

Q&A with the Hon. Glenda A. Sanders

By Monica Q. Vu



[Editorial Note: Prior to her appointment to the Orange County Superior Court, Judge Sanders was a partner at Latham & Watkins where she tried a wide range of commercial matters, and before that was a Barrister in South Africa where she tried a wide variety of criminal and civil matters. Judge Sanders is on the ABTL's

Judicial Advisory Council.]

Q: *At what point in your life did you know you wanted to become a lawyer, and why?*

A: While there is seldom a single moment or event leading to the choice of one career or path over another, at the age of 13 I remember being astonished at the fact that our gardener was arrested on criminal charges based on what was ultimately shown to be unreliable evidence. Although he was released within a week or so, it brought home to me at an early age the importance of a fair legal system with

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RETAILERS BEWARE — Why Regulators and Class Counsel May Be Salivating

By Michael Yaghi

So you are walking through your favorite book store perusing the best-seller table or cruising through the formal dress section of a department store to buy a new dress. You select the item you want and approach the cashier to make your purchase. The cashier asks you for your zip code after you hand over your credit card to complete the transaction. You think nothing of it, thank the cashier and leave with your new item. While you may not think it was a big deal that the cashier asked for your zip code, the California Supreme Court certainly does.



The California Supreme Court recently held that retailers cannot ask consumers for their zip codes when they purchase goods with their credit cards. To do so would violate California's Song-Beverly Credit Card Act. As the Supreme Court held in *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524 (Cal. Sup. Ct. 2011), capturing a zip code during a consumer credit card transaction violates California Civil Code Section 1747.08. Plaintiff Pineda sued Williams-Sonoma because the retailer asked for her zip code during a credit card purchase transaction. At the end of the sale, Williams-Sonoma had Pineda's credit card number, name (from the credit card), and zip code captured and recorded in its records.

The California Supreme Court overturned the lower court's order sustaining Williams-Sonoma's demurrers because Section 1747.08(a) prohibits retailers from requesting or requiring the consumer to provide any personal identification information as a condition of accepting the credit card for payment if the retailer cap-

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Letter From the President

By Darren O. Aitken



The strength of any voluntary organization is a function of the commitment of its membership. In that respect, our chapter of the ABTL is truly blessed.

As I write this, our membership numbers are nearing an all-time high, and we may have exceeded our previous membership record by the time this column goes to print. The fact that our chapter has been able to maintain and grow its membership in the challenging economic climate of the last few years is a testament to the value of the educational programs we present, as well as the camaraderie we foster between members of the bench and bar. Our ability to connect to so many members of the Orange County legal community is grounded on the commitment of our chapter's membership committee, currently led by Philip Kaplan, and our various "champions" within our member firms who both ensure that their own firm's membership is renewed and who also introduce our chapter to their many contacts within the legal community.

Our dinner programs are well-established "must-go" events where lawyers from throughout Orange County can catch up with old friends, make new acquaintances, and converse with members of the bench in a relaxed setting. The programs themselves focus on cutting edge topics and news-making events, and provide legal education beyond the mundane. Taking our last two programs as an example, we have explored the far-reaching (and the sometime humorous and sometimes terrifying) effects that social media and "always on" communications devices have had on the manner that juries are selected, how they serve and how juror decisions are reached. We also discussed the challenges that our nation has faced when attempting to apply our concepts of the rule of law to the ongoing conflicts in Iraq and Afghanistan. Our innovative programs themselves are the product of the hard work and commitment of our Dinner Program Committee, currently stewarded by Daniel Livingstone, who devote an extraordinary amount of ef-

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Avoiding the Hague: How to Serve A Foreign Corporation Through Its American Subsidiary
By William C. O'Neill



"To be sure, the bulk of the *Cosper* decision is devoted to the due process minimum contacts problem on which first year civil procedure professors usually spend too much time." -Justice David G. Sills, *Yamaha Motor Company v. Sup. Ct. (Connors)* (2009) 174 Cal.App.4th 264, 273.

I. Introduction

New York Times writer Thomas Friedman contended in his book, *The World is Flat: A Brief History of the Twenty-First Century*, that globalization leads to increasing relevance of the global marketplace while concurrently decreasing the relevance of geographical divisions. This was not news to most litigators. Among many issues globalization has foisted upon litigators and clients is the increased cost associated with simply serving foreign entities to initiate the litigation. Litigants must familiarize themselves with the "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters," more commonly called the Hague Service Convention. While the Hague Service Convention requires its sixty-two signatories to designate a "Central Authority" for service, each country differs in the way service is effected. And these differences are costly.

