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California Punitive Damages: Life After State Farm

On April 7, 2003, the United States Supreme Court issued *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), purporting to apply the brakes to punitive damage awards. The court pronounced a nexus between actual and punitive damages. With some exceptions, single-digit ratios at most, wrote Justice Kennedy, would likely comport with due process. In the short time that has transpired since *State Farm*, appellate courts from around California have begun to respond to *State Farm* in various, perhaps even divergent, ways. Below, I discuss some of these cases. Inasmuch as this article is intended simply to give a sense of where we are headed and is not intended as a legal brief, I include unpublished cases.

Fraud/Lemon Law Violation

Los Angeles County — 4 to 1 (340 to 1?). *Simon v. San Paolo U.S.*

Holding Co., Inc., 113 Cal. App. 4th 1137 (2003). Plaintiff sued for promissory fraud, damages, and specific performance of a contract to purchase real property. The jury found by special verdict that there was no enforceable

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Hon. Laurence D. Kay

The Securities Class-and-Derivative Litigation Two-Step

Your client, a publicly traded company, has just announced that it will miss its quarterly earnings forecast by a significant amount. You are attuned to the possibility of a class action complaint under Section 10(b) of the Securities Exchange Act of 1934, in which it will be alleged that the company defrauded investors by “concealing” the “truth” for many months, only to “shock the market” with the announcement. You have prepared the company for this possibility, and you are disappointed but hardly surprised when the complaint is filed. You reassure the company that under the Private Securities Litigation Reform Act of 1995 (“PSLRA”), the plaintiff will have to meet an exacting pleading standard and will not be able to conduct any discovery until and unless your motion to dismiss is denied. You have a pretty good idea of how the court will analyze that motion, since many of the key provisions of the PSLRA have now been interpreted.

The following week, however, a shareholder derivative complaint is filed in Superior Court, naming all of the company’s directors and alleging that they breached their fiduciary duties by permitting the company to publish false information. The allegations concerning the underlying wrongdoing appear to have been lifted word-for-word from the federal complaint, but this new lawsuit is beyond the reach of the PSLRA’s procedural safeguards, and it will unfold in a forum in which most judges have had less exposure to these cases. You quickly discover that there are no reported decisions in California that explicitly address this type of suit.

The securities litigation two-step — a federal class
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William S. Freeman

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The Securities Litigation Two-Step

action followed closely by a remarkably similar state derivative complaint — is now commonplace. The shareholder derivative suit, a tool traditionally used to attack alleged insider corruption or questionable corporate transactions, is now routinely used as an alternative means to pursue claims of misleading corporate disclosure.

A compelling case can be made that the use of derivative suits to pursue corporate open-market disclosure claims is a fundamental perversion of the derivative device. While that argument should be made, defense counsel also must deal with immediate questions of strategy and tactics. Handling these cases effectively requires careful footwork, complex conflict-of-interest analysis, thoughtful advice, and long-range strategic planning. While attempting to shape the emerging law in state court, counsel must also focus on day-to-day decisions, anticipating multiple possible outcomes at every stage of the litigation, and staying several moves ahead of the game.

How Did We Get Here?

To understand the dynamics of the current situation, it is necessary to review the recent history of the securities class action wars.

A dozen years ago, it seemed that every time a public company announced disappointing news, it was immediately hit with a rash of class action fraud suits under Section 10(b) of the Exchange Act. In response to public outcry over perceived litigation abuses, in 1995 Congress enacted the PSLRA, which, among other things, set forth exacting pleading requirements and imposed an automatic discovery stay until a complaint had survived a motion to dismiss.

The PSLRA did in fact lead to an increased success rate for defendants in motions to dismiss. In response, plaintiffs' counsel sought to avoid the PSLRA altogether by filing class actions in state courts under state securities laws, where they hoped to take advantage of more lenient pleading requirements and immediate discovery. Congress thwarted that tactic in 1998 by enacting the Securities Litigation Uniform Standards Act ("SLUSA"), which provided that most shareholder class actions must be litigated in federal court under the federal securities laws. SLUSA, however, contained a loophole: it provided that shareholder derivative actions could continue to be litigated in state court. The significance of that loophole has been growing ever since.

Differences Between Class Actions and Derivative Cases

Securities class and derivative actions are radically different both in theory and in practice. In a class action, the plaintiffs are shareholders seeking recovery of personal investment losses allegedly caused by misleading disclosure. A judgment or settlement results in a payment that is divided among the shareholders.

The derivative suit is also commenced by a shareholder, but the similarity with the class action ends there. The defendants may include the same officers and directors, but the underlying plaintiff is the corporation itself; the suit is "derivative" because "the rights of the plaintiff shareholders derive from the primary corporate right to redress the wrongs against it." *Desaigoudar v. Meyercord*, 108 Cal. App. 4th 173, 183 (2003). (Whether the company has in fact been damaged by the alleged wrongs is highly debatable; plaintiffs resort to arguing that the company will have to spend money to defend the already-filed class action, and that its future ability to raise capital may be impaired.) In theory, at least, any monetary recovery goes not to shareholders, but to the corporate treasury.

Derivative suits have long been brought to contest proposed corporate transactions, generally on the theory that a deal was improperly conceived or structured for the benefit of corporate insiders, or that the directors breached their fiduciary duties by failing to maximize the price paid to shareholders. The use of the derivative suit to re-package class action claims that are already pending in federal court is both innovative and controversial. While it can be expected that California courts will eventually develop a uniform body of law concerning these cases, for now the frontier is largely unregulated, and defense counsel must adapt accordingly.

The Demand Requirement and Plaintiffs' Attempts to Avoid It

The derivative suit is an exception to the rule that the corporation, acting through its board, has the sole right and power to sue for redress of injuries to the corporation. *Burks v. Lasker*, 449 U.S. 471, 487 (1979) (concurring opinion of Stewart, J.). It is, in essence, an attempt to wrest from the board a key mechanism of corporate governance. Both Delaware and California have statutory safeguards to prevent this seizure of power from being routinely or easily accomplished. To establish standing to bring a derivative action, a plaintiff must either make demand on the board that it institute the action itself, or allege "with particularity" her reasons for not doing so. Del. Chancery Ct. R. 23.1; Cal. Corp. Code section 800(b) (2). The pre-suit demand requirement is rooted in legislative policy discouraging judicial interference with corporate decision-making. *Shields v. Singleton*, 15 Cal. App. 4th 1611, 1619 (1993), quoting 1A Ballantine & Sterling, *Cal. Corporations Law* section 292.03, p. 14-19 (4th ed. 1992).

