ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl

NORTHERN CALIFORNIA

REPORT

Volume 21 No. 1

WINTER 2011/2012

Trying Employment Cases: A View from the Bench

Making the most of your case in an employment trial requires many of the same best practices as in other types of cases, including preparation, efficient use of trial time, effective use of technology and adoption of innovative, engaging techniques like mini-opening statements. But success in trying employment cases also poses special challenges because jurors have some expertise in the field. Other areas of practice in federal court involve specialized legal and factual issues that are beyond the common experience of many jurors, such as a patent case involving arcane legal issues applied to cutting-edge technology. But when it comes to employment trials, the vast majority of jurors have personal experience through their own work history or those of family members and close friends, and many are familiar with, or even trained in, their employer's human resources policies and practices. Whether the experience is positive, negative or mixed, gleaned from a position in management or

Hon. Elizabeth D. Laporte

Continued on page 2

Also in This Issue

The Rise of the Computer Fraud and Abuse Act

Major changes are in the works for the Computer Fraud and Abuse Act ("CFAA"). 18 U.S.C. § 1030. In the past ten years, the CFAA has moved from obscurity into the limelight as Congressional amendments drastically increased its scope. The watershed began in late 2001, when Congress, as part of the USA Patriot Act, adopted a definition of "loss" in the CFAA that made it easier for private litigants to meet the $5,000 threshold for damage or loss. In 2007, Congress expanded a crucial liability provision to criminalize "intentionally access[ing] a computer without authorization or exceed[ing] authorized access, and thereby obtain[ing]…information." 18 U.S.C. § 1030(a)(2)(C). This section imposes liability on anyone who accesses a computer without authorization or who exceeds authorization, even if the person commits no further wrongdoing. Since 2002, complaints alleging a cause of action under the CFAA have increased nearly 600% percent.

Sebastian Kaplan

2011 brought several potential developments in CFAA jurisprudence. First, the Ninth Circuit decided and then recanted *United States v. Nosal*, a case effectively resolving a raging circuit split on the meaning of "authorization." Second, Congress is considering an amendment to the CFAA that would eliminate liability under the CFAA that is predicated solely on the violation of a computer use policy or website terms of use.

Many commentators have criticized the CFAA for potentially criminalizing activity such as visiting social networking sites or checking personal email. These critiques stem largely from *United States v. Drew*, 259 F.R.D. 449 (C.D.

Continued on page 6

Continued from page 1

Trying Employment Cases

the rank and file, emotionally fraught or not, almost every juror arrives at the courthouse with a particular perspective on the issues to be tried. And almost every juror considers herself an expert in the field of employment relations.

Further, the backdrop of the current economic and social climate may strongly affect the receptivity of the jury pool to your client's theory of liability and damages. Counsel need to assess and prepare their cases in light of this reality. For example, the serious economic downturn of recent years may have led jurors initially to hold plaintiffs more personally responsible for doing everything possible to keep their jobs while people they know are involuntarily unemployed despite their best efforts. But now, with protests capturing frequent news coverage, it is possible that jurors have become more skeptical of large employers, that they may view as refusing to hire while keeping executive pay in the top one percent.

A winning strategy starts with effective use of the pretrial conference. Attorneys should come prepared, having met and conferred and agreed on as much as possible, so that they persuade the judge to adopt well reasoned stipulations and present only real, significant disputes that require judicial resolution.

In limine motions should focus on issues that truly matter, without throwing in the kitchen sink. With cases involving employees' private lives, it can be difficult to remain objective about the facts that are really worth fighting over. Refrain from unpersuasive attempts to keep very relevant but damaging evidence out, which the judge is unlikely to grant. From the opposing parties' perspective, consider whether using sensitive, embarrassing or stale information to undermine an opposing witness will backfire and be perceived by the jury as bullying, tangential or both.

Logistical issues regarding introduction of deposition testimony at trial, especially videotaped testimony, should be addressed in advance to avoid disruption and ensure an adequate record on appeal. Consideration should be given to how to preserve the record regarding videotaped presentations in case of an appeal, since court reporters usually do not report the audio portion of the excerpts as they are played. For example, the parties may stipulate to substituting the relevant excerpts of the written deposition transcript or making DVDs of the excerpts part of the record.

Employment cases often present the issue of witnesses — typically the individuals who made the adverse employment decisions or policies at issue — who will be called by the employer in its defense but will also testify first as adverse witnesses called by the plaintiff. *See* Fed. R. Evid. 611; Cal. Evid. Code § 776. When the individual is acting as the plaintiff's witness, the plaintiff usually prefers to direct the line of questioning and limit its substance to topics the plaintiff wants to elicit. This tactic forces the defendant to wait until its case-in-chief to recall the witness to give a more fulsome and appealing explanation of why they did what they did. The defendant may sometimes be willing to have such witnesses appear twice; giving them a chance to recover from any difficulties handling the plaintiff's initial questioning and to better prepare after the defense has seen how the plaintiff's case-in-chief has played out. But the defendant often prefers to avoid the potential for their key witnesses to make a negative first impression on the jury by being confined to material that the plaintiff cherry picks. In arguing that the witnesses should be permitted to complete all their direct testimony for both sides at the same time, the defendant may stress the inconvenience or hardship on the employer of having senior managers away from their duties for significant periods of time, or on the witnesses personally. Judges have discretion on how to handle this recurring issue, so it behooves the parties to address it at the pretrial conference.

As to exhibits, judges wish that counsel would refrain from meritless objections, and instead focus on the objections that really matter. The authenticity of documents should almost always be a matter of stipulation to avoid wasting precious time before the jury, and only challenged where there is a genuine issue about a "hot" document. Settle jury instructions as soon as possible, preferably before the trial starts, so that you can try your case in light of how the jury will be instructed. One special advantage of settling the instructions before trial is allowing the jury to be preinstructed before opening statements on the handful of substantive instructions that set out the key elements of liability, which helps jurors focus on the key facts that will prove, or disprove, liability.

The Ninth Circuit's and California's jury instructions for employment cases usually present an excellent starting point — and quite often an appropriate ending point — for the parties to agree on proposed instructions that the judge will likely adopt. Some tailoring may be necessary to adapt them to the particular case at hand (as is already built in to some of the model instructions) or, less frequently, to address an amendment to the applicable statute or change in binding precedent since the model instructions were last updated. The parties should focus on keeping the instructions in plain English. Further, they should resist the temptation to craft dueling instructions that sharply depart from the model ones in a transparent attempt to tilt them to favor one side or the other, at the risk of losing credibility with the judge and wasting time. In the zeal to win at trial, do not lose sight of the possibility that "winning" an unduly favorable jury instruction may come back to haunt you on appeal in the form of reversible error.

