

Q&A with the Honorable Carlos Moreno

By John A. Vogt



[Editor's Note: For this judicial interview, the Editor of the Report, John A. Vogt, spoke with the Honorable Carlos Moreno, Justice of the California Supreme Court. Mr. Vogt would like to extend a special note of gratitude to Justice Moreno for his support to our organization.]

Q: What drew you to the law?

A: At an early age, I found myself often in a position of helping others, mostly relatives, to effect a fair resolution to their diverse problems. Within my family, I often acted as a facilitator by helping them negotiate the legal system and in interpreting various matters for them. I recall helping my uncle with insurance claims when he was treated for various medi-

-Continued on page 4-

- IN THIS ISSUE -

- ◆ Q&A with the Hon. Carlos Moreno Pg. 1
- ◆ Commercial Real Estate CDO Litigation:
The Credit Crisis' Next Wave? Pg. 1
- ◆ President's Message Pg. 2
- ◆ The Rise and Fall of "Balance Billing" .. Pg. 3
- ◆ Another Arrow in the Quiver:
Unique Aspect of Malicious Prosecution
Claims Pg. 3
- ◆ Brown Bag Lunch Update Pg. 4
- ◆ Leadership Development Committee
Off To A Fantastic Start Pg. 17

Commercial Real Estate CDO Litigation: The Credit Crisis' Next Wave?

By Jayant W. Tambe



Could the next wave of the credit crisis flood courthouses with commercial real estate securities lawsuits? The Wall Street Journal recently reported nearly unprecedented delinquency rates for the \$700 billion of securitized loans backed by commercial real property assets and warned of alarming default and loss rates, particularly given the current climate for refinancing commercial mortgages. (See Lingling Wei, "Commercial Property Faces Crisis," Wall St. J., Mar. 26, 2009, at A1.) Standard & Poor's has announced that it intends to place on negative ratings watch an array of structured financial products backed by commercial real estate assets. (See Jay Miller, "S&P Warns on CMBS," Wall St. J., Apr. 7, 2009, at C8.) Similar developments in the residential real estate market released a flood of litigation a little more than a year ago. Even if the commercial real estate market manages to keep its head above water, litigation is likely.

Among those in line to get soaked: collateralized debt obligations backed by commercial real estate assets ("CRE CDOs") and the institutions and professionals that have structured, managed, and marketed them. CRE CDOs were a common financing mechanism for commercial real estate's explosive growth in the middle of the decade. But faced with a perfect storm similar to that which struck the residential real estate market — plummeting asset values, rising default rates, and tight credit markets — CRE CDOs will likely face lawsuits similar to those now dogging CDOs backed by residential real estate assets. Further, unique features of CRE CDOs might generate their own litigation risks. This Article highlights those litigation risks and discusses some potential defenses.

-Continued on page 7-

The President's Message

By Richard J. Grabowski



The administration of justice is the firmest pillar of good government.
—George Washington.

As we approach mid-year, our state and local governments are in the midst of grappling with the difficult task of balancing their budgets. With governmental revenues significantly reduced, painful cuts in many areas are inevitable. Our state courts have already felt the budget pinch, with \$24 million having been cut from the budget of the Orange County Superior Court.

However, our courts are not merely another government program to be expanded or contracted in the budget process. Our courts are a co-equal branch of government, providing an essential check and balance in our democratic system. This essential truth is not often heard above the din and clamor of interest groups seeking to protect their budgets from painful cuts. Ethical considerations at times prevent our judges from speaking out in public forums about the effects further budget cuts will have on the administration of justice.

As members of the bar, we are free to express our views about the effect proposed budget cuts will have on our courts, our judges and on the administration of justice. Our collective voice should be heard in support of our court system. With this in mind, your ABTL Chapter, along with other bar organizations, will remain abreast of the latest budget proposals that effect our Courts. You can expect that our collective voice will be heard in support of the effective the administration of justice.

On a positive note, our Chapter's Leadership Development Committee is off to a fine start. Its inaugural event was very well attended. It has a core group of young lawyers who are energized and are developing programs geared to lawyers who have been in practice ten years or less. Our bench has

-Continued on page 10-

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The Rise and Fall of "Balance Billing"

By Mark E. Earnest



Introduction

Doctors and other medical providers often contract with health maintenance organizations (hereafter "HMO") (references to HMOs in this article include all entities required to reimburse emergency care providers, such as "health care service plan[s]" and their "delegates" as outlined in Health and Safety Code section 1371.4(e)) to provide medical care to HMO

members and, after services are performed, the HMO pays the doctor pursuant to the contract. In emergency situations, however, HMO members rarely have the time to locate an HMO-contracted doctor and are instead treated by emergency care providers who may not have a preexisting contract with the HMO. These "noncontracting doctors" are statutorily required to provide emergency medical care to HMO members (Health & Saf. Code, § 1317 (requiring emergency care providers to provide emergency services without first questioning the patient's ability to pay); see 42 U.S.C. § 1395dd (providing similarly under federal law)), and HMOs are statutorily required to compensate the doctors for the care provided (Health & Saf. Code, § 1371.4 (providing that a for-profit "health care service plan shall reimburse providers for emergency services and care provided to its enrollees, until the care results in stabilization of the enrollee," regardless of whether the provider rendering the services has contracted with the plan)).

A common battle commences when a noncontracting doctor bills the HMO for services provided to HMO members. Often, the HMO reimburses the noncontracting doctors in an amount lower than billed, claiming the bill was excessive and its lower payment is reasonable. Prior to the recent California Supreme Court decision in *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group*, 45 Cal.4th 497, 87 Cal.Rptr.3d 299 (2009) ("*Prospect Medical*"), this situation often resulted in the noncontracting doctor trying to recoup the difference by directly billing the patient, a practice commonly known as "balance billing." *Prospect Medical*, however, shut this practice down in January of this year.

Another Arrow in the Quiver: Unique Aspect of Malicious Prosecution Claims

By William C. O'Neil



A plaintiff who waits until trial to cultivate blame has likely already lost the case. Recently, economic sectors particularly hard hit by the economic downturn have become breeding grounds for lawsuits. A distressed home owner files a new lawsuit every day in Orange County alleging wrongful foreclosure or loan misrepresentation. Business purchasers seek to rescind deals that appeared fruitful during prosperous

times, but have proved disastrous as the economy sours. In each instance the lawsuit attempts to assign blame.

Every so often, one party will institute an action against another party based on an ulterior, malicious motive. The "principal situations" in which civil proceedings are initiated for an improper purpose are those in which (1) the person initiating them does not believe that his claim may be valid; (2) the proceedings are filed primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; and/or (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 383.)

Many attorneys have had clients who review an adversary's complaint, or cross-complaint, and asks with bewilderment how an action that fits one of those four categories can even be filed, let alone prosecuted. In most cases, the attorney must attempt to explain to a puzzled client that a demurrer challenges only the legal sufficiency of a complaint and that a factual challenge will require time and money. About that time, a settlement demand representing slightly less than the projected discovery costs arrives and the client wants to know her options.

This article covers only two of many unique aspects of the claim formally entitled "Malicious Institution of Civil Proceeding," but commonly called malicious prosecution. While this article does discuss the broad concepts underlying malicious prosecution, it is

-Continued on page 11-

-Continued on page 13-

Brown-Bag Lunch Update

By Scott Shaw and Laura Schiesl



We have combined this article to summarize the lunch with the judges in the Complex Division last quarter and the lunch with Judge Guilford this quarter. Last quarter we had a great turn out for the Brown Bag Lunch with judges from the Complex Division in Orange County Superior Court. Judge Andler opened her courtroom to at least thirty young attorneys. In addition to

Judge Andler, we were fortunate to have Judge Velasquez, Judge Colaw, Judge Wieben-Stock, and Judge Sundvold in attendance. This quarter, we were fortunate to meet with Judge Guilford who provided



us with a tour of his courtroom and chambers, as well as helpful advice for young litigators. The information gained at these two lunches was extremely beneficial, and everyone in attendance was greatly appreciative.