If the plaintiff makes pre-suit demand on the board and the board determines not to pursue the claim, that determination is accorded considerable deference by the court under the business judgment rule, and constitutes a defense to the suit. *Desaigoudar, supra*, 108 Cal. App. 4th at 183-85; *Grimes v. DSC Communications Corp.*, 724 A.2d 561, 565 (Del. Ch. 1998). Perhaps for this reason, plaintiffs routinely attempt to avoid the pre-suit demand requirement.

Instead, plaintiffs allege that demand is "excused" because it would be "futile." The claim of "demand futility" is based on boilerplate allegations that could be made

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with equal force against any company's board: that since the plaintiff has named all directors as defendants, they cannot be expected impartially to consider suing themselves; that directors "dominate" or "control" each other; and/or that a derivative claim will not seriously be considered because it might not be covered under the company's directors and officers insurance policy.

In both California and Delaware, the demand futility pleading requirements are stringent. Conclusory allegations will not suffice; the plaintiff must allege specific facts as to each individual director that demonstrate the absence of a disinterested majority of directors who could consider a demand. *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993); *Oakland Raiders v. Nat'l Football League*, 93 Cal. App. 4th 572, 587 (2001); *Shields*, *supra*, 15 Cal. App. 4th at 1621-23. As a result, one would think that superior courts would uniformly dismiss complaints that employ boilerplate language and make generalized accusations that directors lack impartiality. The reality is that enforcement of these pleading strictures has, thus far, been inconsistent in the trial courts, and the California appellate courts have yet to issue definitive pronouncements about the use of derivative suits to advance claims of corporate non-disclosure. As a result, defense counsel must plan for a number of eventualities.

Managing Discovery in the Derivative Case

To defense attorneys accustomed to the PSLRA's discovery stay, an early set of interrogatories or document requests in a derivative case may come as an unpleasant surprise. But defense counsel is not without weapons.

The first is a possible stay of discovery. On occasion, derivative plaintiff's counsel may determine, for strategic reasons of his own, that a stay would be useful, either to permit the two actions to proceed in tandem if the federal motion to dismiss is denied, or just to avoid the burden of "going it alone" at the early stages. If counsel is not interested in a voluntary stay, there is a basis to seek a stay in federal court. The PSLRA provides that "upon a proper showing," the federal court in which the class action is pending may order a stay of discovery in the derivative suit "as necessary in aid of its jurisdiction..." 15 U.S.C. section 78u-4(b)(3)(D). If it appears that the discovery is being sought in the derivative case for the purpose of evading the federal discovery stay, defense counsel should seriously consider moving for such a stay. (At the very least, counsel should be able to persuade the derivative plaintiff's attorneys to agree not to share discovery with the class plaintiff's counsel.) Another possible basis for a stay is that until the demand futility demurrer is overruled, the plaintiff has not established that she has standing to sue, and therefore should not be permitted to take discovery.

Even if a complete stay is not obtained, you can still negotiate, or apply for an order, for staged discovery in the

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Insurance Coverage in Patent Infringement and Antitrust Lawsuits

Insurance companies have moved aggressively in the past decade to limit liability coverage for intellectual property claims. They have scored some victories in court, successfully challenging coverage under general liability policies for patent infringement. The California Supreme Court also handed carriers a win last year in *Hameid v. National Union Fire Ins.*, 31 Cal. 4th 16 (2003), interpreting "advertising" to mean only widespread dissemination to the public at large.

Changes to standard form policies in 1997 and again in 2001 have also limited coverage to narrow intellectual property offenses. Not all carriers have adopted these forms, however, so insureds must continue to review their policies in each instance for possible coverages.

This article focuses on an additional source of coverage in patent infringement litigation: shotgun counterclaims, often including antitrust, Lanham Act and common law causes of action, brought in response to the insured's patent infringement lawsuit. The factual allegations of such counterclaims may trigger coverage under a general liability policy's personal injury and advertising injury coverages. Once the carrier begins defending the counterclaims, moreover, the carrier may find that it cannot distinguish between the work needed to defend the counterclaims and to prosecute the insured's claim. This may result not just in a defense for the counterclaims, but also in substantial funding for the insured's patent infringement suit.

"Sham" Litigation

General liability policies typically extend personal injury coverage to "malicious prosecution" claims. Counterclaims in patent litigation rarely state a cause of action for malicious prosecution as such, but often contain allegations that the insured's efforts to protect its patent rights, in that suit or in other suits, amount to "sham" litigation intended to monopolize the market. A sub-species of this claim, a so-called "*Walker Process*" claim, alleges that the insured has attempted to enforce a patent procured through fraud on the Patent Office. These allegations can appear in claims for monopolization under federal and state antitrust laws, interference with prospective economic advantage, and abuse of process. Under California law, such allegations trigger a duty to defend.

In *CNA Casualty v. Seaboard Surety Co.*, 176 Cal. App. 3d 598 (1986), Seaboard and other carriers refused to par-



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Insurance Coverage in Patent Lawsuits

ticipate with CNA in the defense of an antitrust lawsuit brought by Salveson. Salveson alleged as factual bases for his antitrust cause of action that the insured, among other things, filed “false, frivolous and sham counterclaims in this action.” *Id.* at 608 n.3. The court of appeal held that these allegations “raised at least the possibility of liability under the malicious prosecution coverage contained in the insurance policies.” *Id.* at 608-09.

Is there coverage without a cause of action as such for malicious prosecution? The answer is yes. California law has long prevented an insurer from “hiding behind the pleadings.” As the Supreme Court said in *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 276 (1966): “In light of the likely overstatement of the complaint and of the plasticity of modern pleading, we should hardly designate the third party as the arbiter of the policy’s coverage.” This is equally true with respect to the “personal injury” and “advertising injury” coverages in the policy. See, e.g., *CNA v. Seaboard, supra*; *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1034 (2002) (“scope of the duty [to defend] allegations of defamation does not depend on the labels given to the causes of action in the third party complaint”).