Keeping the instructions clear presents a special challenge where, as frequently happens in employment cases, the plaintiff has brought overlapping but not identical state and federal claims, such as both a federal ADA claim and a state disability claim under FEHA. Instead of proposing confusing, lengthy instructions, the plaintiff should consider dropping whichever claim is less favorable or the parties should explore stipulating to instruct on the federal or state statute only, with the result to govern the parallel claim.

As to the proposed verdict form, the plaintiff should

Continued next page

Continued from page 2

Trying Employment Cases

respect genuine concerns of the judge and the defendant regarding issues that need to be broken out and decided in sequence by the jury to ensure a fair verdict and address any special issues like predicate findings for equitable relief that the judge will be asked to order if the plaintiff prevails. At the same time, the defendant should avoid long, complex verdict forms that may invite juror confusion and increase the odds of inconsistent verdicts. Read and reread and read again the proposed verdict form to make sure it flows clearly and logically before submitting it to the judge.

Both the plaintiff and the defendant usually share an interest in having a written juror questionnaire tailored to the case and filled out in advance before *voir dire*, in order to tease out the relevant personal experiences and perspectives of prospective jurors, especially in light of the frequent time limits on *voir dire* in federal court. Further, a questionnaire can save jurors the embarrassment of answering sensitive questions in open court or in time-consuming sidebars, potentially allowing prospective jurors to be more candid. At the same time, the judge may be concerned with the added cost and inconvenience of calling the jurors in ahead of time to fill out the questionnaires. The best way to persuade a judge to use a questionnaire is to stipulate to a reasonable set of questions that are not too lengthy and stick to relevant issues. Also, be careful that the questionnaire does not give the jurors only extreme options, along the lines of: "Agree or disagree: Employers can do no wrong/Employers are always at fault." Such questions may strike prospective jurors as talking down to them and result in unhelpful, arbitrary answers that do not reflect their actual views.

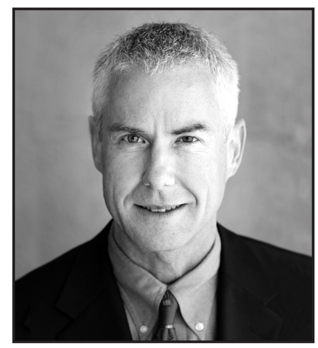
In federal court, the judge usually conducts most (if not all) of the *voir dire* based on questions proposed by the parties, allowing a limited time for each party to conduct follow up questioning. Whether the questions are posed by the judge, the attorneys, or both, open-ended questions that allow the jurors to reveal their relevant experiences and opinions are generally most effective. Conversely, wasting *voir dire* on calculated efforts to try to enlist jurors to your side wastes precious time better spent on ferreting out jurors who are predisposed against your case. Judges are likely to impose time limits on the presentation of evidence, after discussing the reasonable amount of time necessary to try the case. Time limits announced in advance of jury selection allow the prospective jurors to reduce their hardship excuses to the relevant period and plan around their jury service. And in judges' experience, the parties rarely run out of time; to the contrary, they often have time left over, as in a recent employment trial before me.

Despite what some attorneys initially think, time limits are your friend, helping to focus the case and avoid boring or frustrating the jury through needless repetition. Remember that most human beings have a limited attention span and information processing bandwidth. Releasing more words into the air in their presence — no matter

Continued on page 6

Presuming Reliance in a Fraud Case

In a fraud case, reliance provides "the causal connection between the wrongful conduct and the resulting damage." W.K. Prosser, *The Law of Torts* § 103, at 729 (3d ed. 1964). Proof of reliance thus serves as the lynchpin of plaintiff's fraud claim. But direct proof of reliance on the challenged misrepresentation or omission may, for many reasons, be difficult to prove. Perhaps plaintiff died after the cause of action accrued. Where plaintiff is an entity, the person who made the fateful decision may have left the company, or may no longer remember precisely what was relied upon. In a class action (or a nonclass proceeding brought by multiple plaintiffs) numerosity may make it impractical to present individualized proof of reliance.



Carl Ciochon

The existence of these kinds of impediments to establishing reliance however, will not necessarily consign a fraud case to the litigation scrapheap. In certain cases the law will afford plaintiff a presumption of reliance, shifting to defendant the burden of proving the plaintiff did *not* rely on the alleged misrepresentation or omission. This article examines situations in which, under either California or federal law, plaintiff may be entitled to such a presumption.

California Common Law: The *Vasquez* Presumption

In *Vasquez v. Superior Court*, 4 Cal. 3d 800 (1971), a group of consumers alleged that their agreement to purchase freezers and bulk supplies of frozen food on an installment basis had been procured by fraud, and sought to have the claim adjudicated as a class action. The trial court sustained a demurrer to the class aspects of their claim on the ground that a class action for fraud could not be maintained by consumers. Plaintiffs sought a writ of mandate from the Supreme Court. Defendants argued (*inter alia*) that because each allegedly fraudulent sale had been made on an individualized basis, individualized proof of fraud was required, and class treatment was inappropriate.

In assessing whether plaintiffs had demonstrated sufficient "community of interest" to proceed as a class, the court focused on plaintiffs' allegation that they "all signed contracts to purchase food and a freezer in reliance upon…recitations by salesmen of a standard sales monologue contained in a training book and sales manual." *Id.* at 810. This allegation of universal reliance on a standard-

Continued on page 4

Continued from page 3

Presuming Reliance in a Fraud Case

ized sales pitch was key to the court's analysis of whether reliance could be shown. As the court explained, "[i]f [plaintiffs] can establish without individual testimony that the representations were made to each plaintiff and that they were false, it should not be unduly complicated to sustain their burden of proving reliance thereon as a common element." *Id.* at 814. This conclusion was based on a three-step analysis.

First, the court noted the long-standing rule that reliance need not be demonstrated by direct evidence. Rather, "[t]he fact of reliance upon alleged false representations may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect." *Id.* (quoting *Hunter v. McKenzie*, 197 Cal. 176, 185 (1925)). Next, the court posited that one of the "circumstances" affording inferential evidence of reliance is action taken following a material misrepresentation: "Where representations have been made in regard to a material matter and action has been taken, in the absence of evidence showing the contrary, it will be presumed that the representations were relied on." *Id.* (quoting 12 *Williston on Contracts*, at 480 (3d ed. 1970)). Finally, the court concluded that this inference/presumption could, in the appropriate circumstances, be applied on a classwide basis: "[I]f the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class." *Id.*

The *Vasquez* presumption thus has two distinct components. First, *Vasquez* supports the availability of a reliance presumption where a material misrepresentation has been made, and "action has been taken" consistent with the representation. Subsequent cases have applied this presumption outside of *Vasquez's* class action context. For instance, where a health plan provider represented that its claims arbitration process was expeditious, and the plaintiff's employer subsequently subscribed to the plan, a rebuttable *Vasquez* presumption was applied to establish reliance. *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 977-79 (1997); *see also Continental Airlines, Inc. v. McDonnell Douglas Corp.*, 264 Cal. Rptr. 779 (1989) (reliance on representation that airplane landing gear was designed so that fuel tanks would not rupture in crash). Second, in a class action, where the same representation was heard or read by all classmembers, *Vasquez* affords "at least an inference" of classwide reliance. *See Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1095 (1993) (making clear that this aspect of *Vasquez* applies only to cases where representation was "actually communicated" to each classmember); *see also* Cal. Evid. Code § 600 (defining "presumption" and "inference").

