

# abt REPORT

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## *Procuring Third Party Document Discovery under the Federal Arbitration Act*

Late last year the Ninth Circuit Court of Appeals issued an opinion restricting the ability to compel document discovery from third parties in arbitration proceedings. In *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703 (9th Cir. 2017), the Ninth Circuit followed what the Second Circuit has called “the emerging majority” of courts holding that section 7 of the Federal Arbitration Act (“FAA”) does *not* empower arbitrators to issue subpoenas to non-parties for the production of documents.



Adam Trigg

Relying largely on then-judge Samuel Alito’s opinion for the Third Circuit in *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004), the Ninth Circuit held that the “clear statutory language” limits an arbitrator’s subpoena power

to only those subpoenas that require third parties to

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## *The Bay Area Complex Litigation Superior Courts Part II*

### Class Certification

All Judges agree that class certification should normally be adjudicated before summary judgment (per *Fireside Bank*). As part of class certification many Judges have the parties submit a trial plan focusing on manageability and evidentiary issues and how the evidence presented by the class representative will prove the claims of absent class members, plus a discussion of how class damages will be proven.



Frank Burke

The Judges have different procedural requirements for scheduling class certification deadlines and hearings. Judge Hernandez will specially set class certification motions as outlined in his Department 17 Guidelines. Judge Smith generally does not determine the appropriate time for filing a class certification motion, relying on the parties to decide and alert Judge Smith during a CMC or status conference. For Judge Seligman, prior to filing a class certification motion, the parties should meet and confer and the motion itself should include a trial plan. Judge Kuhnle typically sets a class certification hearing well in advance of any certification briefing and adopts an extended briefing schedule. Judge Walsh usually sets the time for the class certification 6 months out and encourages a longer, non-statutory briefing schedule. For Judge Weiner, the parties will discuss certification and summary judgment timing at the CMC. Judge Goode specially sets class certification motions after discussing with counsel how much time they need for

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appear before the arbitrator with documents at a hearing. While the *CVS* ruling is a restriction on third party discovery in arbitrations under the FAA, it does not entirely prohibit parties from obtaining documents from a non-party. As suggested in Judge Chertoff's concurrence in *Hay Group*, and discussed below, parties to an arbitration governed by the FAA still maintain the ability to issue subpoenas to third parties to appear before an arbitrator with documents at a hearing prior to the final arbitration hearing.

### Court Interpretations of FAA's Section 7

It has long been the policy of both federal and state law to encourage and enforce contractual provisions compelling arbitration of disputes. Congress passed the FAA in 1925. The FAA included provisions for pre-hearing discovery, including Section 7, which governs an arbitrator's subpoena power:

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. . . . [I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 7 (emphasis added).

Courts have disagreed whether this provision provides for arbitrators to issue subpoenas to third parties solely for the production of documents. In *In re Security Life Insurance Co. of America*, 228 F.3d 865 (8th Cir. 2000), the Eighth Circuit held that it does. While recognizing that Section 7 "does not . . . explicitly authorize the arbitration panel to require the production of documents for inspection by a party," the court determined that "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party

prior to the hearing." *Id.* at 870–71. The court determined that this interpretation furthered the goal of efficient resolution of disputes in arbitration actions. See also *Am. Fed'n of Tel. & Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999) (considering the FAA as guidance in labor arbitration case and interpreting Section 7 as implicitly allowing pre-hearing document discovery from third parties).

More recently, the Second, Third and Fourth Circuits have held that the plain language of Section 7 demonstrates that the arbitrator's power to compel the production of documents is limited to production at an arbitration hearing. *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275–76 (4th Cir. 1999) (stating "[n]owhere does the FAA grant an arbitrator . . . the authority to demand that nonparties provide the litigating parties with documents during prehearing discovery," but opining that "a party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship"); *Hay Group*, 360 F.3d at 407; *Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 215–16 (2d Cir. 2008) (following *Hay Group's* "emerging rule" of a narrow reading of section 7). In *Hay Group*, then-Judge Alito found that Section 7 "unambiguously" limits the arbitrator's subpoena power to compelling a third party to appear before the arbitrator and "bring with him" documents. *Hay Group*, 360 F.3d at 407. Thus, the provision "applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier." *Id.*

The Third Circuit rejected the argument that it was "absurd" to empower the arbitrator to compel attendance at a hearing and bring documents, but not the "lesser power" to compel production of documents. The court reasoned that Congress had good policy reasons to restrict third-party discovery to testimony and production at hearings, which "actually furthers arbitration's goal of resolving disputes in a timely and cost efficient manner." *Id.* at 409.

The requirement that document production be made at an actual hearing may, in the long run, discourage the issuance of large scale subpoenas upon non-parties. This is so because parties that consider obtaining such a subpoena will be forced to consider whether the documents are important enough to justify the time, money, and effort that the subpoenaing parties will be required to expend if an actual appearance before an arbitrator is needed. Under a system of pre-hearing document production, by contrast, there is less incentive

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to limit the scope of discovery and more incentive to engage in fishing expeditions that undermine some of the advantages of the supposedly shorter and cheaper system of arbitration. . . .

*Id.* In his concurrence, Judge Chertoff expanded on this reasoning, pointing to a work around that arbitrators can employ when third party document discovery is necessary in advance of a hearing:

Under section 7 of the Federal Arbitration Act, arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. This gives the arbitration panel the effective ability to require delivery of documents from a third-party in advance, notwithstanding the limitations of section 7 of the FAA. In many instances, of course, the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence.

*Id.* at 413.

