

ABTL REPORT

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Letter from the President

IT is quite an honor to become the fifth president of the Northern California ABTL. In the years since Art Shartsis, Jerry Falk, Steve Bomse and Steve Schatz founded the organization, we have grown dramatically. We are now the largest of the three chapters in California. We have been favored with active judges. Our programs continue to be interesting, timely and educational. Our dues remain a bargain. With the help of my fellow officers Barbara Caulfield, Steve Brick and Doug Young, I hope to continue these achievements in the coming year.



Harold J. McElhinny

Upon becoming the President of an organization dedicated to the skill of trying complex civil cases, I have had reason to reflect, once again, on the vanishing opportunities to practice our art. At the Annual Seminar in Hawaii last October, Judge Walker noted that the most recent statistics from the U.S. Administrative Office of the Courts reflect that, nationwide, less than one

percent of civil filings is ultimately resolved by jury trial. This is down substantially from the eight percent figure I recall from several years ago. (Similarly, less than ten per-

Continued on Page 12

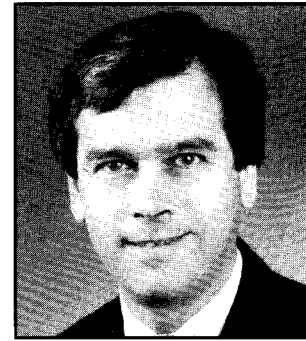
Also in this Issue

David J. Berger	Turning Trade Secrets into Non-Compete Agreementsp. 3
Barry P. Goode	On ENVIRONMENTAL LAWp. 7
Charles R. Rice	On SECURITIESp. 9
Mary E. McCutcheon	On INSURANCE.....p. 11

Temporary and Contract Workers: Benefits & Pitfalls

A swarm of recent cases has challenged the widespread practice of excluding "contingent" workers from an employer's pension, health, and other benefit plans. In the most notorious of these – *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996), *suggestion for rehearing en banc granted* (February 10, 1997) – the Ninth Circuit held that Microsoft could not refuse to cover "freelance" technical workers in its 401(k) plan even though they had agreed in their retention contracts to be excluded. The court's pronouncement that "[l]arge corporations have increasingly adopted the practice of hiring temporary employees or independent contractors as a means of avoiding payment of employee benefits, and thereby increasing their profits" may well prove to be a clarion call for litigation – of an inherently class nature – over contingent worker exclusions. This article briefly reviews the statutes applicable in such cases, and then analyzes how the courts have dealt with them to date. The author then offers practical suggestions for employers who sponsor benefit plans, and face litigation over those plans, suggested by his analysis of current case law.

Pros and Cons of Using Contingent Workers. Employers have always used contingent workers to perform work not readily handled by their regular workforces. These include temporary workers hired to substitute for regular employees who are sick or on vacation, occasional, seasonal, and incidental workers engaged for overflow work, leased workers whose assignments may be of longer duration, and independent contractors brought in to handle technical and specialized projects. The practice has been expanding: currently, 90% of U.S. businesses use contingent workers, with 60% of companies reporting



D. Ward Kallstrom

Continued on Page 2

Continued from Page 1

Temporary and Contract Workers

increased usage in the past five years. U.S. temporary help payroll in 1996 exceeded \$30 billion.

There are several reasons for this. The traditional role of contingent workers — to help a company meet short term, occasional, or unanticipated staffing needs — has expanded to supplement workforces thinned by early retirement plans. Companies in cyclical or seasonal industries, or those sensitive to economic swings, find it less disruptive to bring in contingent workers temporarily than to hire regular workers who must soon be laid off. Some small and start-up companies have reduced the administrative costs and burdens associated with payroll and record-keeping functions by using contingent workers whom the employer does not payroll. The common practice of excluding contingent workers from employee benefit plans also achieves cost savings by reducing both direct benefit costs and record-keeping burdens.

These savings can, of course, have associated costs. Highly trained and technical contingent workers often command higher pay than regular employees doing the same work. Contingent workers are sometimes perceived to be less loyal, committed, or skilled than regular employees, and to produce lesser quality work. There are also costs associated with increased turnover.

Further, there are legal risks. Although a company may legitimately believe, based on contractual understandings with contingent workers and/or the agencies that supply them, that contingent workers are not its "employees," such contract arrangements do not control their legal status. Companies can be surprised to find that they are employers, or "joint employers," of leased workers, independent contractors, or "freelancers" for purposes of overtime and tax withholding laws, which define the term "employee" broadly. Also, small companies should be aware that their use of contingent workers can subject them to employment laws (e.g., Title VII, ADA, FMLA, COBRA) whose coverage is triggered by a minimum number of "employees." And a company that has not purchased compensation coverage for contingent workers may not be able to rely on the exclusivity provision of the workers' compensation act when sued by them for personal injuries. Assessing these risks can be difficult because the test of "common law employee" status is vague and fact-intensive.

The *Microsoft* case is only one of many recent cases which have raised concerns that contingent workers may be entitled to participate in the service recipient's health, pension, 401(k), and other employee benefit plans, despite express contractual understandings that they would not participate.

The Statutory Context. The starting point is two statutes — the Internal Revenue Code, 26 U.S.C. ("IRC"), and the Employee Retirement Income Security Act, 29 U.S.C. §§1001 *et seq.* ("ERISA"). The IRC prescribes certain substantive rules relating to coverage under employee plans, which include "retirement plans" (e.g., 401(k), pension, and ESOP plans) and "welfare plans" (e.g., health, disability, and group life plans). Compliance with these rules is generally a condition for various tax advantages, but is not mandatory for employers willing to

forego the tax benefits. Thus, failure to satisfy the requirements of the IRC may cost a plan its tax advantages, but generally does not make it illegal.

The best-developed IRC rules are those governing "qualification" of retirement plans. One of these, the "minimum coverage" rule of IRC §410(a), is replicated in ERISA, 29 U.S.C. § 1052(a). The rule states that a qualified plan cannot exclude workers on account of age if they are over age 21, or on account of time of service if they have worked at least one 1000-hour year. The IRS holds that this rule — which is made subject to IRS interpretation by 29 U.S.C. § 1202(c) — does not prevent a plan from "establishing [other] conditions," such as "that an employee be employed within a specified job classification." 26 C.F.R. §1.410(a)-3(d).

The IRC has other qualification requirements material to eligibility exclusions for contingent workers that have no analogue in ERISA. First, §401(a) makes it a condition of qualification that a retirement plan be maintained "for the exclusive benefit of ...employees and their beneficiaries." Thus, a plan that covers persons who are not employees of the plan sponsor — such as independent contractors — may fail to qualify. Second, §401(a)(4) states that a plan will not qualify if it discriminates in either contributions or benefits in favor of highly paid employees; §410(b) sets forth tests to ensure that coverage does not impermissibly favor such employees. Third, §414(n)(3) requires plans to count some leased workers as "employees" for limited purposes, such as non-discrimination testing. This rule applies to a leased worker if (1) his services are provided under an agreement between the recipient company and a "leasing organization," (2) he has worked for the recipient substantially full-time for at least a year, and (3) his work is under the recipient's primary direction or control. This rule is designed to prevent employers from discriminating in favor of highly paid employees by using leased workers to fill lower-paid positions; hence, it does not apply if leased workers constitute no more than 20% of the recipient's non-highly paid workforce and they participate in a pension plan sponsored by the leasing organization.

