ASSOCIATION OF BUSINESS TRIAL LAWYERS

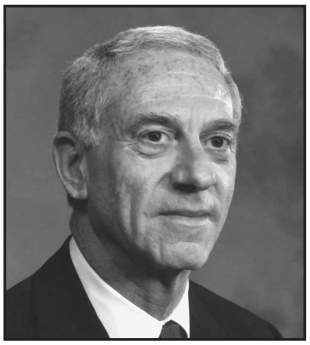
abtl REPORT NORTHERN CALIFORNIA

Volume 11 No. 3

SUMMER 2002

When Opinions Are Conclusive

Must a trier of fact accept expert testimony as conclusive? As a general rule, expert opinion testimony is not conclusive even if uncontradicted. However, there are two exceptions to this rule in California. The first exception is in professional malpractice actions, where uncontradicted expert testimony of the prevailing standard of care is conclusive. The second established exception is in actions involving the value of real property.



Robert K. Hillison

In our practice in Fresno, we have tried many real property disputes where application of the rules governing expert valuation of property is a key issue. Attorneys unfamiliar with or unpracticed in the nuances of the rules risk their clients' interests. This article examines the rules regarding expert opinions in California and explores some situations that have arisen in our practice where these rules have proved determinative.

The General Rules Governing Expert Opinion

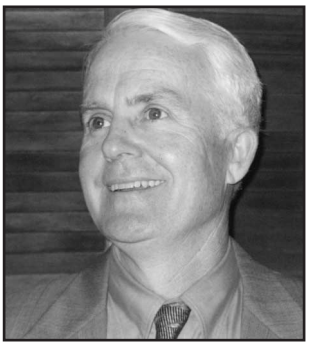
The threshold issue is whether expert testimony is required. Expert testimony is not required "where a ques-

Continued on Page 2

Also in this Issue

CCP Section 170.6 Should Be Repealed

Imagine a world where: students could disqualify a teacher from teaching them, workers could veto an employer's selection of a supervisor, and athletes could determine which officials would referee their games? What if the student, worker or athlete only had to give 10 days' notice in order to disqualify the teacher, supervisor or official? What if the required notice only consisted of a written declaration under oath asserting that the teacher, supervisor or official was incapable of being "fair" to them and no one could challenge that assertion?



Hon. Stephen J. Kane

Sound absurd? It should. Yet, this very scenario prevails daily in our state trial courts. Code of Civil Procedure section 170.6, enacted in 1957, provides that each litigant/attorney may peremptorily disqualify a superior court judge in any filed case. Generally, the peremptory challenge must be made within 10 days after the party knows the identity of the assigned judge. For those hearings in which the judge is not known until the hearing date, the challenge can be exercised at the time of assignment. All that is required is the sworn statement of the party/attorney that the particular judge is biased against the party/attorney. If timely made and in proper form, the disqualification is final and not subject to further scrutiny.

For those courts with direct calendaring (where a case is assigned to a particular judge for all purposes at the commencement of the action), the impact of section 170.6 is minimal, because the disqualification must be made within 10 days' notice of the assigned judge. For other calendaring systems, the specter of disqualifying a judge anytime during the pendency of an action looms ominously.

Continued on Page 8

Continued from Page 1

When Opinions Are Conclusive

tion is resolvable by common knowledge." *Jorgensen v. Beach 'N' Bay Realty, Inc.*, 125 Cal.App.3d 155, 163 (1981). As the court in *Jorgensen* put it: "The correct rule on the necessity of expert testimony has been summarized by Bob Dylan: 'You don't need a weatherman to know which way the wind blows.'" Or as a recent Third Circuit case somewhat less colorfully, but more precisely, put it: "As a general principle, 'expert evidence is not necessary…if all the primary facts be accurately and intelligibly described to the jury, and if they, as [persons] of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training of the subject under investigation.'" *Oddi v. Ford Motor Co., et al.*, 234 F.3d 136, 159 (3rd Cir. 2000); *cert. denied*, 532 U.S. 921 (2001).

Once admitted, expert opinion evidence is generally not conclusive even if it is uncontradicted. A "jury is not required to accept at face value a unanimity of expert opinion: 'to hold otherwise would be in effect to substitute a trial by 'experts' for a trial by jury….'" *People v. Samuel*, 29 Cal.3d 489, 498 (1981) (citations omitted). The rule holds in bench trials as well. *See Foreman & Clark Corp. v. Fallon*, 3 Cal.3d 875, 890 (1971) (trial court not bound by the range of expert opinion in determining the rental value of a property); *Marriage of Battenburg*, 28 Cal.App.4th 1338, 1345 (1994) (family law judge not bound by unanimous opinion of experts to determine the best interests of a child).

Expressing this rule, BAJI No. 2.40 provides, in relevant part: "You are not bound by an opinion. Give each opinion the weight you find it deserves. However, you may not arbitrarily or unreasonably disregard the expert testimony in this case." *See also Mittelman v. Seifert*, 17 Cal.App.3d 51, 69 (1971) (pilot's misconduct); *Krause v. Apodaca*, 186 Cal.App.2d 413, 417 (1960) (cause of fire). The Ninth Circuit Model Jury Instruction 3.7 (Opinion Evidence, Expert Witnesses) is substantially similar to BAJI No. 2.40.

The Malpractice Exception

The best known exception to the general rule for expert opinions is found in cases involving professional malpractice. In this context, California case law has established that uncontradicted expert testimony of the prevailing standard of care is conclusive. *See, e.g., Engelking v. Carlson*, 13 Cal.2d 216, 221 (1939) (physicians); *Lysick v. Walcom*, 258 Cal.App.2d 136, 156 (1968) (attorneys); *Allied Properties v. John A. Blume & Assoc.*, 25 Cal.App.3d 848, 857 (1972) (architects); *Bily v. Arthur Young*, 3 Cal.4th 370 (1992) (accountants); *Williamson v. Prida*, 75 Cal.App.4th 1417, 1424 (1999) (veterinarians). The established rationale for this rule was expressed by the California Supreme Court in a medical malpractice case: "Only physicians who practice their profession at a particular place could have any knowledge of the method of treatment customarily used by the other members of the profession practicing there; the subject, therefore, calls for expert opinion only." *Liberty Mut. Ins. Co. v. Industrial Acc. Com.*, 33 Cal.2d 89, 95 (1948).

The courts have been careful to restrict this exception to cases of malpractice and not other areas involving scientific expertise. For example, in *Howard v. Owens Corning*, 72 Cal.App.4th 621 (1999), appellant argued that the jury should be required to accept uncontradicted opinion testimony that the cause of the plaintiff's injuries was exposure to asbestos. The Court of Appeal rejected the argument and approved instructions to the jury in accordance with BAJI Nos. 2.40, 2.41 and 2.42. The court stated, "[t]he *exceptional* principle requiring a fact finder to accept uncontradicted expert testimony as conclusive applies *only* in professional negligence cases where the standard of care must be established by expert testimony." *Id.* at 632.