In *CVS*, the Ninth Circuit followed the Third Circuit's decision in *Hay Group*. The Court held that “[a] plain reading of the text of Section 7 reveals that an arbitrator’s power to compel the production of documents is limited to production at an arbitration hearing.” 878 F.3d at 706. In rejecting the argument that it would be absurd to grant an arbitrator the power to summon a witness to an arbitration hearing without also granting the power to subpoena documents, the Court pointed to the practical reasons for doing so identified in *Hay Group*. *Id.* at 708. Thus, the Ninth Circuit became the latest court to follow *Hay Group*’s “emerging rule” of strictly construing Section 7’s language and limiting the ability to subpoena third parties for documents.

### **The “Chertoff Strategy” as a Solution**

While *CVS* and its progenitors undoubtedly restrict the ability of parties in an arbitration proceeding to compel document production from third parties, parties may still obtain documents from third parties prior to the final arbitration hearing by following the steps Judge Chertoff outlined in his concurrence in *Hay Group*. Because Section 7 only requires the third party to “appear before” a single arbitrator, Judge Chertoff concluded that arbitrators can issue a subpoena

summoning a third party to appear before an arbitrator with documents in advance of the final arbitration hearing, and the arbitrator can then adjourn the hearing, giving the parties the time to review the documents prior to the final merits hearing.

Although conducting a hearing for the sole purpose of receiving documents is less efficient than a simple third party subpoena for documents that parties can employ in court cases, there are several positive aspects of proceeding in this manner. Most importantly, because courts have been regularly interpreting Section 7 to prohibit document discovery subpoenas, this strategy is the only viable method of receiving documents from a third party prior to the merits hearing. Also, as Judge Chertoff noted, the inconvenience to a third party of sending a witness to appear before an arbitrator with documents may cause the third party to simply provide documents rather than going to the trouble of appearing before the arbitrator. Indeed, the subpoenaing party could use the California Judicial Council form for a subpoena for personal appearance and the production of documents (SUBP-002), which provides for the option of producing the documents requested along with a declaration of custodian of records in lieu of appearing at a hearing with the documents. Essentially, employing this strategy invites the parties to negotiate the scope of the document production, much like the process that parties undergo in any litigation in court.

One objection to this strategy may be that Section 7 is meant to be limited to the final arbitration hearing on the merits, not a hearing held solely for the purpose of receiving documents. The Second Circuit has explicitly rejected this argument. *Stolt-Nielsen Transp. Group, Inc. v. Celanese AG*, 430 F.3d 567, 578 (2nd Cir. 2005) (“Nothing in the language of the FAA limits the point in time in the arbitration process when the subpoena power can be invoked or says that the arbitrators may only invoke this power under Section 7 at the time of the trial-like final hearing.”). And the *CVS* opinion repeatedly states that Section 7 requires “a hearing,” implying that the hearing need not be the final merits hearing. 878 F.3d at 706, 707, 708.

Surprisingly, parties to arbitrations—and even arbitrators themselves—are often unaware of this method for obtaining discovery from a third party. For example, in a recent arbitration (prior to *CVS*), we issued a third party subpoena for the production of documents to a large international company whose dedicated subpoena counsel promptly objected, citing several cases holding that the FAA does not provide for third party discovery, including *Hay Group*. When we responded by asking the arbitrator to set a hearing and issue a sub-

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response and reply, and whether they need to exceed the usual page limits. He prefers to have 2-4 weeks between the reply brief and the hearing depending on the filing volume. Judges Walsh and Hernandez have a similar approach. Judge Wiss asks the parties to give her 10 days between the filing of the last paper and the hearing date.

Judge Karnow provides parties with a document entitled “Complex Litigation – Class Action Materials,” available on the Court’s website, which provides a checklist for class certification issues and also a checklist for obtaining preliminary approval of class settlements. Judge Smith also has separate procedural guidelines for preliminary approval and final approval of class action settlements.

The types of evidence the Judges find compelling on class certification depends on the case. But, regarding declarations, Judges Seligman, Walsh, and Weiner view quality as more important than quantity, and find multiple identical declarations less persuasive. Deposition transcripts and documents, on the other hand, can be quite helpful. Several Judges note that statistics or surveys can be

helpful in certain circumstances, though Judge Weiner notes they are more commonly appropriate for damages purposes than liability. Judge Weiner also states that experts proffering statistics or surveys are likely to be subject to a Section 402 pretrial hearing. Judges Karnow and Smith are likely to subject the statistical evidence to the standards set forth in *Duran*.

### Related Cases

All Judges prefer to address related cases as soon as possible, both because the existence of related cases factors into whether a case will be treated as complex, and so that the related cases can be adequately coordinated in different jurisdictions. Related cases are joined upon notice and motion and are governed by CCP 1048 and CRC 3.350 and 3.500 for consolidation and CCP 403-404 and CRC 3.501-3.550 for coordination. The procedure varies depending on whether the cases are non-complex or complex and whether the actions are pending in the same or different counties.

### Special Procedural Requirements

Most of the Judges stated that they recognize that the complex litigation cases present cutting edge issues

which may require briefing beyond the statutory page limits. On the other hand, Judge Goode stated that he “appreciates concision. Do not repeat things and do not bury adverse authority or difficult points in footnotes. Double space your briefs.” Judge Hernandez noted that counsel is doing something wrong if he or she cannot get it under the page limit. Judge Walsh notes that brevity is the best way to keep the reader’s attention. “Get it down to the heart of the issues. Put your best arguments up front, and keep them concise and clean. Footnotes are fine and have a different grammatical purpose than text.” Judge Weiner requests a table of contents and a table of authorities in every brief, even if less than 10 pages. Judge Smith urges parties to be reasonable in seeking extended briefs, do not sneak in extra pages, and notes that footnotes with long string cites are ineffective.

Because most of the complex litigation Judges hold CMCs periodically and frequently, there appears to be less of a need for ex parte discovery motion practice. Judge Walsh notes that Santa Clara County has a 24 hour rule on expedited motions, and complex court practitioners must secure a time for an expedited hearing. Judge Weiner sets aside two afternoons per week for potential ex partes, on Tuesdays and Thursdays, with notice by 10 a.m. the previous day.