Nothing in the IRC requires a plan to cover any particular category of employee; for example, leased workers may be excluded as a class. IRC §414(n) does, however, include a trap for the unwary; it requires any exclusion of leased workers (as defined therein) to be explicit. Because most contingent workers, and indeed most leased workers, are not leased workers as defined in §414(n), a provision that simply excludes §414(n) leased workers may have the unintended effect of *not* excluding others.

The IRC also has eligibility rules — generally, nondiscrimination tests — for some types of welfare plans. These tests are inconsistent and do not apply to all types of welfare plans. IRC §414(n)(3) requires that leased employees be treated as employees of the recipient for purposes of most of these tests. Some of the welfare plan tax preferences are not available in any event to contingent workers who are not common law employees. This is true, for example, under health and disability plans, group life plans, and cafeteria plans.

In contrast to the IRC, ERISA prescribes mandatory

Continued on Page 3

Continued from Page 2

rules for the enforcement of employee rights under benefit plans. Although ERISA broadly preempts state laws that "relate to" employee benefit plans, it does not require employers to offer plans. If an employer elects to offer a plan, ERISA does not require that every employee be entitled to participate in it, and permits employees to be excluded by job description, location, or other classification. Although §1140 prevents employers from discriminating against employees to interfere with benefit rights, employers can generally limit plan eligibility in any way that does not violate some statutory rule. Whether a worker is an "employee" within a covered classification is decided under common law agency principles.

Since ERISA requires plans to be written, an employer's intent to exclude contingent workers may not be enforceable unless it is in the written plan. Further, because ERISA requires the administrator to give plan participants a summary plan description ("SPD") of their rights under the plan, some courts have allowed coverage claims to go forward based on the worker's reliance on the SPD even if the plan itself negates coverage.

ERISA also requires each plan to have a claims and review procedure, which generally must be exhausted before a court will consider a suit for plan benefits. If the suit challenges the denial of a claim based on an interpretation of an ambiguous term, and the plan gives the administrator discretion to interpret its terms (as is most often the case), the court will review the denial under a deferential "abuse of discretion" standard. If the plan does not confer discretion, the court will review the denial *de novo*, treating the plan language as though it were a contract.

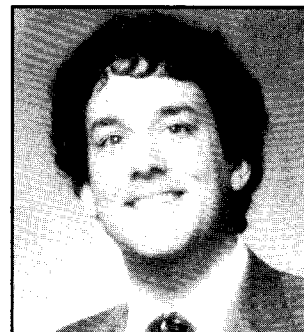
The Case Law

Standing to Sue. A preliminary question in any case in which contingent workers seek coverage under an employee benefit plan is whether they have standing to sue. ERISA authorizes suit by a "participant" to recover benefits, to enforce or clarify rights under a plan, or to sue for injunctive or other equitable relief to redress violations of ERISA or the terms of a plan. 29 U.S.C. §502(a)(1)-(3). A "participant" is "any employee...of an employer...who is or may become eligible to receive a benefit" under a plan. §1002(7). Although in the usual case, contingent workers have never been told that they are plan participants, actually know that they are not entitled to any benefits, have never received any plan benefit, enrollment form, or SPD, and have been found by the plan administrator to be excluded by plan language, a coverage claim will rarely be thrown out for want of standing. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the Supreme Court held that a plaintiff would qualify as one who "may become eligible" for benefits, and thus have standing to sue, if "he ha[s] a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." Because some courts have accepted claims that leased workers have participation rights by force of law, it has been held that leased workers have at least a "colorable claim" sufficient to establish standing. *Abraham v. Exxon Corp.*, 85 F.3d 1126 (5th Cir. 1996).

Continued on Page 6

Turning Trade Secrets into Non-Compete Agreements

ONE of the most controversial issues in trade secret law today is the use of the so-called "inevitable disclosure" theory to prevent a former employee from working for a competitor in their area of expertise. Companies urging adoption of this theory argue that an injunction prohibiting such employment — not just disclosure of trade secrets — should issue merely upon a showing of three elements: first, that the former employer and the new employer are competitors; second, that the employee's new position is comparable to his prior position or is such that the trade secrets the employee obtained in their prior employment would be very beneficial in his new position; and third, that the new employer has not taken sufficient, demonstrable steps to prevent any misappropriation from occurring. As a practical matter, this third prong often becomes the decisive issue, putting the burden on defendants to demonstrate what precise steps they have taken to ensure that no misappropriation will occur.



David J. Berger

The inevitable disclosure theory is used to obtain the benefits of a non-compete agreement (*i.e.*, prohibition against certain types of employment) without the stigma and strict scrutiny applied to such an agreement. Examples of recent cases involving the inevitable disclosure theory include AMD's efforts to stop several of its engineers from joining Hyundai Electronics, and Proctor & Gamble's effort to prevent its vice president for laundry and cleaning products from accepting a similar position with arch-rival Clorox. More generally, the inevitable disclosure theory has become increasingly common in negotiations with departing employees, and an important weapon in the arsenal of a company trying to prevent its former employees from joining a competitor.

The theory has caused particular concern among companies and employees in Silicon Valley and other similar areas containing large concentrations of highly skilled, mobile employees. Often employees in these areas obtain a large amount of general technical knowledge in their positions. Such knowledge can be difficult to distinguish from legitimate trade secrets, particularly for those not skilled in the particular technology or field. Yet the diffusion of this general technical knowledge has been recognized by scholars as an important factor in the economic success of Silicon Valley and other such areas. If legitimized by the courts, the inevitable disclosure theory could significantly impede the spread of general technical knowledge that occurs when employees leave one company for another and that forms the backbone for economic growth.