The theme of the day in the Complex Division was problem solving. All the judges in attendance agreed that a significant benefit of the Complex Division is the ability to help litigants and parties solve problems. Towards this end, the judges shared their insights and suggestions with us from the case management stage through preparation for trial.

In the Complex Division, case management conferences are much different than in the “Tower” across the street. Judge Colaw stated that status conferences in his courtroom can last anywhere from ten minutes to an hour, depending on how long it takes to solve a particular issue or problem. According to Judge Wieben-Stock, this is what makes the Complex Division unique—the problem solving mentality. The judges in the Complex Division are all experienced in analyzing

-Continued on page 15-

-Q&A: Continued from page 1-

cal ailments. For some reason I’ve always had success in navigating bureaucracies. I’m not sure if that’s a good or a bad sign. But I learned at an early age that there is a process for most things, and I have never been deterred by having to go through a process, legal or otherwise.

When one is successful doing that, and you realize that you can help people around you (like your family), it’s very rewarding for the person doing the facilitating. So I got a great deal of satisfaction in helping other people, particularly in the law, and practicing as an lawyer, puts you right in the middle of the process in interpreting complex procedures and complex statutes, and ultimately getting relief for the clients that you are representing.

Q: Did you have any role models or influences during your legal career?

A: In terms of becoming a lawyer, I don’t have anybody in mind. I was not someone who watched Perry Mason (or some other lawyer TV program) or who aspired to become a lawyer or judge at an early age. It always amazes me when I meet people who say that I went to law school because, after I graduated from college, I felt that I needed some practical skills. But once I became a lawyer, I certainly counted former Justice Elwood Lui (now a partner at Jones Day) as one of my role models and mentors. Early on I was assigned to his courtroom as a young deputy city attorney, and handled about a dozen trials in his courtroom. I considered him an excellent judge and someone to emulate. There were other judges in the criminal courts building in downtown Los Angeles at that trial in the late 1970’s — such as Chief Justice Ron George (who was a judge there), Arthur Gilbert and Norm Epstein — who I also admired. There was a deep bench of excellent judges and, in terms of modeling myself as a trial judge, I certainly count each of them as role models. Finally, in terms of the appellate bench, I studied the opinions of the Warren court in law school, and thought that Justice Earl Warren was someone to be admired for his vision of the law. I would put him up there among my judicial heroes along with Justice Thurgood Marshall for his enduring impact on the law as a lawyer and judge.

Q: Why did you decide to become a judge?

A: Probably for the same reason that I became a lawyer. That is, I thought that even more so than a lawyer, a judge was in a position to actually do the right thing. A judge doesn’t represent a client or a particular interest.

-Continued on page 5-

-Q&A: Continued from page 4-

As a judge, you get to balance the equities (in some situations) and follow the law without becoming an advocate for one side over another. You are in a position to be a fair decision maker, and I think that's an ideal position to be in as a legal professional.

Q: How would you describe your judicial philosophy?

A: My judicial philosophy is considered by others to be fairly moderate in both civil and criminal cases. I don't approach any case with a predisposition one way or the other. Certainly, being fair, open-minded and considerate of litigants, and having an even disposition with lawyers appearing in front of me; these are traits that I would characterize as part of my judicial philosophy and demeanor. I would describe my philosophy as one who adheres to the rule of law, as opposed to bending to public opinion.

Q: What do you believe is the role of the California Supreme Court?

A: First and foremost, our role is to clarify the law, to resolve conflicts in the law among the various courts of appeal, and to decide important questions of law that are of statewide interest — whether they are in the nature of a statewide proposition or some other pressing issue that has significant impact throughout the State.

Q: How, if at all, has your view on the role of the Supreme Court been affected by the recent recession?

A: Although I suspect that it's a bit premature to say, I anticipate that our Court may eventually see some cases that will have their origins in the current recession — whether those are employment issues, real estate disputes, or in other deals gone bad. So, in terms of the types of cases that are currently before us there is no present impact. But don't get me wrong, I think the recession is impacting all of us, both in the public sector and the private sector. And, there definitely is an impact on our court — in terms of furloughs for court employees, closing courts down, and in significant cutbacks to our budget. I think that, in a real sense, there will be very direct impacts on our court operations.

Q: From what I've seen, the California Supreme Court enjoys a very high degree of public confidence. Why do you think that's so?

A: I think that the public has a very high level of confidence in our judiciary, both at the state and federal levels. Fortunately, there are very rare instances of corruption. I think people generally view our judicial system as being fair and above board, and where one truly does have a day in court. Moreover, I think people recognize our court as one of the leading courts in this country, and that we've really emphasized, particularly in the last decade, opening up the courts in terms of facilitating access to justice through the promotion of transparency and community outreach by the courts. I think all of this contributes to why our Court enjoys a great deal of public confidence.

Q: The work of the Supreme Court seems to be more politicized by those outside the Court. Are you able to isolate yourself from such distractions?

A: One of my predecessors used to say that being a Justice on the California Supreme Court is akin to having a crocodile in the bathtub while you're shaving in the morning. The crocodile represents public opinion, and it's staring you in the face every day. And he would say that, in his opinion, it was sometimes hard to ignore the crocodile while you're shaving. I can't say I've ever felt that way, but admittedly we're all human. We're all a product of everyone and everything we've come across. Thus, we all have personal preferences — it's human nature — but we try not to let that affect our ultimate disposition. I think we do a very good job of not letting the Court be swayed by the politics of the day. And I firmly believe that, by and large, we do a good job of remaining independent and impartial while adhering to the rule of law.

Q: In these tough economic times, what challenges do you see facing the bench and bar in general and the California Supreme Court in particular?

A: Fiscally, there is definitely a significant impact on our Court in terms of court employees, closing courts down, and in cutbacks of our budget. For example, the courts recently had to cancel a bi-annual conference because of the budgetary crisis. And, I think that's true with all of our courts, especially the trial courts. We are all trying to do the same work with fewer resources. Our goal, of course, is to maintain our level of productivity, which is becoming increasingly harder to do. So just like every other branch of government, the courts are experiencing the same kind of budgetary constraints and hardships.

Q: The Supreme Court grants review in a small number of cases. Can you describe your approach / philosophy in deciding whether to grant review in a par-

-Continued on page 6-

-Q&A: Continued from page 5-

ticular matter?

A: First of all, we have to be extremely selective in picking the cases that we review. We have limited resources, and we recognize that we are not a court of error, but a court of precedent. So we want to pick cases that are going to advance or, at the very least, clarify the law or resolve conflicts that may exist in the law. In deciding whether to grant review, we look at all of those things. Is there a conflict? Is this an issue of substantial public importance? Is granting review going to make a difference not only in this case, but in cases down the road? These are all important questions that we consider when we decide how to allocate our limited resources.

Q: In terms of preparing a Petition for Review, what advice would you give to civil litigators seeking review of a case to the California Supreme Court?

A: A lawyer should narrowly define the issue of law that he or she wants us to review. I think we all believe in the incremental development of the law and, to the extent that a lawyer can concisely and persuasively pinpoint a specific issue that calls for our review, that is very important. We really do have a very narrow focus. To that extent, a petitioner should not overindulge in the facts. Instead, we expect to see a concise statement of the facts, and a concise and accurate description of the issue to be resolved and, just as importantly, why review is necessary — not only for this case, but for future cases as well.