Most of the Courts, except Alameda County, have e-filing in the complex litigation courts. In cases with a voluminous record, Judge Goode may request hyper-linked briefs. The Alameda County Judges request courtesy copies to be delivered to chambers. E-filing is permissive but encouraged by Judge Weiner, who also requires courtesy copies to be e-mailed to the Complex Civil Department.

Judge Goode is unlikely to grant a motion to exclude expert testimony under *Kennemur* unless the moving party can show that the expert was asked for all of his or her opinions and the bases for them. On apex depositions, Judge Walsh requires that the party seeking the deposition must show that they have exhausted discovery of subordinates, and that the apex deponent is critical on a central issue. He sometimes also imposes time limits.

Judges Goode and Hernandez report that they are amenable to special hearings or “science days” to educate them on technology issues or environmental issues in their cases.

### Motions for Summary Judgment/Adjudication

The Judges all encourage parties to avoid voluminous statements of fact which are likely to raise factual disputes. They also strongly discourage scattershot

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Chandra Russell

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## On INSURANCE

Challenging the Hourly Rates  
Imposed by Insurers on Independent Counsel

**W**hen a liability insurer agrees to defend its insured after the insured has been sued, this is often cause for celebration, as the insured believes its defense will be paid. The insurer may reserve its rights to deny coverage, and advise that such reservation creates a “conflict of interest” entitling the insured to “independent” counsel. Thus, instead of the insurer selecting the insured’s defense counsel, which is common under a duty to defend policy, the insured gets to choose its own counsel. Still reason to celebrate, right? But, as you may suspect, this selection right comes with a catch. The insurer advises that while the insured can choose its own counsel, the insurer only agrees to pay a very low hourly rate, maybe \$225 or \$250 per hour (it varies, sometimes dramatically so), which is much less than what is being charged by the insured’s independent counsel. If the litigation against the insured is significant, the delta between the rate the insurer agrees to pay and counsel’s actual rate can add up to millions of dollars.



Amy Briggs

An insurer claims it need only pay these low hourly rates pursuant to the requirements set forth in California Civil Code section 2860(c), which governs the financial relationship between an insurer and an insured’s independent counsel. Section 2860(c) states:

The insurer’s obligation to pay fees to the independent counsel selected by the insured is limited to the rates which are 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.

While section 2860(c) allows an insurer to only pay independent counsel the same rates it pays to other lawyers to defend similar actions in the same locale, an insured should not simply accept the insurer’s say so on this. There are several ways to both challenge an insurer’s unilaterally imposed rates. This article addresses a few such ways.

First, an insured should demand that the insurer produce detailed information about the counsel to whom it is paying these low rates. An insurer often imposes “panel counsel rates” in these situations, which are rates that an insurer pays to certain law firms that have special agreements with the insurer, often in writing. In these agreements, the panel counsel often agree to charge the insurer reduced hourly rates,

regardless of the type of case, or location of the litigation, typically in exchange for the anticipation of a large volume of work from the insurer. Under such a situation, an insured can argue that there is no “similarity” of actions as mandated by the statute. Instead, the panel counsel’s rates are unaffected by the complexity, sophistication, nature of the allegations, legal claims, factual circumstances, location, or any other factors of the cases in which they are appointed. Thus, such rates provide no support under the § 2860 requirements.

Second, an insured should demand that the insurer provide detailed information about the specific cases that the insurer is touting as “similar actions in the community where the claim arose or is being defended,” to support the low hourly rates imposed. With this information, an insured can ascertain whether such cases are, in fact, “similar” or not. For example, are these purported “similar” actions less complex than the lawsuit against the insured? Do they involve different legal and/or factual issues? What about the amounts in controversy – are they dramatically less and thus, the exposure potentials are not even comparable? Also, where are these other actions pending? Are they in different communities? The more an insured can demonstrate dissimilarities the better to demonstrate that the insurer cannot support the hourly rate it seeks to impose pursuant to § 2860.



Susan Page White

Third, if the parties cannot informally agree on an acceptable hourly rate for independent counsel, either party can seek to resolve the dispute through final and binding arbitration pursuant to § 2860. And, in any arbitration, if the Arbitrator determines that insurer’s evidence does not satisfy the § 2860 requirements, the insured should argue that a “reasonableness” standard should be applied to determine the appropriate rate for the insured’s independent counsel (with evidence to support that independent counsel’s actual rates are “reasonable”). Indeed, a “reasonableness” standard is a ubiquitous standard for attorneys’ fees in insurance litigation and other contexts. *See, e.g., California Rules of Professional Conduct Rule 4-200 (setting forth factors in determining the reasonableness of attorneys’ fees); Hartford Cas. Ins. Co. v. J.R. Marketing, L.L.C., 61 Cal.4th 988, 1001 (2015) (insurer’s obligation to finance its insured’s defense is “the duty to pay the reasonable costs of defense.”).*

An insured need not simply accept its insurer’s word when it imposes inappropriately low hourly rates on an insured’s independent counsel. Instead, an insured should challenge such rates, when appropriate, either informally or in arbitration.

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objections to every statement of fact submitted, whether or not material and in dispute, which are unlikely to be dispositive and are extremely time consuming for the Judges. They may be stricken or lead to sanctions if abused. Judge Smith encourages parties to use excerpts of exhibits where possible, and discourages including arguments in briefs that are not necessary for decision.

Judge Seligman encourages the parties to meet and confer before filing a dispositive motion. Judges Hernandez and Weiner have no unique rules around page limits, and if a party requests to file an over-length brief, it is generally granted.