Litigators and clients alike, then, should know that there is a way to avoid the Hague Service Convention - even when the foreign corporation does not maintain a physical location in California. So long as California has both general and personal jurisdiction over the foreign corporation, a recent appellate decision affirms that domestic subsidiaries can be considered the "general manager" of its foreign parent. See *Yamaha Motor Company v. Sup. Ct. (Connors)*, *supra*, 174 Cal.App.4th at p. 267. Though the Yamaha court recognized the dubious analysis of a California Supreme Court case on which it relied to reach its conclusion, *stare decisis* required the conclusion that service is valid under state law on an American subsidiary of a

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Brown Bag Lunch with the Hon. Thomas J. Borris and the Hon. David A. Thompson
By William C. O'Neill

"One thing I know; the only ones among you who will be really happy are those who will have sought and found how to serve." Albert Schweitzer

ABTL Young Lawyers Division members met recently with Presiding Judge Thomas J. Borris and Assistant Presiding Judge David A. Thompson for our quarterly brown bag lunch. We congregated in a conference room across the hall from Judge Thompson's chambers, surrounded by Coca Cola memorabilia donated to the Court by former Chief Executive Officer/Clerk of the Court, Alan Slater. Judge Thompson had invited Judge Borris to join the lunch. Orange County's unique bench/bar relationship continues to be exhibited in moments like these when both the Presiding Judge and Assistant Presiding Judge take time to mentor a younger generation.

Judge Borris and Judge Thompson began by imparting advice to young lawyers. First, be prepared and use common sense. While the advice itself may appear to be common sense, some young (and not-so-young) attorneys ignore the differences between zealous advocacy and professional separation. There exists a stark divide between basing your professional reputation on an unsubstantiated argument by stating "I believe ..." versus starting such an argument with the phrase: "It is my client's strongly held belief that" The latter phrase advances a client's cause by championing an argument dear to a client without sacrificing the credibility of other arguments.

Dovetailing nicely from that point, both judges encourage young lawyers to send only the highest quality written work to court. Not only is this important for zealous advocacy, but young lawyers are building reputations within our community and within the judiciary. Glaring typos and faulty citations can affect credibility. Third, observe a judge's practices before appearances. Fourth, avoid using the phrase "clearly." According to Judge Thompson, nothing alerts him to a potential pitfall like the word "clearly."

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proper safeguards to protect the innocent and convict the guilty. While there was much to be admired about the South African legal system in its application of the common law, the overlay of statutory law designed to segregate people in every aspect of their lives depending on skin color also made me acutely aware at an early age of the impact of law and justice (or the lack thereof) on the everyday lives of ordinary people. This coupled with my participation in inter-school debates, as well as my love of language and how it can best be used to communicate meaningful ideas, made the law a fairly obvious career choice for me.

Q: What do you miss most/least about practicing law/private practice?

A: I greatly enjoyed practicing law. I loved the thrill of winning a motion, a trial, an argument, a client. I enjoyed the intellectual analysis and the advocacy that was at times so energizing. I do not miss timesheets. And I am somewhat saddened by the fact that a fascination with statistics (profits per partner, billable hours etc.) has led to a more quantitative than qualitative assessment of lawyers. This in turn has diluted collegiality, reduced mentoring and decreased an appreciation for the more complex but less measureable aspects of what it means to be a great lawyer. I wonder how Atticus Finch would be evaluated at year-end for purposes of partnership distributions in the modern law firm? I reached a point in my life when I felt less the need to advocate for a client's cause and more the need to find the correct answer. As a judge, it is my duty to apply the law fairly and evenly. I have felt such a sense of freedom knowing that is my goal.

Q: Who have you come across in your legal career that has inspired you the most, and why?

A: I cannot single out one person. So many people have inspired me. They include law professors who taught me the importance of jurisprudence rather than mere black letter law, barristers who generously gave of their time to teach me the art of courtroom advocacy, partners and associates at Latham & Watkins who welcomed me into this country, and helped me to understand a new legal culture, and judges who have had the courage to make the

right decision (as our oath mandates) no matter how politically unpopular it might be.

Q: Was there ever a moment in your career that the legal system disappointed you, and what if anything, did you do about it?

A: When I was practicing law, it disappointed me when the judge would not listen or allowed only the most cursory oral argument. Clients invest a lot of money and effort in having their attorneys prepare for a motion or a trial. They want to have their day in court, or at least feel like they did. Of course, judges must control their courtrooms and ensure attorneys remain focused but when efficiency trumps procedural fairness, it makes the client feel cheated of her right to be heard. That disappointed me as an attorney. The efficacy of the legal system depends in large part upon the belief that it is fair. We undermine its effectiveness when we deprive people of that fundamental need to be heard.

Q: When did you first know you wanted to become a judge, and why?

A: I spent five years practicing as a barrister at the South African Bar in the city of Durban. Most successful barristers want to become judges. If I had remained in South Africa a judgeship would have been my career goal. When I came to the States I was consumed with the task of taking the bar, learning a new legal system, making new friends and adapting to a new culture. Then came children and all the pleasures and demands of parenthood. When I came up for air about 15 years later, I realized how much I longed to be able to enjoy the intellectual aspects of law unfettered by the need to win and guided instead by the desire to find the correct (or at least the most correct) answer.