Rule 10b-5 and "Fraud on the Market"

The best known presumption of reliance applies in securities fraud cases brought under SEC Rule 10b-5. In *Basic, Inc. v. Levinson*, 485 U.S. 224, 245 (1988), the Supreme Court endorsed the "fraud on the market" theory, premised on the notion that (i) purchasers and sellers of publicly traded securities reasonably rely on price in making their purchase and sale decisions, and (ii) where a security is traded on an efficient market, material misrepresentations will necessarily be reflected in its price. As the Court explained:

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business.... Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.

Id. at 241-42 (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-61 (3d Cir. 1986)).

In the Ninth Circuit, a plaintiff seeking the benefit of this presumption must show that defendant "made material representations or omissions concerning a security that is actively traded in an 'efficient market'...." *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999); *cf. Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 265 (5th Cir. 2007) (in the Fifth Circuit, a plaintiff must show the misrepresentation "actually moved the market"); *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 481 (2d Cir. 2008) (in the Second Circuit, plaintiff must show that the defendant "(1) publicly made (2) a material misrepresentation (3) about stock traded on an impersonal, well-developed (*i.e.*, efficient) market"). The question of whether the market in any particular security was "efficient" can be the subject of significant dispute and expert testimony. *Compare In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1 (1st Cir. 2005) (encouraging detailed economic analysis to determine market efficiency), *with In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 489 n.3 (S.D.N.Y. 2011) ("the NYSE is a paradigmatic efficient market").

Omissions Under 10b-5: The *Affiliated Ute* Presumption

Like *Basic, Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), was an action brought under Rule 10b-5. Members of the Ute Indian Tribe alleged a deceptive scheme to purchase for less than market value their shares in a corporation formed to hold tribal land. The Supreme Court agreed that defendants' role in the transaction gave rise to a disclosure obligation, and that they could not simply "stand mute" while helping plaintiffs sell their shares for less than market value. *Id.* at 153. The Court further held that "[u]nder the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." *Id.* at 153-54.

Over the years, the federal courts have struggled to define the precise boundaries of the *Affiliated Ute* presumption. As one court described the problem:

> Any fraudulent scheme requires some degree of concealment, both of the truth and of the scheme itself. We cannot allow the mere fact of this concealment to transform the alleged malfeasance into an omission rather than

Continued next page

Continued from page 4

Presuming Reliance in a Fraud Case

> an affirmative act. To do otherwise would permit the *Affiliated Ute* presumption to swallow the reliance requirement almost completely. Moreover, it would fail to serve the *Affiliated Ute* presumption's purpose since this is not a case where reliance would be difficult to prove because it was based on a negative.

Joseph v. Wiles, 223 F.3d 1155, 1163 (10th Cir. 2000). Accordingly, most circuits, including the Ninth, hold that the *Affiliated Ute* presumption applies only in cases "that primarily involve omissions." *Binder,* 184 F.3d at 1064 ("the *Affiliated Ute* presumption should not be applied to cases that allege both misstatements and omissions unless the case can be characterized as one that primarily alleges omissions.").

Mirkin v. Wasserman: California Rejects "Fraud on the Market" and *Affiliated Ute* as Substitutes for Actual Reliance

In *Mirkin v. Wasserman*, 5 Cal. 4th 1082 (1993), the California Supreme Court was asked to adopt the "fraud on the market" and *Affiliated Ute* presumptions in the context of an action for fraud and deceit under Civil Code sections 1709 and 1710. Plaintiffs were a class of purchasers of publicly traded securities, the market price of which had allegedly been inflated through material misrepresentations. Their complaint did not, however, allege that plaintiffs had actually read or heard any of the alleged misrepresentations. Plaintiffs nonetheless urged the court to allow their claims to proceed based on either a fraud on the market theory or an *Affiliated Ute* presumption. The court declined, explaining that "California courts have always required plaintiffs in actions for deceit to plead and prove the common law element of actual reliance." *Id*. at 1092. In so ruling, the court noted that it was not leaving plaintiffs without a remedy, since both the California Corporate Securities Law (which imposes no reliance requirement) and Rule 10b-5 permit a plaintiff to recover without proof of actual reliance. *Id*. at 1090 (citing *Basic* and Cal. Corp. Code §§ 25400, 25500, as interpreted in *Bowden v. Robinson*, 136 Cal. Rptr. 871, 877-78 (1977)).

Practical Considerations

In cases where direct evidence of reliance is weak, entirely lacking, or impractical to present, plaintiff's ability to invoke a presumption of reliance can mean the difference between dismissal and victory at trial.

California Common Law. If the action is brought under the California law of fraud and deceit, can plaintiff adequately allege — and, equally importantly, subsequently prove — actual reliance? At the pleading stage, it *may* suffice (at least as a practical matter) to merely allege the magic words that "plaintiff reasonably relied on defendant's misrepresentations" (though it must be noted that this approach proved insufficient in *Mirkin*, where parsing of the complaint revealed no allegation that plaintiffs had actually read or heard the alleged misrepresentations). Regardless of plaintiff's pleading burden, in order to certify a class, survive summary judgment, or meet plaintiff's burden of proof at trial, plaintiff must either: (a) present direct testimony to the effect that "I heard the representations, I made the decision, I relied on the representations in making the decision"; or (b) successfully invoke a *Vasquez* presumption. Even in cases where *Vasquez* should clearly apply, courts may be reluctant to enter a finding of fraud based solely on a presumption. Counsel would therefore be well advised to develop and present whatever direct evidence of reliance can be mustered.

10b-5 Misrepresentation Cases. If the action is brought under Rule 10b-5 and based on misrepresentation, can plaintiff plead fraud on the market in sufficient detail to survive a 12(b)(6) motion? As an ever more defendant-friendly Supreme Court has moved from an interpretive approach under which 10b-5 was applied "flexibly" to effectuate its remedial purpose (*e.g., Affiliated Ute,* 406 U.S. at 151), to one which focuses on limiting 10b-5's "implied private right of action" (*e.g., Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011)), the federal courts have been increasingly receptive to challenges to the fraud on the market presumption. In particular, 12(b)(6) motions are now frequently converted into mini-trials on the adequacy of plaintiffs' fraud on the market allegations. Plaintiffs' counsel should be prepared to confront multiple declarations by impressive economics and finance experts advancing complex explanations about why the alleged misrepresentation was not material and the market in the subject security inefficient.

