ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

ORANGE COUNTY

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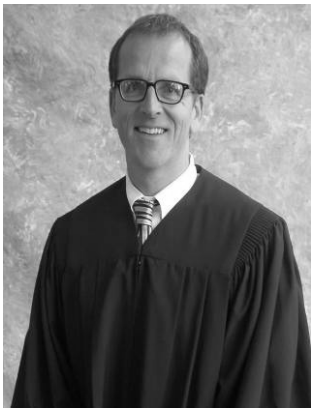
Q&A with the Hon. David A. Thompson

By Linda A. Sampson



[Editor's Note: We caught up with the Honorable David A. Thompson for this judicial interview. Judge Thompson was appointed to the bench by Governor Pete Wilson in 1997. Before taking the bench, Judge Thompson spent time as both a civil litigator with Rutan & Tucker and a transactional lawyer with Morrison & Foerster. Prior to that, he was a staff attorney for Justice Edward Wallin with the California Court of Appeal.]

Q: *Why did you decide to become a Judge?*

A: I guess you could say I had the wrong friends and relatives right from the start. When I graduated from law school, in the early 1980's, I became

-Continued on page 5-

-IN THIS ISSUE-

- **Q&A with the Hon. David Thompson ..... Pg. 1**
- **Voter Identification and Laws and *Crawford v. Marion*..... Pg. 1**
- **President's Message ..... Pg. 2**
- **New Attention on Aiding and Abetting: *Stoneridge*'s Closing the Door on Securities Fraud Claims May Have Opened a Murky Window..... Pg. 3**
- **Brown Bag Lunch Series: Breakfast with the Complex Panel..... Pg. 3**
- ***Puerto v. Superior Court*: Implications on Traditional Limitations on Discovery and Employee Privacy Under California Law ..... Pg. 4**

Voter Identification Laws and *Crawford v. Marion*

By Jay C. Gandhi and Brenna H. Kantrovitz

> **"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic are illusory if the right to vote is undermined."**
> ***Wesberry v. Sanders,* 376 U.S. 1, 17-18 (1964)**

Overview

As the 2008 presidential election looms, no time is better suited to evaluating the cornerstone of American democracy: The right to vote. The justices of the U.S. Supreme Court evidently agree. On January 9, 2008, the Court heard oral argument in the case of *Crawford v. Marion County Election Board*. How the court decides *Crawford* may determine not only how voters are required to vote for the 44th president of the United States, but also how election laws can be challenged in the future.

At the heart of Crawford are the constitutional limits on state voter identification requirements. The case is an appeal of two lower court decisions that upheld an Indiana state law requiring individuals to present government-issued photo IDs in order to vote. *Crawford* presents the Court with the task of determining whether Indiana's voter identification law

-Continued on page 10-

The President's Message
By Martha K. Gooding

Welcome to a new ABTL year. I am proud to serve as President this year and pleased to report that the Board has been hard at work planning a busy and productive year. But before giving you an idea of what's in store in the coming months, a few acknowledgements are in order.

First, on behalf of the entire ABTL membership, I thank our outgoing president, Jim Bohm, for all his contributions to the organization, not just in his extraordinary year as president but in all his years of involvement, as a Board member, officer and member of annual seminar committees. Thank you, too, to our outgoing Board and Advisory Board members – Peter Stone, John Hueston, and the Hon. Cormac Carney. We appreciate all they have done to help make ABTL a success.

Second, I look forward to working closely with the other officers this year: Vice President Richard Grabowski, Treasurer Sean O'Connor, and Secretary Darren Aitken. They are a dedicated and hard working group, and we all benefit from their energy and creativity. It is a pleasure to serve with them.

Third, I welcome our new Board and Advisory Board members: Sherry Bragg, Daniel Livingston, Jay Gandhi, the Hon. Richard M. Aronson, and the Hon. Erithe A. Smith.

And, of course, we thank you — our members — for your continued involvement and support.

Now for a look at what is ahead in the coming months:

Celebrate a Milestone: Plan to join us on Quattro de Mayo – **May 4** – to celebrate ABTL Orange County's first fabulous decade. We will mark our tenth year anniversary with an evening of Mexican themed music and food at the beautiful and historic Mission San Juan Capistrano. If you have never been to an evening event at the Mission, you are in

-Continued on page 14-

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New Attention on Aiding and Abetting: *Stoneridge*'s Closing the Door on Securities Fraud Claims May Have Opened a Murky Window

By Michele D. Johnson and Gal Dor

In the closely watched *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc*. case, 128 S. Ct. 761 (2008), the U.S. Supreme Court recently held that there is no private right of action under Section 10(b) of the 1934 Securities Exchange Act against a company's suppliers who knowingly participated in sham transactions that helped the company issue misleading public statements, but who did not themselves issue the statements. The decision appears to cut off private rights of action under the federal securities laws against anyone who helps a company defraud its investors but does not itself speak directly to those investors. A collateral effect of the decision may be to focus new attention on state law causes of action for aiding and abetting breach of fiduciary duty. In California, that focus will reveal a quagmire of conflicting authority. Earlier decisions held that liability for aiding and abetting someone else's fiduciary breach attached only to a defendant who owed an independent duty to the plaintiff. Later decisions rejected the requirement of an independent duty, as long as the aider-abettor knowingly provided substantial assistance to the fiduciary alleged to be the primary wrongdoer.

The consequences of this split of authority are far-reaching. Issues surrounding the scope of the aider-abettor's liability as joint and several or merely proportional; whether the secondary actor can be liable for silence or inaction; and the degree of relevance of the aider-abettor's own personal motive or financial gain are all influenced by whether liability must be premised on an independent duty. In Cali-

-Continued on page 15-

"Brown Bag Lunch" Series: Breakfast with the Complex Panel

By Corbett H. Williams

On Thursday, March 6, 2008, I had the privilege of joining four distinguished judges from the Complex Civil Panel of the Orange County Superior Court for a "Brown Bag Breakfast" sponsored by the ABTL. In attendance were the Honorable Gail A. Andler, Ronald L. Bauer, Stephen J. Sundvold, and Complex Panel Supervising Judge David C. Velasquez. Judge Andler hosted the event, which was held in her courtroom at the Civil Complex Center, a 36,000 square foot, five-courtroom facility designed especially for complex civil litigation and the first of its kind in Southern California. Cases heard by the Panel have been designated "complex" because they require the exceptional judicial management these judges are able to provide. Typical complex cases include class actions, other multiparty cases, and cases involving particularly difficult or novel legal issues. The Complex Division benefits Orange County's courts by relieving busy civil dockets of overly complex matters, thus controlling costs and promoting effective decision making by the court, the parties and counsel.

When we arrived, Judge Andler welcomed us into her courtroom's jury deliberation room where we had an opportunity to meet each of the judges in attendance and enjoyed coffee and a light breakfast. We then gathered around the counsel tables in her courtroom for conversation with the four judges. Judge Velasquez welcomed us and explained that the Complex Division has a particularly strong commitment to technology and already employs electronic filing for the convenience of parties and counsel. The Complex Center courtrooms also provide document presentation systems that allow the judge, jury and counsel to view the same document simultaneously. "Plug and play" features also allow coun-

-Continued on page 9-

Puerto v. Superior Court – Implications on Traditional Limitations on Discovery and Employee Privacy Under California Law

By Sean A. O'Brien and Mark E. Earnest

The recent California appellate decision in *Puerto v. Superior Court* (2007) 158 Cal.App.4th 1242 raises interesting issues that may ultimately have a broad impact on employee privacy and traditional parameters governing the discovery and deposition of party-affiliated witnesses, such as employees. The holding in *Puerto* – when providing names of percipient witnesses in response to written discovery (usually pursuant to Form Interrogatory No. 12.1 or a special interrogatory), a party must also provide contact information – seems facially rational, but as applied to the specific facts of the case, is entirely out of place. The two main problems are that the defendant in *Puerto* was a business entity providing names of its *current employees* who (1) generally cannot be directly contacted by opposing counsel once litigation has commenced, and (2) have reasonable expectations of privacy as to protection of their contact information.