Q: I know you've practiced law as a litigation attorney on two continents. What would you say is the most significant difference between litigating a case in South Africa versus the US?

A: There are two major differences. First, there are no jury trials in South Africa, only bench trials. Second, there is a split bar in South Africa; there are solicitors and barristers. The solicitors work more closely with the client, and perform many of the tasks

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that litigation associates perform here. Barristers are essentially trial lawyers. They rely on others to do a lot of the very necessary background work but they are ultimately responsible for the presentation of the case to the judge. I was a barrister.

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

That I get to make what I consider to be the right decision under the law, rather than simply pursuing what best serves a particular client's interests.

A: If you weren't a lawyer or judge, what would you do?

I have always loved English literature and so I might have ended up teaching English at a university. I flirted with the idea earlier on in my career but I always knew the law was for me.

Q: What advice do you have for a young lawyer in his/her first experience at court?

A: Get into court as often as you can, even if it's unpaid. If you are a law student, do an externship or internship. Seek out opportunities to volunteer at the DA's or PD's Office. The DA's office used to have a program pursuant to which associates from law firms were assigned to the DA's office for a few months at a time. I am not sure if that program is still in place. Handle a pro bono case in order to get more courtroom experience. The Family Law Court is always grateful for attorneys to assist the many pro per litigants appearing before it. When I first started out at Latham, I took a leave of absence for several months to volunteer at the DA's office. I tried several misdemeanors cases. It was an invaluable experience, and it was great fun.

Q: What do you like to do in your free time?

A: I enjoy technology. I stay abreast of all things Apple and continue to be amazed at how iPads and iPhones are transforming the world and way we work. I love to read. I especially enjoy biographies such as "John Adams" and "First in Class" (about President Clinton). Recently I have been reading several books dealing with the financial crisis, such as "The Big Short" by Michael Lewis, and Bethany McLean's "Smartest Guys in the Room" (about En-

ron). I greatly enjoyed Jonathon Franzen's most recent book "Freedom." I also enjoy wake boarding with my daughters and my husband at Big Bear and other local lakes.

Q: What made you come to the United States to practice law?

A: It happened fortuitously. My husband and I were both barristers in South Africa and we did not want to raise children in a country under a system of racial segregation. We also believed South Africa would not change politically, at least not anytime soon. We intended to move to Sydney, Australia where we had both been offered jobs. Before we moved, however, we traveled to the United States on vacation where we stayed with a long time friend. He introduced us to an old law school friend of his who was then a partner at Latham & Watkins. That led to an offer from Latham. I was extremely impressed with the attorneys I met at Latham's then Newport Beach office and after serious consideration and discussion, my husband and I decided we would give California a try. My husband later also joined Latham and we worked there together for 15 years before I took the bench in 2003. My husband continued at Latham, and after a very short stint as associate general counsel for a company, he was appointed to the Orange County Superior Court bench in early 2010.

Thank you Judge Sanders for your time.

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tures and records the information. Personal identification information includes the consumer's "address and telephone number." The Supreme Court concluded that since the statute prohibits capturing an "address," the Legislature intended to prohibit the capturing of any component of the address itself, such as the zip code.

Otherwise, retailers could circumvent the statute's prohibition by simply asking the consumer for a limited portion of his or her address (street number, city, or zip code), allowing the retailer to subsequently locate the consumer's full address, by using the limited

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information provided, for future marketing purposes. Since capturing a zip code is unnecessary to complete a credit card transaction—a quick review of the consumer’s identification (e.g., a driver’s license) is sufficient to prevent fraud—the business practice of asking for such information is solely to benefit the retailer’s future marketing efforts.

It is clear why state regulators and class counsel may be chomping at the bit to bring their regulatory enforcement investigations and class actions against retailers who ask consumers for their zip codes (or other personal identification information, such as a street name or a street number) during a credit card transaction. But there is plenty for defense counsel to litigate over to protect their retailer clients. Developing a sound and comprehensive discovery plan, briefly discussed below, is critical to defending retailers in these uncharted waters.

First, Section 1747.08 contains a safe harbor provision. Courts will not award civil penalties if the retailer can show “by a preponderance of the evidence” that it did not commit the violation intentionally, and instead that it was the result of a “bona fide error” despite the fact that the retailer reasonably employs measures to prevent such error. If retailers have policies and procedures in place prohibiting and preventing the capturing of personal identification information during credit card transactions, they may seek refuge under the safe harbor provision for alleged violations. Developing sufficient evidence in discovery to bring the alleged violations under the safe harbor provision is therefore critical to any retailer’s defense. This would not apply of course if the retailer routinely asked consumers for some component of their addresses in order to locate full addresses for future marketing. In this regard, it might be beneficial to develop evidence from expert witnesses to show how the limited information obtained by the retailer could not lead to the discovery of a full address.