Q: Often times, cases in which the California Supreme Court grant review are supported by amicus briefs. As trial lawyers, many times our clients will want us to weigh in as amicus, particularly if the outcome of a case on review to the Supreme Court may have serious ramifications in on-going trial court or appellate litigation involving that client. This is a two-part question. First, how much weight do you give to amicus positions in deciding to grant review or, if review is granted, in deciding the outcome of cases? And, second, what advice would you give to lawyers in the preparation of an amicus position?

A: I think amicus briefs and letters to the Court are very helpful because they give us a broader perspective of how an issue will impact a particular industry or type of case. It gives us the big picture. For example, they are very helpful in pointing out certain

unintended consequences of a decision of the court of appeal — which might be correct on its facts and maybe even the law, but if left unreviewed, could have unintended consequences (if read broadly). So I think that we look at amicus from that perspective, because I think, in some ways, they have the same perspective that we, as a court, might take. We want to know the rule of law that will come out of the case, and the future applications and ramifications of that rule of law. Often times, individual counsel for the appellant or respondent do not take that broader perspective. So I think the views of amicus are very helpful because they give the Court the broader perspective of a case.

Q: What, if anything, are the common mistakes you observe lawyers making in your courtroom?

A: First, reading from a prepared statement or speaking from a memorized script. Second, if the lawyer does not have a good sense of the formalities and decorum of an appellate court and argument. Sometimes I observe lawyers in our courtroom being too informal — addressing the Court as “you guys.” Believe it or not, that’s happened more than once. Another common mistake I see is when a lawyer is not responsive to a question asked by the Justice or interrupting the Justice when he or she is speaking. I would say, in terms of oral argument, those are the common mistakes. In terms of briefing, overstating a case and/or misrepresenting the record or the law are huge mistakes. These destroy a lawyer’s credibility.

Q: Any thoughts about how you’d like your judicial legacy to be perceived by future generations?

A: I fully recognize that in the vast majority of our cases our Court is going to be the last resort for a litigant. So I always bear in mind that I want opinions that I sign onto to be followed for years to come. I want my decisions to be the right decisions now and in generations to come. Finally, I want my judicial legacy to be one that stood for fairness and compassion and for following the rule of law.

Q: Outside of the law, are there any personal accomplishments that you are particularly proud of?

A: I’ve always been very proud of my community involvement — that is, work outside the court. I have been very active in foster care reform within the State. For example, I am the co-chair of a statewide foster care commission as well as the chair of a court-directed foster care communion. I’m proud of the work I’ve done in that area. I am also proud of a cer-

-Continued on page 7-

-Q&A: Continued from page 6-

tain amount of mentoring I have done for high school students — both in terms of encouraging them to go into the law and in continuing with their college education.

Q: What do you do for fun?

A: I like riding my bike — that's both fun and it keeps me in shape. I also like opera. In fact, I sang very briefly for a local community opera company Los Angeles. When I am out for the night, I like going to the theatre and enjoy a good musical. I also like to travel.

For example, I recently presided over a law student mock trial competition in Mexico. It also was wonderful to see Mexican law students incorporating oral testimony in trials, which is new to the Mexican judicial system.

Q: If you were not a Justice on the California Supreme Court, what would you most like to do?

A: In terms of a profession, I've always been interested in city planning or practice as an architect. And for fun, I wish I were an accomplished opera singer (which I'm not). *It's always been a gift that I admired, and wished I had.*

Q: Why architecture?

A: I like the interaction of people and space. I also like the art and design aspect as well as making people feel comfortable in their surroundings. And I think being an architect really embodies so many skills — from the environment to construction, to psychology, the arts. To me, an architect can be a Renaissance man, and I find that appealing.

Thank you Justice Moreno for your time.

♦*John A. Vogt is a partner at Jones Day and is a member of the Firm's Trial Practice Group. Mr. Vogt also serves as the Editor of the ABTL Report.*

-Real Estate: Continued from page 1-

CDOs — A Brief Introduction

A CDO is a structured financial product in which debt and equity are issued to finance the purchase of a pool of assets (the "collateral pool"), and income from the collateral pool is used to service the debt. The assets in the collateral pool are selected according to investment guidelines set forth in the CDO's documentation and generally include financial assets, such as loans or debt securities, or securitized assets, such as asset-backed securities or securities issued by other CDOs.

CDO debt is issued in classes or tranches of notes that receive principal and interest payments according to a priority-of-payment protocol. Senior notes typically are investment-grade, and the noteholders generally are entitled to receive their full distribution of interest (or principal and interest) payments before any distribution to the subordinated noteholders. Subordinated notes typically are issued at the lowest investment grades, or below investment grade, and offer an attractive yield relative to senior notes to compensate for their junior status. This tiered distribution structure redistributes the collateral pool's credit risk among the noteholders. The equity tranche of the CDO, which might be retained by the collateral manager (discussed below) or sold to an investor, generally receives distributions last and is the first to suffer losses if the collateral pool's assets fail to generate the anticipated income.

Before the credit crisis, CDOs were attractive to investors — principally financial institutions, insurance companies, pension funds, and hedge funds — for several reasons. CDOs provided investors with exposure to asset classes that they did not want to hold directly or could not hold directly due to their own investment guidelines. CDOs provided investors with regularly scheduled distributions that could match an investor's own payment obligations. And CDOs provided an attractive rate of return, with yields superior to those on comparably rated debt.

CDOs were also attractive to the professionals and institutions that brought them to market and that have administered them. The entities that sponsored and structured CDOs included financial institutions and asset managers. Not only did they earn fees for their effort, but they also accomplished other goals, such as selling assets into the CDO to raise capital or to man-

-Continued on page 8-

age their balance sheets. CDO trustees — typically banks — have earned fees for holding the collateral pool assets in trust for the benefit of the noteholders and certain other persons, enforcing the terms of the CDO, and acting as a collection agent to collect payments from the assets in the collateral pool and distribute payments to the noteholders. In a managed — as opposed to a static — CDO, an investment advisor, acting as a collateral manager, trades collateral in and out of the collateral pool to manage risk and performance. The collateral manager earns a fee for its services. (Another entity involved in bringing a CDO to market is the issuer, a bankruptcy remote entity typically organized in a non-U.S. jurisdiction that has a favorable regulatory and tax regime. The issuer issues the debt and equity of the CDO and pledges the collateral pool's assets and their income to a trust (administered by the trustee) for the benefit of the noteholders and certain other persons.)

Distinguishing Features of CRE CDOs

CRE CDOs differ from other CDOs in at least three ways. First, the collateral pools of CRE CDOs consist mainly of commercial real estate assets. When static CRE CDOs were first marketed in the late 1990s, their collateral pools comprised mainly commercial mortgage-backed securities and debt issued by real estate investment trusts. By the mid-2000s, managed CRE CDOs had emerged, and their collateral pools often included less liquid real estate assets such as whole loans, B notes, mezzanine loans, and preferred equity.

Second, the offering documents for CRE CDOs often include asset-specific disclosures because a single asset in the collateral pool often accounts for greater than five percent of the collateral pool's aggregate principal balance. This is in contrast to the offering documents for other CDOs, which generally do not contain asset-specific disclosures because concentration limits generally prohibit a single asset from accounting for a large portion of the collateral pool. In those transactions, asset class disclosures and investment guidelines are viewed as providing sufficient information to investors. Similarly, the transaction documentation for CRE CDOs often includes asset-specific representations and warranties.