The Facts of *Puerto*

Puerto involved an action against Wild Oats Markets grocery chain wherein eight former employees sued Wild Oats for wage and hour violations. Significantly, the case was not brought as a class action. During discovery, each plaintiff served written discovery on Wild Oats that included Judicial Council Form Interrogatory No. 12.1, which requested that Wild Oats state the name, address and telephone of each individual who is a percipient witness. 158 Cal.App.4th at 1246.

Wild Oats, through its counsel, initially responded by setting forth blanket objections, including an objection based upon "the right of privacy of third-party non-litigants" pursuant to the California Constitution. When later pressed by plaintiffs to further supplement these deficient responses, Wild Oats decided to get cute. In each of the supplemental responses Wild Oats disclosed somewhere between 2600 and 3000 names, all of which represented persons who worked at Wild Oats stores in California during the time period that plaintiffs had been employed. *Id.* After further meet and confer efforts, plaintiffs brought a motion to compel seeking Wild Oats to disclose the telephone numbers and addresses for each of the employee names that had been disclosed.

This is where the strategy of Wild Oats' backfired. Having put into play between 2600 and 3000 names in the hopes of perhaps overwhelming its adversary or rendering its response to Form Interrogatory No. 12.1 meaningless, it seems clear that the strategy only caused the trial judge to become upset. (In what can only be construed as a gross understatement and a bit of backtracking, Wild Oats' counsel later admitted at oral argument that the list of witnesses had been "over inclusive," and that the vast majority of persons on the list may not have any personal or relevant knowledge. 158 Cal.App.4th at 1255, fn. 4.) As a result, the trial judge decided to "hoist" Wild Oats and its counsel on "its own petards." Specifically, the trial judge "turned the tables," partially granting the motion to compel, requiring Wild Oats to provide the telephone numbers and addresses of all the individuals previously identified by name in response to Form Interrogatory No. 12.1. In addition, the trial judge borrowed, from existing class action procedural law, an "opt-in" notice procedure whereby all of the percipient witnesses identified were required to be contacted to fill in a post card authorizing a third-party administrator to disclose their address and telephone numbers to plaintiffs. *Id.* at 1247.

On appeal, the *Puerto* court affirmed the trial

-Continued on page 7-

-Q&A: Continued from page 1-

friends with Justice Ed Wallin and Justice Tom Crosby. Also my brother-in-law, Chris Strople was a judge. They genuinely enjoyed their work and I envied their lifestyles. The seed was planted then.

As a lawyer, I never found any one thing I wanted to do for the rest of my career. I found myself wanting something completely new and different every six or seven years. That is why I moved from litigation to a real estate transaction practice in the late 1980's. By the mid-1990's I was looking for a new challenge and really wanted to give something back.

Q: *Do you have any regrets about leaving the practice of law and becoming a judge?*

A: None, other than the smaller paychecks.

Q: *What do you like about being a judge?*

A: I like making decisions. As I see it, my job is to follow the law, act fairly, and do the right thing to the best of my ability. I don't have any stake in the outcome and I don't have to worry about making clients or partners happy with my decisions. In fact, one side or the other is often unhappy with any decision. That is the nature of litigation.

Also, while it is a lot of work, the hours are more manageable and more conducive to having a good family life. That said, the civil panel judges are usually in trial four out of five days and hear 12 to 15 motions a week. We have excellent research attorneys, but I also read almost everything myself, so I usually work late a couple nights a week to keep up.

Q: *Prior to your appointment to the bench, you were both a real estate lawyer and a litigator. Do you think that diverse background has helped you be a better judge?*

A: Yes, it certainly gave me a different perspective as a judge, and it made me a better lawyer when I was practicing. Understanding the risk and reality of litigation helped me negotiate and put business transactions together. Knowing generally how deals are structured and supposed to work was an advantage when litigating deals that had fallen apart.

Q: *Have you developed any particular preference for matters before you?*

A: No, not really. I have been fortunate with respect to assignments and have had the opportunity to do a variety of things over the years. I started out hearing criminal cases. That was enjoyable even though I had no prior criminal experience. I heard all kinds of misdemeanor trials, conducted felony preliminary hearings, and even started a drug court.

I then moved to the general civil panel where I stayed for six years. That was enjoyable too. I had trials on everything from complex business, insurance and employment disputes to personal injury, medical malpractice and probate matters. I was familiar with many of these types of cases from private practice and the legal issues were fascinating.

Recently I moved to the felony trial panel, which can be anything from narcotics possession and up to and including homicide. I am still in the process of getting up to speed but am really enjoying it so far. The criminal law is complicated but well defined and the facts in some of these cases are just incredible.

I think it is good to change assignments periodically. When you see the same types of cases over and over it is hard to stay fresh and give each case the full open minded consideration it deserves. I don't like having preconceived notions about a case and I don't want to assume I know what the lawyers or parties are going to say or do next.

Somewhere down the road I would also like to take a turn on the complex civil panel.

Q: *Although you have recently returned to the criminal bench, you presided over a lot of business cases. Have you noticed any trends in those types of cases?*

A: Four things. First, more people are using focus groups or mock trials and jury selection consultants, particularly in the bigger cases. These tools can be

-Continued on page 6-

-Q&A: Continued from page 5-

very helpful.

Second, arbitration is not always fast or cost effective anymore. Now you can spend a lot of time and money litigating over whether the dispute is going to be tried or arbitrated.

Third, many more cases are being resolved in mediation. People like having their fate in their own hands rather than submitting their dispute to a judge or jury.

Fourth, most general civil cases in Orange County are being resolved or tried within 18 months from date of filing. There is no problem getting cases out to trial.

Q: *What common mistakes have you seen lawyers make in trial?*

A: **Insufficient attention to verdict forms and jury instructions:** Often these tasks are delegated and lawyers do not focus on them until the end of the trial. I think this is a huge mistake. Verdict forms and jury instructions can determine the outcome of the case. How do you know what to try to prove or disprove if you do not know what question the jury is ultimately going to be asked or what the elements of the causes of action are?

Excessive cross-examination: This is an area where less is almost always more. It is rarely effective to simply slog through the entire direct examination again. I have even seen a defense lawyer defeat a potential non-suit by filling in elements the plaintiff failed to prove. Find a half-dozen good points to cover, hit them hard and then sit down.

Plaintiff calling an adverse witness first: A plaintiff almost never gains any advantage by calling a 776 witness first. What generally happens is a perfunctory direct examination by plaintiff's counsel, followed by an extensive "cross-examination" by defendants' counsel. The defendant gets to tell his whole story before the plaintiff even gets started.

Malfunctioning courtroom technology: Technology is great -- when it works. But there is nothing worse than when it doesn't work and the lawyer is staring at the device shaking his or her head and mumbling "I just don't know what's wrong." The jury gets impatient.

Q: *What makes a great trial lawyer?*

A: Maybe great trial lawyers are just born, but there definitely is an art to it. For example, the great trial lawyer always has an objective when examining a witness, but also listens carefully and responds to the witness rather than merely sticking to a script. If the witness bobs and weaves, this lawyer follows but never loses control. Meanwhile, this lawyer is constantly monitoring the reaction of the jury and the judge, and adjusting the tone and subject of the questioning as needed. He or she knows just when to push and when to leave it alone for argument. It is both beautiful and humbling to watch.

Q: *What do you enjoy doing when you are not working?*

A: Right now my life outside work is all about family. My wife and I have two young children. We really enjoy doing kid stuff with them. I am having my second childhood.

Q: *If you could have dinner with any person (living or dead), who would it be?*

A: That's easy -- Mick Jagger. He is the ultimate rock star and male archetype. In fact, forget the dinner. I would settle for 15 minutes over coffee. Can you arrange it?