Judges Hernandez, Goode, Karnow, Wiss, and Weiner view CCP 437c(t), stipulations to adjudicate sub-issues, as an underutilized statute that can be highly effective as part of the summary judgment/adjudication process.

Judge Walsh believes that the complex department is more open to motions for summary judgment/adjudication than typical unlimited jurisdiction courts, although Judge Goode observes that few motions for summary judgment are granted. Motions for summary adjudication fare slightly better, but not much. Judge Karnow expects the parties to understand the shifting burdens of proof, as well as the sometimes technical procedures required for such motions.

Several of the Judges suggest that counsel look for other methods to resolve dispositive issues, such as bench trials on stipulated facts, early motions in limine on key expert issues, early jury instructions to settle the law, or expedited jury trials.

### **Settlement Conferences**

Generally, the complex Judges do not act as settlement Judges in their own cases, but some may act as a settlement Judge for other cases in the complex litigation department. Most Judges observe private mediation as the most common ADR approach among complex litigants.

In Alameda there are 3-4 settlement Judges. All asbestos and other types of cases go to them, unless the parties use an outside mediator, which they often do. If the parties request a judicial settlement conference, they are sent to one of the dedicated settlement departments utilized in Alameda County.

In Santa Clara, a Mandatory Settlement Conference occurs 1-2 weeks prior to trial, usually on a Wednesday. MSCs are typically handled by Temporary Judges,

mediators who have been involved previously in the cases, and other sitting Judges. Judges Kuhnle and Walsh may be involved in a settlement conference if the case involves a jury trial and the parties agree to their involvement, but typically do not participate in cases going to bench trial.

There is an assigned settlement Judge in San Mateo whom Judge Weiner may send the parties to if they cannot reach agreement before trial.

The San Francisco Superior Court has a panel of judicial mediators and there are about 12 Judges on the panel. If Judge Wiss determines a settlement conference is needed, Judge Wiss will try to facilitate a settlement conference with a sitting Judge of the parties' choice.

Judge Goode will not normally act as a settlement Judge on matters he oversees, asking other colleagues to sit in if needed, except in rare cases upon request of all parties.

### **Trial Management Issues**

Many complex litigation Judges conduct final pre-trial conferences 2-3 weeks before trial. Santa Clara and Contra Costa Counties have the most specific rules. The Santa Clara County Complex Litigation Guidelines require a joint statement of the case and controverted issues, stipulation to all facts amenable to stipulation, and exchange of in limine motions, exhibits, voir dire questions, proposed jury instructions, deposition designations, and a grid listing all proposed witnesses with estimated times for direct and cross examination and redirect examination and subject matter. Contra Costa County local rules require a final Issue Conference. Judge Goode's Issue Conference Order requires a statement of the case, voir dire questions, filed motions in limine, and exhibit numbering before the conference. It also includes a list of sua sponte rulings for which in limine motions need not be filed. Judge Goode also uses a mandatory witness grid system. In both Santa Clara and Contra Costa, a final witness time estimate is established, which the Judges use to keep counsel on track for the trial end date provided to the jury.

Judges Seligman, Karnow and Weiner also establish time limits for each side at trial, pursuant to discussions with counsel. Judge Smith only asks for a time estimate. Judge Karnow strongly encourages the parties to develop a trial management plan. Once the time limits are established, he uses a chess clock and strictly enforces the total time limit. When a party's time is up, it is deemed to have rested.

Judges Wiss, Weiner and Seligman also report using final pretrial conferences to cover witness and exhibit

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JAIDEEP VENKATESAN

## The Defend Trade Secrets Act Two Years Later

Enacted on May 11, 2016, the Defend Trade Secrets Act (“DTSA”) created a federal cause of action for trade secrets misappropriation, with the hope of unifying the patchwork of state laws governing trade secret misappropriation claims. It also gave plaintiffs a weapon unavailable under state trade secrets laws: the ability to obtain a court order to immediately seize trade secret materials from defendants. Federal courts have since issued several important decisions that have shaped the application of the DTSA.

### I. Seizure Actions under the DTSA

Under the DTSA, a plaintiff can request an order “providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.” 18 U.S.C. §1836(b)(2)(A)(i). A court can issue a seizure order “only in extraordinary circumstances,” and where injunctive relief under F.R.C.P. 65 is inadequate to protect the plaintiff’s trade secrets. 18 U.S.C. §1836(b)(2)(A)(ii)(I). A seizure order authorizes law enforcement to seize trade secret information from the defendant, including media containing such information.

Federal courts have taken the “extraordinary circumstances” requirement seriously and have rarely granted seizure orders. In *OOO Brunswick Rail Mgmt. v. Sultanov*, No. 5-17-cv-00017-EJD, 2017 U.S. Dist. Lexis 2343 (N.D. Cal. January 6, 2017), the Northern District of California denied the plaintiff’s request for a seizure order because other remedies were sufficient to protect its trade secrets. Two employees had emailed confidential documents to their personal email accounts and retained company devices after terminating their employment. The court granted the plaintiff’s request for a preservation order, but found a seizure order unnecessary because the court was ordering the defendants to bring their devices at a subsequent hearing under F.R.C.P. 65. Courts in the Southern District of Florida (*Balearia Caribbean Ltd. Corp. v. Calvo*, No. 1:16-cv-23300-KMV (S.D. Fla. Aug. 5, 2016)), the Eastern District of Tennessee (*Jones Printing, LLC v. Adams Lithographing Co.*, No. 1:16-cv-442 (E.D. Tenn. November 3, 2016)), and the Eastern District of Michigan (*Dazzle Software II, LLC v. Kinney*, No. 2:16-cv-12191-MFL-MLM (E.D. Mich. July 18, 2016)) have similarly denied applications for seizure orders because the plaintiff was unable to show that the defendant’s conduct was extraordinary and that F.R.C.P. 65 relief would be insufficient.