10b-5 Omission Cases. May plaintiff's 10b-5 action legitimately be characterized as "primarily" based on omissions, thus warranting application of the *Affiliated Ute* presumption? Keep in mind that courts tend to be skeptical of plaintiffs' efforts to invoke *Affliated Ute*, and that there are more cases rejecting application of the presumption than employing it. If an *Affiliated Ute* presumption is sought, care should be taken to plead purely omissions, since a determination that the action presents a "mix" of omissions and misrepresentations will typically lead to rejection of the *Affiliated Ute* presumption.

Rebutting the Presumption. Where plaintiff has successfully invoked a presumption of reliance, how does defendant rebut that presumption? Can defendant show that plaintiff acted in reliance on other factors, such as personal preferences, alternative motives, or representations made by others? Is there evidence plaintiff had already made a decision before the alleged misrepresentations were made? Did plaintiff know the true facts, rendering reliance unreasonable? In a securities case, can it be shown that the alleged misrepresentations or omissions did not affect the market price?

Ultimately, the cases governing presumptions of reliance display a tension between two competing views. The cases applying such a presumption stand for the proposition that where the facts indicate a material misrepresentation and logically connected harm to the plaintiff, defendant may properly be required to show the misstatement did not cause the harm. On the other hand, the cases declining to permit plaintiff the benefit of such a presumption reflect the view that fraud is serious business, and plaintiffs should be required to establish every

Continued on page 6

Continued from page 5

Presuming Reliance in a Fraud Case

element of their claim. The tension between these two views will be present so long as cases such as *Vasquez*, *Basic* and *Affiliated Ute* remain the law. Any case in which this issue arises will thus present a felicitous opportunity for thoughtful, skilled advocacy in support of the argument that a presumption of reliance should — or should not — apply.

Carl Ciochon is a partner with the Oakland office of Wendel, Rosen, Black, & Dean LLP. Cciochon@wendel.com

Continued from page 3

Trying Employment Cases

how persuasive they appear to you — has diminishing returns. A frequent comment I hear from jurors after they've rendered their verdict is: why was there so much repetition in the trial? Don't the attorneys realize we got it the first time?

Consider asking the judge to allow you to present "mini" opening statements, perhaps five minutes each, right before *voir dire*. Mini openings help orient prospective jurors to the issues in the case, peak their interest in serving, and elicit more relevant responses to *voir dire*. In both a mini and traditional opening statement, do not overreach: under-promise and over-deliver. Be wary of demonizing the plaintiff, or conversely, the key employer decision-makers if they are not inherently unsympathetic and the supporting evidence is not very strong. Also, consider proposing that jurors be allowed to submit written questions during the trial in a controlled manner, with the judge consulting the attorneys as to whether and, if so, how best to answer. The Ninth Circuit has a pattern instruction for this purpose. *See* Ninth Circuit Model Civil Jury Instruction 1.15. Jurors appreciate the opportunity even if they seldom use it, and it offers a window into their concerns, which trial counsel can then address.

During trial, use your time before the jury efficiently to get right to the key evidence, showcase favorable witnesses, and undermine the credibility of unfavorable ones without seeming to overreach or bully them. If you need to get necessary but tedious evidence into the record and cannot do so by stipulation, try to keep it short and intersperse it with more interesting testimony to keep the jury engaged. Don't waste time engaging in frequent objections (especially improper speaking ones) or bickering with opposing counsel, or worse, the judge. Similarly, limit requests for sidebars to few to none, because jurors hate them. They find them tedious and disrespectful of their time, and suspect (sometimes correctly) that the attorneys are attempting to hide relevant evidence. Instead, anticipate such concerns in advance, and use breaks to address issues that must be raised outside the presence of the jury.

Of course, use technology effectively. Find out what equipment the court already has available, which may be sufficient. By now it probably goes without saying that showing excerpts of videotaped depositions is far more effective than reading aloud from a transcript. Highlighting key parts of documents on a screen as a witness testifies about them is also helpful.

As the trial proceeds, make sure you have your witnesses ready to go with adequate backup in case a witness gets on and off the stand more quickly than anticipated or fails to arrive on time. The judge and the jury will appreciate the respect shown for their time. Conversely, running out of evidence to present during standard trial hours without a good reason, especially if it happens more than once, may count against your time before the jury or have other unpleasant consequences.

When deciding whether to file optional midtrial motions or requests for special corrective jury instructions directed toward the latest skirmish with the other side, exercise restraint. What may seem to you to be an urgent and reasonable request after a long trial day may strike the judge as unnecessary at best and overreaching at worst. For example, after the plaintiff has given heart-wrenching testimony about the effect of the employer's actions on the family, a request to have a special instruction to the jury not to be swayed by sympathy is not likely to be granted because the standard jury instructions already cover that ground. Save the midnight motions for addressing the few, if any, issues that may really decide the case that you have a good chance at winning. And if possible let the judge know to expect an after-hours filing so that the judge can prepare to address the motion while minimizing inconvenience to the jury.

Finally, use closing argument to pull together the evidence in light of the instructions and hammer home your theme, again without overreaching. Ask if the judge will give the instructions before closing argument, so that you can highlight key points from the instructions as you close. Then wait for the verdict, knowing that you have done your best.

The Honorable Judge Elizabeth D. Laporte is a United States Magistrate Judge for the Northern District of California, and is a member of the Board of Governors for the Northern California chapter of ABTL.

Continued from page 1

Rise of the Computer Fraud and Abuse Act

Cal. 2009), where federal prosecutors indicted a Missouri woman for cyberbullying a minor. The legal basis for the prosecution was that the defendant, a middle-aged woman, violated MySpace's terms and conditions by creating a profile claiming she was a teenage girl. Although the district court granted defendant's motion for judgment of acquittal, the court left open whether violation of a websites terms and conditions could result in criminal prosecution.

Although *Drew* was a criminal prosecution, it shows how business litigators can test the CFAA's boundaries. The CFAA is now pleaded in several contexts that go far beyond the computer hacking activities that most associate with cybercrime and that motivated the passage of the statute. Specifically, the CFAA is now a common cause of action in civil disputes between employers and employees who download or copy information from company com-

Continued on page 8

ROGER HELLER

On CLASS ACTIONS

Those of us who have opened a credit card account or made a major purchase recently are familiar with "terms and conditions" — *i.e.*, the rules and restrictions that govern our relationships, as consumers, with the companies with which we do business. Often in the form of lengthy "agreements," these terms serve the role of standardizing and organizing our everyday commercial dealings. In many respects, they help control litigation by clarifying parties' legal rights and responsibilities. Increasingly, however, businesses are including provisions whereby they retain broad discretion to change terms, sometimes without notice to the customer. These provisions arguably provide needed flexibility — *e.g.*, by allowing parties to adjust their relationships to account for technological advances — but they also create a degree of uncertainty and the potential for abuse. Class actions challenging alleged abuses of such contractual discretion are on the rise, and recent developments suggest that this trend will continue even as questions regarding the general direction of consumer litigation emerge.