Finally, the lineup of institutions that admin-

ister CRE CDOs sometimes includes a special servicer and master servicer, roles that do not exist in most other CDOs. The special servicer manages distressed assets in the collateral pool. The master servicer, rather than the trustee, collects payments from certain assets in the collateral pool. These parties were added to CRE CDO deals at the request of rating agencies and investors due to the specialized nature of the collateral pool's assets.

Litigation Risks

The current wave of litigation involving CDOs backed by residential real estate assets suggests what might be in store for CRE CDOs. In one type of lawsuit, CDO investors have leveled claims against issuers, structuring agents, dealers, trustees, and collateral managers for (i) fraud and negligent misrepresentation based on allegedly misleading statements about collateral pools, deal protections, or market risk; (ii) breach of fiduciary duty for mismanaging collateral pools; and (iii) breach of contract for failure to live up to the terms of the transactions. (See, e.g., Complaint, *M&T Bank Corp. v. Gemstone CDO VII, Ltd.*, Index No. 2008-007064 (N.Y. Sup. Ct. Erie Cty. June 16, 2008).)

Lawsuits by investors in CRE CDOs are not the only possibility. Current credit crisis litigation includes shareholder suits against financial institutions to recover losses allegedly caused by the institutions' structured finance activities and investments. (See, e.g., *In re Citigroup Inc. Shareholder Deriv. Litig.*, 964 A.2d 106 (Del. Ch. 2009) (dismissing a shareholder derivative action).) CDOs have featured prominently in these lawsuits, even though the claims are not tied directly to a particular CDO's performance. Rising commercial real estate defaults — and the ensuing stress on CRE CDOs — could fortify these lawsuits or trigger a new wave.

In a third type of lawsuit, known as an interpleader action, a party holding a specific asset asks the court to determine who among two or more competing claimants is entitled to that asset. Disputes involving the distribution of CDO assets seem almost tailor-made for resolution by interpleader because of the CDO structure, in which a trustee holds assets for the benefit of the investors. Indeed, several CDO trustees have initiated interpleader actions as a result of allegedly ambiguous transaction documentation concerning the proper distribution of CDO assets following an event of default. (See, e.g., *Amended Interpleader Complaint, Deutsche Bank Co. Americas v. Lacrosse Fin. Prods, LLC*, No. 08-civ-0955 (S.D.N.Y. Nov. 5, 2008). Faced with alleged ambiguity in the transaction documentation, an investor in one CDO simply sued the co-issuers, trustee, and broker-dealer under various common law theories. See Com-

-Continued on page 9-

plaint, *M&T Bank Corp. v. LaSalle Bank Nat'l Ass'n*, No. 08-cv-00581 (W.D.N.Y. removed Aug. 6, 2008).)

Litigation Risks Unique to CRE CDOs

The distinguishing features of CRE CDOs, described above, might themselves be a source of litigation risk. For example, asset-specific disclosures could be fertile ground for allegations of misrepresentations and omissions, and asset-specific representations and warranties might provide a platform for breach of contract claims. This risk is not inherent in other CDOs because, generally, their documentation does not include asset-specific disclosures or asset-specific representations and warranties.

Asset-specific disclosures also might present a problem to defendants on the element of materiality. The fact that one asset, as opposed to another, is highlighted in the transaction documentation could prevent defendants from successfully arguing that alleged misstatements about the asset were immaterial, at least on a motion to dismiss. Asset-specific disclosures also could help investors craft complaints that can survive challenges to the specificity of the pleading. (Under the federal and state rules that control how a complaint must be pleaded, allegations of fraud (and, in some states such as New York, negligent misrepresentation) must be pleaded with specificity. See Fed. R. Civ. P. 9(b); N.Y. C.P.L.R. 3016(b).) When an asset is identified in some detail in the offering document, an investor can focus its pre-litigation diligence and its pleadings on that asset. Investors in other types of CDOs do not have that luxury because disclosures in the documentation for those transactions usually stop at the asset class level.

Another potential litigation risk comes from the involvement of a special servicer, a role that does not exist in other types of CDOs. Poor CRE CDO performance could prompt investors to test — in court — the latitude that special servicers generally are given to work out troubled assets. Such second-guessing lawsuits might prove too fact-specific for resolution on a motion to dismiss. Litigation risk also is heightened by the perilous state of commercial real estate and credit markets, which could further constrain the workout options available to special servicers.

Some Defenses

Certain arguments that have gained traction in recent credit crisis litigation could prove helpful in defending against CRE CDO lawsuits. One argument focuses on the element of loss causation, that is, proof that an investor's loss was caused by the defendant's alleged malfeasance. Companies have defeated shareholder securities fraud actions at the motion to dismiss stage by demonstrating that alleged misrepresentations in their disclosures were not the cause of share price declines. Rather, they argue, an unforeseen, unprecedented collapse of credit markets and housing prices caused a market-wide contraction that unavoidably affected the companies' share prices. (See, e.g., *In re 2007 Novastar Fin., Inc. Sec. Litig.*, No. 07-0139-CV-W-ODS, 2008 WL 2354367, at *3 (W.D. Mo. June 4, 2008) (dismissing a federal securities fraud complaint brought by shareholders of a mortgage originator: "[N]othing in the Complaint demonstrates a connection between these changes [to the company's internal controls and underwriting standards] and the Company's later misfortunes, particularly in light of the economic downturn described [in the Complaint]."). See also *Pittleman v. Impac Mortgage Holdings, Inc.*, No. SACV 07-0970, 2009 WL 648983, at *4 (C.D. Cal. Mar. 9, 2009) (dismissing a federal securities fraud complaint brought against an originator of Alt-A mortgages: "Plaintiff argues that this case is about a staggering race-to-the-bottom of loan quality and underwriting standards as part of an effort to originate more loans for sale through secondary market transactions. The Court disagrees. This case is about a company involved in a volatile industry at the onset of a long, destructive economic downturn.") (internal quotation marks and citation omitted).)

Whether defendants in CRE CDO lawsuits can successfully advance this loss causation argument remains to be seen. One potential hurdle is that, even if distress in the commercial real estate market proves to be unprecedented, market participants might not be able to demonstrate that the stress was unforeseeable. This hurdle might be especially high for managed CRE CDOs because collateral managers arguably will have had more time than their residential real estate colleagues ever had to anticipate market stress and manage collateral accordingly. That said, disrupted credit markets — hardly the fault of a collateral manager — arguably have limited collateral managers' options. A CDO's own investment and trading guidelines might further constrain a collateral manager's options in an unstable market.

Another argument concerns the element of scienter — proof of a wrongful state of mind, such as an intent to

-Continued on page 10-

-Real Estate: Continued from page 9-

deceive. Courts have held that an executive who loses money alongside shareholders logically lacked an intent to deceive those shareholders. The reasoning: An executive would not have invested in the company if she knew the company was a sham. (See, e.g., *In re Bristol-Myers Squibb Sec. Litig.*, 312 F. Supp. 2d 549, 561 (S.D.N.Y. 2004) (dismissing a federal securities fraud claim: “[T]he Individual Defendants, in almost every instance, *increased* their . . . holdings [in the security at issue] during the Class Period — a fact wholly inconsistent with fraudulent intent.”) (emphasis in original).) Collateral managers that hold junior investments in a CDO transaction may advance that same argument against plaintiffs that hold more senior positions because the collateral managers almost certainly suffered losses before the more senior noteholders. The argument should have even greater force in CRE CDO lawsuits, because in many CRE CDO transactions, the collateral managers often bought or otherwise retained the equity tranche, as well as all non-investment grade tranches of notes.