The first court to issue a seizure order was the *Southern District of New York in Mission Capital Advisors, LLC v. Romaka*, No. 1:16-cv-05878 (S.D.N.Y. July 29, 2016). The court first issued a TRO and ordered the defendant to appear at an order to show cause hearing. The defendant evaded service of the TRO and failed to appear at the hearing. The court found that the defendant was unlikely to comply with any F.R.C.P. 65 order, establishing the extraordinary circumstances necessary for a seizure order. The Western District of Oklahoma also issued a DTSA seizure order where the plaintiff had demonstrated that the defendants had improperly acquired its trade secrets and had demonstrated a “willingness to evade or ignore the law.” *Blue Star Land Servs., LLC v. Coleman*, No. Civ-17-931-R, 2017 U.S. Dist. Lexis 202396 (W.D. Okla. December 8, 2017); see also Order Granting Ex Parte Civil Seizure, Dkt. 10.

To obtain a seizure order, a plaintiff will need to show more than that a defendant may possess its trade secrets – it must establish why F.R.C.P. 65 remedies are insufficient, such as because the defendant is unlikely to obey a F.R.C.P. 65 order. Only then will a court authorize law enforcement to seize alleged trade secret materials.



Jaideep Venkatesan

### II. The DTSA and Inevitable Disclosure

Federal courts have also wrestled with the controversial “inevitable disclosure” doctrine in DTSA actions. Under that doctrine an employer may prevent a departing employee from joining a competitor if the employee would “inevitably” use the former employer’s trade secrets, even absent evidence of actual use. States have varied widely in their recognition of the doctrine. California has declared it improperly transforms a confidentiality provision into a non-compete agreement prohibited by California Business and Professions Code section 16600. See *Whyte v. Schlage Lock Co.*, 125 Cal. Rptr. 2d 277, 293 (2002). On the other hand, Illinois recognizes the doctrine (*Strata Mktg. v. Murphy*, 317 Ill. App. 3d 1054, 1070 (Ill. App. Ct. 2000) (“We believe [*PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995)] interprets Illinois law and agree that inevitable disclosure is a theory upon which a plaintiff in Illinois can proceed under the Act.”)); as does Delaware (*W.L. Gore & Assocs. V. Wu*, No. 263-N, 2006 Del. Ch. Lexis 176, \*33 (D.Ch. 2006) (recognizing that defendant could be enjoined if “the nature of the trade secrets and the business they relate to are such that their disclosure would be inevitable if [defendant] were allowed to resume working in that particular area of the chemical industry”)).

The DTSA allows a court to issue an injunction “to prevent any actual or threatened misappropriation.”

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## Defend Trade Secrets Act

But it prohibits an injunction that would “prevent a person from entering into an employment relationship,” and requires that “conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person knows[.]” 18 USC § 1836(b)(3)(A). This language would appear to preclude the inevitable disclosure doctrine.

But federal courts determining whether to apply the doctrine under the DTSA have ignored this language, instead relying upon whether state courts in their jurisdictions recognize the doctrine under state law. For example, several courts in the Northern District of Illinois have applied the doctrine relying on previous decisions applying Illinois’s trade secrets law. In *Molon Motor & Coil Corp. v. Nidec Motor Corp.* No. 16 C 03545, 2017 U.D. Dist. Lexis 71700 (N.D. Ill. May 11, 2017), the court found that a plaintiff had properly pled trade secret claims under both the DTSA and Illinois law by relying on the inevitable disclosure doctrine, even though it had not specifically alleged use of its trade secrets. The court treated both the federal and state statute as analogous, and relied upon pre-DTSA case law applying Illinois law. Subsequent courts applied to doctrine to requests for injunctive relief. *Mickey’s Linen v. Fischer*, No. 17 C 2154, 2017 U.S. Dist. Lexis 145513, \*39-\*45 (N.D. Ill. September 8, 2017); *Cortz v. Doheny Enters.*, No. 17 C 2187, 2017 U.S. Dist. Lexis 106454, \*34 -\*35 (N.D. Ill. July 11, 2017).

In contrast, the Northern District of California relied upon California law to strike DTSA allegations premised on the inevitable disclosure doctrine in *UCAR Tech (USA) Inc. v. Li* No. 5:17-cv-01704 – EJD, 2017 U.S. Dist. Lexis 206816, \*8 -\*9 (N.D. Cal. December 15, 2017). The court held that some of the plaintiff’s allegations were based on actual misappropriation, but struck allegations “that suggest reliance on the ‘inevitable disclosure’ theory” because “California courts have resoundingly rejected claims based on” the theory.” *Id.* at 9 (citing to *Whyte*, 101 Cal. App. 4th at 1463). The court thus based its decision on state law rather than applying the express language of the statute.

This trend is particularly evident in Missouri which, unlike Illinois or California, has not definitively affirmed or rejected the doctrine. *H&R Block E. Tax Servs. V. Enchura*, 122 F. Supp.2d 1067, 1075-1076 (W.D. Mo. 2000) (suggesting that the doctrine may be used in conjunction with other factors). The Eastern District of Missouri reflected this ambiguity in *Panera, LLC v. Nettles*, No. 4:16-cv-1181-JAR, 2016 U.S. Dist. Lexis 101473, \*11-\*12 (E.D. Mo. August 3, 2016) granting injunctive relief after finding “the rational underpinning the [inevitable disclosure] theory helpful” though neither Missouri nor the Eighth Circuit have

adopted the doctrine. *Id.* at 11. See also *Express Scripts, Inc. v. Lavin*, No. 17 CV 1423 HEA, 2017 U.S. Dist. Lexis 105006, \*19-\*20 (E.D. Mo. July 7, 2017).