Continued on Page 4

Turning Trade Secrets

The inevitable disclosure theory was developed in the early 1980s in two Fifth Circuit cases. See *FMC Corp. v. Varco International, Inc.*, 677 F.2d 500 (5th Cir. 1982); *Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186 (5th Cir. 1984). Yet the theory was not included in the Uniform Trade Secrets Act ("UTSA"), and declined in popularity as the UTSA was adopted by most states. For example, in one of the first inevitable disclosure cases decided under the UTSA, a district court in Minnesota denied plaintiff's motion for injunctive relief based upon inevitable disclosure, holding that "in the absence of a covenant not to compete or a finding of actual [disclosure] or an intent to disclose trade secrets, employees may pursue their chosen field of endeavor in direct competition with their prior employer." *IBM Corp. v. Seagate Technology, Inc.*, Civ. 3-91-0360, slip op. at 7 (D.Minn. April 21, 1992). The court further recognized the potential unfairness of the inevitable disclosure doctrine, stating that "a claim of trade secret misappropriation should not act as an *ex post facto* covenant not to compete." *Id.*

However, a recent Seventh Circuit decision, *Pepsico, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995), may have breathed new life into the theory. In *Pepsico*, the Seventh Circuit affirmed a preliminary injunction preventing the defendant, a general manager of Pepsico's new age and sports drinks (*i.e.*, non-cola drinks), from accepting a similar position with Quaker Oats' Gatorade division. The court held that Illinois' UTSA permits a plaintiff to "prove a claim of trade secret misappropriation by demonstrating that defendant's new employment will inevitably lead him to rely on plaintiff's trade secrets." *Id.* at 1269. The court found that "unless Redmond possessed an uncanny ability to compartmentalize information, he would necessarily be making decisions about Gatorade and Snapple by relying on his knowledge of [Pepsico's] trade secrets." *Id.* The court coupled this finding with its disbelief, based on Redmond's and Quaker's lack of candor, that Redmond would keep his promise not to disclose Pepsico's secrets (and that Quaker would ensure no Pepsico secrets were used). An essential element of the court's ruling was its finding that plaintiff had shown "proof of [defendants'] willingness to misuse" Pepsico's secrets. *Id.* at 1270-71.

Two recent decisions from district courts in North Carolina split on the viability of Pepsico and the inevitable disclosure theory. The *Pepsico* decision and its rationale was rejected by the court in *FMC Corp. v. Cyprus Foote Mineral Co.*, 899 F. Supp. 1477 (W.D.N.C. 1995), where the court denied a preliminary injunction motion based upon an inevitable disclosure claim. The *FMC* case is the more common type of trade secret case seen in Silicon Valley, as the individual defendant was an engineer with specialized technical skills, who left the leading technology company in his field after 14 years to join a competitor alleged to have inferior technology. *Id.* at 1479-81. In denying plaintiff's motion for injunctive relief, the court recognized the danger of the inevitable disclosure theory, noting that "if the doctrine is applied as urged by FMC, then no employee could ever work for its former employer's competitor on the theory that disclosure of confiden-

tial information is inevitable." *Id.* at 1482.

The court rejected one of the most popular arguments by proponents of inevitable disclosure: that the individual's technical expertise gained at the prior employer is based on that employer's trade secrets, and therefore is not part of the general skills, knowledge and expertise an employee can take to a new employer. The court ruled that the defendant:

has a great deal of general skill and knowledge as an engineer who has worked for 14 years in the area of lithium production. That experience and his skills are "general" not in the sense that everyone has them, but rather in the sense that they are not specific to the techniques and processes utilized by [plaintiff]. [Defendant] is free to sell those skills in the marketplace. The mere fact that [defendant] acquired some of those skills working for [plaintiff] does not mean that he must work for [plaintiff] or not work at all.

Id.

More recently, in *Merck & Co. Inc. v. Lyon*, 941 F.Supp. 1443 (M.D.N.C. 1996) the court further explained *Pepsico* and *FMC Corp.* in granting a narrow injunction against disclosure rather than employment. The individual at issue in *Merck* was Gary Lyon, who had been responsible for marketing Merck's Pepcid AC. After joining Glaxo as Director of Global Marketing, Lyon was responsible for marketing Glaxo's Zantac 75, the top selling prescription drug in the world and a major competitor for Pepcid AC. *Id.* at 1447-49. Plaintiff claimed that, as a result of his work for Merck, Lyon had "consumer insights," "professional insights" and other information which made it "inevitable" that he would disclose Merck's alleged secrets if he worked for Glaxo.

The court initially found that a plaintiff could maintain a "claim of trade secret misappropriation by demonstrating that defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets." *Id.* at 1457 (*citing Pepsico*, 54 F.3d at 1269). However, the court further held that, under the inevitable disclosure theory, an injunction prohibiting employment cannot issue absent "some showing of bad faith, underhanded dealing, or employment by an entity so plainly lacking comparable technology that misappropriation can be inferred." *Id.* at 1458-59 (*citing FMC*, 899 F.Supp. at 1483). The *Merck* court, while finding the existence of trade secrets and their risk of disclosure, did not find significant bad faith or underhanded dealing by defendants.

Accordingly, the court sought to balance these competing interests by enjoining only the disclosure of secrets, not employment. See *Id.* at 1462; 1464-65. The court further required that plaintiff identify in detail the alleged secrets prior to the issuance of any injunction, noting that "[w]here the alleged trade secrets were only broadly defined, plaintiffs must rely on their confidentiality agreement...." *Id.* at 1462.

The First Circuit rejected the inevitable disclosure theory in *Campbell Soup Company v. Giles*, 47 F.3d 467 (1st Cir. 1995), a case quite similar factually to *Pepsico*. In *Giles*, defendant was a New England regional sales manager for Campbell Soup, who left to take a similar job for the maker of Progresso soups. As in *Pepsico*, the plaintiff argued that the defendant would "inevitably disclose"

Continued from Page 4

plaintiff's secret marketing and strategic plans as he made similar decisions in his new job.

The district court in *Giles* rejected the inevitable disclosure doctrine, holding that public policy "counsels against unilateral conversion of non-disclosure agreements into non-competitive agreements. If Campbell wanted to protect itself against competition from former employees, it should have done so by contract. This court will not afford such protection after the fact..." The First Circuit affirmed this ruling, holding that Giles was "unlikely to use or disclose" plaintiff's secrets merely because he held a similar job with a competitor.

The opinions in *Giles* and *FMC* appear to be more soundly based upon the UTSA and traditional legal principles than *Pepsico*, while the more balanced opinion in *Merck* attempts to modify the extreme views of the *Pepsico* court. For example, proponents of inevitable disclosure argue that the UTSA's allowance of an injunction against "threatened misappropriation" allows an injunction based on inevitable disclosure. Yet inevitable disclosure and threatened misappropriation are not the same. Threatened misappropriation typically requires a plaintiff in a trade secret case to show some indicia of bad faith or intent to disclose. In contrast, inevitable disclosure merely requires a showing of similar positions and lack of adequate safeguards, without any showing of intent.

More generally, inevitable disclosure runs contrary to established standards for a preliminary injunction. Specifically, a party seeking a preliminary injunction traditionally bears the burden of showing a likelihood of success on the merits — *i.e.*, that the defendant is going to disclose trade secrets. In contrast, the inevitable disclosure theory places the burden on the defendant to show (according to the Seventh Circuit) "an uncanny ability to compartmentalize information." *Pepsico*, 54 F.3d at 1269. It is not clear that this burden can ever be met. Further, even trying to determine how to make such a showing demonstrates the problem with the theory: it transforms the case from the real world (what are the alleged secrets and what is the evidence of actual or threatened misappropriation) to the metaphysical (what information can an individual "compartmentalize").

Two California statutes make the inevitable disclosure particularly inappropriate under this state's version of the UTSA. First, Cal. Bus. & Prof. Code § 16600 broadly prohibits covenants not to compete. Specifically, this section provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." This provision demonstrates the California legislature's strong policy statement that an employee should not be prohibited from taking a job with a competitor, irrespective of whether this job is identical to the prior position.

