This rule is as important to the winning party as to the losing party. Whether a summary judgment is won or lost depends on the evidence that is considered "admitted," regardless of who introduced it. A judgment may be affirmed or *reversed* on appeal based on waiver of objections. So, what happens when an attorney makes the proper objections, repeatedly asks for rulings on them, and still the trial judge refuses to rule?

That was exactly the case in *City of Long Beach v. Farmers and Merchants Bank* , 81 Cal. App. 4th 780 (2000). In response to the plaintiff's motion for summary judgment in that case, the defendants filed a 16-page set of evidentiary objections that set forth the objection, the basis for the objection, and a space for the court to rule on each objection (by checking a box marked "sustained" or a box marked "overruled"). The hearing took place over two days and the defendants asked for a ruling on their objections each day, yet the trial court did not rule on the objections.

The court of appeal concluded that defense counsel did all that he "could be expected to do in terms of seeking rulings on the previously filed objections." (*Id*. at 784.) But this conclusion begs the question: Just how far must a practitioner go to preserve the issues for review? Most hearings do not continue over two days — must the objection be raised at least twice at a single hearing? More important, is counsel required to do everything in his power in every case, or is there some lesser minimum that will achieve the same result?

The question has yet to be explicitly answered. In *Sambrano v. City of San Diego*, 94 Cal. App. 4th 225 (2001), the trial court relied on the dubious holding of *Biljac Associates v. First Interstate Bank*, 218 Cal. App. 3d 1410 (1990), stating that it was only considering admissible evidence, without actually disclosing what that evidence was. The courts of appeal are naturally troubled by the *Biljac* rule, the primary problem being that it does not tell the court of appeal what evidence was admitted or what evidence the trial court considered. The rule that summary judgments are reviewed *de novo* "presupposes there is an established record on which appropriate legal conclusions can be drawn de novo." (*Sambrano, supra*, 94 Cal. App. 4th at 235.) Many evidentiary rulings require the trial court to exercise discretion — such as where the court must decide whether two accidents were sufficiently similar to the case at bar to allow them into evidence, or when the objection is that the evidence is cumulative or unduly prejudicial. Answering these questions is not a suitable task for "a three-judge panel committed to reviewing issues of law, not fact." (*Id*. at 236.) In these situations, the trial court's failure to rule explicitly on the objections leaves the appellate court "with the nebulous task of determining whether the ruling that was purportedly made was within the authority and discretion of the trial court and was correct." (*Id*. at 235.)

But, of course, when the trial court relies on *Biljac*, the court of appeal is not even certain what the purported rulings were. This leaves the court in a difficult position. In *Sambrano*, for example, the court of appeal concluded that the defendant's objection to plaintiff's evidence was well taken, but because the trial court had not expressly ruled on the objection, the appellate court was left with the problem of determining whether the evidence must be "deemed to be part of the record because of the waiver rule" or, in the alternative, whether the court should deem that the evidence was not considered on its merits under *Biljac*. (*Id*. at 238.) The court ultimately concluded that the latter rule applied — *i.e*., that the evidence was not admitted by the trial court — but the court offered little in the way of guidance in terms of the legal analysis that led to this conclusion. Instead, the decision appears to be result-driven — *i.e*., the court concluded the evidence was not considered by the trial court because that conclusion allowed the court to affirm the summary judgment. *(Id*. at 241.) However, the court could have just as easily determined that the waiver rule applied and, therefore, the evidence was admitted and created a triable issue of material fact, which would have required reversal of the judgment.

That is what happened in *Gallant v. City of Carson, supra,* 128 Cal. App. 4th 705, where a majority of the court of appeal held that the failure to obtain rulings on objections operated as a waiver of those objections, which in turn required reversal of the judgment. The interesting thing about *Gallant*, however, is that it did not involve summary judgment. Rather, it was an appeal from an order on an anti-SLAPP motion. One justice dissented on the ground that the summary judgment waiver rule should not apply to other motions unless expressly stated in the relevant statutes. Code of Civil Procedure section 437c expressly states that the court must consider all evidence except that to which objections have been sustained. But the anti-SLAPP statute contains no such limitation.