### III. Pleading DTSA Claims

Plaintiffs asserting DTSA claims in federal court must satisfy federal pleading requirements. Two pleading issues merit attention - the specificity of the trade secrets at issue, and whether the trade secrets are related to a product or service used in interstate commerce.

#### A. Specificity of Trade Secrets

Federal courts have held that plaintiffs must plead allegations of trade secret misappropriation with sufficient specificity to put the defendant on notice of what is allegedly misappropriated - though they differ in how specific plaintiffs must be. The Northern District of Illinois has followed its interpretation of state law to allow allegations that describe the alleged trade secrets “in general terms.” See *Mission Measurement Corp. v. Blackbaud, Inc.*, 216 F. Supp. 3d 915, 920-921 (N.D. Ill. 2016) (quoting *Covenant Aviation Sec., LLC v. Berry*, 15 F. Supp. 3d 813, 818 (N.D. Ill. 2014)). See also *ChattePlug, Inc. v. Digital Intent, LLC*, No. 1-16-cv-4056, 2016 U.S. Dist. Lexis 149391, \*8 (N.D. Ill. October 28, 2016); *Prominence Advisors, Inc. v. Dalton*, No. 17 C 4369, 2017 U.S. Dist. Lexis 207617, \*9 (N.D. Ill. December 18, 2017). Other courts have similarly allowed general descriptions to suffice, including the Southern District of New York (*Tesla Wall Sys., LLC v. Related Cos., L.P.*, No. 17-cv-5966, 2017 U.S. Dist. Lexis 207932, \*24 (S.D.N.Y. December 18, 2017) (trade secrets need not be disclosed in detail); North Dakota (*Aggreko, LLC v. Barreto*, No. 1:16-cv-353, 2017 U.S. Dist. Lexis 35573, \*7 (D. N.D. March 13, 2017) (allegations describing general categories of trade secrets were sufficient)), Montana (*SleekEZ, LLC v. Horton*, No. CV 16-09-BLG-SPW-TJC, 2017 U.S. Dist. Lexis 71410, \*11 (D. Mont. April 21, 2017) (general description of alleged trade secrets was sufficient)), New Jersey (*Med-Matrix, LLC v. Boyce*, No. 17-3400, 2017 U.S. Dist. Lexis 184162, \*5 (D. N.J. November 7, 2017) (no special pleading requirements for trade secret claims)), and the Western District of Virginia (*Hawkins v. Fishbeck*, No. 3:17-cv-00032, 2017 U.S. Dist. Lexis 170678, \*12 (W.D. Va. October 16, 2017) (plaintiff’s description of “various facets” of its “software and related products” sufficient)).

Some jurisdictions require more specificity. The Northern District of California in *Space Data Corp. v. X*, No. 16-cv-03260-BLF, 2017 U.S. Dist. Lexis 22571 (N.D. Cal. February 16, 2017) held that a plaintiff “merely provided a high-level overview” of its purported trade secrets and did not satisfy F.R.C.P. 8 pleading standards. Similarly, the Western District of Wisconsin relied on previous Seventh Circuit cases pre-dating the DTSA that interpreted state law claims as requiring specificity. See *Kuryakyn Holdings v. Ciro*,

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FRANK CIALONE

## *The Trust Exception To The American Rule on Attorney's Fees*

California lawyers all know that, under the “American rule,” each party is responsible for paying his, her, or its, attorney’s fees, unless a statute or contract calls for shifting fees from one party to another. In trust cases, however, there is an exception: Because the probate court is a court of general jurisdiction, with equitable powers over trusts, California courts have held that, under certain circumstances, the court may charge a beneficiary’s interest in a trust the trustee’s legal fees and costs incurred in a trust proceeding.

The Probate Code already provides certain statutory grounds for shifting fees from a trust (which, generally speaking, will pay the trustee’s legal fees, absent a contrary determination by the court) to a beneficiary. For example, under Probate Code section 17211(a), if a beneficiary contests the trustee’s account and the court determines that the contest was without reasonable cause and in bad faith, the court may charge the beneficiary for the trustee’s attorney’s fees and costs and the trustee’s own compensation. The charge will be imposed against the beneficiary’s interest in the trust, with the beneficiary being personally liable for any unsatisfied amount. Similarly, under Probate Code section 15642(d), if the court finds that a beneficiary has petitioned for removal of a trustee in bad faith, and that the removal would be contrary to the settlor’s intent, the court may order the beneficiary to pay the trustee’s attorney’s fees.

The courts’ interpretation of their equitable powers to impose fees goes somewhat farther than these statutory powers, but is also more constrained. The courts’ equitable power to charge a trustee’s fees to a beneficiary extends to all manner of trust proceedings - not just to the challenges to accounts or the petitions for removal to which the above-cited statutes apply. But that equitable power does not extend to holding the beneficiary personally liable for a trustee’s attorney’s fees; it allows the courts to charge only the beneficiary’s interest in the trust.

In 1975, the California Supreme Court held in *Estate of Beach* that an executor’s fees could not be charged to the contestant’s share of the estate, citing the well-known principle, reflected in Civil Code section 1021, that a prevailing party ordinarily is not entitled to

recover attorney’s fees and costs. The Supreme Court held that the trial court’s order would “unduly deter ... proceedings brought in good faith.” The Court of Appeal seized on those last few words, in the 1994 case *Estate of Ivey*, to distinguish *Estate of Beach* and affirm a trial court’s ruling charging the trustee’s fees for defending objections to an account to the objector’s share of the trust after finding that the objections were brought in bad faith.