The Supreme Court also held that a violation did not mandate the imposition of civil penalties because awarding penalties is within the trial court’s sound discretion. While section 1747.08 sets a maximum penalty of \$250 for the first violation and \$1,000 for each subsequent violation, courts are not required to assess

penalties at these amounts. Thus, there is no guarantee for a windfall for regulators or class counsel. Instead, assuming the retailer cannot establish safe harbor protection, developing sufficient evidence in discovery to prove that the retailer acted in good faith and did not intend to violate the statute may help to convince a court to assess penalties for any proven violation at an amount much lower than the statutory maximum. Indeed, courts are more inclined to restrain their exercise of discretion when parties have acted in good faith.

The bigger issue is that violating Section 1747.08 triggers a violation of Section 17200 of California’s Business & Professions Code. The California Attorney General may enforce Section 17200, and may seek civil penalties under Section 17206. Section 17206 provides for civil penalties up to \$2,500 “for each violation.” California courts weigh many factors when assessing civil penalties under Section 17206: the seriousness of the alleged violation; the number of these violations; how often the retailer engaged in the alleged violations; how long these violations occurred; whether the retailer willfully engaged in the alleged violations; and the retailer’s net worth (assets and liabilities). Developing a strong discovery plan to garner all of the evidence illustrating how these factors weigh heavily in favor of the retailer is critical to mounting a successful defense to civil penalty claims in any regulatory enforcement action brought by a state agency.

Outside of the regulatory enforcement context, there appears to be plenty to litigate in the class action context as well. The Supreme Court decided *Pineda* at the pleading stage—overturning the lower court’s order sustaining Williams-Sonoma’s demurrers—leaving plenty of battle ground for defense counsel. Whether class counsel can establish numerosity, commonality, and typicality could determine how far reaching the *Pineda* decision ultimately becomes. Attacking class certification is critical to the retailer’s defense, thus developing sufficient evidence to defeat certification becomes paramount.

The critical prong to attack with respect to class certification seems to be commonality. Presenting evidence demonstrating each consumer transaction is

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different may defeat any assertion of commonality. How did the cashier ask for the personal identification information? Did the cashier actually capture the information? How did the cashier capture it? Why did the cashier capture the information? Did the consumer ask to add his or her information to a marketing list? Did the consumer offer his or her information in order to receive future marketing materials from the retailer? At what point in the transaction did the consumer provide his or her information to the cashier—after the credit card transaction was completely over or before hand? Did the cashier ask for the information as a true “condition” to accepting the credit card as payment?

Since the answers to these questions (and many others) vary, each transaction is arguably not common enough to certify a class. For these same reasons, establishing typicality may also be difficult—class members would have claims based on different facts, which means they could be subject to unique defenses, making typicality nonexistent.

While it is clear that retailers cannot ask for a customer’s zip code as a condition to accepting a credit card for payment, it is not clear yet the full impact the Pineda decision may have on retailers going forward. But the legal landscape may shape up rather quickly as parties litigate these new issues in future regulatory enforcement proceedings and class actions.

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fort to identifying the topics and speakers about which we as a chapter are justifiably proud.

Our chapter continues to lead the way within the ABTL in harnessing our collective talent and energies in supporting the general public as it interacts with the Orange County legal system. Our traditional wine tasting event on behalf of the Public Law Center, which provides desperately needed legal advice to low income Orange County residents, both directly and through organizing the pro bono activities of the local legal community, was a great success and will enable our chapter to again make a sizeable financial contribution. At our November Dinner Program, we will again be collecting gift cards for the Orange County CASA program and stuffed animals for the Superior Court’s adoption program. For those unfamiliar with the program, CASA is an acronym for Court Appointed Special Advocates, and it is a non-profit organization that trains community volunteers to serve as mentors and advocates for the abused and neglected children who are in the foster care system. The gift cards donated by our chapter’s members allow the CASAs to give the kids they sponsor a “special treat,” whether it be a meal out or a small present. Furthermore, this year our chapter is expanding its outreach activities thanks to the initiative of two current Board Members. Due to a proposal submitted by current Chapter Vice President Mark Erickson, ABTL member firms will be assisting Habitat For Humanity in building and renovating housing for low income Orange County residents. Also, following a proposal by Board Member Karla Kraft, our chapter has begun “hosting” a small number of local law students who have expressed an interest in business litigation at our dinner programs. Thanks to all these efforts, our chapter is having a positive impact in the community in which we live and practice.

The commitment of our chapter’s members also serves the ABTL as a whole. This year, the Orange County Chapter is proud to serve as the “host chapter” of the ABTL’s 38th Annual Seminar. This year’s seminar is being held at the Bacara Resort & Spa in Santa Barbara, California, on October 13 through 16. Board Member Scott Garner is chairing the statewide committee organizing this event and it promises to provide

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valuable education in a fantastic location. Registration is currently open, and I look forward to seeing you there.

Our chapter is strong, and growing stronger. This will remain the case, however, only so long as our membership remains strong and committed to our programs. This is where each of us comes in. Please continue your support. We can't do it without you.