The dissenting opinion expressed dismay at the appellate courts imposing procedural hurdles rejected by the Legislature, but was also concerned that "lawyers ought not to be put in the position of haranguing the very judges whose favorable rulings they seek." (*Id*. at 715.) This is a sentiment with which many practitioners, no doubt, would agree. But until it appears in a majority opinion, lawyers and their clients are stuck with having to do everything in their power to obtain rulings on objections in any context to avoid waiver of those objections on appeal. The Supreme Court has recently twice ducked review of the issue — in *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004) (where the issue was raised in the petition for review, but ignored) and in *Gallant v. City of Carson*, *supra*, 128 Cal. App.4 th 705 (in which the Supreme Court recently denied review).

In the June 1999 issue of *abtl Report*, attorney Robin Meadow and Justice Paul Turner suggested steps that an attorney might take to avoid waiving objections. Those suggestions remain prudent today. Attorneys should make sure their evidence conforms to the rules of evidence so that their opponents will be less inclined to object. When making objections to an opponent's evidence, discretion is more likely to get results: Object only to the critical evidence. Over inclusiveness in this context might hurt

(Continued on page 12)

We communicate 55% of our feelings and attitudes through body language (primarily facial gestures), 38% through vocal features (loudness, tone, speed), and only 7% through the words themselves. Yet advocates in mediation prefer to separate the parties and to conduct the negotiations through the mediator. Advocates thus deprive themselves of the most essential information about the other side's true feelings and attitudes towards the proposals.

Negotiation — A Poker Game

Negotiation is a poker game, whether or not in mediation. How can you play this game effectively when you cannot read the "tells" of the other side?

The answer, unsurprisingly, is preparation, preparation, preparation. Advocates need to prepare for mediation with the same diligence and purposefulness that they devote to trial preparation — more so, since more cases resolve themselves through mediation than through trial.

Preparation begins when you first intake a case. You should develop integrated litigation and settlement strategies to optimize the resolution result offered by either. Mediation is a favored forum for settlement. Think in advance about how and when to address the mediation option and what litigation tactics should precede it.

Early Mediation — A Tactical Advantage

> Consider an early mediation for tactical advantage. If you do not reach settlement, you will still gain helpful insight into the other side's case, their personalities and negotiating style, what kind of witness the opposing party will make, and how they value their case.

Accurate case evaluation is the most critical part of your preparation. Advocates often focus on the merits of a case and may undervalue other factors. Case evaluation, however, accounts for *all* elements of value, many of which may be external to the litigation.

> Expect the mediator to conduct an evaluation during the mediation. In one unfair competition/trade secret case, I held an attorneys-only meeting to establish the case's worth. Both sides soon realized that, *based on their own appraisals,* they were very close indeed.

Know Your Mediator

Find out all you can about your mediator. If the mediator has a website, review it. Discuss the mediator's style with other advocates who have mediated with him or her. Just as you need to discover all you can about the other side and their negotiating habits, you should study the mediator. That is the person with whom you are really negotiating.

Select a Mediation Strategy

Once you have scheduled your mediation, you should select an appropriate mediation strategy. Most advocates choose a competing strategy, but there are other strategies as well. Which one is right for you will depend on your previously determined objectives, your anticipation of the other side's likely strategy, your appraisal of the other side's negotiating style, and similar factors. It is common to shift strategy during the mediation, typically from competing to compromising or collaborating.

There are many negotiating tactics that align themselves with each mediation strategy. Choose those tactics that work best with your strategy.

Your mediation brief should cover more than just the facts and law of the case. Highlight objectively each side's strengths and weaknesses and possibly include your case evaluation (including methodology) in the brief. If the parties had a prior relationship, state what it was. If there are sensitive issues, state them. Also state prior offers and counteroffers.

Prepare Your Client

Prepare your client for the mediation. Because mediation is a more flexible forum than trial or arbitration, you should consider negotiating tactics that utilize your client, such as "good cop/bad cop." Determine in advance when you want your client to speak and script for them what they will say. Have your client prepared for the mediator's questions. And have them understand that your role in the mediation is different from your role as a litigator — they should not expect you to zealously press your case, but rather to negotiate on their behalf.