Q: *If you could choose any job in the world other than a judge or lawyer, what job would you choose?*

A: Tugboat captain. My brother is a tugboat captain and he really loves his job. The stress is relatively low, the pay is good, and the benefits are great, plus he gets to be out on the ocean all the time. Also, he usually works for five or six months

-Continued on page 7-

-Q&A: Continued from page 6-

straight and then has a few months off. He is "taking his retirement in installments."

Thank you Judge Thompson for your time.

♦*Linda A. Sampson is Of Counsel in the Irvine office of Morrison & Foerster.*

-Puerto: Continued from page 4-

court's order requiring Wild Oats to provide the contact information (*e.g.*, personal addresses and telephone numbers) for all of the potential percipient witnesses listed. The *Puerto* court, however, went beyond what the trial court was willing to do – institute some sort of "opt-in" notice mechanism – and instead issued a peremptory writ of mandate simply directing disclosure of contact information for the individuals identified in response to Form Interrogatory No. 12.1. Finally, and perhaps because it wanted Wild Oats' counsel to be able to save face in front of its client, the peremptory writ was issued without prejudice to allow Wild Oats to further amend and supplement its previous interrogatory responses to list only those persons that Wild Oats legitimately believed to have percipient knowledge. *Id*. at 1260.

Where *Puerto* Went Wrong

1. Party-Affiliated Witnesses and Form Interrogatory 12.1

The *Puerto* court erroneously treated Wild Oats' employees as "non-parties," instead of as "party-affiliated witnesses." The distinction is key. For example, all that is required of a party to depose a party-affiliated witness, such as an employee listed as a percipient witness, is to notice the other side. *See* C.C.P. § 2025.280(a). Most experienced litigators simply would identify the *current* employee by name, and indicate in the discovery response that they may be contacted through counsel of record for the party. On the other hand, a non-party witness, such as a *former* employee listed as a percipient witness, may require a subpoena and thus disclosure of contact information would be necessary. *See Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1398.

2. Ethical Rules and *Ex Parte* Contact of Employees

Rule 2-100 of the California Rules of Professional Conduct states that an attorney "shall not communicate directly or indirectly…with a party" whom the party "knows to be represented by another lawyer," without that lawyer's consent. When dealing with business entities, this rule applies to a company officer, director, managing agent, and to an employee where the communication relates to the employee's acts or omissions or where the employee's statements could bind or be deemed an admission of the company. Thus, even low-level employees may not be contacted *ex parte* unless they fit within this narrow category. *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1210-1213.

Notably, Rule 2-100 does not apply to *former* employees (as long as the inquiry is not about prior privileged communications) or where the *ex parte* contact is pre-litigation. This is true even where the attorney knows the party-affiliated employee will likely obtain counsel after the lawsuit is filed or if the company has in-house legal counsel. *See Jorgensen v. Taco Bell Corp.* (1997) 50 Cal.App.4th 1398, 1402; *Truitt v. Superior Court* (1997) 59 Cal.App.4th 1183, 1188.

However, Rule 2-100 and its obvious purpose – to prevent attorneys from taking advantage of the opposing party in the absence of counsel – is entirely ignored by the *Puerto* court. Giving credence to this rule produces the likely situation where opposing counsel is ethically prohibited from *ex parte* contact with the opposing party's current employees, making their contact information ultimately irrelevant and useless.

-Continued on page 8-

-Puerto: Continued from page 7-

3. Opt-In/Opt-Out Procedure in Non-Class Action Setting

The trial court also erroneously applied the opt-in notification procedure employed in pre-certification discovery for non-parties (such as customers or consumers) that are potential class members. *See, e.g., Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360; *CashCall, Inc. v. Superior Court* (2008) 159 Cal.App.4th 273. The problem with this is two-fold. First, as discussed above, this analysis is inapplicable to discovery of percipient witnesses' identity and contact information because they are party-affiliated, and second, *Puerto* was not a class action where plaintiffs' counsel necessarily was seeking to obtain the identities of additional class members.

In an effort to establish that the employees' privacy interests in their contact information were minimal, the court compared the employees' interests to the privacy interests of (1) persons with whom a party had had extramarital affairs and (2) staff and volunteers working at an abortion clinic. *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347; *Morales v. Superior Court* (1979) 99 Cal.App.3d 283. Not surprisingly, the court concluded that "the [employees'] invasion of privacy was not nearly as significant" and that this was "routine civil litigation." *Puerto*, 158 Cal.App.4th at 1255. What the court missed, however, was that none of the cases it cited or discussed dealt with discovery of current employees, *i.e.* party-affiliated employees, who were listed by the company as percipient witnesses in response to written discovery. Thus, the cases relied on by the *Puerto* court are readily distinguishable.

The *Puerto* court then compounded the error on appeal by dispensing completely with the need to utilize the opt-in notice procedure. To justify its position, the *Puerto* court proposed a hypothetical where the defendant produces a percipient witness list of a mere 10 employees, rather than 2600 to 3000 names. The court opined that no protective order requiring the use of a third-party administrator and an "opt-in" procedure would be issued by a court in that instance, and therefore the number of percipient witnesses should make no difference in the invasion-of-privacy analysis. 158 Cal.App.4th at 1255. While it is true that the potential number of witnesses does not alter the particular analysis, the hypothetical misses the point. A court *should* grant a protective order against disclosure of witness contact information as long as those witnesses remain current employees of the party. This is because the other side in the litigation is *required* to make them available for deposition.

In sum, by suggesting contact with employees either via third-party administrators using an opt-in protocol or directly through *ex parte* contact by opposing counsel, the *Puerto* court disrupts the standard practice of providing just the names of current employees who are percipient witnesses and stating they may be contacted through counsel for the company.

Moving Forward

If your client is a business entity involved in litigation, here are a few suggestions.

First, do not produce a massive list of party affiliated witnesses just to frustrate opposing counsel. Rather, list only the truly percipient witnesses. If the witnesses are *former* employees, you will probably need to provide last known contact information. However, if the witnesses are your client's *current* employees, provide only their names and state that they should be contacted through counsel for the company.

Second, advise your client to inform its employees about the litigation and ask them not to discuss it with the opposing party, opposing counsel, or any investigators. It may also be a good idea to provide any employees who may have relevant information an opportunity to sign an engagement letter stating that they want the company's counsel to represent them without charge in connection with any such claims, whether they end up named as a party or not.

-Continued on page 9-

-Puerto: Continued from page 8-

Third, if practical and true, send opposing counsel a letter stating that the former and/or current employees who are listed as percipient witnesses have retained your services in connection with the dispute and to refrain from making *ex parte* contact with them. *Jorgensen, supra*, 50 Cal.App.4th at 1403.

Final Thoughts

Although *Puerto* went wrong on numerous fronts, it still informs a significant lesson – do not get cute with discovery responses. In addition, keep in mind the distinction between listing your client's former and current employees as percipient witnesses. And finally, whatever you do, do not provide some 2000+ names of employees that are not truly percipient witnesses, else you may find yourself in a *Puerto*-type conundrum.

♦ *Sean A. O'Brien and Mark E. Earnest are litigation attorneys in the Irvine office of Payne & Fears LLP.*

-Brown Bag: Continued from page 3-

sel to interface with court media systems through personal laptops.

A wide range of topics were discussed, as the judges in attendance spoke on their experiences as judicial officers and responded to questions from attorneys participating in the event. In particular, Judge Andler spoke about the use of demonstrative evidence during witness testimony. She explained that some judges allow counsel to graphically represent witness testimony during evidence presentation, but that others consider this practice argumentative and require counsel to reserve demonstrative evidence for closing argument. Judge Andler also addressed the importance of keeping client expectations in check throughout the course of litigation. She additionally recommends that counsel familiarize clients with the courtroom environment by providing them an opportunity to observe the court while in session.