The prevailing party in *Estate of Ivey* relied in part on CCP Section 128.5, but also relied on the equitable powers of the probate courts. Subsequent decisions hold that those equitable powers alone provide sufficient basis for the courts, and that the procedures of CCP Section 128.5 do not apply. Thus, *Rudnick v. Rudnick*, a 2009 case, the trial court found that beneficiaries’ objections to a proposed sale of trust real property were not brought in good faith but to disrupt the sale, and “created unnecessary delays and asserted disingenuous arguments....” The court acknowledged that it had no statutory or contractual authority to shift attorney’s fees to the losing party, but relied on its equitable powers and charged the trustee’s fees to the objecting beneficiaries’ share of trust assets. The Court of Appeal affirmed.



Frank Cialone

In 2017 the Court of Appeal affirmed this interpretation of the probate courts’ equitable powers, but acknowledged an important limitation. In *Pizarro v. Reynoso*, the trial court found that a petition was filed in bad faith. The trial court ordered that the trustee’s attorney’s fees be charged to the petitioners’ shares of the trust and, if those shares were not sufficient, to the petitioners personally. The Court of Appeal affirmed only in part, holding that the courts’ equitable powers over trusts authorized only the charge against the petitioners’ shares of the trust, not against them personally. As in *Rudnick*, the court expressly noted that it was not relying on statutory fee-shifting provisions, but the probate courts’ equitable powers. Practitioners who find themselves in probate court should understand the scope of those equitable powers, which in these cases extended to overriding the well-known “American rule.”

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## Complex Superior Courts Part II

lists and objections, in limine motions and jury instructions. Judge Weiner also addresses jury questionnaires and motions to bifurcate, and requires counsel to meet and confer regarding exhibits and submit a stipulation regarding admissibility and authentication as well as deposition designations and objections. Judge Smith holds her pretrial conferences on the first day of trial, and requests parties to file only motions in limine on issues that will arise early in the trial, and generally file only motions, objections and other trial documents that are going to be used.

Judges Walsh, Wiss and Weiner prefer to pre-instruct the jurors at the outset of the trial on standard CACI elements of the main claims and defenses, so the jurors will have a roadmap of what they are to decide. Most of the rest pre-instruct the jurors before closing arguments, though Judge Weiner instructs after closing arguments.

Judge Goode has allowed witnesses to testify via Skype upon stipulation of the parties.

All of the Judges require some form of notice of witnesses to be called in advance of the day they will be called.

Most of the Judges are used to the parties bringing computerized presentation systems to trial, though many require the parties to agree upon and use the same system. Many of the complex courts have high-tech equipment in them. The Judges are amenable to the parties using realtime transcripts and like to have realtime on the bench. Some of the Counties have cut funding for Court reporters, so the parties must bring private reporters. In those cases, the Judges appreciate having realtime also.

All of the Judges allow juror notetaking and most allow juror questions, though the manner in which the questions are asked varies. The Judges are generally amenable, if the parties stipulate, to other trial methods such as juror notebooks, interim summations, and use of full or partial deposition summaries in lieu of reading transcripts. Judge Smith does not allow interim summations and probably would not allow deposition summaries.

*Frank Burke handled complex litigation in state and federal courts for 42 years, and now serves as a full time neutral at ADR Services, Inc. and a Pro Tem Settlement Judge in the Santa Clara and San Francisco County Superior Courts.*

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## Defend Trade Secrets Act

242 F. Supp. 3d 789, 798-799 (W.D. Wis.2017) (plaintiff “offers vague, generalized descriptions of its purported trade secrets without demonstrating that any specific piece of information meets the statutory definition of trade secret”). The Eastern District of Michigan rejected general descriptions of trade secrets as insufficient. *Ukrainian Future Credit Union v. Seikaly*, No. 17-cv-11483, 2017 U.S. Dist. Lexis 194165, \*20 -\*22 (E.D. Mich. November 27, 2017).

As with the inevitable disclosure doctrine, federal courts have followed state law precedents as to trade secret pleading in their respective jurisdictions. Practitioners should consult such precedents when determining how to plead trade secrets under the DTSA.

### B. Interstate Commerce

The DTSA expressly applies only to trade secrets that are “related to a product or service used in, or intended for use in, interstate or foreign commerce.” 18 U.S.C. §1836(b)(1). Courts have dismissed complaints that fail to allege a sufficient nexus between the trade secrets at issue and products or services used in interstate commerce, including in Delaware (*Hydrogen Master Rights, Ltd. V. Weston*, 228 F. Supp. 3d 320, 338 (D. Del. 2017), the Eastern District of Pennsylvania (*Gov’t Emples. Ins. Co. v. Nealey*, No. 17-807, 2017 U.S. Dist. Lexis 91219, \*34-\*35 (E.D. Pa. June 13, 2017), and Minnesota (*Search Partners, Inc. v. MyAlerts, Inc.*, No. 17-1034, 2017 U.S. Dist. Lexis 102577, \*4 (Minn. June 30, 2017).) However, the Northern District of Illinois questioned whether interstate commerce allegations were required in *Wells Lamont Indus. Grp. LLC v. Mendoza*, No. 17 C 1136, 2017 U.S. Dist. Lexis 119854, \*7-\*8 (N.D. Ill. July 31, 2017). Assuming, without deciding, that such pleading was required, the court found that the allegations allowed it to “reasonably infer” that the products at issue were used in interstate commerce. Other courts may not be as forgiving, however, so plaintiffs are advised to make sure to plead this element of a DTSA claim.

Instead of creating a uniform body of federal trade secret law, federal courts have relied upon decisions interpreting analogous state laws and reflected the diversity of their jurisdictions. Federal courts have also fallen back on the familiar remedies allowed under F.R.C.P. 65 rather than employ the new seizure act provisions. Practitioners can expect these tendencies to continue as DTSA law develops.

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## Procuring Third Party Discovery

poena for the third party's appearance at the hearing for the purpose of receiving the documents, both the arbitrator (and his colleagues he discussed it with) and the third party had not encountered the issue before. Ultimately, the arbitrator issued the subpoena and we negotiated a scope of production from the third party without the need to ever hold the hearing. At least in that case, Judge Chertoff's prediction proved correct.