Second, and equally significant, Cal. Civ. Proc. Code § 2019 (d) requires specific identification of any alleged trade secrets by the plaintiff prior to any discovery (or relief) being available for a claim alleging trade secret misappropriation. This procedural requirement can eliminate the possibility of any "inevitable disclosure" injunction because, once the secrets are identified, an injunction against employment would appear to be overbroad. Instead, assuming an injunction is appropriate, the relief

should be limited to an injunction prohibiting disclosure of the specified secrets. The inevitable disclosure theory appears to be contrary to the clear expression of the California legislature in favor of employee mobility. Section 2019 (d) contemplates that the required disclosure will allow courts to separate the actual secrets from that information which constitutes a skilled employee's general knowledge. Thereafter, (assuming an injunction prohibiting disclosure has already been issued) the determination of whether the job can be performed without disclosure of the alleged secrets should be made by defendants, knowing that an incorrect decision is punishable by contempt. This appears to be consistent with the type of relief entered by the *Merck* court.

The expanded use of the inevitable disclosure theory is likely to continue, despite the general reluctance of courts to transform, in effect, an employee's agreement not to disclose trade secrets into a covenant not to compete. The theory's adoption by the Seventh Circuit will only increase its popularity among employers looking to prevent a valued employee from using his or her skills for a competitor. Regardless of the applicability of the inevitable disclosure theory, however, there are several steps that the first employer and departing employee can take to ensure that trade secrets will not be misused. Important actions include the following:

Understand The Information Claimed To Be Secret. In many trade secret cases, a principal issue is whether particular information qualifies as a trade secret. This is particularly true with technical employees, who have obtained knowledge about, for example, general engineering principles as well as the applicability of those principles to specific issues. Such disputes are best resolved prior to an employee's departure, when the employer can tell the employee what information the employer considers confidential and provide specific examples of alleged secrets. General confidentiality agreements, in which an employee is reminded, in essence, that everything learned on the job is confidential, are not adequate. While some employers may find this effort burdensome, it is worth remembering that, as described above, Cal. Civ. Proc. Code § 2019(d) requires specific identification by the plaintiff of the claimed trade secrets before any discovery (or relief) is available. Better to provide the information to the employee before litigation begins and try to avoid the litigation entirely.

Leave All Documents Behind. An employee leaving one company to join a competitor (or to start his or her own company) should not take any documents from his prior employer. A central issue in any trade secret dispute, especially one involving a claim of inevitable disclosure, is whether the employee and new employer appear likely to misuse the plaintiff's trade secrets. A finding that the employee took confidential documents to the new employer can be a significant indication of an intent to misappropriate the prior employer's trade secrets, even if the documents do not reveal specific secrets or techniques. For example, scientific or technical journals with notations in them can be used as evidence that an employee was trying to make notes of particular secrets. Because of the significance that courts give this issue, it is

Continued on Page 6

Continued from Page 5

Turning Trade Secrets

advisable to leave behind all but the most innocuous souvenirs.

Maintain Current Confidentiality Agreements. Most employees joining a new company are asked to sign a confidentiality agreement promising not to disclose the new employer's confidential information, as well as any confidential information of a prior employer. In sensitive situations, it may be advisable to bring in counsel to advise new employees of their confidentiality obligations and ensure that no misappropriation will occur. This is another area where the proverbial ounce of prevention is worth a pound of cure.

Intellectual property is often the lifeblood of a high technology company. Employees generally understand the importance of such information and usually do not want to risk their careers by disclosing valuable, proprietary information to a competitor and/or new employer. Establishing sound policies at the beginning — and end — of the employment relationship can result in a substantial lessening of the risk of dispute between the employer and the departing employee.

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Continued from Page 3

Temporary and Contract Workers

Efficacy of Contracts Assigning Non-Employee Status. The earliest cases considering contingent workers' rights to ERISA plan benefits focused on the effect of employment contract provisions assigning non-employee status to particular employees. Because it was assumed that coverage would turn on whether or not the workers were employees of the plan sponsor, little weight was placed on actual plan language. In one case, plaintiff was denied a pension for lack of sufficient service because she had worked as a part-time independent contractor during her first year of service with the employer. Despite a written contract establishing that status, the court ruled that the plan administrator abused its discretion in denying her pension claim because she had been an employee as a matter of law. *Holt v. Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987). Similarly, in *Professional & Executive Leasing, Inc. v. Commissioner*, 862 F.2d 751 (9th Cir. 1988), the Ninth Circuit refused to give effect to contractual provisions that purported to establish the "employee" status of professionals. PEL leased executives, professionals, and other highly paid workers to recipient businesses in which the workers had pre-existing equity or ownership interests. Finding that the professionals were not in any real sense common law employees of PEL, and that PEL did not maintain even the minimal degree of "control" over them that would satisfy the reduced standard applicable to professionals, the court held that the plan did not qualify because it included non-employees and, therefore, was not maintained for the exclusive benefit of employees as required by IRC §401. The obvious purpose of the arrangement was to discriminate against non-highly paid employees of the recipient businesses, who could not participate in PEL's plan.

Impact of the IRC Coverage Rules. A second, more recent, group of cases has considered whether an employer's decision to comply with the IRC tax qualification rules summarized above imposes any mandatory requirements on coverage of contingent workers. As explained previously, the IRC rules do not announce substantive legal requirements, but only standards that must be met for a plan to qualify for tax benefits. Courts have differed on whether the employee has the right to require the employer to comply with IRC rules which, if violated, would disqualify the plan, contrary to the employer's intent.

The leading case in this area is *Abraham v. Exxon Corp.*, 85 F.3d 1126 (5th Cir. 1996), upholding Exxon's practice of excluding leased (or "special agreement") workers from its pension plan. Although these workers appeared to be common law employees indistinguishable from Exxon employees except in the way they were payrolled, Exxon's pension plan specifically excluded leased and special arrangement workers in order to reduce Exxon's benefits costs. The court first held that ERISA §1052(a) does not prevent exclusion of common law employees "on a basis other than age or length of service." The court then held that, even if the exclusion operated to discriminate in favor of highly paid employees in violation of IRC rules, those rules "do no more than determine whether a plan is a qualified tax plan." An IRC

Continued on Page 8

BARRY P. GOODE

On ENVIRONMENTAL LAW

The Song of the Dodo

IT is an important perspective.

He writes:

There are extinctions, and then again there are extinctions.

Inevitably every once in a while a single species passes quietly into oblivion. At other and much rarer times, large groups of species...disappear suddenly in a great catastrophic wipeout.

[These mass extinctions occurred] at the end of the Ordovician, in the late Devonian, at the end of the Permian, at the end of the Triassic [and] at the end of the Cretaceous.

We're experiencing one now.