Judge Sundvold spoke about his role in settlement efforts and explained that he makes an effort to establish rapport with parties to promote candid discussion about the strengths and weaknesses of their case. Once parties have a realistic view of their prospects at trial, settlement is more likely. Judge Bauer shared his views on motions for summary judgment and demurrers. Like many judges, Judge Bauer feels that summary judgment motions are an inefficient method of resolving claims. As an alternative, he suggests that parties ask the court to resolve discrete issues using evidentiary hearings involving a few witnesses for both sides. Additionally, Judge Bauer suggested that demurrers are generally a waste of time and are often counterproductive because they educate the plaintiff. In fact, Judge Bauer quoted one experienced litigator as saying, "to demur is to commit malpractice." Judge Velasquez also explained that demurrers often work against a defendant's interests because they tend to focus the plaintiff's attention on one or two viable claims.

The judges also explained the process by which cases are assigned to the Complex Division. While class actions are presumptively complex and should be filed in the Complex Division, other cases are transferred at the discretion of the assigned judge. When counsel believe a case should be transferred to the Complex Division, the issue should be raised with the assigned judge, who will generally contact a member of the Complex Panel to resolve the question of transfer.

I want to thank Judges Andler, Bauer, Sundvold, and Velasquez for taking time out of their busy morning schedules to participate in this very enlightening and enjoyable event. It was a pleasure to meet each of them and an honor to share breakfast in Judge Andler's courtroom.

♦ *Corbett H. Williams is an associate in the Irvine office of Jones Day.*

-Voter Identification: Continued from page 1-

violates the First and Fourteenth Amendments of the U.S. Constitution.

Background: Indiana's Law on Voter Identification

Passed in 2005, Indiana's voter identification law requires voters to present a government-issued ID to vote in federal, state and local elections. Voters without identification may vote using a provisional ballot. The provisional ballot, however, is counted only if the voter travels to a circuit court or county election board to prove his or her identity within 10 days of the election. In January 2007, the U.S. Court of Appeals for the Seventh Circuit upheld the law. The decision was appealed and *certiorari* was granted on September 25, 2007.

The petitioners, along with several non-profit political-interest groups, a state representative, and the Indiana Democratic Party, argue that, in effect, the law would disenfranchise thousands of the State's registered voters who do not have, and, in many instances, cannot obtain, the limited identification accepted under the law. The petitioners allege that the law has a disparate impact on poor, elderly, and minority voters. They contend that there is no evidence of in-person fraud or other substantial justification for the law.

The respondents, along with the State of Indiana and the Marion County Election Board, contend the law is necessary to prevent voter fraud and ensure that only registered individuals vote. They counter that the law is justified by the threat of in-person voter fraud and argue that requiring a government-issued ID is nondiscriminatory and reasonable and that there is no evidence of an adverse impact created by the law. Even if there is some burden, the respondents argue that the burden is minimal and thus not unconstitutional, as all election laws "invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428 (1992).

Indiana is one of over 20 states that have recently passed more stringent voter ID laws, and many other states are considering similar legislation. Several of these states have faced challenges to their in-person voting requirements, most notably Missouri and Georgia. Missouri's law was challenged and found unconstitutional by the Missouri Supreme Court. *Weinschenk v. State of Missouri*, 203 S.W.3d 201 (2006). There, the court found that while there is a compelling state interest in preventing voter fraud, the photo ID requirement was not narrowly tailored to accomplish that purpose and was an "onerous procedural requirement which effectively handicap[s] exercise of the franchise." Georgia's voter ID law was also challenged and struck down. However, following invalidation, the law was revised to allow all voters to vote-by-mail and thus without IDs. The new law was challenged and subsequently upheld.

Indiana's Law Does Not Address Voter Fraud during Registration or Through Absentee-Ballot Voting

It is important to note what is challenged in *Crawford*, and what is *not*. The Indiana law applies only to how registered voters can vote when they go to a polling place in person. The case does not involve two important aspects of the right to vote in the modern day: (i) voter registration; and (ii) absentee, or vote-by-mail, ballots. This is relevant because many of the perils that both parties point to in their "parade of horribles" are actually present, if not more so, in voter registration and vote-by-mail ballots. There is solid evidence that voter fraud has frequently occurred at both the voter registration stage and through absentee ballots. On the other hand, registration requirements can be just as onerous as the challenged law's in-person voting requirements.

Challenges to Election Regulations Should Be Allowed Prior to Enforcement

Importantly, Crawford is a facial constitutional challenge; it was brought before the 2005 law went into effect. Most voter regulation laws are likewise challenged on a facial basis. Facial challenges enable courts to determine the constitutionality of a challenged law before it is applied in an election. Pre-enforcement challenges prevent contentious cases like *Bush v.* Gore and their resulting post-election litigation quagmire. Challenges after the enforcement of a voting law can leave election results uncertain for many months, if not years. Frighteningly, the very ability to bring a facial challenged to an election law appears to be in jeopardy in *Crawford*.

The first question raised in oral argument was whether the petitioners had standing to challenge the law. Below, the Eleventh Circuit determined that one ground for standing was the Democratic Party's organizational interests. Justice Souter agreed with

-Continued on page 11-

-Voter Identification: Continued from page 10-

the circuit court's analysis that the party's interests were impaired by having to divert resources from the goal of electing its candidates to instead helping members get proper identification. However, Justice Scalia asked whether the Democratic Party actually had the right to bring the case on behalf of people who would be harmed by the law. He noted the amorphous membership of the party, and questioned whether individuals had voluntarily assigned the party the right to represent them for the purpose of challenging voting laws.

Inquiry into standing evolved into the essential issue of when the Court should allow facial challenges to laws. During oral argument it became clear that the Court was seriously considering whether *Crawford* should, or even could, be brought as a facial challenge. The respondents, and some Justices, such as Justice Scalia, seemed to support rejecting this facial challenge in favor of allowing future "as-applied" challenges to the law. Because of his belief that every facial challenge is an immense dictum on the part of the Court, Justice Scalia said it would be appropriate to apply the "*Salerno* standard" in this case. Under the standard in *U.S. v. Salerno, 481 U.S. 739* (1987), to prevail on a facial challenge, "the challenger must establish that *no set of circumstances* exists under which the [law] would be valid." (The only recognized exception to this Salerno rule is in the "limited context" of First Amendment speech protections, though the Court has since made a de facto exception in abortion cases.) Justice Scalia believed the challenge to Indiana's law did not meet this standard, and was thus required to be brought through an as-applied suit.

However, as Justice Souter pointed out, if the Court applies the *Salerno* standard to election regulation lawsuits, there could never be a facial challenge to a voter identification requirement. Justice Ginsburg disagreed that deciding this facial challenge would be mere speculation by the Court. She found there were already facts that showed real people whose vote had not been counted under the Indiana law. Justice Ginsburg pointed to evidence presented from one county in which 34 people lacked a proper photo ID and were required to go through the affidavit process. Only two of these 34 voters followed through the entire procedure to have their vote counted.

The ultimate question the Court must answer is whether election lawsuits are better brought as as-applied challenges, or whether such an approach might instead encourage more election law litigation. Even those in favor of allowing facial challenges, like *Crawford*, to go forward concede that a virtue of as-applied challenges is saving an entire law from being scrapped because of discrete and redressable flaws. Instead, a specific injunction could be issued to remedy the challenger's precise injury or burden.

However, legal resolution of an as-applied challenge would occur long after an election was held under the law and the entire matter would be academic until the litigation was resolved. Those who were actually burdened by the law would face unconstitutional restrictions on their right to vote during this entire time. In this way election laws are similar to laws that burden speech under the First Amendment. In other words, requiring the enforcement of a flawed law before allowing a legal challenge may unconstitutionally restrain, or even preclude, an individual's exercise of his or her constitutional rights. As mentioned above, requiring challenges to be as-applied, instead of facial, could lead to the messy and reactive morass of post-election litigation.