Conclusion

CRE CDOs — and the institutions and professionals that have structured, managed, and marketed them — are potential targets in the next wave of credit crisis litigation. That litigation might mirror litigation currently underway against non-CRE CDOs, and certain distinct features of CRE CDOs might be the fulcrum for further litigation. Defenses that have proved helpful in the current wave of litigation could prove helpful in defending against the next wave. It certainly is not too early (or too late) for investors, dealers, collateral managers, and trustees to review their CRE CDO transaction documentation to assess any material weaknesses, to evaluate litigation risks and opportunities, and to prepare accordingly.

♦ *Jayant W. Tambe is a partner at Jones Day, and is the co-leader of the Firm's financial institutions litigation & regulation practice.*

-President's Message: Continued from page 2-

been very supportive. The Leadership Development Committee's next event will be a bench and bar mixer on July 30, 2009. I hope you will encourage your colleagues to attend.

Last but not least, I feel it is important to remind each of you that the organization is firmly committed to continuing to provide its members with interesting and important articles. This edition of the Report reflects that commitment. Our lead article — an interview with Justice Carlos Moreno of the California Supreme Court — is an insightful look into one of our most respected jurists in this State. I want to personally thank Justice Moreno for taking the time to participate in this interview. In this edition, you also will read a timely piece about the next potential wave of litigation arising out the credit crisis. In it, Jay Tambe explains how our courthouses may soon be flooded with commercial real estate securities lawsuits. We hope that you enjoy these and the other articles in this edition of the Report.

♦ *Richard J. Grabowski is the Partner-In-Charge of Jones Day's Irvine office, and is a member of the Firm's Trial Practice Group.*

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Path to Prospect Medical

The relevant legal history in this area begins with *Coast Plaza Doctors Hospital v. UHP Healthcare*, 105 Cal.App.4th 693, 129 Cal.Rptr.2d 650 (2003). The issue before the court in that case was whether the Knox-Keene Health Care Service Plan Act of 1975 (Health & Saf. Code, § 1340, et seq.) – the comprehensive scheme regulating health care plans – prohibited a noncontracting doctor from bringing a private cause of action against an HMO for reimbursement for emergency and medically necessary services provided to the HMO members. 105 Cal.App.4th at 696. The court held that noncontracting emergency care doctors may bring such private causes of action, despite the lack of a contract with the HMO. *Id.* at 707.

Although noncontracting doctors could now sue HMOs for reimbursement, these doctors faced serious problems when the HMO had previously delegated its payment responsibilities to contracting medical providers, as permitted by statute, who were insolvent. (See Health & Saf. Code, § 1371.4 (e), providing a “health care service plan may delegate the responsibilities enumerated in this section to the plan’s contracting medical providers” thereby making those “delegates” liable for the delagor’s payment responsibilities.) This precise issue arose in *Ochs v. Pacific Care of California*, 115 Cal.App.4th 782, 9 Cal.Rptr.3d 734 (2004), where doctors sought reimbursement from the HMO because the HMO’s delegate was insolvent or otherwise unable to pay. The *Ochs* court held that an HMO is “not statutorily obligated to pay for emergency services when it has delegated its payment responsibilities to a contracting medical provider that becomes insolvent or is unable to pay,” unless the HMO was negligent in its delegation. 115 Cal.App.4th at 787. The court reasoned that Health and Safety Code section 1371.4(e) “provides a statutory safe harbor for health care service plans that have delegated the obligation to pay for emergency services to their contracting medical providers” and that it was in no position to legislate to the contrary. *Id.* at 793. Specifically, the court analyzed the legislative history of the statute, concluding that the “clear implication is that the Legislature believed that...health care service plans did not remain liable to pay for emergency services after a delegation.” *Id.* at 792. If the HMO’s delegate is unable to pay for the services provided, the HMO is insulated and noncontracting doctors are left footing the bill.

To extinguish or at least minimize their losses, noncontracting doctors latched onto *dicta* in *Ochs* and turned to the patients for amounts left unpaid or disputed by the patient’s HMO. In particular, the *Ochs* court observed “that [the Health and Safety Code] appears only to limit ‘balance billing’ of insured patients by physicians who have contracted with the patients’ plans. [The noncontracting doctor] may have a remedy against the individual patients, and those patients a remedy against [the HMO].” *Ochs*, at 796. In other words, the *Ochs* court opined that only HMO-contracted doctors were prohibited from “balance billing.” By this language, the practice of “balance billing” by *noncontracting* doctors seems to have been permitted.

Facts and Holding of Prospect Medical

In *Prospect Medical*, Plaintiffs and Appellants (hereafter “Prospect”) acted as a “delegate” of health care service plans and became “statutorily obligated to pay for emergency services provided to patients who have subscribed to those health care service plans.” Defendants and Respondents (hereafter “Emergency Physicians”) were “health care providers and [were] statutorily required to provide emergency care without regard to an individual’s insurance or ability to pay.” 45 Cal.4th at 503.

In this case, after providing care to Prospect’s members, Emergency Physicians issued bills to Prospect for reimbursement. Prospect sometimes paid less than the amount it was billed, claiming the bills were excessive and its payments were reasonable. When payment was not received in full, Emergency Physicians then billed the patients directly for the remaining balance, *i.e.* they engaged in “balance billing.” *Id.*

After various billing disputes, Prospect filed suit against Emergency Physicians seeking, among other things, a judicial determination that “balance billing is unlawful.” Prospect did so partially because its members were being threatened by collection agencies and with legal actions. The trial court sustained Emergency Physicians’ demurrers without leave to amend and entered judgments accordingly, which Prospect appealed. The Court of Appeal concluded, among other things, that “balance billing is not statutorily prohibited.” The California Supreme Court granted review of one question: is “balance billing” a lawful practice? *Id.* at 503-04.

After a thorough review of case law and legislative history, the Supreme Court ruled that “billing disputes

-Continued on page 12-

-Balance Billing: Continued from page 11-

over emergency medical care must be resolved solely between the emergency room doctors, who are entitled to a reasonable payment for their services, and the HMO, which is obligated to make that payment.” *Id.* at 502. In shutting down “balance billing” for both contracting and noncontracting doctors alike, the Supreme Court directly addressed the *Ochs* “balance billing” language, stating that the “[statute’s] language does not authorize the round-about route of the doctor collecting from the patient, who must then collect from the HMO. Rather, it mandates that the HMO pay the doctor directly. It does not involve the patient in the payment process at all.” *Id.* at 509. In sum, regardless of whether medical services were provided by a contracting or noncontracting doctor, HMO members that receive medical care may not be billed for any unpaid or disputed amount – the doctor’s sole remedy is to bring an action against the HMO.

Underscoring this, the Supreme Court reiterated, “[a] patient who is a member of an HMO may not be injected into the dispute. Emergency room doctors may not bill the patient for the disputed amount.” *Id.* Finally, to remove all doubt, the Court stated, “Balance billing is not permitted.” *Id.* at 507.

Limitations of *Prospect Medical*

Of notable interest in *Prospect Medical* were the Supreme Court’s efforts to limit its holding. For example, the Court explicitly stated that the issue before it was “narrow” and limited to “the precise situation before [it]—billing the patient for emergency services when the doctors have recourse against the patient’s HMO.” *Id.* at 502, 507 FN 5. In avoiding other issues, such as how to resolve disputes over bills between noncontracting doctors and HMOs, the Court expressed, “[a]ll we are holding is that this entitlement [to reasonable reimbursement] does not further entitle the doctors to bill patients for any amount in dispute.” *Id.* at 509. The Court refused to “solve the societal and economic problems defined by [the parties’] rhetoric,” emphasizing anew that its decision was limited to the issue before it. *Id.* at 510-11. Thus, the Court clarified current legislation and legal precedent, but did not overstep its bounds and address issues not properly before it.