"He" is David Quammen. The quote is an amalgam of sentences taken from an essay he published in 1981 ("The Big Goodbye: Who Will Survive the Late Quaternary Extinction") and his new book, which you must read: *The Song of the Dodo; Island Biogeography in an Age of Extinctions* (Scribner 1996).

Quammen has given the subject much thought in the last fifteen years. Now, he treats us to his mastery of evolution and extinction in a book that is part intellectual history, part science, part travelogue, part animal stories, part mystery (was it murder?) and part just good, playful writing.

The framework of the book is simple. Quammen starts with (who else?) Charles Darwin and Alfred Russel Wallace. He traces the development of their thinking, from early field trips and preliminary hypotheses, through the race to publish the theory of the origin of species, and beyond.

From there, Quammen moves nimbly through the nineteenth and twentieth centuries, explaining the factors that lead to the formation of new species. But there is little heavy lifting. Quammen intersperses the academic material with illustrative essays based on his own field trips. A bit like the comic relief in a Shakespeare tragedy, he takes us to Mauritius, the Amazon, Indonesia, Madagascar, Tasmania, the Gulf of California and other remote, but entertaining places.

Having shown us how species originate, he turns to a description of how they become extinct. Why? Where? What makes extinction more likely? He explores, chronologically, the discoveries and theories of the brightest ecologists of the twentieth century. He shows the evolution and extinction of ideas: how important ideas originated, spread, were built upon, reshaped, deepened and occasionally discarded. He leads the reader gently through stacks of academic material to provide an understanding of what — in 1996 — we think we know about

the subject. Respectful of the reader's intelligence, with nothing tedious, he provides more travelogues, meetings with remarkable men and women, and even plot twists; an important tale told in a compelling way.

But inexorably, he leads us to confront the deeply troubling fact that ecologists have discovered: we are in the midst of a great die-off.

The "background rate" of extinction is "the routine average rate at which species disappear. It's generally offset by the rate of speciation, the rate at which new species evolve." The "informed guess" of an eminent paleontologist is that the background level is "perhaps a few species per million years for most kinds of organisms."

According to respected ecologists the current rate of extinction is between 100 and 1000 times the background level. There is no evidence of a corresponding change in the rate of speciation. Hence, "the late Quaternary extinction" of today.

The Cretaceous extinction may have been caused by a meteorite. But contemporary extinctions are caused, in significant part, by humans. Indeed, much of *The Song of the Dodo* deals with our increasing encroachment on wilderness areas — until what remains are patches of habitat too small to continue to support certain species.

(After you read *The Song of the Dodo*, pick up *Savages*, by Joe Kane. His narrative of one industry's impact on indigenous homo sapiens in a corner of South American rainforest reverberates with Quammen's themes.)

Perhaps because humans, not meteors, are the cause of this loss, Quammen ends on a faintly hopeful note. Twice, he quotes Michael Soulé: "There are no hopeless cases, only people without hope and expensive cases."

I confess. I know Quammen. So I can tell you, I do not think his hope springs from a deep faith in attorneys. But American law does have the Endangered Species Act. It has been unfortunately cumbersome in both listing and protecting species. A recent report by the Environmental Defense Fund, *Rebuilding The Ark*, says only 10% of all listed threatened and endangered species are known to be increasing in population; at least 40% are declining.

Yet *The Song of the Dodo* may spread, beyond narrow academic circles, some important learning. If that is so, it could affect how the Endangered Species Act is interpreted and applied. Simply put, if Quammen succeeds in popularizing an understanding of these issues, his teachings could find their way into the jurisprudence of the statute.

If you are an environmental lawyer, that's your excuse for reading this book. If you practice in another area, forget the excuse; just treat yourself to a good read.



Barry P. Goode

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Continued from Page 6

Temporary and Contract Workers

violation — even if it costs a plan its favorable tax status — “does not permit a court to rewrite the plan to include additional employees.” At least two other circuits have indicated they may share the Fifth Circuit’s view. *Clark v. E.I. DuPont de Nemours & Co.*, 1997 U.S. App. LEXIS 321 (4th Cir. Jan. 9, 1997) (per curiam); *Trombetta v. Cragin Federal Bank for Sav. Employee Stock Ownership Plan*, 102 F.3d 1435 (7th Cir. 1996).

Two district courts have reached a different result. In *Renda v. Adam Meldrum & Anderson Co.*, 806 F. Supp. 1071 (W.D.N.Y. 1992), plaintiff worked in the jewelry department of defendant’s department store and sought coverage under its retirement plan. The plan administrator denied the claim because workers in that department were employed by another company, which leased the space and managed the department. The facts, however, strongly suggested that defendant was plaintiff’s employer for all purposes; moreover, the plan did not automatically exclude employees in leased departments. The court ruled for plaintiff on summary judgment, finding that she was a common law employee, that she was a “leased employee” under IRC §414(n), and that she satisfied the age and service requirements of IRC §410(a). Following *Renda*, another court has held that leased workers who meet the minimum age and service test of ERISA §1052(a) cannot be excluded from an employer’s pension plans, although they can be excluded from welfare plans. *Bronk v. Mountain States Tel. & Tel. Inc.*, 943 F.Supp. 1317 (D. Colo. 1996).

Renda and *Bronk* relied upon an earlier case, *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805 (10th Cir. 1984), in which a labor union’s secretary sought coverage in the multiemployer welfare and pension plans in which the union participated. The plans defined “covered person” as an “employee for whom payments are made...as provided by a collective bargaining agreement” or “for whom the employer is required to make contributions.” No collective bargaining agreement or other contract applied to union employees, and the union made contributions to the plans for its officers, but not for the secretary.

The Tenth Circuit held that the welfare plan administrator properly denied plaintiff’s claim for coverage, because the plan was reasonably construed to let the union decide which of its employees to cover and because “the law permits a welfare plan to discriminate against particular employees.” The court reached the opposite result with respect to the pension plan, despite its “almost identical” plan language, because the plan required its terms to be construed to meet IRC qualification rules. Since the plan would have discriminated in favor of officers and highly paid employees of the union, and hence failed to qualify, if plaintiff was excluded, the plan was construed to require the plaintiff’s inclusion thereunder. The question whether *Crouch* requires pension plan inclusion of contingent workers who are common law employees in the absence of plan language mandating that the plan be construed to satisfy the IRC’s qualification rules, is presented in a pending appeal in *Bronk*.

Ambiguous Exclusions. Finally, a pair of recent appel-

late cases suggest that ambiguous plan coverage exclusions may be narrowly construed if the court believes that the employer is creating unreasonable employment classifications. In *Epright v. Environmental Resources Mgmt., Inc. Health & Welfare Plan*, 81 F.3d 335 (3d Cir. 1996), plaintiff sought health and disability benefits under a welfare plan that covered “full-time” employees after “60 consecutive days of active, full-time employment” (defined as 30 hours of work each week) and excluded “part-time” employees. From his hire in 1992 until July 31, 1993, when he suffered a disabling off-the-job injury, plaintiff worked 40 to 65 hours a week but was designated as a “temporary” employee, a category not mentioned in the plan. The employee handbook defined “full time” employee as one who continuously worked at least 30 hours per week and was “designated” as a full time employee, but provided no guidelines for making or changing a designation. Shortly before his accident, plaintiff was told his coverage under the plan would begin on August 1, 1993. The plan administrator denied his claim because he was a “temporary employee” on the date of his injury. The Third Circuit set aside the denial as an abuse of discretion in that the plan’s definition of “full time employee” did not exclude “temporary” full time employees after the 60-day eligibility period. It criticized the argument that it should defer to the administrator’s interpretation of the “ambiguous” plan as an attempt to “rel[y] on a self-serving company practice.”