The Other Exception — Real Property Valuations

There is at least one other area where uncontradicted expert testimony may be dispositive. In any action in which the value of real property is to be ascertained, special rules of evidence apply, codified at Evidence Code sections 810, *et seq*.

Evidence Code section 813 provides, in part: "(a) The value of property may be shown *only* by the opinions of any of the following: (1) Witnesses qualified to express such opinions. (2) The owner or spouse of the owner of the property or property interest being valued." (Emphasis added.) Accordingly, when the only evidence of the value of real property introduced at trial is an uncontradicted expert opinion (*i.e.*, when no owner offers an opinion of value), the expert's opinion is conclusive. Once an expert testifies and gives an opinion of value, the burden of producing evidence shifts to the other party. Evid. Code § 550(a). If the adverse party fails to offer any evidence of value, the expert's testimony is uncontradicted and is dispositive of the issue. A trier of fact may not ignore the evidence and determine the value of real property to be something other than that shown by the opinion evidence. The rule is summarized in *Redevelopment Agency v. Modell*, 177 Cal.App.2d 321 (1960), where the court held that the jury improperly rejected expert testimony in awarding less than fair market value of any expert. The court stated:

> [T]he jury may not ignore the evidence and fix compensation and damages contrary thereto. In such cases it is only where the evidence is conflicting that the jury may draw their conclusions from view [of the premises], and even then a verdict beyond the maximum, or less than the minimum fixed by the testimony, will not be sustained. *Id* at 326-27.

The rule of *Redevelopment Agency* has been consistently and uniformly followed in California. BAJI 11.80 provides (in relevant part):

> You must determine the fair market value of the subject property only from the opinions of the witnesses who have testified.
> You may not find the market value of property to be less than or more than that testified to by any witness. (Emphasis added.)

Although a witness may take into account sales of com-

Continued next page

Continued from Page 2

When Opinions Are Conclusive

parable property (Evid. Code § 816), a trier of fact can only weigh the testimony of the witness; it cannot decide value on the basis of comparable sales. Evidence Code section 813(b) permits evidence of the "nature and condition" of property; however, it is only for the limited purpose of enabling the trier of fact to "understand and weigh the testimony given" by the expert.

Before they were codified, these evidentiary rules were developed through court decisions. In *County of Los Angeles v. Faus*, 48 Cal.2d 672 (1957), the court reversed a long line of cases and held that evidence of the prices of comparable property is admissible in evidence. In *South San Francisco Unified School Dist. v. Scopesi*, 187 Cal.App.2d 45 (1960), the court stated that although an expert may express an opinion as to the highest and best use of property and its fair market value, the reasons on which the expert's opinion is based "do not become evidence in the sense that they have independent probative value upon the issue as to market value." Both parties presented expert testimony; the issue related to the admissibility of prices paid in sales of comparable properties. The rule announced is that facts stated as reasons to support an opinion of value, although admissible, are not evidence with independent probative value. *Id*. at 51. In *City of Pleasant Hill v. First Baptist Church*, 1 Cal.App.3d 384 (1969), the court determined that a trial judge had wide discretion to determine the comparability of sales and, therefore, the admissibility (relevance) of the evidence. *Id*. at 415. In *Hunter v. Schultz*, 240 Cal.App.2d 24 (1966), the Court of Appeal upheld the trial court's determination to weigh the testimony of an owner (not an expert) regarding the value of improvements (not the value of real property).

The value of real property is a matter of opinion established by expert testimony because only a person with special knowledge, skill, experience, training or education (Evid. Code § 720) is thought to have the special knowledge of market prices of similar land in the same neighborhood to render an intelligent and accurate estimate of the market value of the particular real property in question. *See, e.g., Sooy v. Kunde*, 80 Cal.App.2d 347, 355 (1947). This rationale is reinforced by the legislature's adoption of statutorily approved methods of valuation, *e.g.*, comparable sales (Evid. Code § 816), capitalization of income (Evid. Code § 819), and reproduction costs (Evid. Code § 820). A lay person, *e.g.*, a neighbor with general knowledge of real estate values in the neighborhood, is not qualified to render an opinion. On the other hand, an owner is permitted to testify about the value of his own property. Evid. Code § 813(a)(2).

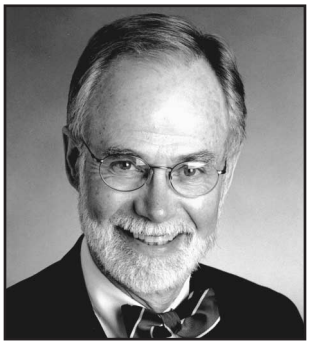
An expert's opinion regarding the value of real property must still meet the fundamental test applicable to all opinion evidence: that it is not speculative and is based on the facts of the case and established principles of value. *See* Evid. Code §§ 803, 814-824. The cases provide authority for rejecting an uncontradicted expert appraisal

Continued on Page 4

Ten Best Rules For Effective Cross-Examination

Not long ago, a young lawyer asked me, "What is the key to winning cases in court?" The answer came without hesitation: "Effective cross-examination." Easier said than done, you may believe, and correctly so for the ability to cross-examine is not acquired at birth; it comes with experience. For most lawyers, the art of questioning witnesses arrives after trying a large number of cases, and experiences sometimes painful. But once acquired, like any fine art, it is never lost and opens the doors to becoming an accomplished trial lawyer.

While not a substitute for experience, this author believes the following rules will help lawyers more effectively cross-examine witnesses. The rules are based upon the author's experience as a trial lawyer, and his practice as a judge of talking to jurors after cases tried before him. Some of the rules relate directly to cross-examining witnesses. Others relate to tactics and other nuances that will enhance your cross-examination.



Hon. Richard L. Patsey (Ret.)

The Ten Best Rules

RULE 1: *Don't do too much* — Utter destruction of a witness is rarely accomplished. If your goal is that, too often you find yourself repeating questions unnecessarily and becoming noticeably frustrated. Rather, your goal should be like that of a commando: strike rapidly and effectively, then withdraw.

RULE 2: *Know the rules of the courtroom* — These rules vary depending upon the proclivities of the judge. For example, some judges insist that you use the court reporter's original transcript, rather than your copy, to impeach. Some judges won't let you enter the well — the area by the witness — when you are examining. Some judges have written rules. If your trial judge does, that's an advantage for you. You will want to get a copy of them. If the judge has no written rules, a helpful bailiff, court reporter, clerk or counsel with experience may be able to fill you in as to the judge's preferences.

Why, you may ask, is knowledge of the rules important? Because the jurors perceive you and your opposing counsel as clever, but not trustworthy. They trust the judge, whom they view as the single impartial figure in the courtroom. If you get the judge visibly upset, you hurt your chances with the jury.