Many consumers are skeptical about the purpose of these agreements. After all, the terms are drafted by businesses and their lawyers, often contain legalese, are difficult for consumers to understand, and are generally non-negotiable. Moreover, given the language used and manner in which the agreements are distributed, consumers are often not inclined or encouraged to read them. Discretionary "change in terms" provisions reinforce consumer skepticism regarding these agreements and who they are intended to benefit.

Read literally, these clauses can make performance of other terms optional for the business, rendering the agreement as a whole less a binding contract and more a series of flexible guidelines subject to unilateral modification. Indeed, businesses have relied on such clauses to change central terms of their arrangements with customers, including, for example, the payment terms for loans and the method of registering transactions for checking account customers.

Businesses' discretion to change terms under these provisions, however, is not unlimited, even absent directly-applicable statutes or regulations. Several courts, including in class cases, have held that the covenant of good faith and fair dealing, implied by common law into all contracts, prohibits businesses from exercising their contractual discretion arbitrarily or unreasonably. *See e.g., Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 923-24 (1985); *Okmyansky v. Herbalife Int'l of Am., Inc.*, 415 F.3d 154, 157 n.3 (1st Cir. 2005) ("Ceding discretion in a contract is not tantamount to subjecting oneself to legalized tyranny…not even the reservation of absolute discretion can clear the way for a totally arbitrary and unprincipled exercise of a contracting party's power."). As Justice Souter explained, while on the New Hampshire Supreme Court:

> Under an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting.

Centronics v. Genicom Corp., 562 A.2d 187, 193 (N.H. 1989). Sometimes, the implied covenant represents the only protection consumers have from potential abusive conduct.

Numerous class actions have been filed recently which have sought to invoke the implied covenant to address discretionary language in standardized consumer contracts. Although some have been successful, others have fallen short, including where plaintiffs attempted to use the implied covenant to impose limitations or requirements on businesses that are at odds with the express terms of consumer agreements. *See, e.g., McCoy v. Chase Manhattan Bank, USA*, 559 F.3d 963, 971 (9th Cir. 2009).

With some exceptions, cases challenging exercises of discretion under standardized consumer contracts are well-suited to class-wide adjudication. The focus of the claims will generally be on the defendant's conduct. Moreover, the standardized nature of the agreements means that there will generally be little variation with respect to the discretionary language and express terms, increasing the likelihood that the expectations of the parties can be determined objectively.

Roger Heller

By developing standardized agreements and retaining unilateral discretion to change terms, businesses have made considerable progress in protecting their interests and their ability to adjust to changing conditions. Mandatory arbitration and class waiver provisions — bolstered somewhat by the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) — have further allowed businesses to take action with respect to their customers without the threat of class litigation. The presence of discretionary "change in terms" provisions, however, may provide plaintiffs with an additional argument, in the post-*Concepcion* world, for invalidating these form contracts, as they push these agreements further in the direction of lacking mutuality. The defense bar should be prepared to address this argument in the future.

The increasing use of "change in terms" provisions in standardized consumer contracts, and recent successes in challenging alleged abuses of discretion, suggest that plaintiffs will continue to file class actions of this nature, and businesses should expect their discretionary choices to receive careful scrutiny. In the meantime, businesses and consumers alike face some uncertainty as to the "terms and conditions" that apply and the extent to which they can be modified, in some cases leaving for a finder of fact the determination of whether the business has crossed the line.

Mr. Heller is a partner in the San Francisco office of Lieff Cabraser, Heimann & Bernstein. Rheller@lchb.com

Continued from page 6

Rise of the Computer Fraud and Abuse Act

puters before leaving their employment. These disputes mostly arise where an employee leaves to work for a competitor, but employers also now raise the CFAA as a counterclaim to employee complaints of wrongful discharge and employment discrimination. Additionally, the CFAA has begun to make its mark in consumer class actions against online service providers, especially companies that collect consumer information online.

The CFAA has several other benefits for businesses. First, it confers federal jurisdiction over commercial torts that are usually pleaded only as state law actions, such as trade secret misappropriation, breach of contract, and intentional interference with prospective economic advantage. Second, there are fewer elements to prove under the CFAA than related state law claims; it is often necessary only to show a defendant accessed a computer and that the plaintiff suffered damage or loss in excess of $5,000.

The actual scope of the CFAA will ultimately turn on the definition of "authorization." There is now raging a circuit split over whether the CFAA's authorization language should be construed broadly or narrowly. Under the broad view, anyone who knows they are acting against the interest of the computer owner is acting "without authorization." So, an employee who has accepted a job with a competitor, and accesses his current employer's computer before quitting, does so "without authorization."

The broad view has been adopted by Judge Posner and the Seventh Circuit. In *International Airport Centers, LLC v. Citrin*, 440 F.3d 418 (7th Cir. 2006), the Seventh Circuit reversed the district court's order dismissing an employer's CFAA claim against a former employee who had copied confidential information from his work laptop and wiped his computer before leaving to start his own competing business. The Circuit held: "Citrin's breach of his duty of loyalty terminated his agency relationship…and with it his authority to access the laptop, because the only basis of his authority had been that relationship." *Id*. at 420–21. Commentators refer to this view as the "agency view."

Under the contrasting narrow view, the victim must grant and revoke authorization, not the defendant. So, an employee who is given authorization to access his employer's customer contact database when he is hired retains his authorization until the employer specifically revokes it, even if the employee has resolved to abscond to a competitor with valuable trade secrets.

This narrow view has been adopted by the Ninth Circuit. In *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009), the Ninth Circuit affirmed the district court's grant of summary judgment for the defendant on the CFAA claim. Brekka worked for LVRC, and emailed numerous LVRC files to his personal email address during his employment, before leaving to compete with LVRC. LVRC also accused Brekka of accessing its network using an unexpired password after he ceased his employment. The Ninth Circuit held: "No language in the CFAA supports LVRC's argument that authorization to use a computer ceases when an employee resolves to use the computer contrary to the employer's interest." *Id.* at 1133. To satisfy constitutional notice, the court held: "The plain language of the statute therefore indicates that "authorization" depends on actions taken by the employer.… If the employer has not rescinded the defendant's right to use the computer, the defendant would have no reason to know that making personal use of the company computer in breach of a state law fiduciary duty to an employer would constitute a criminal violation of the CFAA." *Id*. at 1135.

In the year or so after *Brekka*, district courts mostly aligned themselves in these two camps. This past year, however, two circuit court decisions changed the landscape in a way that expands the scope of the CFAA.