The language of the plan, and the conduct of the employer-administrator, were also critical to the Ninth Circuit in *Microsoft*, which held that “freelance” workers were entitled to participate in the company’s 401(k) plan. Microsoft supplemented its regular work force with freelancers, who resembled regular workers in most respects except that they were not paid by Microsoft’s payroll department, but by its accounts payable department, and were not eligible for employee benefits. Upon their hire, the freelancers signed contracts agreeing they were independent contractors and would be ineligible for company benefits. In the settlement of an IRS audit, however, Microsoft conceded that the freelancers should be treated as common law employees. It then offered some freelancers an opportunity to convert to regular employee status, but told the majority they could continue to work at Microsoft only through a new employee leasing agency. Plaintiffs then claimed that the former freelancers, as a class, were entitled to retroactive coverage under Microsoft’s 401(k) and other employee benefit plans.

The plans’ administrator (a Microsoft officer) denied the claims, in part based on the contracts, but in part because plaintiffs were not “regular, full time employees” in approved headcount positions” as required by the plans. The 401(k) plan, however, did not have that requirement, but covered “any common-law employee...who is on the United States payroll of the employer.” During the ensuing court proceeding, Microsoft changed the basis for denial under the 401(k) plan, arguing that plaintiffs were excluded because they were paid not through its United States payroll department, but through its accounts payable department (or, later, through the new temporary agency).

Continued on Page 10

CHARLES R. RICE

On SECURITIES

IT'S too early to tell whether the Private Securities Litigation Reform Act, enacted in December 1995, will substantially reduce the total volume and expense of securities litigation. It's clear, however, that the Law of Unintended Consequences is still in effect.

There were fewer *federal* securities cases filed in 1996 than in 1995. But one study found that the same number of federal cases were filed between April and October 1996 as were filed during the comparable period in 1995. Most of the total decline from 1995 to 1996 may simply be due to fewer filings in *early* 1996, caused by plaintiffs' lawyers waiting somewhat longer to file suit so they could gather evidence to meet the Reform Act's stricter pleading requirements.

In addition, the bullish stock market, rather than the Reform Act, may be primarily responsible for any drop in securities litigation last year. A bear market, especially if technology stocks drop sharply, could lead to many more complaints being filed.

State Court Cases. Since the Reform Act was passed, there has been a dramatic increase in filings in state courts under California's securities statutes. In many cases, plaintiff firms have filed in *both* state and federal court.

The Reform Act does not preempt state securities laws, but parallel filings in state court do seem to undercut the federal reforms. Defense attorneys particularly object to plaintiffs conducting immediate discovery in state court when, under the Reform Act, discovery is initially stayed in federal court until motions to dismiss are resolved. Defense efforts to stay such state court discovery, however, have met with only limited success.

The viability of this state court strategy will ultimately depend on how the courts decide a number of key issues. For example, the state and federal courts will have to decide whether one forum's proceedings should be stayed and, if so, which one. Moreover, since there is little case law on the California securities statutes, there are many open questions, including whether these statutes protect non-California investors, whether defendants must have been trading stock when the alleged misrepresentations were made and what level of *scienter* is required.

Scienter. The Reform Act requires a complaint to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). District courts in California have differed about what this means, and no circuit court has reached the issue.

One court in the Central District of California has adopted the pre-Reform Act test of the Second Circuit, which requires allegations of (1) a motive and opportunity to commit fraud; or (2) strong circumstantial evidence of conscious behavior or recklessness. *Marksman Partners,*

L.P. v. Chantal Pharmaceutical, 927 F. Supp. 1297, 1309-12 (C.D. Cal. 1996). Allegedly "unusual" insider trading during the class period satisfied this test. *Id.* at 1312.

By contrast, Judge Smith in the Northern District has held that Congress did not intend to codify the Second Circuit standards of motive, opportunity and recklessness and that plaintiffs must allege facts creating "a strong inference of knowing misrepresentation." *In re Silicon Graphics Inc.*, 1996 U.S. Dist. LEXIS 16989 at *16 & *21 (N.D. Cal. 1996). Defendants' "relatively small" stock sales, which were "generally consistent in amount with sales made in previous quarters," were not sufficient to create such an inference. *Id.* at *37. Under this test, plaintiffs will find it harder to get past the pleadings stage and force defendants to undergo costly discovery.

Lead Plaintiffs. Reform advocates tried to reduce the power of "entrepreneurial" plaintiff firms, like Milberg Weiss, to file suits that were not necessarily in investors' best interests. The Reform Act also tried to end the "race to the courthouse" by plaintiff firms, which allegedly resulted in complaints being filed too quickly, without adequate investigation, because the quickest firm would be first in line for lead counsel.

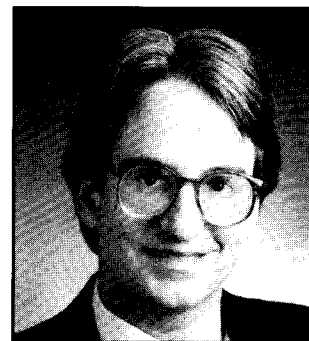
The Reform Act establishes procedures for selecting "lead plaintiffs" that presumptively favor investors with the largest financial stake in the litigation. Reform advocates hoped that institutional and other large investors would become "lead plaintiffs" and exercise a moderating influence. Such investors have not rushed to do so, however, apparently discouraged by the risk of opening their investment decisions to discovery and alienating the companies in which they invest.

Ironically, the Reform Act has actually increased the market share of Milberg Weiss according to a recent study by two Stanford law professors. Now that the competition for "lead plaintiff" focuses on the size of the named plaintiffs' investments, Milberg Weiss has a new advantage because its size and high-profile attract more and larger investors as potential "lead plaintiffs."

The Reform Act may also discourage the pre-enactment practice of some courts to require competitive bidding between plaintiff firms. Under the Reform Act, the selected "lead plaintiffs" can choose their own counsel "subject to court approval." Although this provision may give a court sufficient discretion to require competitive bidding, such bidding may conflict with the Reform Act policy that the "lead plaintiffs" chosen for their stake in the outcome should control the litigation.

The last, but not least, unintended consequence of the Reform Act is the increased work for securities lawyers. We will keep busy litigating both the provisions of the Reform Act and the long-neglected state securities laws.