While subpoenaing a third party to attend a hearing before an arbitrator and bring documents is a permissible method of obtaining document discovery prior to the final arbitration hearing, it is important to note that the scope of the documents that can be compelled is likely limited. Section 7 allows the arbitrator to compel the third party to bring with it documents "which may be deemed *material as evidence* in the case." This materiality limitation has not been heavily litigated, but several opinions, including *CVS*, suggest that it narrows the scope of the documents that can be compelled. *CVS*, 878 F.3d at 708 ("[A]n arbitrator's power under section 7 extends only to documentary evidence 'which may be deemed material as evidence in the case,' further demonstrating that under the FAA an arbitrator is not necessarily vested with the full range of discovery powers that courts possess."); *Kennedy v. Am. Express Travel Related Servs. Co.*, 646 F. Supp. 2d 1342, 1346 (S.D. Fla. Aug. 12, 2009) ("The fact that § 7 uses 'material' and 'evidence' and does not track the language of Rule 26(b)(1) makes clear that the statute is not the wide open search for truth that Rule 26 provides."). The subpoenaing party would be wise to focus on the fact that Section 7 says documents "which *may* be deemed material as evidence," suggesting that the documents can be compelled if they are possibly material, but this issue has not been decided by the courts.

### Conclusion

In the last two decades, courts have developed an emerging consensus that under the FAA arbitrators do not have the power to issue document subpoenas to third parties. While this consensus certainly limits the ability of parties to an arbitration to obtain documents from third parties prior to the final hearing, it is not an absolute bar. By seeking a hearing and subpoena from the arbitrator for the purpose of receiving the third party's documents, parties can ensure they will receive documents prior to the final hearing, and often negotiate production from third parties without a hearing.

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LAWRENCE M. CIRELLI

## Letter from The President

Dear ABTL Members and Friends,

I have had the distinct pleasure of serving as the President of the Northern California Chapter of the Association of Business Trial Lawyers for the past seven months. As we reach the midpoint of the ABTL program year, it is a good time to look back at the year we have had and to look forward to what lies ahead. It is hard to believe how quickly the first half of the year has gone by. We have had a terrific year so far, due to the hard work of many people. Our Dinner Program Co-Chairs, Molly Moriarty Lane, David Steuer, and Christine Van Aken, (recently appointed to the San Francisco Superior Court) have thus far put together four excellent dinner programs.



Lawrence M. Cirelli

We started off the year in January with Molly Moriarty Lane moderating a discussion entitled "Pioneer Women Attorneys Discuss How To Handle Bias In The Workplace," with Melinda Haag of Orrick LLP, Renee Lawson, Deputy General Counsel of AirBnB, and Justice Therese Stewart of the First District Court of Appeal engaging us with a lively discussion on this very important and timely topic. In March, on the heels of the conclusion of what some called "the trial of the century," Judge William H. Alsup of the United States District Court for the Northern District of California, Eric Goldman of the High Tech Law Institute at Santa Clara University School of Law, and Arturo Gonzalez of Morrison & Foerster, lead trial counsel for Uber, joined us for an engaging and informative discussion entitled: "The Waymo-Uber Trial and the Future of Trade Secrets Law." In May, Eric Holder, the 82nd Attorney General of the United States, and Leslie Caldwell, former United States Assistant Attorney General for the Criminal Division entertained and educated us in a program entitled "The Anatomy of An Investigation."

We concluded the first half of the year in June with our annual Silicon Valley dinner program. A panel of privacy experts, Derek Care, Legal Director – Privacy for Uber, Mark Krotoski of Morgan Lewis, and Jake Snow, Technology & Civil Liberties Attorney at ACLU-

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## Letter from the President

Northern California, joined us for discussion entitled “A Little Privacy Please! What Lawyers Need To Know About New Developments In Data Protection.”

Our Chapter’s Leadership Development Committee has also hosted two programs for lawyers with ten years of experience or less during the first half of the year. Those programs - “The Duty of Competence: Effective Practice Management Strategies for Attorneys,” and “Embracing Generational Diversity: Effective Communication Strategies for Multi-Generational Teams,” were very successful and well attended. The LDC plans to host two more evening CLE programs this year, as well as two brown bag lunch programs with local judges.

As we look forward, the Northern California Chapter is the host chapter for this year’s 45th ABTL Annual Seminar to be held from October 10-14 at the beautiful Wailea Beach Resort in Maui, Hawaii. Annual Committee Co-Chairs, Rachel Brass and Walter Brown, along with their committee, have been hard at work putting together what will certainly be a terrific event. The seminar is titled: “#thisis2018: When #metoo Becomes A Business Dispute.” Judge Richard Kramer (Ret.) is back this year by popular demand, and he is putting together what, as always, surely will be an engaging and amusing hypothetical. The seminar sessions will cover dealing with such a crisis starting with the company board meeting, a plaintiff intake interview, defense witness preparations, what is different about #metoo, and will culminate with a TRO hearing, motion to compel arbitration, the navigation of indemnity and insurance issues, and a clopening (closing argument/opening statement hybrid). Registration is now open, so please reserve your room and your place at the conference - it is filling up quickly.

Our last two dinner programs of the year will be on September 11 and December 11 at The Four Seasons in San Francisco. The programs are still in development, but if the first four programs of the year are any indication, these should be excellent programs as well. Mark your calendars now.

I hope you all are enjoying your summer, and I look forward to seeing you in September and in Hawaii in October.

Lawrence M. Cirelli

*Lawrence Cirelli is the President of the Northern California Chapter of The Association of Business Trial Lawyers and a partner and trial lawyer at Hanson Bridgett LLP specializing in business litigation.*

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