It seems apparent that the Supreme Court did not want to play the role of regulators and define what compensation HMOs must pay to noncontracting emergency room doctors, despite previous unanswered calls for legislation in this area. See *Ochs*, 115 Cal.App.4th at 793. To illustrate, the Supreme

Court confirmed the holding in *Bell v. Blue Cross of California*, 131 Cal.App.4th 211, 31 Cal.Rptr.3d 688 (2005), stating that “[e]mergency room doctors are entitled to reasonable payments for emergency services rendered to HMO patients.” *Id.* at 509 (emphasis in original). Similar to the *Bell* court, the Supreme Court did not *define* what a “reasonable” payment was, stating that the “larger problem of adequate compensation for emergency room doctors” was not before them. *Id.* at 510. The Court noted that, although the “Legislature has acted to protect the interests of noncontracting providers in reimbursement disputes,” this “area of the law might benefit from comprehensive legislation.” *Id.* at 507, 510.

Ramifications of *Prospect Medical*

Fortunately, a few guidelines have been drawn in the health care industry as a result of *Prospect Medical*. First, noncontracting emergency care doctors are entitled to prompt and reasonable payments for services rendered to HMO members. Second, noncontracting emergency care doctors may bring private causes of action against HMOs for failure to fully reimburse the doctors for services performed for HMO members. Third, noncontracting emergency care doctors may not directly bill HMO members for services provided or amounts left unpaid or disputed by the HMO.

Apart from these standards, who *Prospect Medical* will ultimately affect and the scope of its application is less clear. Initially, HMO costs could swell in the form of larger payments to noncontracting doctors and if litigation over disputed bills escalates. HMO members could see raised premiums and perhaps sub-par medical care if more experienced and more expensive doctors opt not to work in emergency departments because of their inability to receive full compensation. (Sen. Com. on Insurance, Analysis of Sen. Bill No. 117 (2000-2001 Reg. Sess.), Mar. 21, 2001.) In addition, noncontracting emergency care doctors, including ambulance companies and hospitals, may also spend increased amounts litigating over disputed bills, resulting in less money to operate the emergency room. This would affect everyone because when emergency departments have less money to operate they close or become short-staffed, often resulting in longer patient waiting, dissatisfaction and prolonged patient pain and suffering. See *Bell*, 131 Cal.App.4th at 222.

-Continued on page 13-

-Balance Billing: Continued from page 12-

Although noncontracting doctors will now have to expend more efforts in battling with HMOs and their delegates to be fully compensated, is legislation the answer? Maybe. For example, one question left wide open by *Prospect Medical* is whether it is retroactive or prospective only. In other words, what happens to the HMO member that expended large sums of money in response to “balance billing” demands? Is he/she entitled to reimbursement? And if so, from whom? As an alternative to legislation, a valid approach to billing disputes in this area exists in the case-by-case procedure currently in place. Current regulations provide that the HMO must pay “the reasonable and customary value for the health care services rendered based upon statistically credible information that is updated at least annually and takes into consideration: (i) the provider’s training, qualifications, and length of time in practice; (ii) the nature of the services provided; (iii) the fees usually charged by the provider; (iv) prevailing provider rates charged in the general geographic area in which the services were rendered; (v) other aspects of the economics of the medical provider’s practice that are relevant; and (vi) any unusual circumstances in the case ...” Cal. Code Regs., tit. 28, § 1300.71 (a)(3)(B); see *Bell*, 131 Cal.App.4th at 216.

With these factors in mind, the private market will determine whether (1) noncontracting emergency care doctors, (2) HMOs or (3) patients ultimately gain, or lose, the most in the aftermath of the end of “balance billing.”

♦ *Mark Earnest is a member of the Business Litigation Group at Payne & Fears LLP.*

-Malicious Prosecution: Continued from page 3-

by no means a treatise on the subject. That being said, parties that find themselves prosecuting or defending a malicious prosecution claim should anticipate at least two procedural nuances: (1) an anti-SLAPP motion will be filed in the vast majority of malicious prosecution cases; and (2) both the malicious party and the attorney representing her during the underlying action will almost always be joined as defendants due to the offending client’s affirmative ability to shift blame to her former counsel.

An Anti-SLAPP Motion Will (Almost Always) Be Filed

By now, most California litigators are well

aware that California’s anti-SLAPP statute (Code of Civ. Proc., § 425.16) provides a valuable weapon for wary defendants. The statute “establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of litigation.” (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) This procedure is a two-step process for determining whether an action is a SLAPP (“Strategic Litigation Against Public Participation”) and, therefore, subject to a motion to strike. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from “protected activity.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) If the court finds that this showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Id.* at p. 89.)

“By definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit.” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732.) The filing of lawsuits is an aspect of the First Amendment right to petition. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.) Malicious prosecution cases, then, will always satisfy the first prong of the anti-SLAPP analysis.

The more challenging portion of the anti-SLAPP motion to strike for both sides will be satisfying the second prong — whether plaintiff has demonstrated a probability of prevailing on the claim. To establish a probability of prevailing, the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” (*Mason v. Dvorak* (1995) 40 Cal.App.4th 539, 548.) Though the court does not weigh the credibility or comparative probative strength of competing evidence, the court should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim. (*Wilson v. Park, Cover & Chidester* (2002) 28 Cal.4th 811, 821.) The court must assume the truth of plaintiff’s evidence. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) The plaintiff need only establish that her claim has “minimal merit” to avoid being stricken as a SLAPP. (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at p. 738.)

Malicious prosecution plaintiffs must prove that the prior action (1) was commenced by or at the direction of the defendant, (2) was pursued to a legal termination in plaintiff’s favor, (3) was brought without

-Continued on page 14-

-Malicious Prosecution: Continued from page 13-

probable cause, and (4) was instituted with malice. (See *Bertero v. National General Corp.* (1974) 13 Cal.3d 43.) Generally speaking, the “prior proceeding” on which malicious prosecution actions may be based include ordinary civil actions like breach of contract or negligence, as well as certain ancillary and special proceedings like insanity proceedings (*Sutherland v. Palme* (1949) 93 Cal.App.2d 307, 312), will contests (*MacDonald v. Joslyn* (1969) 275 Cal.App.2d 282), attachment proceedings (*Vesper v. Crane Co.* (1913) 165 Cal. 36, 41); injunction proceedings (*Asevado v. Orr* (1893) 100 Cal. 293, 296), and receivership proceedings (*Jones v. Richardson* (1935) 9 Cal.App.2d 657, 659). Cross-complaints and certain appeals will also satisfy the “proceedings” definition. (See *Bertero v. National General Corp.*, *supra*, 13 Cal.3d at 53 [cross-complaint]; see also *Soukup v. Law Offices of Herbert Hafif*, *supra*, 39 Cal.4th at pp. 296-97 [“the maintenance of an appeal by plaintiffs in an action discovered to lack probable cause may expose the plaintiff’s attorney to liability for malicious prosecution.”])

Certain proceedings, though, will not support a claim for malicious prosecution. Of note, a malicious prosecution action fails where the underlying action was a contractual arbitration (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122), a small claims proceeding (*Pace v. Hillcrest Motor Co.* (1980) 101 Cal.App.3d 476, 479), or a family law proceeding (*Bidna v. Rosen* (1993) 19 Cal.App.4th 27). These three proceedings are particularly prevalent and the latter two often breed strong ill-will between the litigants. Whether a question arises in a formal client meeting or at a cocktail party, attorneys should be wary of advising a potential client to pursue a malicious prosecution action if the action did not arise from a common civil trial action.

The second element of malicious prosecution requires that the prior proceeding terminate favorably for the plaintiff. Practically speaking, then, defendants cannot file a cross-complaint for malicious prosecution because the action has not yet terminated. (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 850.) This concept is particularly vexing to clients seeking immediate justice. For further discussion about this element, consult *Witkin Summary of California Law* 10th Ed., §§ 499-505.