Humanize Yourself to the Other Party

Advocates rarely make an opening statement in joint session. This can be a mistake. Your purpose is not to persuade the mediator, but to humanize yourself to the other party, strike the right tone early in the negotiation, and diffuse strong feelings. You also gain the opportunity to study the other side and their reactions to your statement. Such information may be useful later in the mediation.

Use the private caucus to fullest advantage. Learn mediator strategies and tactics and how to respond to them. Recognize that the mediator in private caucus is seeking to bond with your client — consider whether and how you want to respond to these efforts.

Bring Creative or Alternative Solutions

And come to the mediation with various creative or alternative solutions to offer. Most settlements are only about money. That often leads to impasse. By knowing in advance other possibilities for settlement that you can suggest to the mediator, you increase the likelihood of resolution.

— Robert A. Steinberg

Detailed Mediation Advocacy Checklist

To receive a detailed checklist of mediation advocacy, call or write Mr. Steinberg at (213) 996-8588 or www.bobsteinberg.com

moving the action to federal court. To satisfy the amount in controversy requirement in diversity cases, the claims of class members could not be aggregated to reach the jurisdictional amount of $75,000. At least one class member (and, under some federal decisions, each and every class member) had to have a claim for more than $75,000.

By amending both the diversity statute, 28 U.S.C. § 1332, and the removal laws, 28 U.S.C. § 1441 *et seq.*, CAFA made it significantly easier for defendants to remove class actions involving over 100 putative class members to federal court. The biggest impact of the new law is that, subject to certain exceptions, it establishes federal jurisdiction over any class action in which any one class member, whether named or not, is a citizen of a different state than any defendant, and where the amount of controversy, which can be reached by combining the claims of the class members, exceeds $5 million.

Andrew Eliseev

CAFA includes certain exceptions to the expansion of original jurisdiction. Under one of them, a district court *must* decline jurisdiction if (a) more than two-thirds of the proposed class members are citizens of the state in which the action was originally filed; (b) at least one defendant is (i) a citizen of the state in which the action was originally filed, (ii) is a defendant from whom significant relief is sought, and (iii) is a defendant whose alleged conduct forms a significant basis for the claims asserted by the proposed class; and (c) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the state in the which the action was originally filed. The district court *must* also decline jurisdiction if two-thirds or more of the proposed class members and the primary defendants are citizens of the state in the which the action was originally filed. Under yet another exception, the district court *may*, after consideration of certain factors, decline jurisdiction over a proposed class action in which greater than one-third but less than two-thirds of the members and the primary defendants are citizens of the state in which the action was originally filed. Several other exceptions exclude from CAFA's jurisdictional provisions cases (a) in which the primary defendants are states, state officials or other governmental entities against whom the district court cannot order relief; (b) which solely involve covered securities as defined under the Securities Act of 1933 or the Securities Act of 1934; or (c) which relate to the rights, duties or obligations relating to any security as defined in the Securities Act of 1933. Additionally, CAFA does not apply to cases involving corporate governance issues and corporate internal affairs issues arising under the laws of the state of incorporation.

The removal provisions of CAFA are co-extensive with its original jurisdiction provisions, and thus, any class action satisfying the new diversity provisions can be removed to federal court. CAFA's removal procedures also eliminate several important exceptions to the existing removal requirements. For example, before CAFA, where removal was based on diversity jurisdiction, removal was not an option if any defendant was a citizen of the forum state. CAFA eliminated this obstacle by allowing for removal (subject to the limited exceptions discussed above) "without regard to whether any defendant is a citizen of the State in which the action is brought." This prevents the situations where the plaintiff could game the system by adding a local defendant only to drop him a year into the case when, as discussed below, defendant could no longer remove the case to federal court. CAFA also liberalizes removal jurisdiction by providing that the action "may be removed by any defendant without the consent of all defendants."