In *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010), a criminal defendant and former employee at the Social Security Administration ("SAA") appealed his conviction and twelve-month sentence under the CFAA. Rodriguez used his privilege as an SSA employee to access a government database and retrieve personal information about individuals he knew, including women he pursued romantically. The question was whether Rodriguez accessed the database without authorization or exceeding authorization — he was authorized to access the database generally, but the SSA prohibited its employees from obtaining information without a legitimate purpose. The Eleventh Circuit affirmed the conviction, holding Rodriguez *exceeded* his authorization by violating the SSA policy. That Circuit distinguished *Brekka* on the grounds there was no explicit employer policy involved in that case.

In *United States v. Nosal*, 642 F.3d 781 (9th Cir. 2011), the Ninth Circuit panel reversed the district court's order dismissing an indictment against Nosal for conspiring to defraud his former employer by taking confidential information and inducing other employees to take such information. Like the Eleventh Circuit, the panel relied on the "exceeds authorized access" language in the CFAA. The panel distinguished *Brekka* — which only addressed access "without authorization" — on the grounds that the victim company had a policy it made employees sign that restricted their use and disclosure of the victim's information to legitimate company business. The panel noted but dodged the problem that this interpretation may apply to all sorts of innocuous activity an employer may prohibit — it merely claimed that § 1030(a)(4) requires the CFAA violation be part of a fraudulent scheme. The dissent, however, correctly pointed out that § 1030(a)(2)(C) contains identical "exceeds authorized access" language, without any qualification requiring additional wrongdoing such as fraud. The majority opinion provided no rationale for limiting the liability provision of § 1030(a)(2)(C) in a way that would not, for example, prohibit an employee who accessed his social networking account on a work computer from being liable if his employer prohibited personal internet use on the job. Perhaps motivated by the dissent's critique, the Ninth Circuit has now called *Nosal* for *en banc* rehearing and vacated the panel's decision.

Continued on page 10

HOWARD M. ULLMAN

On ANTITRUST

In *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), the Third Circuit held that the Foreign Trade Antitrust Improvements Act ("FTAIA") does not impose a *jurisdictional* bar on antitrust claims involving trade or commerce with foreign nations, but rather merely sets forth required elements of an antitrust claim involving foreign trade. This technical distinction has real-world consequences, because it will likely make achieving early dismissal of some U.S. antitrust claims against foreign companies more difficult. The decision also sets forth factors that inform the analysis of whether foreign firms' conduct is directed at U.S. import trade and is thus within an FTAIA exemption and subject to U.S. antitrust law.

The FTAIA

The FTAIA exempts certain foreign conduct from the reach of the Sherman Act. At the same time, it provides that the Sherman Act will apply if the defendants are involved in "import trade or commerce" or if the defendants' conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, import commerce, or certain export commerce, and the conduct "gives rise" to a Sherman Act claim. Courts have historically treated the FTAIA as creating a jurisdictional bar to antitrust claims involving trade or commerce with foreign countries, and have entertained and granted motions to dismiss complaints for lack of jurisdiction under the FTAIA.

Animal Science Products Rejects the Argument That the FTAIA Creates a Jurisdictional Bar

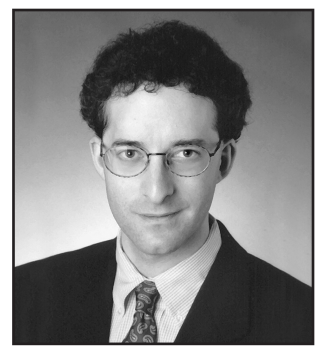
The U.S. purchaser-plaintiffs in *Animal Science Products* brought a putative class action alleging that Chinese magnesite producers engaged in a price-fixing conspiracy that had an impact on United States commerce and therefore violated Section 1 of the Sherman Act. The district court dismissed the complaint on the ground that it lacked subject matter jurisdiction to adjudicate the dispute under the FTAIA.

The Third Circuit reversed, and reinstated the complaints. The court based its ruling on the Supreme Court's decision in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), which involved neither the FTAIA nor even an antitrust claim. In *Arbaugh*, the Supreme Court distinguished between substantive limitations on claims set out in federal legislation and the subject matter jurisdiction of the U.S. courts. The Court ruled that a statutory limitation is *jurisdictional* — meaning that courts cannot even hear a case that does not meet the requirements — only if Congress "clearly states" that it intends for a limitation to be jurisdictional. *See id.* at 515-16. Applying this rule, the Third Circuit determined that the FTAIA does not impose a subject matter jurisdiction bar, because it "neither speaks in jurisdictional terms nor refers in any way to the jurisdiction of the district courts." Instead, the court wrote, "the [FTAIA] statutory text is wholly silent" about federal court jurisdiction. The Third Circuit's decision charts a new course, and also conflicts with decisions of other courts, including the U.S. Court of Appeals for the Seventh Circuit, which had determined in *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942 (7th Cir. 2003) (*en banc*), that the FTAIA does impose a subject matter jurisdiction bar.

Significance of the Jurisdiction/Elements of Claim Distinction: Burden on Defendants

Under *Animal Science Products*, FTAIA limitations help define the necessary elements of a plaintiff's claim, but do not create a jurisdictional bar to suit. This distinction is significant for at least two reasons.

First, the burden on a motion directed at lack of subject matter jurisdiction rests with the plaintiff. In contrast, on a more typical defense motion to dismiss for failure to state a claim, the defendant carries the burden. Second, on a lack of subject matter jurisdiction motion, the court can usually look outside the four corners of the complaint and consider and determine other facts which might allow a case to go forward. On a motion to dismiss for failure to state a claim, the court must generally look only at the face of the complaint, and must accept all alleged facts to be true.



Howard M. Ullman

Animal Science Products' Guidance as to Application of FTAIA Import Exception to Foreign Companies

In remanding, the Third Circuit offered some guidance as to the application of the FTAIA's "import trade or commerce" exception to foreign companies.

- First, the exception must be given a "relatively strict" construction. However, although functioning as a physical importer may satisfy the import trade or commerce exception, it is not a necessary prerequisite. Rather, the inquiry is whether the defendants' alleged anticompetitive behavior was "directed at" an import market. Nor, the court suggested, are foreign defendants necessarily beyond the reach of U.S. antitrust law just because the port of first destination of goods sold is outside the U.S.
- Second, the court held that the FTAIA's "effects" exemption does not contain a "subjective intent" requirement. Instead, the "direct" and "substantial" effect contemplated by the FTAIA must merely have been "foreseeable" to an objectively reasonable person.
- Finally, the court listed specific factors that may support application of U.S. antitrust law to foreign defendants. These include whether the defendants took steps to prevent foreign manufacturers from selling to U.S. firms, or to prevent at least one American firm from purchasing products directly from certain foreign manufacturers. Additionally, although the port of first destination question is not dispositive, it may be relevant to whether foreign sellers' actions were directed at a U.S. import market.