Must the counterclaimant allege that the “sham” litigation was already resolved against the insured (strictly satisfying the elements of a claim for malicious prosecution)? *CNA v. Seaboard* rejected this argument, finding the potential existed because the insured’s suit (the allegedly “sham litigation”) could potentially be resolved against it. In addition, California law on malicious prosecution does not necessarily require a judgment against the insured to meet the “finality” element. A voluntary dismissal of a suit or of causes of action could satisfy the requirement if it evidences a resolution on the merits. See, e.g., *Kennedy v. Byrum*, 201 Cal. App. 2d 474, 480 (1962) (finding voluntary dismissal sufficient for purposes of asserting malicious prosecution claim). In addition, the Ninth Circuit has held that allegations amounting to abuse of process (which does not require a final determination) trigger coverage under the malicious prosecution offense. *Lunsford v. American Guar. & Liab.*, 18 F.3d 653, 654-56 (9th Cir. 1994); see also *Pacific Telesis Group v. National Union Fire Ins. Co.*, 1999 U.S. Dist. LEXIS 3170 (N.D. Cal. March 17, 1999) (Breyer, J.).

Defamation and Disparagement

Counterclaims often include allegations that the insured made false statements in the trade press or in the course of soliciting customers that the counterclaimant has infringed on the insured’s patents or has stolen trade secrets, or that its product does not work. The allegations may appear within antitrust or Lanham Act claims, or in connection with common law causes of action with labels such as defamation, disparagement, trade libel or injurious falsehood. Such allegations also may trigger a duty to defend.

Policy language is important here. Some policies ex-

pressly cover both defamation and disparagement claims. Other carriers have attempted to draft policies in such a way as to cover “libel, slander or defamation,” but not “disparagement” or “trade libel.” Carriers often use this language to argue that in this commercial context, the counterclaims sound in “disparagement,” not “defamation,” and deny coverage.

The distinctions between “defamation” and “disparagement,” or between “libel” and “trade libel,” may not be obvious to a lawyer, much less the layperson who provides the standard for interpreting policy language. California courts are now split as to whether a policy providing coverage for “libel, slander or defamation” also extends to disparagement claims. Compare *CNA v. Seaboard*, 176 Cal. App. 3d at 611-12 and n. 7 (allegations that the insured made statements “misrepresenting the business, property and rights possessed by plaintiffs” potentially covered by policy provisions for “libel, slander, or other defamatory or disparaging material”); and *Truck Ins. Exchange v. Bennett*, 53 Cal. App. 4th 75, 83 (1997) (allegations of disparagement of title to radio stations not covered by policy provision for “a libel or slander or other defamatory or disparaging material”).

Here again, however, the specific factual allegations may be critical. As a general matter, false statements criticizing a business or its goods are defamatory if they explicitly or implicitly call into question the company’s honesty, integrity or competence. *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 550 (1985). For example, several courts have held that accusations of patent infringement are defamatory. See, e.g., *Amerisure Ins. Co. v. Laserage Technology Corp.*, 2 F. Supp. 2d 296, 304 (W.D.N.Y. 1998); *OMI Holdings, Inc. v. Federal Ins. Co. of Canada*, 1997 WL 30861 (D. Kan. 1997). See also *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1035 n.13 (2002) (acknowledging that accusations of patent infringement might constitute both “disparagement” and “defamation”). An accusation of “willful” patent infringement should certainly be deemed defamatory. Counterclaims alleging false accusations of theft of trade secrets would also call into question a company’s honesty and integrity and may also amount to a covered defamation. Actionable comments criticizing the quality of a company’s products, on the other hand, are probably not by themselves defamatory.

Defense Cost Issues

Faced with such allegations in the counterclaims, carriers generally agree to defend under a reservation of rights. This only sets the stage, however, for a ferocious battle over defense costs. Because patent and antitrust litigation of this kind often “bets the company” and sweeps through a wide range of corporate conduct over long periods of time, defense costs will be high. Most carriers will therefore employ a combination of tactics to limit their defense costs. These include: limitations to “panel counsel” rates under Civil Code section 2860; allocation of attorneys’ fees and costs between defense of the counterclaims and prosecution of the insured’s patent infringe-

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ment claims; and imposition of "billing guidelines." All of these carrier objections to paying for defense costs are subject to challenge, and should be contested as early and often as possible.

Where the insured is being defended by independent counsel, section 2860 allows a carrier to pay only the rates "actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended." The language fits easily with ordinary personal injury or construction defect litigation. But because carriers do not ordinarily defend patent infringement or antitrust lawsuits by themselves, and virtually never do so without a reservation of rights entitling the insured to independent counsel, they may not be able to show that they retain attorneys for these kinds of suits "in the ordinary course of business." The insured, therefore, should insist that the carrier pay the actual rates being charged by defense counsel unless the carrier can prove, through evidence of specific cases and attorneys, that it has actually paid "panel counsel" for this kind of litigation.

Buss v. Superior Court, 16 Cal. 4th 35 (1997), requires a carrier to defend both covered and uncovered claims subject to a right, at the end of the case, to seek reimbursement as to defense costs related solely to the defense of uncovered claims. If the carrier must defend some of the counterclaims, it must defend all of them. Carriers, nonetheless, will usually claim a right to allocate as to the prosecution of the insured's patent claims, because *Buss* on its face does not address this issue. They may then ask the insured's counsel to create separate invoices, or they may hire an auditor to make an allocation, or simply deduct a flat percentage they feel ought to be attributable to work on the insured's "affirmative" claims.

Suppose, though, that the insured has filed a suit for patent infringement, and the counterclaims allege that this and other infringement lawsuits are "sham" litigation. The main defense to the sham litigation claim is for the insured to prove its claim for patent infringement. A defense to the defamation allegation is that the statements were true. Thus, there is no practical distinction between the work on the insured's infringement claim and the defense of the counterclaims. (One exception would be work on the insured's damages claim, although even here expert analysis of the particular market in which the parties compete could overlap.) It will be impracticable to segregate the work in invoices, and a carrier's effort to do so after the fact will almost always result in arbitrary reductions in the amounts it reimburses.