RULE 3: *Keep taking the pulse of the jury and make the necessary changes* — No matter how carefully you prepare, something always goes wrong. Thus, you need a battle plan that allows for rapid changes in direction and

Continued on Page 4

Continued from Page 3

Rules For Effective Cross-Examination

focus upon a moment's notice. Also, to recognize when change is necessary you will need to keep a careful eye on the jury and the judge.

RULE 4: *Be efficient in your use of documents* — The use of documents, like exhibits or deposition transcripts, for impeachment purposes is helpful and persuasive if presented to the witness efficiently and pursuant to recognized rules of evidence. However, if you fumble around or incur evidentiary objections, which are sustained, you demonstrate to the jury you don't know what you're doing. If the case involves a number of documents, have an assistant help you with the process.

RULE 5: *Be David, Not Goliath* — Americans like David, not Goliath. Even if your client is a Goliath, try to appear like David. Some law firms make a big mistake in loading up counsel and other assistants at counsel table. The fewer the better, in my view. If you have assistants for reading answers to depositions or assisting in the use of documents, keep those persons away from counsel table, and preferably outside the courtroom, when you don't need them.

RULE 6: *Chumminess with opposing counsel doesn't get it done* — Be respectful to opposing counsel, of course. However, it hurts to be chummy. Side jokes between counsel, the hand on the shoulder, the slap on the back all convey an image to the jury that elevates opposing counsel to a level above your client.

RULE 7: *Avoid unnecessary repetition of witness' answers* — Don't repeat the witness's answer, unless it is devastatingly helpful to you and then only once. You have lots of time in argument to recite what the evidence is. There is a tendency by inexperienced counsel, perhaps because of nervousness, to repeat answers to the simplest questions, such as the name and address of the witness. Jurors often remarked after trial that they found this to be a waste of time and an insult to their intelligence.

RULE 8: *It isn't necessary to have the last word* — Too often, redirect and recross testimony is unnecessarily repetitious because counsel believe the last word wins. Such testimony bores the jury and aggravates even the most patient judge. Redirect should be limited to something new that has not been covered on direct. The same for recross. During closing argument you will have plenty of time to comment on the testimony given, and to emphasize what you believe is important.

RULE 9: *Don't be cute* — Remember, as an attorney you are not generally perceived by the jury as one to be trusted. Don't try to be cute. Don't try to entertain. Show the jury by your tone and actions that you are a sincere advocate, righteously pursuing a just cause.

RULE 10: *Chill Out* — Trial work is a stressful calling — mostly because of the extraordinary commitment of time required to adequately prepare. Don't make it worse by believing you can control or are responsible for whatever happens in court.

Many of the twists and turns at trial are wholly fortuitous, and beyond your control. Profit from your experience and do your best to see that mishaps don't repeat themselves. But keep in mind that in some wholly unanticipated form, mishaps or even mistakes will occur. That's life — don't beat yourself up for being less than superhuman.

Judge Patsey is a retired Superior Court Judge, now specializing in mediation, arbitration and referee assignments with JAMS, The Resolution Experts, based in Walnut Creek.

Continued from Page 3

When Opinions Are Conclusive

on the ground that it is speculative. In *Pacific Gas & Electric Co. v. Zuckerman*, 189 Cal.App.3d 1113 (1987), the trial court had relied on the opinion of the owner's expert. The reviewing court found that this expert's testimony was unduly speculative, and, therefore, flawed. The court concluded that the opinion of the owner's expert should not have been admitted, and overturned the judgment on the ground that it was not supported by substantial evidence. The opinion does not reference evidence of any alternative valuation; accordingly, the *Zuckerman* opinion could be read to mean that even uncontradicted expert testimony of value, if speculative, may be disregarded. This conclusion is consistent with recent cases. *See City of San Diego v. Sobke*, 65 Cal.App.4th 379 (1998) (expert opinion valuing good will utilizing capitalized discounted cash flow analysis stricken for lack of foundation); *County Sanitation Dist. v. Watson Land Co.*, 17 Cal.App.4th 1268 (1993) (granting an *in limine* motion excluding an expert's opinion of the value of easements because the methodology employed, capitalization of a hypothetical stream of income, was not sanctioned by law).

Whether an opinion is based on improper matter and, therefore, lacks foundation is a preliminary question for the court. Evid. Code § 803; *Sobke*, 65 Cal.App.4th at 387. However, there is a difference between a trial court exercising its broad discretion under Evidence Code section 803 to exclude evidence and permitting such testimony and later disregarding it. Presumably, once a court has ruled that opinion testimony is admissible, and thus meets the section 803 test, convincing the court to disregard an uncontradicted, unimpeached opinion of value will be a formidable task, even if you believe it is speculative and lacks foundation. Make your motion early.

Real Property Opinions Of Value In Practice

Application of these rules leads to interesting results. A partner sues for an accounting and dissolution and to divide agricultural land owned by the partnership among the partners. All partners agree to use the same real property appraiser. At trial, the appraiser's opinion of value is the only evidence introduced as to the value of the partnership's real property. One partner argues that the value of one of the parcels is too high, relying on the opinion of a soil expert who testifies that the characteristics of the

Continued next page

Continued from Page 4

When Opinions Are Conclusive

soil make it less suitable for its highest and best use (growing crops). Pursuant to Evidence Code section 813(b) and the *Scopesi* rule, the court should accept the opinion of the appraiser as conclusive. The appraiser has taken into account the condition of the soil in rendering his opinion. The fact that an expert in a field something other than appraisal of real property has an opinion about one of the components considered in determining value does not impeach or contradict the appraiser's opinion.

A public agency condemns a parcel of real property with two assessor's parcel numbers. At trial, the agency's appraiser opines that the highest and best use of the entire parcel is the same as the two parcels individually and, therefore, has the same value. The owner's appraiser testifies that the highest and best use of Parcel A is different from Parcel B, which results in a substantially higher value for Parcel A. The jury finds that Parcel A and Parcel B have different values. Although there is an argument that by finding that the two parcels have different values, the jury is bound by the opinion of the owner's appraiser, because the agency's appraiser offered a single opinion of value, the court will likely uphold a verdict determining the value of Parcel A anywhere between the values opined by the agency's appraiser and the owner's appraiser.

After a judicial foreclosure, an institutional lender requests a deficiency judgment. At the fair value hearing, the only evidence of value is the opinion of the lender's appraiser. The appraiser's opinion of value is based on a discounted cash flow analysis that projects rental income over the next ten years. The court determines that the discounted cash flow analysis is speculative. Here, the court can refuse to admit the opinion under Evidence Code section 803 or can disregard it, and then make a finding of no deficiency.