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Charles R. Rice



Temporary and Contract Workers

The Ninth Circuit set aside the denial. First, it held that, although the plan conferred discretion on the administrator to construe its terms, the new basis for denial was not entitled to deference because the administrator had not construed the language in question when it denied plaintiffs' claims. Next, it ruled that the phrase "on the U.S. payroll of the employer" was ambiguous, since it could be read to require coverage of either all employees paid by Microsoft from its U.S. accounts, or those employees paid by Microsoft's U.S. payroll department. The court then looked to extrinsic evidence to resolve the ambiguity, but found it inconclusive. Although Microsoft's contracts with the freelancers stated that they would not receive employee benefits, those contracts reflected only the parties' erroneous conclusion that the freelancers were independent contractors. Microsoft also argued that the plan had to be read to exclude the contingent workers because IRC-required 401(k) plan tests could only be made through its payroll department, but the court found it irrelevant that Microsoft might have fouled up its testing by erroneous payroll practices. To resolve the ambiguity in plan language, the court invoked the doctrine of *contra proferentum*, and read the plan against the interest of the drafter, Microsoft.

Microsoft can be read as a narrow decision. The plan's exclusion of contingent workers was ambiguous; moreover, Microsoft's denial decision was based upon a finding of common law employee status — a basis that could readily be challenged, and which Microsoft itself dropped during the lawsuit. Further, instead of having the administrator reconsider the denial, Microsoft asserted its own interpretation of the plan in the course of the litigation, inviting *de novo* review. And the argument that the plan should be read to exclude freelancers because of testing problems was undermined by the fact the freelancers had been payrolled internally (and not by an outside leasing agency) and, thus, Microsoft had all the necessary data. Nonetheless, the parties had indisputably intended freelancers not to be covered, and Microsoft's reading of the plan was fully consistent with that intent. Apparently because it viewed Microsoft's behavior as too self-serving, the Ninth Circuit found a way to give plaintiffs benefits to which they were not entitled.

Observations

Suits — including class actions — over contingent workers' benefit plan coverage are becoming common. Such actions can be enticing to plaintiffs' lawyers in that (i) the liability issues will turn upon the application of law to written instruments and, hence, may not require substantial effort; and (ii) success at the liability stage will usually lead to an attorneys' fee award under ERISA, and produce a substantial "common fund" recovery to support a large contingency fee. To minimize exposure to bad outcomes in this tricky and unsettled area, employers should consider the following prophylactic actions:

- Do not presume that courts will respect contract language defining who is an "employee," or that plan language limiting coverage to "employees" will effectively exclude contingent workers of any type. Some courts

view "employee" as a legal term and will grant scant deference to an administrator's understanding of the term (even if the plan confers discretion). In addition, some courts are suspicious of the fiduciary's motivation in exercising discretion, especially if (as is often the case) the employer or one or more officers is the plan administrator. Plans should exclude categories of workers not to be covered with as much specificity as possible.

- It is not clear how the courts will evaluate exclusions that are implicit rather than explicit. For example, a plan limiting coverage to "regular" employees as reflected in the employer's payroll system would be more specific than the plan in *Vizcaino* but less specific than the one in *Abraham*. It is preferable to include a list of excluded categories in the plan.

- A plan should not exclude leased workers solely by reference to those defined in IRC §414(n), since the employer's intended exclusion of leased workers may apply to independent contractors and other contingent workers who are not within that narrow group.

- Language creating rights for employees beyond those stated in ERISA — such as a provision that a plan be administered to comply with all IRC rules, to ensure tax qualification, or to treat employees in a uniform, nondiscriminatory manner — should be avoided.

- A contingent worker exclusion may be easier to defend if the excluded group is payrolled by persons other than the service recipient and the recipient does not set their salaries. In almost every case, the administrator of a benefit plan needs access to compensation data (e.g., to measure pay-related deductibles and benefit limits, determine the employer contribution, calculate benefits, or perform IRC nondiscrimination tests). If the service recipient does not pay contingent workers or set their salary, its plan administrator cannot readily access the needed data. Despite *Microsoft*, courts may be willing to find that a plan is intended to exclude contingent workers where their inclusion would make the plan inadministrable due to a lack of compensation data.

- It is vital that a strong administrative record support the claim denial. This should include reference to plan language and the practical difficulties if contingent workers were included. Decision makers who are closely aligned with the employer may consider avoiding an appearance of conflict of interest by getting advice from counsel or engaging an independent fiduciary.

- The case law has not confronted the most costly part of contingent worker litigation — identifying the class members over the relevant time period, deciding whether they worked enough to be eligible, and measuring damages. This can be a daunting challenge for a large employer with decentralized hiring practices. Plaintiffs' counsel, if previously successful on the merits on partial summary judgment, may have little interest in expediting the process. Hence, an employer whose plan language is not helpful should consider early settlement to avoid incurring such costs.

Contingent worker exclusion cases are the latest wave of ERISA-related class litigation. By careful planning, employers can minimize the risk that such litigation will be filed, and the risk of adverse results if it is.

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MARY E. MCCUTCHEON

On INSURANCE

STANDARD general liability policies may not be quite so "standard" when it comes to personal injury and advertising injury definitions. Seemingly insignificant variations in these definitions can be critical in determining an insurer's defense obligations for an intellectual property claim.

Personal injury and advertising injury coverages are defined to include certain "offenses." Many policies list "libel" and "slander" among the covered offenses. Some policies list vaguer terms such as "belittling" or "disparagement" in place of or in addition to "libel" and "slander," suggesting that statements which ultimately might not constitute libel or slander still fall within the scope of coverage. And some policies extend coverage to injury to "a person's or organization's goods, products or services" — implying that trade libel or similar torts are insured.

As intellectual property claims are generally brought by competitors, odds are that somebody is saying nasty things about somebody else. Coverage does not depend on whether a specific cause of action for libel, slander, disparagement or even trade libel is explicitly alleged; it merely requires that factual allegations raise the potential for a covered offense. And because coverage for these offenses is included in "personal injury" (which does not require advertising), the duty to defend can arise even if the allegations are wholly unrelated to the insured's "advertising activities."

Traditionally, "advertising injury" included coverage for the offenses of "piracy" and "unfair competition." Because these terms could easily extend to almost any competitive business injury, insurers have replaced them with coverage for "misappropriation of advertising ideas or style of doing business" or "unauthorized taking of advertising ideas or style of doing business." This revision, however, may not have had the limiting effect intended by insurers. According to *Lebas Fashion Imports of USA v. IIT Hartford Ins. Group* (1996) 50 Cal.App.4th 548, this coverage extends to a variety of claims, including trademark infringement and misappropriation of product styles, sales techniques and trade names. This coverage need not be limited to advertising business, but can encompass the manner in which a business is conducted. *Sentex Systems, Inc. v. Hartford Acc. & Indem. Co.* (C.D. Cal. 1995) 882 F.Supp. 930, *aff'd* (9th Cir. 1996) 93 F.3d 578.