Also, 28 U.S.C. § 1446 generally states that defendant cannot petition to remove a case more than a year after the commencement of the lawsuit, regardless of whether defendant discovered the facts allowing the removal after the end of the one-year period. CAFA disposed of that rule by adding a new Section 1453(b) which provides that a defendant may file a removal petition within 30 days of the first pleading or paper from which the defendant may conclude that the action satisfies the removal requirements, even if it occurs outside of the one-year period.

Additionally, CAFA allows for accelerated appellate review of decisions granting or denying remand. Before CAFA, under 28 U.S.C. § 1447(d), remand orders could not be reviewed on appeal. CAFA added Section 1453(c), which states that a court of appeals may accept an appeal of an order of a district court granting or denying a remand motion if application is made to the court of appeals not more than seven days after entry of the order. If a court of appeals accepts such an appeal, it must decide it not later than 60 days (unless all parties agree to an extension of no more than 10 days).

Thus, CAFA substantially expands class action defendants' opportunity to defend these cases in federal court. In such cases, defendants should benefit from litigating in federal court. Federal courts often are more conservative in construing state law claims (especially in the consumer protection area), more receptive than state courts to defenses such as federal preemption, have greater resources than state courts (*i.e.*, clerks and libraries) to assist in considering and disposing of cases and may be more hostile to certification of classes. Also, whereas a defendant sued on the same issues in several state courts is unable to coordinate or consolidate these copycat lawsuits, access to the federal courts opens the doors to multidistrict litigation consolidation pursuant to 28 U.S.C. § 1407.

The Settlement and Attorneys' Fees Provisions

CAFA also establishes a number of requirements related to the settlement of class actions in federal courts. This was prompted by a concern that a disproportionate share of settlement proceeds often are received by plaintiffs' lawyers and that the plaintiff often receives little benefit from such settlements.

Sections 1712 and 1715 are likely to have the biggest impact on the ability of parties to resolve class actions. Section 1712 deals with so-called "coupon settlements," which the Senate Report described as the settlements "in which class members receive nothing more than promotional coupons to purchase more products from the defendants." Section 1712 reaffirms the old rule that coupon settlements may be approved only after a fairness hearing in court, and only if the court's reasons are explained in writing. Additionally, a court has discretion to require that some portion of the value of unclaimed coupons be distributed to charity, something courts were not empowered to do before CAFA.

Section 1712 also addresses attorney's fees in coupon cases. It states that "the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are *redeemed*." (*Emphasis added.*) The court may consider expert testimony about the actual value to the class members of the coupons that are redeemed. Prior to CAFA, plaintiffs' attorneys were able to seek fees calculated as a percentage of the gross amount of coupons awarded. Again, because so many of these cases are lawyer-driven, we should expect to see a substantial reduction of coupon settlements.

(Continued on page 12)

Letter from the President

As we start the thirty-second year of the ABTL in Los Angeles, I am honored to have been elected President of the Los Angeles chapter. In 1990, I attended my first annual seminar in Hawaii. I had just moved to Los Angeles from San Francisco, which did not at that time have an ABTL chapter. My "introduction" to the ABTL was extremely memorable.

At that seminar, business litigation practitioners attended and participated, not "merely" as panel members but as an active audience. The late Max Gillam attentively sat in the audience and would talk to young business lawyers between sessions. Throughout the four days of the seminar, I encountered experience and knowledge, most often tempered with humor and humility. Moreover, the sessions themselves were phenomenal opportunities for lawyers of all levels of experience to hone skills and share experiences. I have regularly attended the annual seminars since, stymied only by professional requirements.

Patrick Cathcart

This year we are going to have what promises to be another great annual seminar, in Tuscon, Arizona at the Ventana Canyon Resort. The program will provide demonstrations by a faculty that promises to be more diverse than any in the past. The topic, Building to a Close, is important to all business litigators: How do business trial lawyers use jury selection, the opening statement, and examination of witnesses (percipient and expert), not just to present the case but to "build to the close." The "art" of not arguing on opening statement, of non-argumentative examination of witnesses, and of examination of experts, all while laying the groundwork for an effective closing argument, will be presided over and critiqued by panels of judges — over two dozen total. We have a large number of participating judges from throughout the state and a gifted cadre of business litigators. Chief Judge Mary Schroeder, of the Ninth Circuit, will deliver the keynote address.