◆*Darren Aitken, the President of the Orange County chapter of the ABTL for 2011, is a partner with Aitken * Aitken * Cohn in Santa Ana.*

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foreign manufacturer and there is no need to serve papers in accordance with the Hague Service Convention. *Id.* at pp. 274-75.

This article initially addresses the personal jurisdiction issue that courts face by summarizing two recent United States Supreme Court cases. This article then explores the *Yamaha* decision, the cases and statutes on which the *Yamaha* court relied, and practical implications of the *Yamaha* decision for litigators facing service concerns outside of the United States when a foreign parent corporation has an American subsidiary.

II. Recent United States Supreme Court Cases Addressed States' Jurisdiction Over Foreign Parent Companies

Civil procedure professors will enjoy reviewing the United States Supreme Court's recent term, wherein the Court once again addressed general and personal jurisdiction in two separate opinions. In the first case, the Court analyzed the "continuous and systematic" affiliation standard necessary to empower a State to entertain claims unrelated to a foreign corporation's contacts with that State. *See Goodyear Dunlop Tires Operations, S.A., et al., v. Brown* (June 27, 2011) 564 U.S. _____. This was

only the third time in sixty years that the Court addressed that standard since its seminal decision, *International Shoe Co. v. Washington* (1945) 326 U.S. 310. In the second case, the Court analyzed the "imprecision" arising from the relationship between jurisdiction and the "stream of commerce" standard addressed in *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.* (1987) 480 U.S. 102. *See J. McIntyre Machinery, Lt. v. Nicaastro* (2011) 564 U.S. _____.

Both the *Goodyear* and *Nicaastro* decisions addressed a state's jurisdiction in the specific contexts of parent/subsidiary and manufacturer/distributor relationships. The importance of jurisdictional determination, of course, cannot be understated. As the *Nicaastro* Court waxed philosophically: "Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law." *Nicaastro, supra*, 564 U.S. _____.

Turning first to the *Goodyear* decision, the case arose from an overturned bus accident outside Paris, France in which two 13-year old boys from North Carolina sustained fatal injuries. *Goodyear, supra*, 564 U.S. _____. Their parents attributed the accident to faulty tires manufactured by foreign subsidiaries of The Goodyear Tire and Rubber Company (Goodyear USA). *Id.* The foreign subsidiaries, incorporated in Luxembourg, Turkey and France, manufactured tires primarily for sale in European and Asian markets. *Id.* A small percentage of those manufactured tires (tens of thousands out of tens of millions) found their way to North Carolina, though the foreign subsidiaries did not sell or ship the tires directly to North Carolina end users. *Id.*

While Goodyear USA did not fight jurisdiction, the foreign subsidiaries did. *Id.* The North Carolina Court of Appeals first acknowledged that the claims neither related to nor arose from the foreign subsidiaries' contacts with North Carolina. *Id.* But the appellate court concluded that the foreign subsidiaries met the "continuous and systematic contacts" standard when they placed their tires "in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina." *Id.*

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When the fight reached the United States Supreme Court, Justice Ginsburg asked the following question on behalf of the unanimous Court: “Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?” *Id.*

The Court ultimately answered the question in the negative, but the import is the trip – not the destination. The Court noted initially that the “Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal’s authority to proceed against a defendant.” *Id.* The Court then spent several pages reviewing its previous jurisprudence that addressed the “continuous and systematic contacts” standard, including *International Shoe* and another law professor favorite, *Shaffer v. Heitner* (1977) 433 U.S. 186. *Id.*

The review’s heavy emphasis on the difference between general and specific jurisdiction analysis exposed the New Jersey Court of Appeals’ improper blending of the two theories. The appellate court justified the exercise of general jurisdiction on the foreign subsidiaries’ placement of their tires in the “stream of commerce.” *Id.* But that metaphor is typically used when a nonresident defendant acts outside the forum by placing a product into the stream of commerce that ultimately causes harm inside the forum. *Id.* As the Court noted, this is germane to *specific* jurisdiction and fundamentally ignores the *International Shoe* instruction that a corporation’s “continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.” *Id.*; citing *International Shoe*, *supra*, 326 U.S. at 318. Instead, contacts are sufficient to establish general jurisdiction only if they “render [the defendant] essentially at home in the forum state.” *Goodyear*, *supra*, 564 U.S. _____. While it is unclear whether the Court has established a new “home” test, the takeaway point from the *Goodyear* opinion is that ties serving to bolster the

exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant.