Conclusion

Often, the opinion of experts is dispositive in contests involving real property. In California, trial judges customarily allow substantial leeway in determining whether a person qualifies as an expert under Evidence Code section 720. However, courts will more carefully scrutinize the foundation for expert real property appraisals. Even if a witness qualifies as an expert and the adverse party offers no contradictory evidence of value, a party could fail to meet the required burden of proof if the proffered opinion lacks foundation, is speculative, or employs a methodology not recognized by statutory or case law. On the other hand, where an expert's opinion is uncontradicted and unimpeached, it should be dispositive.

Robert K. Hillison, past President of ABTL's San Joaquin Valley Chapter, is a partner in the Fresno firm of Caswell Bell & Hillison LLP, practicing business, real estate and construction litigation. He thanks Brian K. Cuttone, an associate with the firm, for his assistance with this article.

The "I'm Unique" Defense To Class Certification

Plaintiffs commonly sue multiple defendants in a class action case. While the plaintiffs may presume that class certification as to all defendants is appropriate, individual defendants may have the ability to successfully raise the "I'm Unique" defense. Using this defense, a defendant argues that there are specific reasons why the case cannot be certified as a class action as to that particular defendant, regardless of whether the court certifies a class action as to other defendants.

The California Supreme Court and Courts of Appeal have published at least fifteen opinions in the last three years on class certification. In several important recent California and federal opinions, certification was denied, or a trial court's order granting certification was reversed and remanded for further proceedings. *See, e.g., Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906 (2001); *Sav-On Drug Stores, Inc. v. Superior Court*, 118 Cal. App. 4th 1070 (2002); *Berger v. Compaq Computer Corp.*, 257 F3d 475 (5th Cir. 2001). In this setting, it pays for each defendant to evaluate whether certification is appropriate as to that defendant.

Michael Cypers

This article discusses the California and federal authorities that support the "I'm Unique" defense in which certification was denied as to one defendant and granted as to others. It then discusses a recent class action case in which one defendant asserted the "I'm Unique" defense to certification. This defense helped that defendant settle the case favorably while a class was certified as to the remaining defendants, forcing them to pay substantially more in settlement.

Source of the "I'm Unique" Defense

Under both federal and California law, a court may certify a class as to some defendants and deny certification as to other defendants in the same action. *Newberg on Class Actions* states:

> Questions concerning the ability of a plaintiff to sue multiple defendants when he or she has had business or other contacts or dealings with only some of them can be analyzed from both a standing level and a Rule 23 typicality perspective. 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 3.18, at 3-103 (3d. ed. 1992).

Thus, the named class plaintiffs must generally demonstrate standing to sue each defendant and that their claims are typical of the claims of all class members.

Federal Cases

A frequently cited federal case denying class certifica-

Continued on Page 6

Continued from Page 5

Defense To Class Certification

tion as to some defendants is *La Mar v. H & B. Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973). In *La Mar*, the Ninth Circuit consolidated two cases that contained a common issue: whether a plaintiff, having a cause of action against a single defendant, can institute a class action against that defendant and an unrelated group of defendants who have engaged in conduct similar to that of the single defendant. *Id.* at 462.

In the first case, a plaintiff conducted business with a pawnbroker, and sought to be the representative of a class action suing all licensed pawnbrokers conducting business in Oregon for violations of the Truth-in-Lending Act. In the second case, a plaintiff purchased a round-trip ticket from an airline he believed overcharged him in violation of the Federal Aviation Act. The plaintiff sued that airline and six other airlines on behalf of a class of ticket purchasers who claimed to be overcharged. The *La Mar* court bypassed the issue of standing, stating: "[U]nder a proper application of Rule 23 of the Federal Rules of Civil Procedure, the plaintiffs here are not entitled to bring a class action against defendants with whom they had no dealing." *Id*. at 464. The Court then asked whether the claims of the plaintiff representatives were typical of the class and concluded that "typicality is lacking when the representative plaintiff's cause of action is against a defendant unrelated to the defendants against whom the cause of action of the members of the class lies." *Id*. at 465. The Ninth Circuit held: "Under proper circumstances, the plaintiff may represent all those suffering injuries similar to his own inflicted by the defendant responsible for the plaintiff's injury. *But in our view he cannot represent those having causes of action against other defendants against whom the plaintiff has no cause of action and from whose hands he suffered no injury." Id*. (emphasis added).

In *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3rd Cir. 1970), the plaintiff was a shareholder of four mutual funds and sought class certification against those four funds, as well as against 61 other mutual funds in which he did not own shares. The Court held that, "[a] plaintiff who is unable to secure standing for himself is certainly not in a position to fairly ensure the adequate representation of those alleged to be similarly situated." *Id*. at 734.

Another example of the "I'm Unique" defense is found in *In Re Endotronics*, Civ. No. 4-87-130, 1988 U.S. Dist. Westlaw 9250 (D. Minn. Jan. 28, 1988). Plaintiffs sought to certify a class action for securities fraud against a number of defendants, and assert a common law negligence claim against the accounting firm of Peat Marwick Main & Company. The Court held that since the accounting firm's report was not directly circulated to the plaintiff investors, there was a genuine question as to whether the firm would be liable due to the many different state law approaches to accountant liability. *Id*. at *9. Since Minnesota's conflict of law rules required each plaintiff to use the accountant liability rules from his or her state of residence, the Court held that "widely disparate legal theories abound and there is no single law governing the entire class [so] the Court finds the plaintiffs, as to this claim, have not met the commonality requirement of Rule 23(a)(2). The Court determines that this lack of commonality precludes class action treatment of the common law negligence action." *Id*. As a result, class certification of the securities fraud claims was approved against the other defendants to the action, but denied as to the claim against Peat Marwick. *Id. See also Angel Music, Inc. v. ABC Sports, Inc.*, 112 F.R.D. 70 (S.D.N.Y. 1986) (collecting cases rejecting class treatment where plaintiff does not allege injury by the defendant, including *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 n.20 (1976)).

California Cases

In *Baltimore Football Club v. Superior Court*, 171 Cal. App. 3d 352, 365 (1985), the California Court of Appeal held that the trial court could grant class certification only as to specific defendants with whom that plaintiff conducted business. The plaintiff, Ramco, Inc. ("Ramco"), brought a motion for class certification on behalf of plaintiffs, National Football League ("NFL") season ticket holders, seeking damages arising out of a players' strike from each of the twenty-eight teams in the NFL. Ramco purchased season tickets for the San Francisco Forty-Niners. However, due to the players' strike against the NFL, a number of the season's home games were canceled and the defendants did not offer the season ticket holders their money back with interest. As in the Ninth Circuit's *La Mar* case, the California Court of Appeal ruled that the community of interest or typicality requirement was not met as to defendants with whom the plaintiff did not do business. *Id*. at 359. The court stated:

> In the absence of a conspiracy between all of the defendants, California has adopted the rule that a class action may only be maintained against the defendants as to whom the class representative has a cause of action. Without such a personal cause of action, the prerequisite that the claims of the representative party be typical of the class cannot be met. If the plaintiff class representative only has a personal cause of action against one defendant and never had any claim of any kind against the remaining defendants, his claim is not typical of the class. *Id*.