The rationale, if not the letter, of *Buss* certainly applies here. Efforts to try to allocate while the case is pending will be difficult at best and risk undermining the insured's defense. From a more practical point of view, too, allocation as to the insured's affirmative claims will often be mooted by an ordinary *Buss* analysis. This is because the counterclaims against the insured will typically include a cause of action for declaratory relief challenging the insured's patents. Under *Buss*, the carrier must defend this claim, along with the covered malicious prosecution and defamation allegations, until the case is concluded.

The insured should challenge the carrier's allocation

efforts early and aggressively. Otherwise, the accumulation of allocated and unreimbursed fees and costs will give the carrier excessive and unfair leverage when it comes time to discuss settlement of the litigation and resolution of the coverage disputes.

Finally, billing guidelines can peck an insured to death. These may seek to: limit staffing; avoid payment for certain tasks such as meetings among attorneys; require task billing; and deem certain work by paralegals and other non-attorney staff unreimbursable "overhead." These are often presented as mandatory by the carrier; however, they are not part of the policy and so not within the contractual obligations of the insured to the insurer. The issue is: what is reasonable? Insureds should review such guidelines carefully at the outset, and then negotiate a three-way arrangement with the carrier and defense counsel, so that defense counsel's practices match what the carrier has agreed to pay.

Conclusion

Counterclaims in patent infringement suits, even though often framed in antitrust causes of action, can contain potentially covered allegations triggering a duty to defend. It behooves the insured, who filed the patent infringement suit initially, to study the allegations carefully and seek advice about tendering the defense. In many cases, the carrier's defense obligations may result in the insured obtaining not only a defense to the counterclaims, but also funding for prosecution of the patent infringement suit. On the other side of the coin, a defendant in a patent infringement suit may want to consider carefully the facts it intends to allege in counterclaims, and make an informed choice about whether it wants to trigger coverage for its opponent.

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California Punitive Damages

contract, but there was fraud on the part of the seller. Thus, under California Civil Code section 3343, the award of actual damages was limited to out-of-pocket expenses, here \$5,000. The jury also found reprehensible conduct and, in the second phase of the bifurcated trial, fixed punitive damages in the amount of \$1.7 million. The Court of Appeal affirmed and the California Supreme Court denied review. The United States Supreme Court granted seller's petition for writ of certiorari and remanded to the Court of Appeal for reconsideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). *Cooper*, noting that punitive damages were not really a "fact" tried by a jury, had established the requirement that punitive damage awards be reviewed by an appellate court *de novo* to assure compliance with the Eighth Amendment prohibition against excessive fines.

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California Punitive Damages

The *Simon* court did so and reaffirmed the original punitive damages award. The U.S. Supreme Court remanded the case again, this time for further consideration in light of *State Farm*.

Division Four of the Second District affirmed again. The court reasoned that compensatory damages of \$5,000 are insubstantial and the single-digit limitation of *State Farm* does not apply in such cases. Furthermore, noting that experts had testified during the trial that the property was worth \$1.5 million — \$400,000 more than the fraudulent promise to sell price — the court reasoned that the “actual harm done” was not \$5,000, but \$405,000. That had been the argument of plaintiff’s counsel to the jury, without objection. In fixing the amount of punitive damages, the jury had been instructed to consider, among other things, the relationship to the “injury, harm or damage.” Moreover, the standard of review required the court to presume that the jury had done so. Viewed in this light, the \$1.7 million original amount of punitive damages was barely more than four times the value of the harm done, and thus consistent with due process under *State Farm*.

Fresno County — 3 to 1. *Johnson v. Ford Motor Co.*, No. F040188, F040529, 2003 WL 22794432 (Cal. App. Nov. 25, 2003). Ford Motor Company had authorized the buy back of a defective automobile and its resale without disclosure of the problem as required by the Lemon Law statute. The jury awarded \$17,811 in compensatory damages to the second buyer and \$10 million in punitives. Citing *State Farm*, the Fifth District reduced the punitives to \$53,435, three times the compensatories. The original award had to be substantially reduced because it was based on an overall course of improper conduct, not just conduct that injured the particular plaintiffs. The conduct was highly reprehensible but involved only economic injury. This case was decided the same day by the same panel as *Romo v. Ford Motor Co.*, *infra*.

Breach of Fiduciary Duty

San Luis Obispo County — 0. *Ballesteros v. Ballesteros*, No. B157107, 2003 WL 22080211 (Cal. App. Sept. 9, 2003). Conversion case. Father bought shares of stock in a bank as custodian for his son. After the bank merged, father surrendered the shares, had them reissued in his own name, and then sold them for a big profit. Son sued. The court awarded \$581,887 in compensatory damages and \$280,000 in punitive damages in favor of the son.

On appeal the Second District, Division Six, struck the punitive damage award in its entirety. The shares of stock had been for the son’s college education and the son had chosen not to go to college. Quoting *State Farm*, the court noted that reprehensibility of conduct is the most important factor. Not every breach of fiduciary duty is reprehensible. “Punitive damages may be awarded only if defendant’s conduct is so reprehensible as to warrant further sanctions to achieve punishment or deterrence.” *Id.* at *5. “[T]he civil sanction authorized for embezzlement

[under California Penal Code section 672] is a \$10,000 fine. Considering the circumstances, any punitive damages are unreasonable and disproportionate to the wrong committed.” *Id.*

Insurance Bad Faith

Orange County — 3 to 1. *Taylor Woodrow Homes, Inc. v. Acceptance Ins. Companies, Inc.*, No. G029532, 2003 WL 21224088 (Cal. App. May 28, 2003). The carrier promised to cover a homeowner’s claim for defective plumbing and then reneged. Meanwhile, in reliance on the promise of coverage, the general contractor paid the plumber to repair the damage. The jury found promissory fraud and awarded compensatory damages of \$293,000, including attorneys’ fees. It then awarded \$5 million in punitive damages.

On appeal, the Fourth District, Division Three, reduced the punitive damages to \$1 million — less than four times compensatories. The jury’s award of 17 times compensatories was “way too much” to punish the insurer. *Id.* at *3. A ratio of 4 to 1 “might be close to the line of constitutional impropriety.” *Id.* at *4. Facts here were “just about as blatant and opportunistic a breach of an insurance contract as might be imagined,” but “not as bad” as *State Farm*. *Id.* at *4.