The Court, having drawn the distinction between general and specific jurisdiction using the “stream of commerce” standard in *Goodyear*, then penned a plurality opinion in *Nicastro* to address the legal limits of the “stream of commerce” standard for specific jurisdiction analysis. In *Nicastro*, a metal shearing machine severed four fingers from the plaintiff’s right hand. *Supra*, 564 U.S. _____. The plaintiff sought compensation in the forum where the accident took place – New Jersey – from the machine’s manufacturer, J. McIntyre Machinery Ltd. (“J. McIntyre”). *Id.* J. McIntyre is a United Kingdom corporation headquartered in Nottingham that did not sell its machines to buyers in America beyond its U.S. distributor. *Id.* While J. McIntyre did not “control” its U.S. distributor, the distributor structured its advertising and sales efforts in accordance with J. McIntyre’s direction and guidance whenever possible. *Id.*

The New Jersey Supreme Court concluded that New Jersey courts could exercise jurisdiction over J. McIntyre without running afoul of the Due Process Clause. *Id.* The New Jersey court reached this conclusion because the injury occurred in New Jersey and J. McIntyre knew or reasonably should have known that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states without preventing distribution to New Jersey specifically. *Id.* Justice Ginsburg, in her dissenting opinion to the *Nicastro* plurality, piled onto the New Jersey Supreme Court’s argument by implying that J. McIntyre should have known a scrap metal shearing machine would reach New Jersey because “New Jersey has long been a hotbed of scrap-metal business.” *Id.* New Jersey’s citizens may not send Justice Ginsburg a thank-you note for her support.

The *Nicastro* plurality decision disagreed with the New Jersey’s conclusions. The Court first recognized that the “stream of commerce” metaphor “refers to the movement of goods from manufacturers through distributors to consumers, yet beyond that descriptive purpose its meaning is far from exact.” *Id.* (Imagine, for a moment, reading that sentence as a first-year law student

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facing the Professor Kingsfields of the world.) The principal inquiry for cases employing this metaphor must be whether the defendant's activities manifest an intention to submit to the power of a sovereign; i.e., purposeful availment. *Id.* Thus, the foreign defendant must be said to have *targeted* the forum rather than simply predicted that its product would reach the State. *Id.* This may give rise to a unique situation where a foreign corporation is subject to the courts of the United States, but not of any particular State. *Id.* Such a unique situation, the Court noted, "is consistent with the premises and unique genius of our Constitution." *Id.* Over spirited dissent, the *Nicastro* plurality ultimately concluded that J. McIntyre had not engaged in any activities in New Jersey that revealed an intent to invoke or benefit from the protection of its laws and, therefore, New Jersey could not exercise jurisdiction. *Id.*

III. An American Subsidiary As Its Foreign Parent's "General Manager"

The *Goodyear* and *Nicastro* decisions will assuredly create additional work for future law students, but they both build on established standards budding attorneys have learned for decades. The principles of "stream of commerce," citizenship, domicile, explicit consent, and "course of conduct" are all words and phrases ingrained into jurisdiction jurisprudence. But what about the phrase "general manager?" What does that mean in the landscape of California's jurisdictional jurisprudence? For foreign corporations that have subsidiaries in California, the answer may be surprising.

In 2009, the *Yamaha* court considered whether a Japanese manufacturer can be served under California law simply by serving the Japanese manufacturer's American subsidiary. *Supra*, 174 Cal.App.4th at p. 267. The court queried whether the "method just seemed too easy a way to get around the Hague Service Convention," so the court accepted review to study the issue. *Id.* That court ultimately concluded that "yes, it really is that easy." *Id.* But why is it so easy to serve a company that has absolutely no physical presence in the United States? The combination of appellate authority from the United States Supreme Court and the California Su-

preme Court, and a California statute, provide the answer.

In 1988, the U.S. Supreme Court considered whether service on a foreign corporation through its domestic subsidiary was compatible with the Hague Service Convention. *Volkswagenwerk Aktiengesellschaft v. Schlunk* (1988) 486 U.S. 694, 696. Importantly, the Court did not face personal jurisdiction concerns and assumed that, under Illinois state law, the domestic subsidiary was the foreign corporation's "involuntary agent for service of process." *Id.* at p. 697. The Court concerned itself primarily with the scope of the Hague Service Convention, which is defined as applying "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." *Id.* at p. 699; citing Art. I of the Hague Service Convention. Consistent with the "unique genius" of our Constitution's sovereignty philosophy, the Court explained that if the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies. *Schlunk, supra*, 486 U.S. at p. 700. In other words, if Illinois requires even one document be sent to the Japanese manufacturer to effect service, then the costly procedures of international service apply.