Indiana's Need to Prevent Voter Fraud and Maintain Voter Confidence

Assuming civil procedure does not determine the results of *Crawford*, the Court must balance the interests presented by the petitioners against those of the respondents. The respondents claim the State has strong interests in preventing voter fraud and ensuring confidence in the voting system that make it necessary to burden the petitioner's rights. The justification for protecting against voter fraud was based on Indiana's inflated voter rolls. These rolls contained many voters who were no longer eligible because of death or relocation. It was argued that Indiana's rolls were among the country's worst with nearly 40% of poll entries inaccurate. According to the respondents, it is because of these inflated voter lists, and reports of fraud around the country, that Indiana's General Assembly passed the law to address concern about voter confidence and ensure the legitimacy of elections.

Justice Scalia asked the petitioners whether there was not a genuine threat of fraud, particularly in light of the inaccuracy of the voter rolls. The petitioners responded that there was not a single re-

-Continued on page 12-

-Voter Identification: Continued from page 11-

corded case of in-person voter fraud in Indiana. Many of the Justices, however, were curious how there could ever be evidence of such fraud. Justices Scalia, Breyer, and Roberts were genuinely concerned with the inflated voter rolls, which they thought presented a significant potential for fraud.

Yet, as mentioned above, the Indiana law did not implement any safeguards for voter fraud with respect to absentee ballots or voter registration. The Court addressed this conundrum of why, if Indiana was truly concerned about voter fraud, large problems of voter registration and absentee ballots remained untouched by the State. Sever Justices questioned Indiana's registration system which allowed individuals to register by mail with nothing more than a utility bill and asked why photo identification was not required for registration, but was required to vote. This incongruity, that respondents justify Indiana's law on a problem that is even more serious in other unaddressed arenas of the voting system, undermines the credibility of the State's true interest. The irony of respondents' position was not lost on the Court and unquestionably raised skepticism amongst the Justices.

The Costs and Problems in Obtaining the Required ID and the Burden of the Provisional Ballot

On the other side of the equation, the petitioners' position is that any incremental state interest served by Indiana's law is vastly outweighed by the range of burdens imposed by the law. The law is too burdensome for two reasons: (i) the difficulty of getting a state photo ID; and (ii) the alternative process required to have a provisional ballot counted if a person lacks a photo ID. The petitioners argued that because it is so difficult and expensive to get the papers — such as a certified birth certificate — many people, especially the elderly and indigent, are effectively shut out from obtaining the required identification and thus voting. Further, the petitioners contend that the alternative procedure for those who voted without such identification was unnecessarily burdensome. The petitioners contend requiring an indigent voter to fill out the provisional ballot at the precinct; make their way to the county seat to sign a verified affidavit within 10 days of the election; and then have an official verify the voter's identity and affidavits, is extreme and onerous.

During oral argument, the Court was concerned with the lack of evidence showing the actual burden put on voters by the law. Justice Roberts asked whether there was even a single instance of someone being denied the right to vote because they did not have a photo ID. Justice Alito likewise found it likewise problematic that there was nothing in the record to quantify the extent of the problem or the extent of the burden. Regardless of the actual number affected by the law, Justice Ginsberg was most concerned with indigent voters, who she thought the law burdened most. She was mystified as to why the state did not allow voters to execute an indigency affidavit at the polling place instead of requiring them to go to the county courthouse. The Court also addressed religious objectors whose faith would not allow a photograph to be taken. This group of voters would also have to resort to the multi-step procedure to the county seat in order for their provisional ballots to count.

Perhaps most telling of the Court's ultimate reading of the burden imposed by Indiana's law is a remark by Justice Kennedy, the current Court's swing voter. Justice Kennedy asked of the petitioners, "You want us to invalidate a statute on the ground that it's a minor inconvenience to a small percentage of voters?" Such cynicism by the Justice in the middle does not bode well for the petitioners persuading the Court that the law poses a substantial burden.

Does Indiana Have Less-Onerous Alternatives at Its Disposal?

Assuming the law was burdensome, the Court briefly considered whether other options were available to Indiana to address concerns over fraud that were less onerous than the challenged law. The respondents were asked if Indiana had considered what the State of Georgia had done – give those without a photo ID such identification free of charge and without requiring the voter to dig up their birth certificates. Justice Breyer felt this would be a less restrictive way that could satisfy Indiana's anti-fraud interests far better than the way chosen. Justice Kennedy was also interested in whether there was a way to preserve the central purpose of the law but give some reasonable alternatives for people who have difficulty meeting the requirements.

-Continued on page 13-

-Voter Identification: Continued from page 12-

The Anticipated Outcome in *Crawford* and the Future of Election Laws

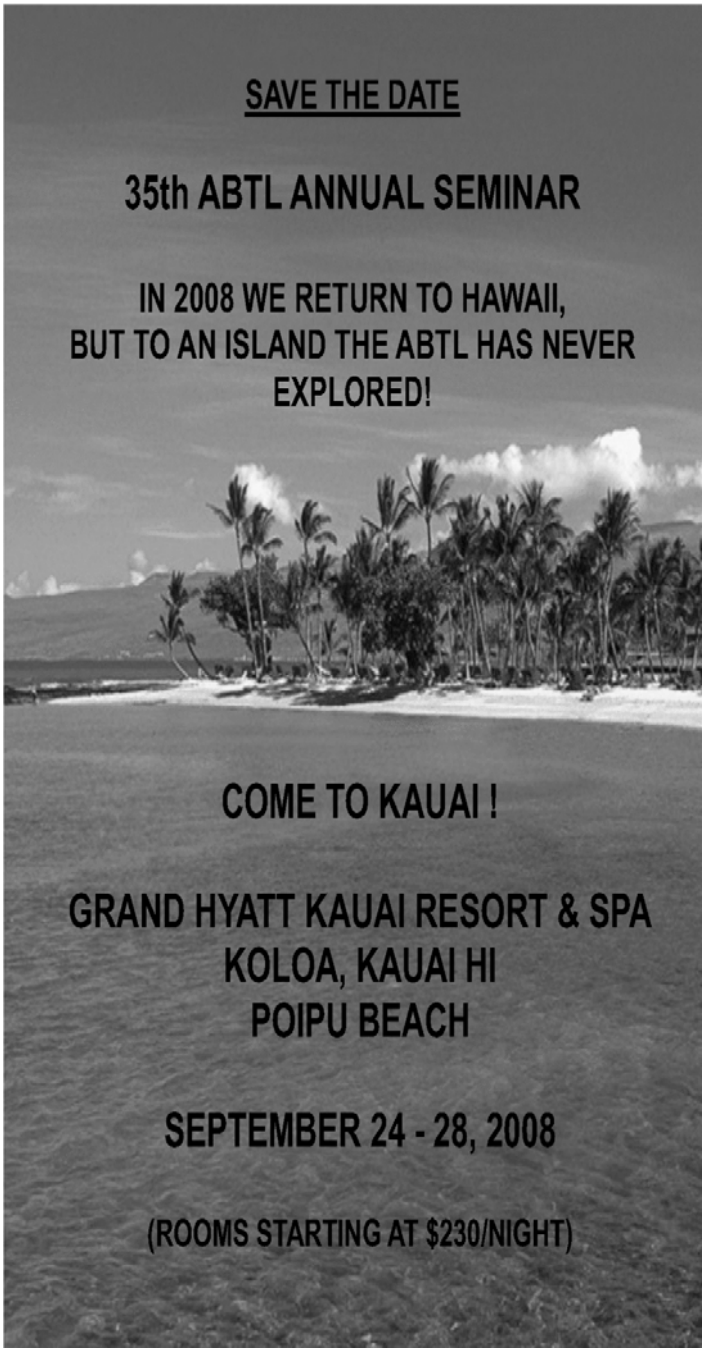
What became clear during oral argument was that the Court felt the petitioners' case had two major weaknesses: (i) the challenge could be better brought as an as-applied challenge, and (ii) evidence of a substantial burden was lacking. The first issue truly is the eight-hundred pound gorilla in the case. If the Court rules that *Salerno* applies in this case and it can not be brought as a facial challenge, all future election law challenges will be vastly changed. Allowing only post-enforcement challenges would prompt enormous amounts of post-election voting litigation and place huge question-marks beside election results for long periods. It would also significantly restrict the ability to challenge election laws in the courts.