In some policies, the covered offense of "infringement of copyright, title or slogan" has been narrowed to "infringement of copyrighted advertising materials, titles or slogans." Where it hasn't, courts have found that "infringement of title" is not necessarily limited to the copyright context, but can extend to the alleged infringement of either a business name or property. *Sentex Systems*, 882 F.Supp. at 944.

A few policies still contain coverage for "unfair competition." *American Cyanamid Co. v. American Home Ass. Co.* (1994) 30 Cal.App.4th 969, 976, n.3, recognized that, in *Bank of the West v. Superior Court* (1992) 2 Cal.4th

1254, the Supreme Court in fact did not rule that this coverage is narrowly limited to the common law tort, but left open the question of "whether it extends to other anti-competitive business practices as long as damages are available."

The definition (or lack thereof) of "advertising activity" must also be examined. Especially when the term is undefined, it can encompass a range of activities which are not considered "ads," such as individual sales solicitations or trade show presentations. See *New Hampshire Ins. Co. v. R. L. Chaides Construction Co.* (N.D. Cal. 1994) 847 F.Supp. 1452 ("advertising activity" "must be examined in the context of the overall universe of customers to whom a communication may be addressed").

Often the most difficult issue to overcome is whether the offense occurs "in the course of" the insured's advertising activities. According to *Bank of the West*, 2 Cal.4th at 1276, the offense must have some "causal connection" with the insured's advertising. Recent Ninth Circuit decisions have stated that "...the injury for which coverage is sought must be caused by the advertising itself." See *Microtec Research, Inc. v. Nationwide Mutual Ins.* (9th Cir. 1994) 40 F.3d 968, 971.

Lebas did not address this issue; the infringing trademark itself constituted the advertising. *Sentex* struck a middle ground by noting that advertising activities need not be the only cause of the injury, and that the insured need not conclusively establish causation at the duty to defend stage. The insured's use of plaintiff's trade secrets, including customer lists, marketing techniques and bidding procedures, to advertise the insured's products and to solicit new businesses from the plaintiff's customers was sufficient to establish that the plaintiff was injured as a result of the insured's advertising activities.

Surprisingly, some insurers actually include "patent infringement" as a covered offense. While the insurer may argue that patent infringement does not occur "in the course of" the advertising, it will be hard-pressed to demonstrate that it consequently provided illusory coverage.

Finally, the fact that these definitions have evolved over the years may warrant a review of earlier policies. Unlike occurrence-based coverage, which depends upon when the *injury* takes place, offense-based coverage requires that the *wrongful conduct* which gives rise to the injury take place during the policy period. In *American Cyanamid*, the court found that policies in place when the allegedly anti-competitive conduct commenced provided coverage even though the plaintiff-competitor was not even in existence (and therefore, could not have suffered damage) at the time.

The arguments for coverage for intellectual property claims can be extremely technical, and most certainly will be met with vigorous resistance from the carriers. Creativity and tenacity, however, may overcome that resistance and give the insured some defense costs relief as it battles a significant piece of litigation.



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Continued from Page 1

Letter from the President

cent of criminal cases results in a jury trial.) Although not quite as dramatic, similar constraints attributed to three-strikes, asbestos cases, etc., have recently been reported in California's state courts. The resulting cycle is obviously vicious. Fewer trials result in less experienced lawyers in trial (not to mention fewer experienced trial lawyers), which results in longer, sloppier trials which, in turn, consume increasing amounts of precious judicial courtroom time.

This gradual strangulation of access to judgment or verdicts has led to the consideration and adoption of several well-publicized efforts to provide solutions. Among the best known are:

Alternate Dispute Resolution

ADR is clearly the appellate courts' favored option to reduce congestion in trial courts in California. Allowing those who can afford it, or who have the leverage to insist on it, to push dispute resolution out of the courtroom (and away from the jury) is clearly a wave of the present. From a trial lawyer's perspective, this is not all bad, as it provides opportunities similar to a bench trial in which to practice and improve one's skills. But, as our program on February 18 has shown, the perceived advantages of mediation and arbitration can be deceptive. As the Supreme Court made clear in *Moncharsh*, the concept of arbitration rests on the principle that the parties have expressly agreed to trade the perceived benefits of speed and efficiency for the ultimate uncertainty of rough justice and absence of appellate review. To the extent that the trial lawyer's skill rests, in part, on making or preserving a record in the expectation that there ultimately will be a cure for legal error or tribunal arbitrariness, those skills are wasted in arbitration.

Business Courts

Another alternative suggested from time to time is the creation of special divisions of business courts within the superior courts of counties where the need would appear to justify specialization. Rejected once in Los Angeles, business courts are again being studied by the Judicial Council. The creation of business courts, however, is simply a variant of the idea of creating more courts generally; a suggestion that is routinely rejected as a cure for congestion.

Timed Trials

According to a recent newspaper article, timed trials, more and more common in federal court, are making their way into the state court system. The concept of time limits established at the beginning of trial, complete with running chess clocks, has been approved by the Ninth Circuit Court of Appeals. *General Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500 (9th Cir. 1995). Having personally participated in timed trials, I am a proponent. Once one gets past the outrageous idea that a judge can limit the scope of one's case to an arbitrary time limit, one sees that the limitation (like page limitations for briefs) forces the advocate to sharpen and prioritize her evidence and to streamline her presentation. The

result, once one gets the hang of it, is a better trial.

It is this last point that leads to the theme of this note, which is that a large step toward improving the problem of court congestion is a counter-cycle of better trial lawyers, using better techniques to present shorter, sharper and more convincing trials. Timed trials work toward that result by allocating fairly to all litigators limited judicial resources. Better lawyers flourish under this restraint.

The critical question is: How does one become an accomplished, experienced, efficient and convincing trial lawyer when there are so few trials? One answer to the opportunity question is a greater participation in *pro bono* activities. Given the severe cutbacks in funding for legal services programs, tens of thousands of individuals in the Bay Area face crushing litigation in the form of evictions, collection activities and family disputes without the benefit of counsel. Each of these proceedings takes up substantial court time yet wastes opportunities for attorneys to develop skills of cross-examination, persuasion, convincing legal argument and even (forgive me) settlement. Larger *pro bono* cases can be equal in complexity to patent or securities actions and require skills in presenting documents, making arcane issues comprehensible and even interesting, and making a record for appellate review. Given the depth of the need, there really is no excuse for "litigators" who go years between trials. People who want to be trial lawyers should be trying cases.

Organizations such as the ABTL can play a role in improving skills and, therefore, trial efficiency. Our programs on final argument, factual development and presentation and the use of technology in trial are just a few examples of programs that have focused on methods of getting information and persuasive arguments across to judges and juries in a more efficient manner.

Sitting through a trial conducted by an inexperienced, unfocused attorney can be quite aggravating, not only on a personal level, but in terms of waste of courtroom time, an increasingly precious asset. Trial lawyers have a responsibility to develop their skills to the point where they can make effective and efficient use of the opportunities they receive. Neither *pro bono* work nor the ABTL is a total cure, but they both are steps in the right direction.

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COMING EVENTS

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| April 8, 1997 | MCLE Dinner:
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