By the time this *abtl Report* is published, we will have had our first dinner program of the year. A stellar panel moderated by Denise Howell of Reed Smith LLP will delve into the issues raised by the recent Supreme Court *MGM v. Grokster* decision. It has been said that this decision will affect every lawyer who represents technology clients or who litigates patent infringement cases. Kathleen Sullivan (professor of constitutional law and former Dean of Stanford Law School — now with Quinn Emanuel), Hank Barry (former CEO of Napster), Russell Frackman (counsel for plaintiff Recording Industry Assocation of America), Bill Murry (former Executive Vice-president and COO for the Motion Picture Association) and Michael Weiss (CEO of defendant StreamCast) will explore the decision and its impact on digital distribution and other emerging technologies.

This year we are planning a dinner program that will discuss the decisionmaking process of the California Supreme Court. Justices Ming Chin and Carlos Moreno have agreed to talk about how the court goes about its work. With the changes at the U.S. Supreme Court, we are planning a program to explore the changes that the Rehnquist court's constitutional direction has wrought for governmental regulation of businesses (from the commerce clause cases to *Kelo* and the "takings" clause, with some discussion of what we can expect from a "Roberts Court"). We will continue to offer luncheon programs, both downtown and on the Westside, that will explore practical application of skills to business litigation. All of these programs offer the opportunity for the bench and the business litigation bar to enhance our skills, to get to know each other and to promote effective relations between lawyers and the judiciary — the central purposes of the ABTL.

Also, the continuing development of the *abtl Report* and of the ABTL website at www.abtl.org, will provide further benefits to all who join and participate. This association continues its strategic role for business litigators and will seek to expand its relevance.

Finally, we are continuing to offer scholarships to one student at each of the five accredited law schools in the Los Angeles area, who are selected by the deans of the schools. This program recognizes superior student talent of need at each of the schools, and hopes to introduce all local law students to the ABTL. The ABTL hopes to reach out to business litigation attorneys as well as aspiring litigation attorneys and to continue to be a part of the professional development of all of us.

— Patrick Cathcart

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Class Action Fairness Act of 2005

Continued from page 10

In addition to the changes introduced in Section 1712, CAFA also requires in Section 1715 that notice of any settlement of a class action in federal court be served upon the "appropriate" federal and state officials. CAFA defines "appropriate federal official" as the Attorney General of the United States or, where regulated financial institutions are involved, the federal officials who have primary regulatory authority over the institutions at issue. "Appropriate state official" includes either a state official who has regulatory authority over matters at issue in the case, or the attorney general of any state in which any class member lives. CAFA does not explain, even in general terms, what, if anything, such government officials should do once notified of a settlement. However, CAFA provides that an order giving final approval of a proposed settlement may not be issued earlier than 90 days after defendant served the government officials with the settlement papers. It is safe to assume that the involvement of government officials may complicate and, at the very least, delay and increase the costs of settlement. A side effect of Section 1715's requirement to lodge settlement papers with government officials also may be that private watchdog groups will have greater access to the terms of settlements and the opportunity to rally class members to opt out of or object to settlements.

In sum, CAFA makes it much more difficult for plaintiffs' lawyers to orchestrate prompt fee-driven settlements of class actions. The attorney's fee limitations imposed in Section 1712 and the government notification provisions of Section 1715 are likely to make cases more difficult to settle. Although that is not a positive feature for defendants, a beneficial side effect may be to limit the number of cases brought by plaintiffs' attorneys for the purpose of extracting a quick settlement.

— Jeff E. Scott and Andrew Eliseev

Waiver of Objections Revisited

Continued from page 8

more than it will help. Remember that a trial judge rules on numerous motions every day: Smart, focused objections on only the critical issues will serve the client better than a shotgun approach. Request a ruling and make sure there is a reporter at the hearing to record the request. At the very least, this may persuade the court of appeal to excuse any failure to obtain a ruling — which may be as important to the prevailing party as to the losing party. Finally, if you cannot get rulings at the hearing on the motion, try to incorporate rulings in any written order.

— Carolyn Oill

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