As to the true burden created by Indiana's law, the generally more moderate Justices (Ginsburg, Souter, and Breyer) appear to have serious concerns as to the burden created by the law. On the other side, the more conservative Justices (Alito, Roberts, and Scalia) appear unconvinced that requiring a government-issued ID can be considered sufficiently burdensome to be an unconstitutional restraint on the franchise. That that even Justice Kennedy expressed his doubt that such a minimal burden rose to unconstitutionality may prove to be the petitioners' Achilles' heel.

Despite the deficiencies found in the petitioners' case, the Court was also concerned with the validity of the state interest submitted by the respondents. The problem of voter fraud was established more by anecdotal evidence and the opinion of officials than concrete evidence. Furthermore, the fact that voter fraud was largely attributable to the State's own faulty voting rolls left many of the Justices skeptical as to the equity of implementing stricter identification requirements merely because of the State's incompetence.

Indiana's law certainly falls into a grey area of constitutional law. There will no doubt be several Justices who declare the law unconstitutionally burdensome and some who find the law justified by the state's interest in preventing fraud and erosion of voter confidence. Overall, however, the tenor and direction of the oral argument seems to hint that the Court will either decide that the challenge cannot be brought facially or that the state interest is not outweighed by the incidental burden imposed by the law. While there is no way to know exactly how the decision will fall, it appears the two most probable outcomes do not favor the petitioners. We may soon be looking at a new landscape in election law just in time for this nation's most important election come November 4th.

♦ *Jay C. Gandhi and Brenna H. Kantrovitz are members of the litigation department in the Orange County office of Paul, Hastings, Janofsky & Walker LLP.*



-President: Continued from page 2-

for a treat. Plan on good food, good music, and wonderful company as we come together — lawyers, judges, friends, and colleagues — to celebrate under the stars.

Serve the Community: Our Chapter is known for its commitment to contributing to the community. On **June 9**, we continue our tradition of dedicating our summer meeting to a wine tasting fundraiser to benefit the Public Law Center, one of the premier pro bono legal service providers in Orange County. The PLC fulfills a vital community need by protecting the right of access to justice for all. ABTL is proud that not only law firms and lawyers support our June fundraiser, but also the court reporting and other firms that work so closely with us. We hope you will bring your summer associates, enjoy some delicious wines and cheeses, and help support the good work of the PLC. Later in the year — at our **November 5** meeting — we will again collect gift cards for the kids at Orangewood and stuffed animals for children whose adoptions are finalized by the courts. Due to your generosity, that effort was a tremendous success last year and we plan to make it an annual event.

Grab a Sandwich (or Muffin) and Meet the Judges: We are sponsoring a series of seven Brown Bag lunches and breakfasts with Orange County state and federal judges throughout the year. These programs, intended principally for newer lawyers, are a unique opportunity to meet in small groups with local judges and gain valuable insight into what works — and doesn't — in their courtrooms. Attendance at each lunch is limited so as to ensure that all participants have an opportunity to meet and speak personally with the judges. So sign up early! Upcoming programs are on **May 29** with Judge Sanders; **July 24** with Judges Fell, McEachen and Moss; **September 4** with Judge Selna; **October 9** with Judge Guilford; and **December 4** with Judge Velasquez. Contact Board member Michele Johnson, at Michele.johnson@LW.com to sign up.

Network, Dine, and Learn: In addition to these special events, we will hold our regular dinner programs on **September 10** and **November 5.** They will be preceded by our traditional cocktail hour and followed by our usual first rate CLE, featuring leading lawyers and judges addressing topical issues. We have moved to e-mail notification of our programs, so watch your Outlook Inbox for details and links to registration forms.

Come To Hawaii: This year's seminar is back in Hawaii at the Grand Hyatt Resort and Spa on beautiful Kauai. The dates are **September 24-28, 2008,** and the topic is something we all confront every day: "Justice in America: Businesses in the Courtroom." Make plans now to bring your family and join us for another memorable annual seminar.

I look forward to seeing you and to another terrific year.

♦*Martha K. Gooding is a partner in the Global Litigation Group at Howrey LLP.*

Mark Your Calendars

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Annual PLC Fundraiser
& Wine Tasting

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June 4, 2008

at the

Westin South Coast Plaza Hotel

Wine Tasting at 6:00 p.m.

Dinner and Program at 7:00 p.m.

More information to follow.

-Securities Fraud: Continued from page 3-

fornia, the *Stoneridge* suppliers may well win or lose their case depending on which position on independent duty is ultimately adopted by the California Supreme Court.

<u>*Stoneridge*: A schemer's scheme</u>

Plaintiffs' allegations in *Stoneridge* read like a textbook securities fraud complaint: backdated contracts, wash transactions, GAAP violations, intentional book-cooking, and a documented multi-participant scheme to defraud investors. Charter Communications, a cable TV operator, allegedly feared it would fail to meet Wall Street expectations for cable subscriber growth and operating cash flow. When more ordinary manipulations of revenues and expenses proved insufficient to make up the difference, Charter's executives allegedly conspired with two of its suppliers to arrange to pay them $20 more for each cable box than the suppliers would normally charge, while simultaneously entering into side agreements providing that the suppliers would turn around and spend the extra money purchasing advertisements from Charter. Charter and the suppliers then allegedly backdated the advertising contracts to give the illusion that the advertising purchases had nothing to do with the cable-box purchases. Recording the advertising purchases as revenue, Charter improperly capitalized its purchase of the cable boxes, thereby enabling Charter to fool its auditor into approving a financial statement showing Charter had met projected revenue and operating cash flow numbers. The suppliers, who allegedly knew all about the scheme, booked these transactions as a wash in their own financial statements.

Plaintiffs, Charter shareholders, sued the suppliers under Section 10(b), 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.105-5. Given a previous Supreme Court holding that Section 10(b)'s implied private right of action does not extend to aiders and abettors (*Central Bank of Denver, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 191 (1994)), the Court evaluated whether the *Stoneridge* plaintiffs had sufficiently alleged, under the reliance element of 10b-5, that they relied on any statements or representations made by the suppliers themselves. The Court held that they had not. In so doing, the Court appeared to eliminate the availability of Section 10 (b) securities fraud claims against investment bankers, accountants, suppliers, and other third parties that transact with a company, even if those secondary actors knowingly and actively helped the company defraud its investors.

<u>When the Supreme Court closes a door…</u>

Although future securities-fraud plaintiffs will surely attempt to plead their way around *Stoneridge*, one state law cause of action that may find its way into more California pleadings as a result of the decision is aiding and abetting. Originally an ancient criminal law doctrine, the tort of aiding and abetting, according to the Second Restatement of Torts, finds a defendant liable if he (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act, or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. Restatement (Second) of Torts § 876(b), (c) (1979).

The language of the Restatement just quoted appears to be clear enough: aiding and abetting can be either knowledge plus substantial assistance, or substantial assistance plus an independent duty to the third party. That is, either the cable-box suppliers knew that Charter's executives were creating sham transactions to inflate their revenues in violation of their fiduciary duties to their shareholders, and substantially assisted Charter by signing backdated contracts to set up those transactions (knowledge + substantial assistance); or the suppliers signed the backdated contracts without knowing why Charter wanted them to do so, and somehow themselves had an independent fiduciary duty to Charter's shareholders (substantial assistance + independent duty). As interpreted by California courts, however, the elements of aiding and abetting, at least as applied to aiding and abetting a breach of fiduciary duty, couldn't be muddier.