The court held that even if the named plaintiff's claims were typical of all class members, the requirement of common questions of law and fact would still be lacking. *Id*. at 359. Thus, the Court held that *Baltimore Football Club* was essentially twenty-eight separate cases with twenty-eight separate defendants rather than one action.

Another case in which the Court certified a class against only some defendants but not others is *Petherbridge v. Altadena Fed. Sav. & Loan Association*, 37 Cal. App. 3d 193 (1974). In *Petherbridge*, the plaintiff borrowed from one lending institution and sought to maintain a class action against thirty-eight separate lending institutions concerning alleged irregularities in the treatment of impound accounts. *Id*. at 195. The Court of Appeal affirmed the dismissal of all lending institutions except the one from which the plaintiff borrowed money.

Continued on Page 8

WALTER STELLA

On EMPLOYMENT

To be, or not to be…held strictly liable? That is the question. At least, that is the question currently being pondered by the California Supreme Court for employers facing liability for supervisor harassment under California's Fair Employment and Housing Act ("FEHA"). The Court is reviewing an appellate decision rejecting an affirmative defense that the United States Supreme Court created under FEHA's federal counterpart, Title VII. The decision is significant because it will determine whether a California employer can avoid liability for its supervisor's harassing conduct by implementing reasonable preventive and corrective measures and showing that the victim unreasonably failed to take advantage of them.

In Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), the United States Supreme Court established an affirmative defense for employers facing liability for hostile environment claims under Title VII. The Court held that employers are vicariously liable for harassment by a supervisor. If no tangible employment action was taken against the employee, however, an employer may raise an affirmative defense by showing that: (1) it exercised reasonable care to prevent and correct harassment; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities or otherwise failed to avoid harm. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

In *Kohler v. Inter-Tel Technologies*, 244 F.3d 1167 (9th Cir. 2001), the Ninth Circuit held that the *Ellerth/Faragher* affirmative defense also applies to claims of harassment brought under FEHA. In *Kohler*, the plaintiff alleged that her supervisor sexually harassed her. After she rejected his advances, he allegedly acted angrily toward her, withheld training and assistance and gave her inconvenient work schedules and a poor performance review. She subsequently resigned.

Although the employer had a comprehensive anti-harassment policy that was distributed to employees on the first day of work and the plaintiff received and read this policy, she never complained. When the company learned of the plaintiff's claims through the EEOC, it hired a neutral third party to investigate her allegations. The employer also offered to reinstate the plaintiff, promising her a new supervisor, the same terms and conditions of employment, and back pay from the time of her resignation through her reinstatement. The plaintiff did not respond to the company's offer and refused to participate in the investigation.

Instead, the plaintiff sued her employer, alleging sexual harassment, discrimination and retaliation in violation of Title VII and FEHA. The district court granted the company's motion for summary judgment, and the Ninth Circuit affirmed, holding that the company established a complete defense to federal *and* state claims under *Ellerth* and *Faragher*. The court found that the affirmative defense serves important policy goals consistent with FEHA, such as encouraging employers to create anti-harassment policies and requiring employees to report harassment before it escalates.

However, a California court reached the opposite conclusion in *Department of Health Services v. Superior Court*, 2001 Cal. App. LEXIS 2675 (November 29, 2001). In that case, the employer had an employee manual describing its policy against sexual harassment and outlining its complaint procedure. The plaintiff was familiar with the policy, but did not complain of alleged harassment by her supervisor for over two years. Upon receipt of the complaint, the employer investigated and ultimately disciplined the supervisor.

The plaintiff sued, alleging sexual harassment and sex discrimination. The employer moved for summary judgment, relying in part on the *Ellerth/Faragher* affirmative defense. After the trial court denied the motion, the employer sought appellate review.

Walter Stella

The California Court of Appeal held that the *Ellerth/Faragher* affirmative defense was inapplicable to claims of harassment by a supervisor under FEHA. The Court based its decision primarily on the fact that FEHA has been interpreted as imposing strict liability on employers for harassment by a supervisor. On the other hand, Title VII imposes liability on employers for hostile work environment harassment by a supervisor only where the employer knows or should have known of the harassment.

The California Supreme Court granted review of the Court of Appeal's decision earlier this year. *Dept. of Health Services v. Superior Court*, 2002 Cal. LEXIS 594 (Cal. Feb. 13, 2002). While the Supreme Court's decision will affect employers' pocketbooks, it should not affect whether an employer takes steps to prevent harassment from occurring. Even in the absence of the defense, employers have the incentive to do so. Without effective measures to prevent harassment, employers face substantial risk of exposure from harassment suits. FEHA even imposes a separate obligation on California employers to take all reasonable steps necessary to prevent harassment from occurring.

Thus, as a practical matter, the California Supreme Court's future holding will decide who will bear the cost of a supervisor's harassment when an employer's preventive measures are not used by the victim. To pay or not to pay? That is the real question the California Supreme Court will answer for California employers.

Mr. Stella is Of Counsel in the firm of Morrison & Foerster. wstella@mofo.com. Lisa Frank, an associate with the firm, assisted with this column.

Continued from Page 6

Defense To Class Certification

Application of the "I'm Unique" Defense

The "I'm Unique" defense recently contributed to the successful settlement by one defendant in a multi-party class action case filed in state court in southern California. Plaintiffs were investors in an investment fund who sued the principals of the fund, as well as a number of professional firms who provided services to the fund over a period of approximately ten years. Some of the defendants allegedly participated in drafting offering circulars that were sent to the plaintiffs. Other defendants allegedly participated in drafting written requests for supplemental investments. One defendant, an accounting firm, was engaged to help the principals "restructure" the investment vehicle. The accounting firm signed an audit report on the entity's financial statements, which was included in a draft offering document filed with the Securities and Exchange Commission ("SEC"). However, the filing was never approved by the SEC, no securities were issued or sold as a result of the offering document, and all of the named plaintiffs admitted in their depositions they did not receive or rely upon any information authored by the accounting firm.

After a few causes of action against this accounting firm survived demurer, the firm asserted the "I'm Unique" defense to class certification. That defense was one of several factors that resulted in a settlement between the plaintiffs and the firm that was reached one day before the class certification hearing. When counsel announced the settlement at the outset of the class certification hearing, the judge indicated that the arguments of the accounting firm in opposition to Class Certification were the arguments he planned to focus on at the hearing. The settlement was consummated and approved by the court. The class was then certified as to all other defendants; one defendant paid five times, and another defendant paid ten times, the settlement amount of the accounting firm that asserted the "I'm Unique" defense.