The Attorney Prosecuting the Underlying Action Will Almost Always Become a Defendant

1. Anticipate the “Advice of Counsel” Affirmative Defense

Many litigators are wary of filing suit against attorneys. But an anticipated affirmative defense in malicious prosecution actions may require joining the attorney(s) prosecuting the prior proceeding. Specifically, the third element of a malicious prosecution action requires that the defendant instituted the prior proceeding without probable cause. Typically, the question of probable cause is “whether as an objective matter, the prior action was legally tenable or not.” (*Sheldon Appel Co. v. Albert & Olier* (1988) 47 Cal.3d 863, 868.) “A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.” (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164-65.)

Here, the difference between prosecuting a malicious prosecution action against the former plaintiff (“party-client”) and the attorney who represented the former plaintiff (“party-attorney”) becomes readily apparent. If the party-client instituted the prior proceeding because the party-client relied on the party-attorney in good faith, and fully disclosed all facts known to the party-client, then the law concludes that the party-client initiated the underlying lawsuit with probable cause. (See *Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1383.) This “advice of counsel” affirmative defense, if proven, will defeat any malicious prosecution action.

Conversely, if the party-client acted in bad faith or withheld facts from the party-attorney he or she knew or should have known would have defeated the cause of action, probable cause is not established. (*Id.*) “[C]ounsel’s advice must be sought in good faith [citation] and ‘... not as a mere cloak to protect one against a suit for malicious prosecution.’ [Citation.]” (*Bertero v. National General Corp.*, *supra*, 13 Cal.3d at 54.) The burden of proving this affirmative defense is, of course, on the party seeking to benefit by it. (*Jackson v. Beckham* (1963) 217 Cal.App.2d 264, 272.)

Though each case will have its own intricacies, the value to a malicious prosecution plaintiff of dividing the blame between two defendants should be apparent. In most cases, the party-client will hire new counsel who will deflect blame on the party-attorney. The party-attorney will deflect blame on the party-client for failing to disclose all relevant facts. Such in-fighting among defendants should be anticipated by all sides and factored in to the overall litigation strategy. As a quick note, the party-attorney should rarely, if ever, represent the party-client in the subsequent malicious prosecution action. The ethical dilemmas posed by this representation abound. (See, e.g., California Rule of Professional

-Continued on page 15-

Malicious Prosecution: Continued from page 14-

Conduct Rule 3-110(A) [failure to act competently].)

One other exception to the “advice of counsel” defense exists when the party-client is also an attorney. (See *Hudson v. Zumwalt* (1944) 64 Cal.App.2d 866, 875.) The *Hudson* court’s exception, though, appears to be fact-determinative rather than categorical. Indeed, if the party-client is an attorney belonging to the real property section of the California Bar Association and institutes a bad faith action over the sale of a home, this “advice of counsel” defense should not be afforded the party-client. If, on the other hand, the party-client is an attorney specializing in family law and institutes an action pertaining to patent infringement, perhaps the facts will support the party-client’s shifting blame to the party-attorney. This small exception, though, illustrates why anticipating the anti-SLAPP motion to strike will necessarily focus the litigation strategy early.

2. Anticipate the Proof Necessary Against the Party-Attorney

Though the elements remain the same, different standards apply to prove the third element of a malicious prosecution action – probable cause – against the party-attorney. As noted above, typically the question of probable cause is “whether as an objective matter, the prior action was legally tenable or not.” (*Sheldon Appel Co. v. Albert & Olier* (1988) 47 Cal.3d 863, 868.) As against an attorney, the standard for determining probable cause is whether a reasonable attorney would have thought the claim legally tenable. (See *Sheldon Appel Co. v. Albert & Olier*, *supra*, 47 Cal.3d at p. 881.) The *Sheldon Appel* court was quick to note, though, that this objective-standard conclusion “does not by any means suggest that an attorney who institutes an action which he does not believe is legally tenable is free from the risk of liability for malicious prosecution.” (*Id.*) While the trial court would still need to determine the objective probable cause standard, the attorney’s subjective beliefs would factor into the fourth element – malice. This objective intent prong, therefore, can lead to an interesting circumstance where an attorney who subjectively believes in a case’s futility can be saved by his own incompetence — i.e., that the case actually had merit.

Conclusion

Reaction and hope rarely prevail in high-stakes litigation. Anticipation is a necessity of any litigator, which is particularly true in malicious prosecution actions. These cases will be tried to a judge early through the anti-SLAPP procedure, and will require

anticipating the defenses and blame-shifting that will quickly take place. While perhaps this arrow will be the least used in any attorney’s quiver, understanding malicious prosecution is knowledge worth having.

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-Brown-Bag:Continued from page 4-

complex issues, but the parties’ attorneys are typically the ones who know their cases best. We, as lawyers, then have a responsibility to our clients to present the key issues to the judges and allow them to assist the parties in resolving the issues. Judge Guilford also discussed how clear and effective writing can assist the court and the parties in communicating the issues clearly and succinctly. The importance of effective writing in “plain English” can further assist the court and the parties to narrow the scope of the case and focus on significant issues.

The judges in Complex Division recommended that parties and their counsel discuss the significant issues in the case prior to appearing in court. The judges have many cases on their dockets, so they do not know our cases well enough to identify the significant issues in dispute. Moreover, cases in the Complex Division are deemed “complex” for a reason, and appearing at a status conference and expecting the judge to tackle all the issues is impossible. As Judge Velasquez commented, the status conferences can be like trying to eat an elephant—i.e., it is difficult to know where to begin. Accordingly, if the attorneys can confer and narrow the issues, the judge can more effectively assist the parties in solving the problems.

One recommendation from Judge Velasquez is that the attorneys jointly propose a Case Management Order. As many already know, the ABTL has a sample Stipulated Case Management Order on its website for commercial/business cases that counsel can use as a template. However, as Judge Colaw noted, the particular Case Management Order will depend on the type of case. For instance, attorneys in a complex class action will focus on different is-

-Continued on page 16-

sues in the Case Management Order (e.g., class certification) than attorneys in large a construction defect case where the Order is likely to be much larger.

Another issue that attorneys should discuss early on in complex cases and include in the Case Management Order is e-discovery. Judge Velasquez commented that it is important for attorneys to analyze e-discovery issues and address them in the Case Management Order or bring the issues to the attention of the court, especially since California State law lacks any e-discovery statutes. Judge Velasquez referred to Assembly Bill No. 5, which would amend the Civil Discovery Act to address the e-discovery issues, but that bill is apparently not a priority for the Governor at this time. Currently, the judge can choose to borrow language from the Federal Rules of Civil Procedure or adopt recommendations from counsel. The judges in the Complex Division seemed to prefer that the attorneys meet and confer and recommend language to the Court, especially language for handling inadvertent disclosure of attorney-client privileged documents. In most cases, attorneys will insist on a “claw-back” provision where the party who inadvertently produces a privileged document is entitled to claw it back. The Stipulated Case Management Order on the ABTL website includes some guidance on this issue, as well as the Federal Rules of Civil Procedure.

Some attorneys may find that e-discovery or traditional discovery issues will cause tensions and further disputes between the attorneys in a particular case. To the extent that the attorneys cannot agree on certain provisions in a Case Management Order, the attorneys should raise these issues with the judge in a case management conference. Judge Andler stated that she prefers to handle the key legal issues early on in the case, because she may be able to resolve the issue through letter briefs and oral argument, or even an early settlement conference. As Judge Colaw added, the lawyers should try to cooperate with each other and work to solve the problems—not exacerbate tensions between the parties and/or counsel. Discovery motions are therefore not recommended. Most attorneys practicing in the Complex Division are

capable of resolving discovery issues without filing a motion, and the judges certainly expect and appreciate the attorneys’ efforts in utilizing creative problem solving techniques.