The chief source of disagreement among California courts is whether liability for aiding and abetting breach of fiduciary duty requires that the alleged aider-abettor must himself owe an independent duty to the plaintiff. The independent-duty debate will make or break many a case. In *Stoneridge*, to be sure, the plaintiffs alleged many facts showing that the suppliers knew about the fraud Charter was attempting to accomplish and substantially assisted Charter by sending it false documents concerning the price of the cable boxes, and by backdating the advertising agreements with Charter. There were no allegations, however, and most likely could not be, that the suppliers themselves owed an independent duty to Charter's shareholders. Indeed, in the con-

-Continued on page 16-

-Securities Fraud: Continued from page 15-

text of Section 10(b), the *Stoneridge* Court found that the suppliers owed no duty of disclosure to the shareholders of Charter. 128 S. Ct. at 769. Whether the suppliers could be held liable for aiding and abetting Charter's breach of fiduciary duty in California, therefore, would hinge on whether plaintiffs would be required to establish that the suppliers owed a separate duty to Charter's investors.

The County of Orange: The aider-abettor must owe an independent duty to the plaintiff

The confusion begins with the propensity of many courts to lump aiding and abetting together with civil conspiracy. To evaluate causes of action for aiding and abetting, courts often look first to the definition of civil conspiracy—an agreement plus a tortious act—and then distinguish aiding and abetting as requiring not an agreement but rather substantial assistance. (*Janken v. GM Hughes Elecs.*, 46 Cal. App. 4th 55, 78 (1996) is an example.) Because it is well-settled that civil conspiracy requires that the conspirator personally and independently be bound by the duty violated by the wrongdoer (*Doctors' Co. v. Superior Court*, 49 Cal. 3d 39, 44 (1989)), courts then extend the independent duty requirement to aiding and abetting as well. For example, the Ninth Circuit held under California law that a plaintiff failed to allege either conspiracy or aiding and abetting where a corporation and its director allegedly acted in concert to breach a joint venture agreement. Because the defendant director was not a named party in the joint venture agreement between the corporation and the plaintiff, the director owed no independent duty to the plaintiff under the contract. Absent the independent duty, the director was not liable for "any tort." *Grosvenor Prop., Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1154 (9th Cir. 1990).

Finally addressing the issue head on, a bankruptcy court in the Central District specifically held that absent an independent duty, there is no liability for aiding and abetting in California. The case, *In re County of Orange*, 203 B.R. 983 (C.D. Cal. 1996), *aff'd in part, rev'd in part on other grounds*, 245 B.R. 138 (C.D. Cal. 1997), arose out of Orange County's bankruptcy in 1994. After the County treasurer implemented highly risky investment strategies that incurred staggering losses of County funds, the treasurer attempted to stave off disaster by issuing new debt offerings, retaining Standard & Poor's to provide investment services in connection with the offerings. Once the resulting losses drove the County into bankruptcy, the County brought claims against Standard & Poor's for, among other things, aiding and abetting the treasurer's breach of his fiduciary duty to the County. The bankruptcy court, walking carefully through California case law on both civil conspiracy and aiding and abetting, found that Standard & Poor's did not owe an independent fiduciary duty to the County and thus could not be liable for aiding and abetting.

County of Orange has largely been cited for this independent-duty requirement without being directly followed. *E.g.*, *Scognamillo v. Credit Suisse First Boston LLC*, No. C03-2061, 2005 U.S. Dist. LEXIS 7162, *11-12 & n.1 (N.D. Cal. Mar. 21, 2005) (denying defendant's motion to dismiss plaintiff's claim for aiding and abetting breach of fiduciary duty because whether defendant owed plaintiff an independent fiduciary duty could not be assessed from the pleadings, while acknowledging split of authority as to whether an independent duty is even required); *Berg & Berg Enters., LLC v. Sherwood Partners, Inc.*, 131 Cal. App. 4th 802, 823 n.10 (2005) (stating in dicta that aiding and abetting does not require an independent duty). Under *County of Orange*, the *Stoneridge* suppliers would not be liable as aiders and abetters. They knowingly assisted Charter's officers and directors by entering into backdated agreements and sending invoices that falsely inflated the cable boxes' price, but they owed no separate fiduciary duty to Charter's investors. Absent such a duty, under *County of Orange*, an action against the *Stoneridge* suppliers for aiding and abetting should be dismissed.

Neilson: The aider-abettor need not owe an independent duty to the plaintiff

Subsequent cases have strongly disagreed with *County of Orange*. Starting with *Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101 (C.D. Cal. 2003), courts have held that a secondary actor who knowingly provides substantial assistance to a breaching fiduciary need not itself have an independent duty to the plaintiff. In *Neilson*, plaintiffs who had been defrauded in an old-fashioned Ponzi scheme sued four banks for allegedly conspiring with the mastermind by providing him with credit, allowing him to commingle personal and investor funds, and lending their names and prestige to his operations. Citing to the Second Restatement of Torts, the *Neilson* Court found that a defendant may be liable for aiding and abetting a breach of fiduci-

-Continued on page 17-

-Securities Fraud: Continued from page 16-

ary duty even though the defendant owes no independent duty to plaintiff, so long as the aider and abettor knows of, and substantially assists, the primary violator's breach of duty.
Other courts followed suit. Where banks allegedly helped corporate fiduciaries loot the company by issuing accounts to sham entities that laundered stolen money, a California appellate court agreed with *Neilson* that a cause of action for aiding and abetting does not require that the banks owe an independent fiduciary duty to the non-depositor corporation. *Casey v. U.S. Bank Nat'l Ass'n*, 127 Cal. App. 4th 1138, 1145 & n.2 (2005). The Court nevertheless upheld the dismissal of the aiding and abetting cause of action because the plaintiffs had inadequately alleged the banks' actual knowledge of the scheme.

After a food conglomerate defaulted on a $100 million credit facility, one lender sued another for knowingly assisting company insiders in breaching their fiduciary duties to the company's creditors. A California Court of Appeal, in an unpublished decision, held that the lender stated a cause of action for aiding and abetting despite the fact that the company's creditors owed no fiduciary duty to each other. *Rabobank Nederland v. National Westminster Bank*, No. A104604, 2005 Cal. App. Unpub. LEXIS 6889, at *26 (Aug. 4, 2005). Similarly, where an insurance broker allegedly assisted fiduciaries of an association's ERISA benefit plan to divert millions of dollars away from the association and into the fiduciaries' own accounts, the defrauded association stated a cause of action against the broker for aiding and abetting despite the absence of an independent duty on the part of the broker to the association. *Miniace v. Pacific Maritime Ass'n*, No. C-04-03506, 2006 U.S. Dist. LEXIS 34420, at *5 (N.D. Cal. May 18, 2006) (citing *Neilson* and *Casey*).

In another proceeding arising out of the Orange County bankruptcy, a California appellate court reached a conclusion opposite that of the bankruptcy court in *County of Orange*, albeit under different reasoning than that applied in the *Neilson* line of cases. Several cities and agencies in Orange County who had deposited funds into the investment pool that the County treasurer then squandered brought suit against the County's securities and financial advisor for, among other things, aiding and abetting the treasurer's breach of fiduciary duties owed to the plaintiff cities and agencies. This time, the Court held that liability for aiding and abetting can attach in the absence of an independent fiduciary duty, as long as the aider-abettor acted for his own individual advantage. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 464 & n. 14 (1998).