This favorable settlement, as well as the results reported in the cases discussed above, suggest that counsel facing a class certification motion should closely evaluate the position of his or her client and, where appropriate, raise the "I'm Unique" defense to class certification.

Michael Cypers is a shareholder at Heller Ehrman White & McAuliffe LLP in Los Angeles, practicing securities and class action litigation.

Continued from Page 1

Repeal CCP Section 170.6

Background

Section 170.6 applies only to state trial court judges. It does not apply to the Courts of Appeal or the state Supreme Court. There is no comparable right to peremptorily disqualify judges in the federal courts.

Efforts to attack this statute on constitutional grounds have been unsuccessful. *Johnson v. Superior Court*, 50 Cal.2d 693 (1958); *Solberg v. Superior Court*, 19 Cal.3d 182 (1977). However, other peremptory disqualification statutes have been invalidated as an unconstitutional interference with the orderly processes of the courts. *Austin v. Lambert*, 11 Cal.2d 73 (1938) (invalidating statute allowing peremptory challenge to be exercised without filing declaration stating ground); *People v. Superior Court (Mudge)*, 54 Cal.App.4th 407 (1997) (invalidating statute permitting parties to stipulate to veto of Chief Justice's assignment of retired judge to hear case). The Court's reasoning in these cases applies equally to section 170.6. An excerpt from the high court's opinion in Austin (cited and distinguished in *Johnson, supra*) is instructive:

> But to put in the hands of a litigant uncontrolled power to dislodge without reason or for an undisclosed reason, an admittedly qualified judge from the trial of a case in which forsooth the only real objection to him might be that he would be fair and impartial in the trial of the case would be to characterize the statute not as a regulation but as a concealed weapon to be used to the manifest detriment of the proper conduct of the judicial department.

From the appellate court opinion in *Daigh v. Schaffer*, 23 Cal.App.2d 449, 463 (1937), quoted and emphasized in *Mudge, supra*, these words of warning still ring true:

> The empowering upon attorneys and litigants of arbitrary action…militate not only against the independence of the judiciary as a coordinate branch of government… it also tends to obstruct the orderly administration of justice…The rights of all of the parties and of the public as well must be considered instead of simply the arbitrary action of the attorneys or litigants who seek to remove a qualified judge from hearing a particular case.

Section 170.6 could be repealed by the legislature, but that will not occur without the support of the Bar, since it was the organized Bar which lobbied hard for its passage. (*Johnson, supra*, at 696.) It is unlikely that the State Bar will support the repeal of legislation which would rescind a right that attorneys have enjoyed and employed for more than 40 years. However, that position is difficult to justify in light of the clear and fundamental duty of attorneys: "To maintain the respect due to the courts of justice and judicial officers…;To counsel or maintain such actions, proceedings, or defenses only as appear to him or her legal or just…; [and] To employ… those means only as are consistent with truth…" (Cal. B&P section 6068 (b), (c) and (d); Rule 5-200 (A), Calif. Rules of Professional Conduct.)

Reasons For Advocating Repeal

While acknowledging the countervailing political forces, the statute should be repealed for several reasons.

First, the peremptory challenge right is unnecessary. There are numerous checks and balances in place to deal with judges who are in fact biased or partial in their decision-making. In California, judges operate under a strict Code of Judicial Conduct. That Code and Code of Civil Procedure sections 170.1 and 170.3 obligate a judge to

Continued on Page 10

MARY MCCUTCHEON

On INSURANCE

An initial review of *California Amplifier, Inc. v. RLI Insurance Company*, 94 Cal. App. 4th 102 (2001) (rev. den. 2/13/02) ("*Cal Amp*") sends a chill down the spine of anyone with an interest in obtaining insurance funds for securities class actions. Fortunately, a second read shows that the case does not eliminate coverage for securities class action claims, as long as they are brought under federal law. And, in view of the enactment of the Securities Litigation Uniformed Standards Act of 1998 (SLUSA), which preempts most securities class actions filed in state court, the decision may have limited impact on securities coverage matters. Nevertheless, it remains relevant to a variety of other insurance coverage disputes.

In *Cal Amp*, the insured sought coverage for the settlement of a class action alleging violations of California Corporations Code section 25400(d), which proscribes the making of "false or misleading" statements which the seller knew or "had reasonable ground to believe" was false or misleading, for the purpose of inducing the sale or purchase of a security. The insurer, RLI, claimed that coverage was precluded by California Insurance Code section 533, which provides that an insurance company cannot provide coverage for a "willful act," *i.e.*, an act which is "inherently harmful" or committed with an "intent to harm." *J.C. Penney Casualty Ins. Co. v. M.K.* 52 Cal. 3d 1009, 1020 (1991). Section 533 does not, however, forbid coverage for negligence, gross negligence or even recklessness. *Id.*

The *Cal Amp* court construed section 25400(d) as imposing liability only when a defendant "knowingly and intentionally" made a false or misleading statement. Therefore, according to the court, coverage for California securities law is precluded by Insurance section 533 as a matter of law. *Id.* at 107.

The *Cal Amp* court acknowledged that the required level of culpability for violation of one element of section 25400(d), whether the defendant knew or "had reasonable ground to believe" that the statement was false or misleading, is "recklessness." The court described "recklessness" as a "'conscious choice of a course of action… with knowledge of the serious danger to others involved in it.'" Id. at 109-110 (citing *Delaney v. Baker* 20 Cal. 4th 23, 31-32 (1999)). The court also found, however, that liability can only be imposed where the statement is made "for the purpose of inducing the purchase or sale" of a security. So, the court found, while recklessness satisfies one element of the statute, deliberate intent is required to satisfy the second element. *Id.* at 110.

In reaching this decision, the court relied on the language of section 25500, which imposes liability on "any person who willfully participates in any act or transaction in violation of section 25400." The court decided that this limitation was meant to emphasize the "high level of scienter" required for a violation, *i.e.*, "more than recklessness." *Id.*

Cal Amp stated that the intent to manipulate the market is an "inherently harmful act," in effect adding another category of conduct categorically uninsured by section 533. *Id.* While this is potentially a troubling statement, the opinion does not expand the scope of conduct proscribed by Insurance Code section 533, so much as define the level of intent required for violations of state securities laws. Indeed, the court acknowledged that securities actions brought under federal law (*e.g.*, Rule 10b-5) are not necessarily precluded from coverage by 533. *Id.* at 117.

The class action underlying *Cal Amp* was brought at a time when plaintiffs evaded the strict pleading requirements of the PSLRA by bringing actions in state court. Because SLUSA preempts most state law securities class actions, the principal holding of *Cal Amp* applies only to those cases which are the exceptions to SLUSA. Nevertheless, for those cases, the results are draconian — there is no coverage.