Illinois law, though, permitted foreign corporations without physical presence in the United States to be served through their American subsidiaries based on a hybrid-substitute service theory. *Id.* at p. 707. The *Schlunk* defendant argued that the Due Process Clause requires methods of service that will provide notice to the defendant and any substituted service theory must necessarily assume that the documents will be transmitted internationally. *Id.* This notice requirement, the argument continued, necessarily means that every case involving service of a foreign national will present an "occasion to transmit a judicial ... document for service abroad" within the meaning of the Hague Service Convention. *Id.* The Court rejected that argument as follows: "Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications. Whatever internal, private communications take place

between the agent and a foreign principal are beyond the concerns of this case.” *Id.*

California’s service rules are arguably even more generous to plaintiffs than the Illinois law outlined in *Schlunk* decision. Corporations Code section 2110, formerly section 6500, permits delivery by hand of a copy of any process to the “general manager in this state” for a foreign corporation. The California Supreme Court grappled with the term “general manager” over six decades ago - in an opinion that has not been revisited, abrogated, or overruled. See *Cosper v. Smith and Wesson Arms Co.* (1959) 53 Cal.2d 77. In *Cosper*, a police officer sustained injuries from a faulty revolver that the officer purchased in California from a sporting goods salesman. *Id.* at p. 79. The officer sued both the salesman and the Massachusetts corporation that manufactured the gun, and attempted service on both by serving *only* the salesman. *Id.* at pp. 79-80. The *Cosper* court acknowledged that the relationship between the Massachusetts corporation and the salesman was a contract to promote, on a “non-exclusive basis,” the sale of its products on the West Coast. *Id.* at pp. 80-81. Despite this seemingly benign relationship, the *Cosper* court concluded that service on the salesman was sufficient to serve the Massachusetts corporation because the representative was the “general manager in this State.” *Id.* at pp. 79, 83-84.

The *Yamaha* court later observed that the relationship between a manufacturer and a non-exclusive dealer in *Cosper* was far less intimate, connected, or interrelated than a parent/subsidiary relationship is. *Supra*, 174 Cal.App.4th at p. 274. To be sure, the *Yamaha* court voiced concern that the *Cosper* court never really grappled with the anomaly that the term “manager,” let alone “general manager,” implies a measure of formal control that both non-exclusive dealers and corporate subsidiaries lack. *Id.* at p. 175. But *stare decisis* compelled following *Cosper*, so the *Yamaha* court concluded that the American subsidiary was the Japanese corporation’s “general manager in the State” and service could be effected within California. *Id.* Given that the internal laws of California did not require international service, the procedures and costs of the Hague Service Convention do not apply.

IV. Conclusion

Practically speaking, litigators should approach the *Cosper* and *Yamaha* opinions with deference and a hint of weariness. *Cosper* and *Yamaha* are not silver bullets, but they are certainly rounds in the chamber. Not all cases will present a clear parent/subsidiary relationship and courts that disagree with the *Cosper* court’s rationale will readily distinguish its analysis and conclusion. Determining the corporate structure early in litigation may require formal discovery, which may be expedited if the foreign corporation challenges personal jurisdiction. Ultimately, litigants must answer three questions: (1) does California have jurisdiction over the foreign corporation?; (2) does the corporation have an American subsidiary or distributor/salesperson?; and (3) can the subsidiary/distributor/salesperson be considered the foreign corporation’s “general manager in the State?” If the answers to these three questions are yes, then the Hague Service Convention can be avoided.

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Both Judge Borris and Judge Thompson also touted the relatively new expedited jury trial statutory system. By combining their experiences as judicial officers with their responsibilities as administrators in their current roles, they are keenly aware that the expedited jury trial system can alleviate pressures for courts, attorneys, and clients alike. Judge Borris noted that Orange County has reached approximately 750,000 new case filings per year. While two-thirds of those cases are parking tickets, the remaining 250,000 new cases place a sizeable strain on the court system that initiatives like the expedited jury trial system may help alleviate.

Judge Borris also noted that, as Presiding Judge, he is acutely aware that the “face” of the court system is often a judicial officer hearing the pressing volume of tickets, misdemeanors, and family disputes – i.e., not the Central Justice Center in Santa Ana. He also recognized the amount of work it takes to operate the court system itself. Some attorneys may be surprised to know that the Orange County Superior Court system, due to mammoth accounting mandates, maintains its own Chief Executive Officer and Chief Financial Officer.

The Young Lawyers Division expresses its sincere gratitude to Judge Thompson and Judge Borris for taking time from their overwhelming schedules to provide us their inside perspectives.

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Excerpt: An Appeal to Reason: 204 Strategic Tools to Help You Win Your Appeal at Trial
By Donna Bader



The following is an excerpt from the first chapter of *An Appeal to Reason: 204 Strategic Tools to Help You Win Your Appeal at Trial* (Bench Press Publishing 2011). This book, written by Donna Bader, an appellate attorney with over 30 years of experience, offers trial attorneys tools on how they can best protect their cases at the trial court

level. Ms. Bader is a certified specialist in appellate law,* who has handled numerous appeals and written over 350 appellate briefs. (*Certified by the California State Bar, Board of Legal Specialization.) Information on *An Appeal to Reason* can be obtained at www.AnAppealtoReason.com/book.

CHAPTER 1.

**UNDERSTANDING THE ROLE
OF ATTORNEYS
IN THE APPELLATE PROCESS**

An all too familiar scenario: *You've lost at trial. To compound your misery, the judge has ruled against you in post-trial motions. You call your appellate attorney, explaining, "Look, this should be a cheap and easy appeal. After all, I've done all of the research on the case and the authorities are in my post-trial motions. And since I know the facts, I should probably argue the appeal. Unfortunately, there were a few sidebar and chamber conferences that weren't reported. I hope that won't be a problem."*

What's wrong with this picture?