Under the *Neilson* line of cases, the suppliers in *Stoneridge* would be liable to Charter's investors. The suppliers allegedly knew that Charter's insiders owed a duty to Charter's investors and knew that by inflating the price of the cable boxes, Charter was able to report higher revenues, inflate the company's stock price, and misstate its financial statements. The suppliers substantially assisted the breach by backdating the advertising agreements and documenting an inflated price for the boxes. Notwithstanding that the suppliers owed no separate duty to Charter's investors, the suppliers would likely be liable for aiding and abetting breach of fiduciary duty under *Neilson* and progeny.

Further implications of the independent-duty debate

Other interesting questions arise from the duty-no-duty controversy. Is an aider-abettor jointly and severally liable for the entire damage caused by the fiduciary's breach, or just liable for a proportional share? Can a person aid and abet by mere inaction or even silence? Is the aider-abettor's personal motive relevant to his measure of liability? The answers could well depend on whether the California Supreme Court opts to adopt the reasoning of *County of Orange* or of *Neilson*.

Joint and several: Some courts would hold the aider-abettor jointly liable with the primary violator for the entirety of plaintiff's injury. *E.g., Howard v. Superior Court*, 2 Cal. App. 4th 745, 749 (1992) (because aiding and abetting requires a conscious decision to participate in the wrongful activity in order to assist the primary violator, the purpose of asserting this cause of action is to hold the aider-abettor jointly liable); *City of Atascadero*, 68 Cal. App. 4th at 467 n.17 (noting that liability of the aider-abettor is joint and several with that of the fiduciary). For the *County of Orange* position, which would require an independent duty for aiding and abetting just like for civil conspiracy, holding the aider-abettor jointly liable with the fiduciary seems to be the likely result. The major significance of a conspiracy cause of action is that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong,

-Continued on page 18-

-Securities Fraud: Continued from page 17-

regardless of the degree of his activity. If both conspiracy and aiding and abetting require an independent duty, then the only difference between the two causes of action is that conspiracy requires an agreement, whereas aiding and abetting requires substantial assistance. Whether a person shakes hands with another in an agreement to commit a wrong, or instead helps him to do it, his liability under the law will likely be the same.

Courts siding with *Neilson*, on the other hand, likely will not impose joint liability. *Neilson* says as much: "Because aiders and abettors do not agree to commit, and are not held liable as joint tortfeasors for committing, the underlying tort, it is not necessary that they owe plaintiff the same duty as the primary violator." 290 F. Supp. 2d at 1135. Indeed, the substantial assistance knowingly provided by the aider-abettor may well cause only a small part of the plaintiff's injury. Without the agreement and separate duty requirements of civil conspiracy, it seems the aider-abettor would be liable only for the injury that his substantial assistance caused.

Liability for inaction: Whether an aider-abettor can be liable for silence or inaction also likely turns on whether the independent-duty requirement is applied or rejected. Consider whether the *Stoneridge* suppliers would be liable for aiding and abetting if, instead of agreeing with Charter's executives to backdate agreements, they simply ignored the fact that Charter was backdating advertising agreements and was paying them more than the asking price for the cable boxes. If the suppliers owed an independent duty to the plaintiffs, they probably would be liable. Inaction in the face of a duty to act is a proper basis for liability for aiding and abetting. *See Roberts v. Peat Marwick, Mitchell & Co.*, 857 F.2d 646, 653 (9th Cir. 1988), *cert. denied*, 493 U.S. 1002 (1989) ("Defendants may be liable for aiding and abetting based on their silence if they have a duty to disclose knowledge that would be material to investors); *Strong v. France*, 474 F.2d 747, 752 (9th Cir. 1973) (holding that in aiding and abetting, liability for silence or inaction arises "only when a duty to disclose has arisen").

Absent a duty to act, however, the question becomes whether a person can "substantially assist" by silence or inaction. In *Neilson*, the Court implied that an alleged aider-abettor would not be liable for a failure to act. "[C]ausation is an essential element of an aiding and abetting claim, *i.e.*, plaintiff must show that the aider and abettor provided assistance that was a substantial factor in causing the harm suffered . . . . A plaintiff seeking to prove a conspiracy claim, by contrast, need not adduce proof that the purported conspirator did anything that caused or contributed to the harm." *Neilson*, 290 F. Supp. 2d at 1135.

Courts outside of California have determined that in the absence of a duty to act, an aider-abettor's liability for silence or inaction depends on the level of his conscious intent to assist the wrongdoer. *Monsen v. Consolidated Dressed Beef Co.*, 579 F.2d 793, 800 (3d. Cir.), *cert. denied*, 439 U.S. 930 (1978) (noting that in the absence of a duty, "inaction . . . may provide a predicate for liability when plaintiffs demonstrate that the aider-abettor consciously intended to assist in the perpetration of a wrongful act"); *see also Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975) ("When it is impossible to find any duty of disclosure, an alleged aider-abettor should be found liable only if scienter of the high conscious intent variety can be proved."). That is, inaction or silence, even in the absence of a duty to act or speak, can give rise to liability if the aider-abettor consciously intended his inaction or silence to substantially assist the fiduciary in committing the wrong. These courts' sliding-scale approach could be a useful analysis under either *County of Orange* or *Neilson*.

Financial gain: Another issue that touches on the independent duty requirement, and another source of confusion within aiding and abetting decisions, is whether the substantial assistance must be motivated by the aider-abettor's own personal gain or financial advantage. Some courts hold that an aider-abettor will be liable only if its substantial assistance arose from a desire to further its own financial advantage or resulted in a personal gain for itself. *E.g.*, *City of Atascadero*, 68 Cal. App. 4th at 463; *Heckmann v. Ahmanson*, 168 Cal. App. 3d 119, 127 (1985). In contrast, the *Neilson* Court concluded that although the plaintiff may use the aider-abettor's financial gain as evidence that it knew of and substantially assisted the primary violator, the aider-abettor's motive is immaterial to liability. 290 F. Supp. 2d at 1129.

The independent-duty requirement can explain this disagreement. The financial-advantage element first arose in the conspiracy context, where an employee or agent of a corporation cannot conspire with the corporation unless the employee or agent acted for his own personal gain. If aiding and abet-

-Continued on page 19-

-Securities Fraud: Continued from page 18-

ting requires an independent duty just like conspiracy, the employee or agent's personal gain may be equally relevant in both causes of action. If, on the other hand, *Neilson* is correct that aiding and abetting does not require the aider-abettor to owe an independent duty to the plaintiff, there is no reason to add a financial-gain element to the cause of action.

Stoneridge is instructive as to the implications of this split of authority. The *Stoneridge* suppliers booked the reciprocal transactions with Charter as a wash in their financial statements. Therefore, the suppliers did not gain any financial advantage from their alleged participation in the breach of fiduciary duty to Chapter's investors. If the suppliers must personally benefit from their participation in the breach in order to be liable for aiding and abetting, the suppliers may be off the hook. If, on the other hand, personal financial gain is not a necessary element for aiding and abetting, plaintiffs may prevail against the suppliers as long as they could prove knowledge and substantial assistance. Of course, a clever plaintiff would argue that even the *Stoneridge* suppliers acted for personal gain because they secured business with Charter that may have been unavailable to them without their agreement to the scheme, or otherwise solidified a client relationship with Charter.

Next stop, the California Supreme Court

Stoneridge has substantially limited the ability of defrauded investors to pursue securities fraud claims against secondary actors, like accountants, brokers, and bankers, who did not directly participate in the issuance of a false statement to investors. Aiding and abetting a breach of fiduciary duty may well be plaintiffs' best alternative cause of action. Renewed attention on the morass of case law will reveal broad disagreement regarding whether the secondary actor must owe an independent duty to plaintiff, whether the aider-abettor can be liable for the entirety of plaintiff's alleged injury, whether the secondary actor can be found to have rendered substantial assistance to the primary fiduciary simply by inaction, and whether the secondary actor must act for its own financial benefit in order to be liable for aiding and abetting. The California Supreme Court will undoubtedly be called upon to resolve these controversies in the future.

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