Orange County — 4 to 1. *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 109 Cal.App. 4th 1020 (2003). An employee who worked at a woodworking factory through an employee lease company was injured the first day of work. The workers’ compensation carrier failed to investigate the injured worker’s claim and wrongfully denied coverage. Damages were reduced by the trial court to \$404,270 compensatories and \$5.5 million punitives — a ratio of about 13 to 1. The Fourth District, Division Three, conditionally reduced the compensatories to \$258,570 and punitives to \$1 million. The harm to Diamond Woodworks was economic, not physical. But the defendant demonstrated absolute indifference to the health and safety of the maimed employee; it stonewalled coverage and denied a defense to Diamond Woodworks for 18 months, showing this was not isolated conduct. This was not a good faith mistake, but intentional misconduct.

These factors were sufficient after *State Farm* to support an award of punitive damages. In reducing the award the court noted that *State Farm* had cautioned, “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” *Id.* at 1055. The court goes on to say that *State Farm* and other precedents “suggest that in the usual case, *i.e.*, a case in which the compensatory damages are neither exceptionally high nor low, and in which the defendant’s conduct is neither exceptionally extreme nor trivial, the outer constitutional limit on the amount of punitive damages is approximately four times the amount of compensatory damages.” *Id.* at 1057.

Intentional Property Damage

San Luis Obispo County — 1 to 1. *Laursen v. Pope*, No. B159647, 2003 WL 22766141 (Cal. App. Nov. 23,

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KATE WHEBLE

On TRADEMARK & COPYRIGHT

Using trademarks in metatags and keywords to direct consumers to the sites of the trademark owner's competitors is an unsettled area of trademark law. In *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 2004 WL 57738 (9th Cir. 2004), the Ninth Circuit established that using trademarks to direct internet traffic to the unlabeled advertisements of competitors is actionable.

Netscape and Excite run internet search engines providing links to websites based on search terms entered by a consumer. They match consumer input to lists of keywords linked to the banner ads of their advertising clients. The Playboy trademarks "playboy" and "playmate" were included in the search engines' keyword lists, so that when a consumer presented the marks to the search engine, competitors' banner ads would appear. Playboy argued that when its competitors' banner ads were not labeled, customers would likely be confused into thinking that Playboy sponsored the ad or that consumers would expect to connect to a Playboy website when they clicked on the unlabeled ads, but would access a competitor's site instead. The district court awarded summary judgment on Playboy's trademark infringement and dilution claims to Netscape and Excite, but the Ninth Circuit reversed and remanded.

The key issue was likelihood of confusion — specifically Playboy's allegation of initial interest confusion. Initial interest confusion occurs when a party leverages the goodwill associated with another's mark by using it to confuse consumers into taking an interest in its own goods or services. Even when consumers realize that their initial interest has been directed to goods other than those they sought, they may nonetheless patronize the infringer instead of the mark holder.

The appellate court viewed Playboy's theory as similar to the theory adopted in *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir. 1999). West Coast had used "MovieBuff," a Brookfield trademark, in the list of metatags, or index words, for its website. The court held that such use constituted trademark infringement in the form of initial interest confusion, since consumers seeking Brookfield through its trademark would encounter West Coast's website, and might even remain there. West Coast thus used Brookfield's mark to attract customers, appropriating Brookfield's good will in "MovieBuff."

Because Playboy alleged likelihood of confusion, the court applied the eight-factor analysis it developed in *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979). These factors are: strength of the plaintiff's mark; proximity of the goods; similarity of the marks; evidence of actual confusion; marketing channels used; type of

goods and the degree of care likely to be exercised by the purchaser; defendant's intent in selecting the mark; and likelihood of expansion of the product lines. Evidence of actual confusion was key here, since it would strongly support a likelihood of confusion. Netscape and Excite's criticism of Playboy's testimony of actual confusion testimony showed a genuine issue of material fact. The balance of the other factors favored Playboy.

Netscape and Excite raised the defenses of fair use, nominative use, and functional use. The court rejected all three. Summary judgment on fair use was precluded because infringement was at issue. Instead, the court applied the nominative fair use analysis it set forth in *New Kids on the Block v. Gannett Satellite Information Network, Inc.*, 971 F.2d 302 (9th Cir. 1992). This tripartite test is essentially a test for confusion, replacing the Sleekcraft test when the nominative fair use defense is raised. The defense failed on the first factor, requiring that "the product or service in question must be one not readily identifiable without use of the trademark," because Netscape and Excite could have used other words to link to adult-oriented websites. The functional use defense had not been raised below, and was inapplicable to Playboy's marks because they were not "functional" or generic terms, but rather distinctive trademarks.

The court focused its trademark dilution analysis on two elements: the fame of Playboy's marks, and the standard applicable for dilution. Though the test for fame includes at least eight factors, the only question contested was third-party use. Netscape and Excite argued that Playboy's marks were registered and used by numerous companies. Playboy countered that defendants' evidence overcounted, for example, by including infringing marks and applications rather than registrations. Finally, the court vacated the district court's opinion on dilution. The court remanded this claim for trial under the higher standard for dilution provided in *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003), which requires a showing of actual dilution.

Circuit Judge Berzon concurred, but expressed concern that *Brookfield*, which the court applied here, had been wrongly decided. She disagreed with a possible interpretation of *Brookfield* that finds infringement where metatags bring consumers to sites that are clearly labeled as not those of the trademark owner.

The *Playboy* case applies the *Brookfield* rule to the use of trademarks to link to competitors' unlabeled ads, which is clearly actionable. However, *Playboy* does not test the *Brookfield* rule where the competing ads are labeled with the sources of their products or services. Judge Berzon's concurrence foreshadows the potential for *Brookfield* to be limited to conditions such as those in *Playboy*.

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Kate Wheble



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California Punitive Damages

2003). In an ongoing war between neighbors, the defendant violated an injunction and deliberately destroyed plaintiff's water system. Compensatory damages were found to be \$396,000 and punitives were set at \$750,000. The Second District, Division Six, found that the conduct was reprehensible and that the two times multiple complied with the dictates of *State Farm*. The problem here was the size of the punitives relative to defendant's net worth. Ten percent of his net worth, or \$295,000, was all that was needed to punish and deter. More would violate due process.