In assessing their exposure to U.S. antitrust law, foreign manufacturers may wish to consider whether their activities ""objectively"" target import goods or services in light of the above factors."

Mr. Ullman is of counsel with Orrick, Herrington & Sutcliffe LLP. hullman@orrick.com

Continued from page 8

Rise of the Computer Fraud and Abuse Act

The problem, it seems, is that courts, and for that matter, the rest of us, are unsure what appropriate conventions apply when it comes to computers and the internet. We have had centuries to iron-out the social and legal norms regarding physical trespass — the closest, but still imperfect analogy to the cause of action created by the CFAA. And while physical trespass may appear simple at first blush, the case law is complex, and its development tested doctrinal limits and generated unique extensions and limitations, such as constructive trespass and adverse possession.

Our lack of social conventions makes courts reticent to extend the scope of the CFAA to activity that is questionably criminal. *Brekka* reveals the Ninth Circuit's discomfort with criminalizing the relatively innocuous act of an employee emailing himself some files for unclear motives. Reading *Citrin*, however, reveals that the Seventh Circuit was cavalier in extending the scope of the CFAA because the judges found firm ground in traditional agency law; *Citrin* is not really a decision about computers or technology at all.

Rodriguez and *Nosal*, in turn, are part of a vanguard of cases that avoid the difficult question of defining nascent and inchoate social norms by focusing on the explicit and specific conventions between the parties — employment agreements, company policies, and the like. This focus on parties' agreements reflects the same theme pervading other recent Supreme Court decisions, such as *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010), which held the City did not violate the Fourth Amendment by searching its employee's text messages. The Supreme Court held the search was reasonable because the clear employer policy stated that the employer was entitled to search its employee's text messages if the employee exceeded the allotted number of messages in a given month. In an area where new technology presents difficult questions, courts are likely to look to the agreements of the parties in deciding access id authorization issues in deciding access and authorization issues based on the agreements of the parties.

In the long run, these agreements between parties will help generate the social norms that will define how we understand what people are allowed to do with computers. In the short run, however, attorneys and their clients concerned about a computer breach should focus on the specific agreements made with employees, vendors, joint venture partners, and other entities that will have access to a client's computer network. Litigators facing the fire-drill caused by a trade secret misappropriation should immediately request the company policy on technology use and consider other means a client may have used to inform its employees about the parameters of acceptable computer use.

In *Pulte Homes, Inc. v. Laborers' International Union of North America*, 648 F.3d 295 (6th Cir. 2011), the Sixth Circuit began the process of codifying certain norms regarding internet use by reversing a district court's dismissal of a company's CFAA claim against a labor organization for orchestrating an email protest campaign targeting its executives. The campaign was successful enough that the volume of email and voice mail overloaded the plaintiff's computer systems and prevented some of its employees from accessing their work email and phones.

Although not discussed by the Sixth Circuit, an important point of context is that the defendant's actions resembled a common form of hacking known as a denial of service (DOS) attack. A hacker launching a DOS attack generates thousands of requests for a specific website in an attempt to overload the server and shut the site down. The defendant's actions in *Pulte* were quite different, as it did not use an automated system to send thousands of emails (although it did use an automated calling machine). Nevertheless, *Pulte* reflects that courts are beginning to recognize that opprobrium of these kinds of activities has permeated social awareness sufficiently to create a plausible inference of intent.

In *Facebook v. Power.com*, No. C 08-05780 JW, 2010 WL 3291750 (N.D. Cal. July 20, 2010), Judge Ware attempted to clarify the norms regarding appropriate internet use, specifically how website owners access competing websites. Facebook sued Power.com for accessing its social network to collect information on Facebook users' friends, an alleged violation of Facebook's terms of service. Facebook moved for judgment on the pleadings or partial summary judgment on its California Computer Crime Law, California Penal Code section 502 claims.

Interpreting California Penal Code section 502 in accord with the CFAA, Judge Ware held that constitutional notice requirements prohibited finding Power.com's activities illegal based solely on Facebook's terms of use. Instead, Judge Ware held access to a website can only be unauthorized if the defendant circumvented technical barriers. This solution is similar to requiring property owners to build a fence to put potential trespassers on notice. Whether this technical barriers requirement will survive the Ninth Circuit's en banc resolution of *Nosal* and whether technical barriers provide sufficient constitutional notice on their own remain open questions.

Congress has been dealing with the same issues, although in less detail. Senator Leahy has proposed revising the CFAA to limit liability to exceeding authorized access to seven categories of sensitive information. Senators Grassley and Franken, going a step further, seek to amend the CFAA to eliminate liability based only on the violation of an acceptable use policy or terms of service agreement, effectively adopting *Brekka*.

Business litigators should be aware that courts are reluctant to hold that novel forms of computer access and use create liability under the CFAA. At the same time, the recent decisions in *Rodriguez*, *Nosal*, and *Pulte* suggest that courts are increasingly willing to accept that breaches of private agreements and actions that resemble recognized forms of hacking are sufficient to survive dismissal. Undoubtedly, these cases will increase the prevalence of CFAA litigation, at least until Congress steps in to provide clarity on this murky subject.

Sebastian Kaplan is an associate with the San Franicsco office of Fenwick & West LLP.
skaplan@fenwick.com

JAMES YOON

On PATENTS

When a company is sued for patent infringement, there are a number of natural reactions. First, the company looks for ways to make the lawsuit disappear or become someone else's problem. Second, it examines the technical issues of the case in hopes of establishing non-infringement or that the asserted patent(s) is invalid. And finally, it searches for ways to minimize the financial costs and burden associated with the patent case. In particular, it searches for ways to limit the amount of discovery on non-technical issues (*e.g.*, damages), and the number of employees who will become involved in the patent case. These reactions, while understandable, can inadvertently reduce the company's effectiveness in mediation, motion practice and trial.

All patent cases are litigated before an audience of "fact finders" who will shape the course of litigation. This audience includes not only the judge, jury and mediator, but also the key decision makers for the patent plaintiff. Effective litigation strategies focus on educating these "fact finders" to see the case in the light most favorable to the defendant company. The strategies begin with the understanding that the audience views patent cases in a holistic as opposed to segmented manner. The audience seeks a story or narrative that will help it understand the case and the position of the parties. Typically, a defendant cannot provide the audience with its desired story by focusing its efforts on educating the "fact finders" about the technical issues (*e.g.*, infringement or validity) of the case. Such technical issues are frequently complex and hotly disputed, and may confuse the audience as opposed to educating them about the strength of a company's case and why a "fair" result would be to rule in the company's favor. The audience wants (and needs) practical, "easy to grasp" information that it can use in forming its opinion about the case. Often, this practical information comes from the damages side of the case.