Mary McCutcheon

Cal Amp does, however, address issues of relevance to other insurance disputes. As discussed above, it reaffirmed the fact that reckless conduct is insurable under section 533. *Id.* at 117. It also addressed the issue of judicial estoppel in the context of insurance coverage. The underlying action had settled, so there was no determination as to the actual state of mind of the insureds. In a summary judgment motion in that action, the insureds unsuccessfully argued that liability under state securities laws requires a knowingly false statement. When they asserted the contrary position in the coverage action, the insurer cried judicial estoppel. The trial court declined to apply the doctrine because the inconsistent position "involved a legal rather than factual issue," and because the initial position taken in the class action was unsuccessful. The Court of Appeal affirmed, describing the contradictory arguments as "a reasonable litigation tactic." *Id.* at 118. Thus, an insured may aggressively defend the underlying liability action without fear that a legal position taken to minimize liability will result in a finding of no coverage.

While the *Cal Amp* decision may be a footnote to the history of the PSLRA and SLUSA, it provides guidance to insureds seeking to preserve coverage in all types of insurance disputes.

Ms. McCutcheon is a partner in the firm of Farella Braun & Martel LLP.

Continued from Page 8

Repeal CCP Section 170.6

recuse himself/herself in several instances, including where there is a possibility that a reasonable person would believe that the judge may not be impartial — even though the judge believes he/she is and will be impartial. The Commission on Judicial Performance reviews all complaints for misconduct against state judges and, when appropriate, metes out discipline, including removal from office. Judges frequently recuse themselves from cases. It is common for judges to make disclosures of potential conflicts and to inquire of the parties if recusal should occur.

Sections 170.1 and 170.3 provide a remedy when a party seeks a disqualification "for cause." Unlike the federal courts, where a motion to recuse a judge "for cause" is decided by the very judge who is being challenged, in California a motion to recuse a judge for cause is decided by a different judge located in a different county assigned by the Chief Justice. This is the procedure that should be used to disqualify a judge if disqualification is justified. Also, all superior court judges must run for election and thus are subject to removal by the voters. Finally, if section 170.6 is necessary, then: why allot only one challenge per party per case?; and why isn't it applicable to the Courts of Appeal and state Supreme Court?

Second, the exercise of this "right" is used by many for reasons unrelated to the "fairness" of the judge. Based on my 15 years as a civil law practitioner and 10 years as a superior court judge, including 2 years as the presiding judge of a master calendar, I believe that the majority of 170.6 challenges are made for reasons other than an honest belief that the assigned judge is biased or cannot be impartial. Most of the challenges are for purposes of judge shopping and obtaining continuances. As a trial lawyer, I suffered through several occasions in which the other side exercised a challenge to disqualify the only available judge in order to obtain a continuance. The tactic worked; the trial was continued and my clients were prejudiced as a result. I have observed similar outcomes as the judge presiding over a master calendar. I have seen the dejected faces of the nonchallenging parties, attorneys and witnesses when the challenge was exercised on the only available judge and the case had to be continued for several months, proving the adage that "justice delayed is justice denied."

The frequency with which certain lawyers — fortunately not a majority — sign perjurious declarations under section 170.6 is appalling. Some have expressed to their adversaries or openly to judges that they felt compelled to file a section 170.6 declaration, not because they could not obtain a fair trial before the judge, but because they needed a continuance or because they preferred a particular judge to another. The clear evidence of this is verified when lawyers disqualify a particular judge in one case but do not do so in dozens of other cases assigned to the same judge. It is a shameful fact that many lawyers believe that section 170.6 may be utilized for any of these purposes.

Third, peremptory challenges create calendaring burdens for the court and cause delays in getting cases assigned and heard. These disqualifications commonly delay assignments of cases to a department and sometimes result in outright continuances of trials and other hearings for weeks or months because the only available judge to hear the matter on the scheduled day is peremptorily challenged. Continuances are the bane of efficient court calendar management. They also prejudice opposing parties and witnesses who are inconvenienced by delays and continuances. For small counties especially, a challenge may necessitate not only a continuance of a scheduled hearing, but the assignment by the Judicial Council of a judge from a different county to hear that one case.

Fourth, section 170.6 continues to be interpreted and applied by appellate case law. Despite almost 50 years since its enactment, section 170.6, with all its nuances and fact-specific applications, continues to be the subject of appellate opinions (published and unpublished) every year. This is a wasteful expenditure of judicial time and resources.

Fifth, section 170.6 diminishes respect for the institution of our trial courts. It reduces the appearance of impartiality in making judicial assignments of cases because it allows the litigants to manipulate that process. And it allows these manipulations without being accountable in any meaningful way. It fosters the notion that there must be many judges who are biased against parties or attorneys and who refuse to recuse themselves; otherwise, why would the legislature codify this right?

Bad judges should be held accountable. And they are. Starting with the selection process, voter approval, the Code of Judicial Conduct, the Commission on Judicial Performance, supervision by a Presiding Judge, and motions to disqualify for cause (CCP section 170.1), they are screened and scrutinized in many ways. As with all groups of people — whether teachers, work supervisors, or sporting officials — some bad ones slip through the safety nets. However, any suggestion that students, workers or athletes be given a similar right would be rejected out of hand by most thoughtful people. The fact that there are some judges who should be disqualified in all or some cases does not justify a sweeping peremptory challenge law which is unnecessary, costly and burdensome to our understaffed trial courts, and prejudicial to other litigants and witnesses.

Conclusion

The Bar should do the right thing and advocate the repeal of section 170.6. Advocating the repeal of section 170.6 will do much to enhance public respect for attorneys and the courts, something that is very much needed in today's legal world. Not only is it the right thing to do; it will demonstrate the Bar's reaffirmation of the lawyer's basic duties outlined in Business and Professions Code section 6068 and adherence to the ethical standards prescribed by the Rules of Professional Conduct.

The Honorable Stephen J. Kane is a judge of the California Superior Court for the County of Fresno.

PETER BENVENUTTI

On CREDITORS' RIGHTS

The widespread demise of dotcoms over the past 18 months is common knowledge. Many scores, if not hundreds, of Northern California businesses have shut their doors when their funding ran out. Few litigators have been spared the sudden disappearance by reason of insolvency of a party to pending litigation.

One might therefore expect to see a booming business in the local bankruptcy courts. Surprisingly that has not happened. There are a number of reasons, but one major cause is a non-judicial proceeding that has become the vehicle of choice for liquidating insolvent technology businesses — the general assignment for benefit of creditors.

The assignment for benefit of creditors is a creature of state law. Though in some states it is based on statute, in California it is strictly a common-law procedure. In concept, a general assignment is quite simple: an insolvent entity transfers all its assets to an independent third party (the assignee). The assignee contracts to take the assignment and to liquidate the debtor's assets for the benefit of creditors. The assignee gives creditors notice of the assignment and of the deadline to submit their claims. The assignee ultimately distributes the cash proceeds to creditors pursuant to their relative priorities, which are governed by state and non-bankruptcy federal law and differ slightly from those under the Bankruptcy Code.