Riverside County — 2 to 1. *Brandstetter v. Holiday Retreats, Inc.*, No E032364, 2003 WL 22391270 (Cal. App. Oct. 21, 2003). Here the defendants and their predecessors had a contract dating back to the 1920's to supply water to certain property. Plaintiff bought one of the lots to which water service was provided, then got into a dispute with defendants, who shut off water service. Defendants refused to accept plaintiff's checks for water service, and admitted they did not care whether plaintiff had any access to water. The jury found that defendants had intentionally interfered with the water easement and set damages at \$158,770. They also found that defendants had acted with malice and assessed punitive damages of \$75,000 against the individual defendant and \$250,000 against the corporation.

The Fourth District, Division Two, affirmed. This was well within the single digit limitation of *State Farm*. Evidence of defendants' financial condition consisted mostly of information about income rather than assets. This was sufficient under California law.

Personal Injury/Wrongful Death

Stanislaus County — 5 to 1 (3 to 1 + 1,000 to 1). *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738 (2003). Parents and a brother were killed in a rollover accident that left three surviving children who were injured passengers. After adjustment, a jury awarded \$4.5 million in compensatory damages and \$290 million in punitive damages. The trial court granted the manufacturer's motion for new trial on punitive damages. Both sides appealed and the Fifth District Court of Appeal reinstated the judgment and affirmed. The California Supreme Court denied a petition for review and the United States Supreme Court thereafter granted the manufacturer's petition for certiorari. On remand for reconsideration in light of *State Farm*, the Fifth District conditionally reduced the punitive damage award from \$290 million to \$23.7 million.

The court's task was complicated by confused compensatory awards on the verdict form. Regarding the individual survivors who had been awarded damages that included their pain and suffering, the court framed the issue as follows: "Which Single Digit Sufficiently Punishes and Deters?" *Id.* at 751. The conduct was "extremely reprehensible" and justified a three times multiple. *Id.* at 755. Evidence of harm to others was still found to be admissible after *State Farm* on the degree of reprehensibility. In

addition, the court allowed \$5 million in punitives for each of two estates that had been awarded insubstantial economic damages (\$5,000 each) under California Code of Civil Procedure section 377.43. Given the compensatory damage limitations in death cases, and the state's "extremely strong interest in being able to impose sufficiently high punitive damages in malicious-conduct wrongful death actions to deter a 'cheaper to kill them' mind set," the court held that "death actions present an example of the type of extraordinary case contemplated by *State Farm*...in which a single-digit multiplier does not necessarily form an appropriate limitation upon a punitive damages award." *Id.* at 761.

The court noted that the total punitives of almost \$24 million were approximately five times the total compensatory awards. Regarding defendant's wealth, the court said that it is a proper consideration, but must be used "only to determine the appropriate punishment for the present malicious conduct, not as a gauge for the imposition of a penalty that will actually deter the entire type or course of conduct that affected these plaintiffs." *Id.* at 753 n.7.

San Francisco County — 6 to 1. *Henley v. Philip Morris, Inc.*, 114 Cal. App. 4th 1429 (2004). Living plaintiff lung cancer case. After the jury found \$1.5 million in compensatory damages and \$50 million in punitives, the trial judge reduced the punitives to \$25 million and the Court of Appeal affirmed. The Supreme Court of California ordered reconsideration of the punitive damages in light of *State Farm*. Our court (First District, Division Four) found extreme reprehensibility resulting in severe physical injury and conditionally reduced the punitives to \$9 million, six times the compensatory damages.

Conclusion

What of the California Supreme Court? Nothing yet, but the Court's comments in *Ferguson v. Loeff, Cabrase, Heimann & Bernstein*, 30 Cal. 4th 1037 (2003), are of interest. The Court agreed with our division that one cannot recover lost punitive damages as compensatory damages in legal malpractice cases. Justice Brown's majority opinion quotes *State Farm* to the effect that compensatories are presumed to make a plaintiff whole. Justice Kennard, concurring and dissenting, cites *State Farm* for the proposition that a proper punitives ratio now cannot exceed single digits, and that a lesser ratio, perhaps one to one, where compensatories are substantial, might be the limit. Since punitives have been reined in by *State Farm*, the majority may be overly concerned, she writes, and the rule laid down by the majority should be limited to class action cases.

The United States Supreme Court will undoubtedly revisit the issues it addressed in *State Farm*, but it will take some time to find out if we have heard the Court correctly.

Laurence D. Kay is the Presiding Justice of the First District Court of Appeal, Division Four; and a member of the ABTL Northern California Board of Governors.



CHIP RICE

On LITIGATION SKILLS

I'm often surprised how many lawyers — even ones that aren't very good — regard themselves as finished products. Great athletes like Michael Jordan are known for working on their game; the best are ruthless at identifying, correcting and compensating for their weaknesses. Lawyers should try to do the same.

Working On Your Game

Litigators get more feedback about their work — and more opportunity to respond to that feedback — than most people. Not all criticism is constructive, but all is worth considering.

The Delphic Oracle perplexed Socrates by calling him the wisest of men. But he talked to the most famous and successful Athenians and was surprised that all of them pretended to know and understand more than they truly did. Socrates concluded that the Delphic Oracle had been praising him only for knowing what he did not know. That's a good reminder for all of us not to be too smug. We all have work to do.

Talking Too Much

My biggest weakness, like a lot of other litigators, is that I talk too much. My father used to accuse me of loving the sound of my own voice; most litigators have the same love for their own voices and want to share that love with others. But that really isn't what we are paid to do.

Litigators are supposed to influence events by persuading judges, juries and even opponents to think our way. Sometimes, that means letting other people have some air-time and showing them that you are listening and that you care about what they think. And silence is often the best way to emphasize anything. Nothing will get an inattentive judge (or anyone else) to look up when you are speaking than to stop speaking until they do.

I've had to learn a lot about the time, place and manner of speaking. Being a litigator is not an exercise in authenticity. You can't just say whatever pops into your head. I have embarrassed myself and others more times than I would like to admit by saying the wrong thing at the wrong time in the wrong place.

Like most other litigators, I also can get carried away by my own momentum. When I was a very young lawyer, a judge stopped me from beating a dead horse by telling me, "Counselor, if you will sit down, I will rule in your favor." Exercising all of the self-discipline that I could muster, I sat down without telling the judge all of the

other reasons that I was right. I'm a lot older now, but it still takes conscious effort to shut up when I am winning.