The audience's view of the case is frequently determined by a number of damages-related factors including: (1) whether the alleged patented technology is important to the success (*e.g.*, profitability) of the defendant's products; (2) whether the alleged patented technology is necessary for the defendant's products going forward; and (3) what other companies in the industry have paid for the alleged patented technology (or similar technology). If the answer to factors (1) and (2) is "yes" and the answer to factor (3) is a substantial amount of money, the audience is frequently inclined to view the asserted patent as valuable, valid and, unfortunately for a defendant, infringed. Conversely, if the answer to factors (1) and (2) is "no," the audience tends to view the patent suit as a nuisance and is less inclined to view the patent as either valid or infringed. As such, it is important for companies to develop damages theories early in the case and take the necessary steps to produce the witnesses and documents that support their theories.

For instance, the most common form of patent damages is the "reasonable royalty." These damages are calculated using a "hypothetical negotiation" methodology that seeks to determine the amount of money a "willing licensor" in the position of the plaintiff and a "willing licensee" in the position of the defendant would have agreed upon for the right to use the patented technology (assuming that it was valid and infringed) at the time of first infringement. Some of the most important factors in determining a "reasonable royalty" are (1) the portion of the defendants' profits attributable to the alleged patented technology; and (2) the nature and form of the license agreements that were previously entered into by the plaintiff and defendant. From the start of the case, defendants should focus on demonstrating that the success of their product is unrelated to the alleged patented feature (*e.g.*, customers buy the accused products because they want features or services unrelated to the infringement allegation). If the company can show that the success of its products is attributable to a non-accused feature that it developed through its own R&D, the showing will have a double benefit to the company. First, it will help demonstrate that the patent is not valuable and, as a result, the defendant would not have paid significant money for the patent in the hypothetical negotiation. And second, it will help convince the "fact finder" audience that the defendant is an innovative company. Such a perception is very helpful at trial because it tends to negate the audience concern that the defendant may have benefited from using patented technology that it did not pay for.

James Yoon

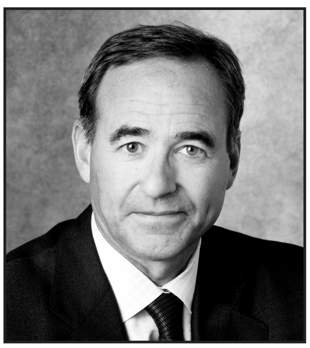
With respect to prior license agreements, the defendant should use those agreements to show that plaintiff's damages demands are excessive and outside industry norms. During litigation, the "fact finders" will attempt to determine a fair price for the plaintiff's patent. The fair price assigned by the "fact finders" will be greatly influenced by the terms of previous license agreements of the plaintiff and/or defendant. If a defendant can show that the plaintiff's demands are outside the scope of prior agreements and industry norms, the defendant can greatly undermine the credibility of the plaintiff's claims for not only damages but also the other issues of the case. Accordingly, from the start of litigation, defendant companies should seek to develop a holistic story that enables the audience of "fact finders" to see the world in the light most favorable to the defendant. Such a story must be easy to understand and persuasive. In all likelihood, it will not be limited to the technical issues of the case.

James Yoon is a partner with the Palo Alto office of Wilson Sonsini Goodrich & Rosati. jyoon@wsgr.com

Letter from the President

Much occurred in 2011 for Bay Area business trial lawyers. There were key California cases decided by the U.S. Supreme Court radically altering class action and arbitration practice, prominent and welcome new judges began sitting in the Northern District, the closure of most San Francisco civil courtrooms in the summer was barely averted, and the implosion and realignment of long-standing local firms continued. Throughout, ABTL shined as the area's finest bench-bar professional organization. We ended 2011 with an increased number of Northern California members — at 1709 — thanks to the huge efforts of Bob Stumpf and Marshall Wallace for our membership committee.

I wrote to you in the Spring 2011 Issue of our ABTL Report, laying out my three goals for the year: membership strength, dinner program originality, and access to open courts. Since then, ABTL saw stellar programs with Chief Judge Ware presiding in Palo Alto over a high tech crimes panel in June, a July East Bay lunch with Justice Mark Simons and Judge Lynn Duryee on electronic evidence, a September dinner with Ken Feinberg, Elizabeth Cabraser and Stu Gordon on alternatives to class actions for mass torts, and our December movie night, replete with popcorn, ethically lifted by Professor Rory Little and Judges Elizabeth Laporte and Richard Kramer. We also found the energy to co-sponsor (with BASF) a complex courts statewide symposium in November, and led a large contingent of Northern Californians to a great October annual seminar in Santa Barbara chaired by the Orange County chapter. The state of ABTL's core mission of bench-bar collegiality remains strong.



Robert H. Bunzel

In July 2011, the San Francisco Superior Court, due to state judicial branch budget cuts, announced it would lay off 40% of its staff and shutter 25 civil courtrooms, including our two indispensable complex litigation departments. A coalition of bar leaders from BASF, CAOC and the City Attorney's Office came together to work with legislators, the AOC, San Francisco, and the Judicial Council to reach agreement by August 31 that San Francisco would receive an emergency $2.5 million infusion of funds and would accept $650,000 in AOC complex litigation grant money, reducing staff layoffs to 15% and civil courtroom closures to 14 while preserving both complex departments. As the ABTL Northern California chapter president, I lent a voice and repeated presence in these efforts, though ABTL as an organization, which uniquely has many judges on our statewide boards, advocates for access to open courts rather than any particular solution. Bar leaders Stu Gordon, Dan Burkhardt, Kelly Dermody, Stephanie Skaff, Chris Kearney, Bianca Young and Chris Dolan deserve our members' appreciation for their work on the interim San Francisco resolution. But San Francisco is not alone, and litigants in state courts will continue to lose access to justice due to funding cutbacks totaling 30% since 2008. 2012 will be a watershed year to prevent further funding cuts to the judicial branch, and a goal to restore $300 million of previous cuts by 2015 is gathering strength in a very combative climate. The State Bar, led again in 2012 by former NorCal ABTL president Jon Streeter, and a group known as the "Open Courts Coalition," led by CAOC 2012 president Niall McCarthy, are important resources that ABTL members should consult to see how you and your firms can advance this effort.

This is my last report to our members. I have yielded the ABTL Northern California president position to Mary Jo Shartsis for 2012, supported by officers Rick Seabolt, Daralyn Durie and Drew Bassak. In passing the leadership responsibility, I am ending a decade of board service to ABTL, having chaired programs, an annual seminar, and much more. Wallace Stevens, one of America's great lawyer-poets, wrote in *Notes Toward a Supreme Fiction* (1942), "The partaker partakes of that which changes him." The priorities and complexity of ABTL have bettered this ex-president, and I hope in some small way I have contributed to our common advance.

Robert H. Bunzel, the President of the Northern California chapter of ABTL for 2011, is the managing shareholder of Bartko Zankel Tarrant & Miller in San Francisco. rbunzel@bztm.com