The assignee can engage lawyers, accountants, brokers and other professionals to assist him, and can pay them from the assignment estate. The assignee's compensation is set by the assignment contract — typically some combination of minimum fee and percentage of funds realized, plus expenses — and is also generally payable from the estate. Although the assignee (or other interested parties) can invoke the jurisdiction of the superior court, no court is involved in the typical assignment at any point from start to finish.

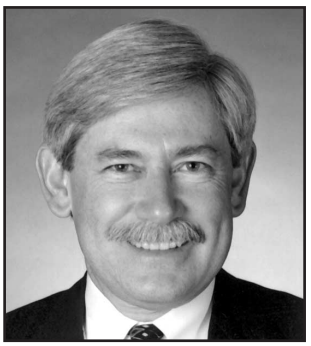
Why choose an assignment instead of a bankruptcy liquidation? There are a number of perceived benefits:

• It is often quicker and less expensive than bankruptcy. Because no court is involved, procedures are less formal and more streamlined, and parties can avoid the expense and delay inherent in pleadings and court appearances. This is particularly useful when the value of the debtor's business will be completely lost if it is not sold very fast.

• An assignment is less "public" than a bankruptcy filing, attracting less notoriety and scrutiny. This is often very important to venture capital investors, who would prefer to bury their mistakes as quietly as possible.

• Unlike bankruptcy, where parties can commence contested proceedings by filing a motion, the threshold cost of litigation in an assignment is considerably higher, and requires filing a civil action in superior court. This reality tends to inhibit litigation and encourage compromise, especially over relatively smaller disputes.

• The assignee has many of the same powers as a bankruptcy trustee. For example, the assignee can sell the debtor's assets, even as a going concern, and can operate the business pending the sale. The assignee also can prosecute lawsuits on behalf of the debtor. In California and many other jurisdictions, an assignee has the status and priority of a "lien creditor" under the Uniform Commercial Code [Com. C. section 9102(52)(A)(ii)], and can also defeat attachments levied less than 90 days before the assignment. And in many states, including California, the assignee has trustee-like power to recover avoidable preferences.



Peter Benvenutti

Assignments do have limitations that make them undesirable in many situations:

• One of the principal advantages of bankruptcy — the automatic stay — is not present so an assignment does not prevent secured creditors from enforcing their liens. Neither does it suspend pending litigation, though as a practical matter plaintiffs lose interest in pursuing claims when there are no free assets from which to recover a judgment.

• Because there is no case pending before a court, it is more difficult and expensive for the assignee to seek judicial relief when that would be helpful — for example, resolving disputes over the validity, amount or priority of claims, or obtaining comfort orders authorizing actions that could be second-guessed. For this, the assignee must file a civil action.

• The assignee has no authority to sell assets free and clear of liens, so sales of encumbered property can usually be made only with the lien-holders' consent.

• Bankruptcy has a comprehensive statute and a well-developed body of case law, but there is relatively little governing authority applicable to assignments. This can create uncertainty and risk.

• Finally, three unhappy creditors holding a total of at least $11,625 in unsecured claims can file an involuntary bankruptcy petition within 120 days after the assignment, and thus pre-empt the assignment.

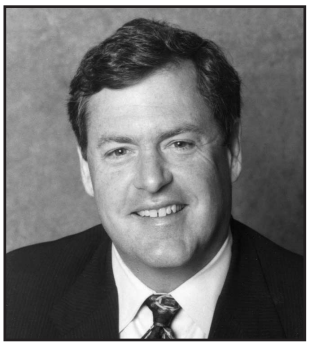
An assignment for the benefit of creditors may not be the right approach for liquidating every insolvent business, but the procedure has won a committed following among many managers and financers of troubled technology companies, and it appears to be here to stay.

Mr. Benvenutti is a shareholder in Heller Ehrman White & McAuliffe LLP, where he practices creditors rights and bankruptcy law.

Letter From The Editor

Welcome San Joaquin Valley

Our Northern California ABTL members may not be aware that there are five ABTL Chapters in California: Los Angeles, Northern California, Orange County, San Diego and San Joaquin Valley. The Los Angeles, Orange County and San Diego Chapters each publish their own *ABTL Reports*, similar to our thrice-annual *ABTL Northern California Report*. San Joaquin Valley, the newest ABTL chapter covering the counties of Fresno, Tulare, Kings, Madera and Merced, does not yet have its own publication. However, all of the ABTL members from the San Joaquin Valley Chapter receive our *Report*.



Ben Riley

To highlight the participation of the San Joaquin Valley Chapter, my Co-Editor Tim Nardell and I are pleased to welcome two San Joaquin members to the ranks of our authors. Judge Stephen Kane from the Fresno Superior Court, a highly respected trial judge, challenges the Bar to reform the judicial preemptory strike right of CCP section 170.6. Also, Bob Hillison, a former President of the San Joaquin Valley Chapter, offers an interesting article on opinion evidence. We hope that these articles will prompt more submissions from the San Joaquin Valley Chapter's judges and trial lawyers, and promote additional joint activities between the chapters.

Who Reads Us?

With this issue marking the start of Tim and my second year on the Editor's desk, we thought you might be interested in learning who reads the *ABTL Northern California Report*. Approximately 3000 copies of each issue (published in the Spring, Summer and Fall) are distributed to the 1800 ABTL members in Northern California and San Joaquin, plus the Boards of Governors for the Los Angeles, Orange County and San Diego chapters. Our readers also include all the Judges and Magistrate Judges of the Northern and Eastern Districts of California, the entire Ninth Circuit, and the United States Supreme Court. Our state judge readership comprises the California Supreme Court, the justices from the First, Fifth and Sixth District Courts of Appeal, and all current and retired state court trial judges in the counties of Alameda, Contra Costa, Fresno, Kings, Madera, Marin, Merced, Napa, San Francisco, San Mateo, Santa Clara, Sonoma and Tulare. We round out our readership with approximately 250 General Counsel from many of the Bay Areas' largest companies, and legal libraries around the state and the Library of Congress. Prospective authors could not ask for a more wide-ranging and impressive readership to peruse and learn from that great article you're planning on writing!

Consider becoming more involved with ABTL by regularly attending our dinner programs and seminars, and by submitting an article for publication. You'll enjoy the process and meet many of your talented fellow trial judges and lawyers. Contact Tim or me to reserve a publication slot in an upcoming issue!

Mr. Riley is a partner with the San Francisco office of Cooley Godward LLP, and serves as the Co-Editor of the ABTL Northern California Report. (415) 693-2092; briley@cooley.com.