Finally, it is especially dangerous to speak up only to display your intelligence or wit. We all have egos, so such displays can be counterproductive — especially in front of a judge or jury. The most effective lawyers I know are particularly good at not showing off.

My colleagues won't be surprised that I know that I talk too much. They tell me so. But they may be surprised to hear that I am actually trying to change. I still have a ways to go, but I'm not finished working on myself yet.

Timing Issues

Having confessed one of my own weaknesses, I'll switch to one of my pet peeves: lawyers with no sense of timing. Every case has a critical path. Some things, like document production, usually have to be done before others, like depositions. A good litigator will make sure that each action and decision is taken at exactly the right time, but many litigators let their own issues about timing get in the way of doing their job.

We all have seen litigators who seem to be avoiding a file or a fact as though it will go away. Papers sink to the bottom of the inbox, and projects don't get done. Then, when the pace picks up because of a motion or trial, the undone project is blocking everything. Litigators have to keep asking themselves what they are avoiding — and why — and then make sure that none of their cases fall off the critical path.

But rushing things can be bad too. Sometimes, we force decisions and actions because we or our clients want to end the anxiety that comes from uncertainty. A good litigator must have a tolerance for ambiguity and make sure that no decision is made and no action is taken too soon. It's usually best to wait as long as possible before making any particular decision so that you will have more information and time to consider it. At some point, the disadvantages of delay will outweigh the advantages, but litigators must not be misled by their own personal issues of avoidance or need for closure. Reason, not instinct, should determine the moment for pulling the trigger.

Conclusion

Confession is good for the soul, and even better for the practice. I know you're good, but I'm sure that you could be better. What do you need to work on?



Chip Rice

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The Securities Litigation Two-Step

state court — limited initially to demand futility-related issues. Counsel will often agree to restrict early discovery to information that bears directly on the reasons why board members could not evaluate a demand impartially, such as their economic relationships with the company or their financial and personal relationships with each other.

If the case survives demurrer, every effort should be made to manage the discovery process to minimize the burden on the company. Whether this leads counsel to seek a voluntary or involuntary stay of “merits” discovery will depend on, among other factors, the similarity of the allegations in the two cases, the pendency of an internal investigation by the company, and the relative stages of the two cases. All other things being equal, it is hard to imagine that conducting discovery twice would be in anyone’s interest.

Motion to Stay Pending Internal Investigation

Because the derivative case implicates corporate governance issues, the defense has available to it a tactic unknown to the securities class action: a motion to dismiss based on a board determination that the continued maintenance of the action is not in the best interest of the company.

If the complaint survives demurrer, the company can appoint a disinterested committee to investigate the complaint’s allegations and consider whether continued litigation is in the corporation’s best interest. If a determination is made that it is not, the company can move to dismiss the complaint. This motion takes on some characteristics of a summary judgment motion, with the court focusing on the investigative process underlying the committee’s determination. *Desai*, *supra*, 108 Cal. App. 4th at 184-90. The most defensible decisions are made only after a thorough investigation by a disinterested committee.

The determination of whether and how the company should undertake such an investigation is complex and highly individualized. It is easiest to make this decision if the board has been properly advised from the outset as to its strategic options in the event the demand futility demurrer is overruled.

Potential Conflicts of Interest

Multi-party representations typically raise potential conflicts of interest, since it is conceivable that the clients’ interests, even if unified at the outset, could diverge down the road. Parallel derivative and class action litigation multiplies the number of conflicts that must be considered under California Rule of Professional Conduct 3-310(C). As with all questions of conflicts of interest, any waiver must be given in writing, upon disclosure of the relevant facts and a discussion of “the actual and reasonably foreseeable adverse consequences to the client” of the potential or actual conflict. *Id.*, Rule 3-310(A).

The analysis of conflicts in any particular situation is beyond the scope of this article. The analysis will be highly fact-specific, and the resolution will depend in part, as it should, on client preferences. It is essential, however, that the possible procedural twists and turns of a derivative case be thought through in advance, so that defense counsel can educate their clients concerning the issues they will have to consider at each stage of the proceedings.

When a company and individual officers or directors are faced solely with a class action, it is not uncommon for defense counsel to represent all defendants jointly throughout the case. In the class-derivative two-step scenario, however, matters get far more complicated. To begin with, counsel is confronted by the fact that the corporation, while procedurally aligned with the individuals as a defendant in the class action, is technically aligned (albeit against its will) against them as a putative plaintiff in the derivative suit.

Initially, the company and the individuals share a common interest in having the suit dismissed, although for different reasons. The individuals seek to defeat any claim of personal liability; the company has a powerful interest in thwarting the attempted hijacking of its power to initiate litigation.

The situation gets more complex in the event the “demand futility” demurrer is overruled. The company now has three strategic options. First, it can take a back seat, allowing the plaintiff to proceed with the litigation on its behalf while seeking to protect its personnel from procedural abuse. Second, it can decide to seek a stay of the litigation to conduct its own investigation through a special litigation committee of the board. If that investigation concludes that the suit is meritless, the company can then move for dismissal. Third, it can enter into settlement discussions, also under the supervision of a special committee. Each of these alternatives raises representation issues requiring full consideration.

Case law regarding conflicts of interest in derivative cases is neither well developed nor clear. What is clear, however, is that defense counsel must think carefully at the outset about the possible paths a derivative case can take, and how the interests of the clients can best be served.

Conclusion

The recent emergence of the derivative action as a tool to pursue corporate disclosure claims is an unintended consequence of the effectiveness of the PSLRA, and it may well be a misuse of the derivative device. In contrast to the PSLRA, the law applicable to state law derivative actions is still developing and clear guideposts have yet to emerge. At least until the courts or the Legislature resolve the doctrinal and policy issues raised by these cases, defendants and their counsel must learn to master the class-and-derivative litigation two-step.

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TRENT NORRIS

On ENVIRONMENTAL LAW

“We use consultants for that.” Environmental lawyers hear these words from their clients more and more as companies attempt to professionalize, internalize, and economize in their management of environmental compliance. The statement is often intended to limit the lawyers’ involvement in advising the company and its environmental, health and safety professionals — all in the name of efficiency.