Judge Andler, for one, encourages attorneys to think about creative ways to stay an early expensive discovery dispute, or proceed with a key substantive issue before spending time and resources on an expensive discovery dispute. As Judge Sunvold observed, parties in the Complex Division are not bound by time constraints for trial, so he encourages parties to attend an early mediation to get to the heart of the issue quickly and inexpensively. At the very least, Judge Sunvold stated that often times the attorneys will recognize that they only need a few key depositions and written discovery, and then they are prepared and willing to discuss the core issues in the case in mediation. Attorneys can often identify and utilize these creative techniques and strategies at the outset of the case by simply reviewing the pleadings.

In some cases, the pleadings may not sufficiently identify the significant issues in dispute. And, although demurrers are generally disfavored by many judges, Judge Andler recognized that sometimes a demurrer or motion to strike can actually help settlement or at least highlight the key disputed issues early in the case. Still, defense attorneys need to carefully analyze their cases and decide whether a demurrer is likely to help more than it will hurt. As Judge Velasquez stated, a narrow complaint may enable the plaintiff’s attorney to focus on the key issues and better prepare for trial. In some cases, the defense attorney may decide it is better not to file a demurrer so plaintiff is left to prove a variety of legal theories. Under these circumstances, the plaintiff’s counsel may not possess a coherent and persuasive trial theme.

On the other hand, some attorneys may find that narrowing a complaint is necessary to prevail on summary judgment. A motion for summary judgment or partial summary judgment is another commonly used mechanism for resolving a case prior to trial. Again, attorneys need to strategize and evaluate the advantages and disadvantages of filing a motion for summary judgment. Judge Colaw noted that experienced judges can distinguish between a motion solely to “smoke-out” the other side’s evidence and generate fees versus a legitimate

-Continued on page 18-



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There is no cost to attend this event.

Leadership Development Committee Off To A Fantastic Start

Our Chapter's Leadership Development Committee is pleased to announce that it is off and running. The Committee is dedicated to serving and increasing the involvement of ABTL member attorneys with ten or fewer years of experience through hosting social and substantive events. Other ABTL chapters have experienced success with similar programs and the response here in Orange County has been equally positive.

The Committee's inaugural "Kick-Off-Event," featuring "March Madness" and an opportunity to meet and network with fellow ABTL members, was a great success with nearly 50 attorneys in attendance. The event was held at The Corner Office (near South Coast Plaza), which provided a casual and relaxed environment, as well as multiple screens to capture all the NCAA Tournament action. Participants reported that it was both fun and productive.

The Committee's next event is slated for July 30, 2009 and will be held atop 3161 Michelson Drive in Irvine, courtesy of Gibson, Dunn & Crutcher LLP. The event will feature food and drinks plus an opportunity for junior attorneys to get to know several distinguished members of Orange County's judiciary. This Fall, the Committee plans to host a substantive program relevant to the practice of junior lawyers. If the inaugural "Kick-Off-Event" is any indication, these events are sure to be a run-away success. All junior ABTL members are invited and encouraged to attend.

The Committee will disseminate additional information as these events approach, or you may contact Corbett Williams (chwilliams@jonesday) or Michael Penn (michael@aitkenlaw.com) for details.

motion. In cases where the parties' attorneys have not narrowed the legal issues, the moving party's chances for prevailing on summary judgment are typically lower.

In the event that the attorney decides to file a motion for summary judgment, all of the judges in the Complex Division agreed that the memorandum of points and authorities (as well as other legal briefs) should be concise. Judge Guilford, for instance, encouraged attorneys to write in a concise manner so that anyone can understand it. He described concise legal writing as necessary in our legal system so that everyone has access to justice. Of course, the judges in the Complex Division also noted that motions for summary judgment must adhere to the statutory requirements and California Rules of Court. In the Complex Division and in federal court, motions are filed electronically, so counsel should be familiar with the e-filing procedures and the courtroom's policies and preferences. For example, some judges may prefer to receive courtesy hard copies of the motion(s), or possibly courtesy copies of the evidence. Judge Velasquez noted that the electronic exhibits do not include tabs separating the exhibits, so hard copies with exhibit tabs can be helpful in a case with many exhibits, and in referring to exhibits at oral argument.

When attending the oral argument on a motion for summary judgment (or any motion), the best advice from the judges is to be prepared. This advice sounds obvious, but it is invaluable. Attorneys are more likely to succeed if they understand their cases well enough to respond on their feet, know their weaknesses and are prepared to address them at oral argument. Similarly, the judges advised us that they prefer attorneys who focus on the issues that the judge identifies as significant. Apparently, too often attorneys argue about issues that are not at the heart of the case, or issues that the judge is not concerned about. Rather than debate insignificant issues with opposing counsel and/or the judge, it is important for the attorneys on both sides to meet and confer prior to the hearing (possibly after reviewing a tentative ruling), and then to remain on topic at the oral argument. All the judges agreed that it is better for attorneys to ask the judge questions for clarification, or even providing a poor response to the judge's question, as opposed to not

providing a response to the question. The skilled oral advocate will address the judge's question head on.

Judge Velasquez recommended that attorneys practice oral advocacy skills prior to attending hearings. The oral advocacy is not only important in trying to persuade the judge, but it is also an effective problem solving tool. For this reason, it is important in some cases for the attorneys to attend the oral argument in person, rather than telephonically. In particular, Judge Wieben-Stock and Judge Colaw commented that they like to see the attorney's body language. They also said that sometimes it is helpful to take a break during the oral argument and ask the attorneys to meet and confer outside in the hallway or in chambers, which is impossible for an attorney who appeared telephonically. Again, the judges all recognize (after years of experience) that the attorneys can solve a lot of problems by meeting and discussing the issues in dispute and/or presenting those issues to the judge when appropriate.

Many of these same recommendations also apply when preparing for trial. In the Complex Division, trials can last very long and typically involve complicated issues and/or numerous parties. Here, again, the judges encourage attorneys to think creatively. For example, in a large products liability case, Judge Colaw said that one option is to try some bell weather cases first, and then possibly try to settle the remaining cases. The attorneys may also want to consider other alternatives such as mini-trials on particular issues or bifurcating trials in stages. In the Complex Division, the parties are not subject to any time constraints, so the attorneys can work together with each other and their assigned judge to find the most economical and manageable approach for trial.

On behalf of all the young attorneys in attendance, we appreciate the invaluable insights and recommendations from Judges Andler, Velasquez, Colaw, Sundvold, Stock, and Guilford. The members of the ABTL are certainly grateful for the time and dedication of the judges who devoted their time to speaking with us.

♦*Scott Shaw and Laura Schiesl are litigators at the law firm of Call, Jensen & Ferrell.*

Save the Date

September 9, 2009

Please join us in welcoming the

Hon. Ming W. Chin

Associate Justice

Supreme Court of California

speaking on

Recommendations for Safeguarding

Judicial Quality, Impartiality, and

Accountability in California

The Westin South Coast Plaza, 686 Anton Blvd., Costa Mesa, CA

6:00 p.m. Cocktails 7:00 p.m. Dinner and Program

Cost: 2009 ABTL Members \$85, Non-Members \$100

Tables of 8 Members Cost: \$650 Tables of 8 Non-Members Cost: \$750

To register, please contact our Executive Director, Linda A. Sampson, at 714.602.2505 or abtloc@abtl.org or register on-line at www.abtl.org.

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