All attorneys are not alike.

To fully understand how a trial attorney can assist in the appellate process, one must appreciate the differences between trial lawyers and appellate practitioners. Why is that helpful? Because the appellate attorney can (and should) become part of the trial team and understanding how he or she works will mean more

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effective communication between team members and an intelligent division of tasks.

The trial attorney creates the record.

Until the trial lawyer comes along, there are no transcripts or records. It is up to the trial lawyer to create them. He or she must take a naked set of facts presented by the client and attempt to weave them into a coherent story. This story must be persuasive to a jury or the court. The trial attorneys' work - whether taking depositions, appearing for motions, or trying a case - is done in a public forum. Their success, to a large extent, is dependent on the spoken word. But trial attorneys cannot overlook that at the appellate level, the written briefs are much more important than the eventual oral argument. Those written briefs are heavily dependent on presenting a record created by the trial attorney. Thus, unless an appellate attorney is involved at the trial level, it is up to the trial attorney to create a complete and meaningful record.

Appreciate the differences between trial and appellate attorneys.

Trial attorneys tend to be risk-takers, especially if they are hired on a contingency basis. They are willing to take cases, knowing there is a possibility they will lose and not get paid (not to mention the expenditure of costs which may never be recovered on the client's behalf). A case may rise or fall on a jury or the court's impressions of the personalities of the attorneys and their clients. Appellate attorneys tend to work far from the glare of the courtroom. Despite the creative flair they may impart to their briefs (or at oral argument), winning or losing is not dependent on the appellate attorney's charisma. Appeals are made to a different audience, one that might not be so easily swayed by emotional pleas. That's why appellate attorneys have often been characterized as the intellectuals or "eggheads" of the legal profession.

Appellate attorneys are often limited by the existing record.

Even though appellate attorneys can be creative in fashioning their briefs, they are limited to creating a story or legal argument based on an existing record.

They are dependent on (or stuck with) the record created by the trial attorney. In essence, appellate attorneys are usually late to the party while the trial attorney is there from the beginning. All too often, the trial attorney fails to consider the need to create a record that will allow the appellate attorney to make a persuasive argument either in support of or against the findings below. Having an appellate attorney participate in the creation of the record can certainly help to ensure that issues are raised and protected for a later appeal.

The role of the appellate attorney is different from that of the trial attorney.

The appellate and trial attorneys have different jobs to do. The trial attorney must present the case to a trier of fact to determine factual questions and must satisfy a legal burden of proof when presenting evidence. The appellate attorney asks the appellate court to decide questions of law but must show prejudicial error.

Don't act like a trial attorney if you are handling your client's appeal.

One of the major criticisms I hear from appellate court justices is that trial attorneys who handle their own appeals merely recycle their trial briefs or motions presented below. To compound the problem, these same attorneys appear for oral argument and reargue the evidence as if they were addressing a jury. In *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, the court described this problem:

“Appellate work is most assuredly not the recycling of trial level points and authorities. Of course, the orientation of trial work and appellate work is obviously different . . . , but that is only the beginning of the differences that come immediately to mind.

For better or worse, appellate briefs receive greater judicial scrutiny than trial level points and authorities, because three judges (or maybe seven) will read them, not just one judge. The judges will also work under comparatively less time pressure, and will therefore be able to study the attorney's

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-An Appeal to Reason: Continued from page 13-

‘work product’ more closely. They will also have more staff (there are fewer research attorneys per judge at the trial level) to help them identify errors in counsel’s reasoning, mis-statements of law and miscitations of authority, and to do original research to uncover ideas and authorities that counsel may have missed, or decided not to bring to the court’s attention.”

(*Id.* at pp. 408-409.)

* * *

(Omitted Tips 7-11; Tips for Success concludes each chapter.)

* * *

Tips for Success

- ◆ Work as a team with the appellate attorney. Each attorney should have distinct and separate tasks in handling dispositive motions and trial proceedings.
- ◆ Enhance effective team communication by understanding each member’s skills and roles.
- ◆ Value the perspective the appellate attorney can bring to trial preparation and in protecting your client’s rights.
- ◆ Understand that an appellate attorney does not merely recycle paperwork previously presented to the trial court when preparing an appellate brief.
- ◆ Create a meaningful record the appellate attorney can work with in handling an appeal.
- ◆ Enlist the assistance of an appellate attorney to help protect the client’s rights by making sure the grounds for appeal are preserved at the trial level.

Recent United States Supreme Court Decisions Impacting Business Litigation

Wednesday, September 14, 2011

Presented by:

Susan R. Estrich

Partner, Quinn Emanuel Urquhart & Sullivan, LLP
Robert Kingsley Professor of Law & Political Science
USC Gould School of Law



and

Ronald D. Rotunda

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