Environmental lawyers should not acquiesce to such limits. While acknowledging the high costs of compliance, lawyers should communicate to their clients how their compliance efforts might benefit from greater involvement of environmental lawyers. After all, it’s a lawyer they’ll call to defend them if something goes wrong.

Companies often hire environmental consultants to help assemble policies for compliance with the myriad of environmental, health and safety regulations. Consultants know the practical techniques of compliance. They work efficiently with in-house environmental staff. They know the details of specific regulations and guidance. Because these regulations constantly change and apply to varied operations and products — with potentially enormous costs — consultants provide a crucial service.

So do lawyers. Environmental lawyers with experience defending enforcement actions and private litigation can provide unique insights into the design of environmental compliance policies. Even if they don’t draft the policies, lawyers should help design them, review consultants’ drafts, and periodically assess their implementation.

Environmental lawyers know that compliance policies that appear to be cost-effective and complete may fall short under the scrutiny of an investigation or litigation. Below are some of the most common deficiencies in environmental compliance programs designed without the help of lawyers:

Twelve binders sit on a shelf at headquarters. An elaborate policy that is not followed usually is worse than a bare-bones policy that is consistently observed. Although various enforcement guidelines provide credit for companies with written compliance policies, the failure to follow a policy may void that credit. It also may constitute a violation of law itself (particularly given the expansiveness of California’s Unfair Business Practices Act), or it may establish a breach of a standard of care. At the very least, a company’s failure to follow its policy is a bad fact in any dispute. A policy must be clear and easy for employees of varying skill levels and experience to follow. The company must have the resources to implement the policy reliably. If a company cannot resist the urge to codify all of its good ideas, they should be labeled as suggestions and distinguished from requirements.

Anyone with questions should call the CEO. Although

putting the CEO in charge of environmental compliance may emphasize the importance of the company’s commitment, it is very risky. The person in charge of implementing the environmental compliance policy is the one most likely to be prosecuted individually if there is a serious problem. It is the company’s job to make sure the top compliance person has the experience, skills, resources, time, and organizational clout to implement the policy. Usually, that is someone at least one or two levels below the CEO.

The corporate parent handles environmental compliance for its subsidiaries. The parent company’s policies and management cannot substitute for those of the subsidiaries. Although a parent company may be concerned about the environmental exposure of its subsidiaries, it risks its own assets if it is too involved in its subsidiaries’ day-to-day operations. The parent is better off providing the resources needed for each operating entity to have its own environmental manager in order to ensure that corporate formalities provide their intended protections.

The legal requirements are misstated. Policies written without legal review can get the law wrong. Most laws are written by lawyers, and lawyers have their own language. The words of a regulation may look like English, but they are often “terms of art,” *i.e.*, “code.” They will be interpreted by courts in light of case law, legislative and regulatory history, and past agency interpretations, all of which are the lawyer’s area of expertise. Even the most experienced consultants sometimes miss a nuance (or worse) that a lawyer’s review would catch.

Audits are conducted solely by non-lawyers. Some states have recently created a privilege for environmental audits. Others have not. The prerequisites for such status are quite varied. Not so with the attorney-client privilege and the attorney work product doctrine. As a result, a company attempting to investigate and correct environmental problems can only be sure it will avoid leaving a discoverable roadmap for prosecutors if lawyers are involved throughout the process. The effectiveness of auditing programs can be greatly enhanced, and their risks greatly reduced, by providing appropriate roles for environmental lawyers, both in the design of the program and in review of the information it generates.

Certainly, lawyers are not cheap. But they are far cheaper when giving preventive advice than when representing a company under investigation or in court whose defense has been compromised by an environmental compliance policy that was not subject to the appropriate legal review. Companies that rely solely on consultants for environmental compliance risk liability if they fail to use lawyers as well.

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Trent Norris



Letter from the President

It is an honor and privilege to join the long line of distinguished lawyers who have served as President of our Northern California chapter of ABTL. It also is an occasion to reflect on what makes our organization so special. My father, to whom I was very close, practiced law in Northern California for almost 50 years, and he and I had many occasions over the years to talk about the differences between the practice of law in his era and ours. Perhaps the most striking difference — and an area where ABTL has an essential role to play — is the level of collegiality and civility between counsel on opposite

sides of often acrimonious disputes. It was my father's custom, after a long day of hard fought trial, to go out for a drink with his opposing counsel. This practice, he told me, unnerved more than a few clients; nonetheless, he felt it was an essential part of separating the zealous advocacy that went on inside the courtroom from the personal relationships which existed, and would exist, outside of court, long beyond the life of one case. My father believed these personal relationships were crucial to the long term health of



Robert A. Goodin

our profession.

My father's era, of course, is not coming back. But rebuilding some of the collegiality and civility — the ability to separate the advocacy from the personal — which has eroded over the years, is a crucial task for business trial lawyers, and a huge part of why ABTL has been so successful. Our members come from all segments of the bar, and our dinner programs, seminars and retreats afford a matchless opportunity to make and build relationships with our fellow lawyers who practice business litigation and the state and federal judges who preside over our cases.

The other stark contrast between my father's era and ours is the frequency with which lawyers actually try cases. Over the course of his career, my father tried over 450 jury trials to verdict. In contrast, young lawyers today who handle business cases can expect to try only a relatively small number of cases over a multi-year period. Why this is so and whether it is good, bad, or some of both, are topics beyond the scope of this article. Indisputably, however, this situation has left an "experience gap" for our young (and even not so young) lawyers. One of the most important goals of ABTL in designing dinner programs and seminar/retreat topics is to address this gap by offering wisdom and pointers from those with wide trial experience to the newer members of our profession.

Our programs also suggest ways in which younger lawyers may themselves obtain trial experience, such as involvement in *pro bono* matters.

I have been blessed with a terrific team of officers: Jon Streeter, Vice President; Claude Stern, Treasurer; and the indefatigable Ben Riley, Secretary (and still *ABTL Report* Editor). We also have an outstanding Board of Governors. I greatly look forward to serving as your President.

Mr. Goodin is a partner with the San Francisco firm of Goodin, MacBride, Squeri, Ritchie & Day, LLP, and is the current President of the Northern California Chapter of ABTL. rgoodin@gmssr.com.

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