

### Q&A with the Honorable David O. Carter

By Christina Von de Ahe



*[Editorial Note: Judge David O. Carter is United States District Judge in the Central District of California, Southern Division. He is a "Double Bruin," having received both his B.A. and J.D. from UCLA. He served in Vietnam in the United States Marine Corps where he received both a Bronze Star and a Purple Heart. Judge Carter started his legal career as an Assistant Dis-*

*trict Attorney with the Orange County District Attorney's Office until he joined the Orange County Superior Court bench in 1981. President Clinton nominated Judge Carter to the District Court in 1998. The Senate quickly confirmed. Judge Carter's interview will be published in two parts. This first part covers his foreign work.]*

**Q:** You just returned from Kathmandu, Nepal. Why were you there?

**A:** There was an eight-nation conference in Kathmandu involving India, Pakistan, and Bangladesh, the Maldives, Sri Lanka, Bhutan, Nepal, and Afghanistan. They wanted to have a counterterrorism

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### Design Patents May Come and Go, But Trade Dress Is Forever

By Sean M. Murray and Jesse K. Bolling

A company has created a bottle. Functionally, it is no different than any other. It holds fluid. Aesthetically, however, it is unique. Its edges, curves, arcs, or angles make it as distinctive and alluring as the iconic glass bottle Coca-Cola introduced in 1915. But what is the best way to protect it?



At first glance, a design patent appears to be ideal. Design patents are inexpensively obtained, easily enforced, and well protected by an array of effective remedies. But, like all patents, they are limited by the constitutional mandate that they last only "for limited Times." Design patents expire only fourteen years after issuance. The company wants its masterpiece to be protected forever.

An alternative is trade dress protection. Trade dress protection holds the potential of unlimited life and provides remedies that are just as effective as those provided by design patents. Trade dress, however, also has a catch. The company's bottle can qualify for trade dress protection only if consumers come to associate the bottle's design with the company. But if competitors immediately copy the bottle design, consumers may never associate the design with any one company.



One solution immediately springs to mind: obtain both design patent and trade dress rights in the valuable new

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## The President's Message

By Mark D. Erickson



2013 is already proving to be a record year for ABTL. Thanks to the hard work of our Membership Chair Mark Finkelstein and his committee, our membership numbers for 2013 have increased by over 10% and now exceed 700 for the first time in our history. We look to build on that success by

continuing the ABTL tradition of quality dinner programs on cutting edge issues in our profession.

In February, we had the chance to view the Federal Corrupt Practices Act from both sides of the fence—with Charles LaBella of the US Department of Justice, Doug McCormick of the US Attorney's office, and Tom McConville of Orrick sharing their perspectives. As part of our emphasis of improving civility between counsel in 2013, we introduced a new feature at our February dinner, with mini-ethics roundtables based on a short hypothetical. The judges assigned to every table shared their perspectives and suggestions on how to resolve problems at deposition with opposing counsel. The feedback from the exercise was positive so we included the feature in our April 17<sup>th</sup> dinner program as well and plan to include the ethics roundtables in future dinner programs.

Our April 17<sup>th</sup> dinner program featured the trial team from the FDIC Indy Mac trial and provided an interesting behind-the-scenes look at the story behind a historic verdict. It is also not too early to ask you to put the ABTL Fundraiser for Public Law Center on your calendar for June 12<sup>th</sup> (we moved the date from June 5<sup>th</sup> to accommodate an OCBA event). As you know, PLC is the only legal services organization in Orange County that provides pro bono opportunities for attorneys while serving the indigent of our county. This is our chance to contribute financially to the mission of PLC because all of the net proceeds from our dinner program that night go to benefit PLC. Last year, ABTL donated a record \$28,000 to PLC and we would very much like to break that rec-

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## **Aryeh Supplies Additional Ammunition for Plaintiffs in the Ever-Expanding Arena of Unfair Competition Claims**

**By Robert T. Matsuishi**



On January 24th, the California Supreme Court in *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal.4th 1185 (2013), presented a major victory to plaintiffs, holding that common law accrual rules (including the equitable exceptions to the general rule) may apply to claims brought under the Unfair Competition

Law (UCL). In one fell swoop, the Court resolved an eighteen-year split among state and federal courts, and disapproved a line of cases that categorically foreclosed the application of the equitable exceptions to accrual rules in UCL claims. Writing for a unanimous Court, Justice Kathryn Werdegar declared that the UCL's silence on the issue of whether common law accrual rules apply triggers a presumption in favor of applying the rules.

### **Common Law Rule of Accrual**

The accrual rules for causes of action are well-established principles of common law that every litigator will encounter in their first month of practice. The applicable statute of limitations for a cause of action commences when the last element of a cause of action occurs. For UCL claims, it is commonly understood that the cause of action accrues when the allegedly unlawful, unfair, or fraudulent business practice occurs - thereby triggering a four-year statute of limitations.

To soften the unforgiving impact of the accrual rules, a number of exceptions to the general rule have been recognized by the courts. These equitable exceptions include: (1) the discovery rule, which delays accrual of certain causes of action until the plaintiff has actual or constructive knowledge of facts giving rise to the claim; (2) the equitable tolling doctrine, which may suspend the running of the limitations period in situations where the plaintiff in good faith pursues alternative remedies and notice

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## **Harris: Decision on "Mixed Motive" Discrimination Case Creates Mixed Feelings for Employment Litigators**

**By Patrick Reider and Tamar G. Arminak**

In the recent case of *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, the California Supreme Court held that a plaintiff employee must prove that the employer's discriminatory motive was a "substantial factor" in the adverse employment action in order to prove his or her discrimination case under California's Fair Employment and Housing Act ("FEHA"). The court further held

that the plaintiff employee may not recover damages, back pay, or an order of reinstatement if the employer was likely to have taken the adverse employment action for a legitimate reason, even if the employer's discriminatory motive was a substantial factor in the employer's decision. However, the court also held that in such cases the court may award other relief under FEHA, such as declaratory and injunctive relief and attorney fees. Thus, the *Harris* decision will unquestionably change the landscape for discrimination cases, though its overall impact remains to be seen.



### **Background**

Under FEHA (Cal. Gov. Code § 12900 et seq.), it is unlawful for an employer to discriminate against an employee "because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation" of the employee. (Cal. Gov. Code § 12940(a).)

The remedies available to a plaintiff under FEHA include back pay, future lost earnings, compensatory damages, punitive damages, injunctive relief, declaratory relief and attorney fees. With respect to attorney fees

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*-Q&A: Continued from page 1-*

conference and they needed a lead expert supposedly. Somehow I got vetted as the lead expert. I was there to lend support to a regional discussion. Of course, the discussion is best if the solutions come from within that region. But that's a hot spot in terms of terrorism right now. So I spent a week there. Very interesting. We have another one scheduled in Pakistan probably at the later part of this year and then another one after that.

Q: Do you think it was successful?

A: Very successful. Countries started talking to each other, especially the judiciary. Oftentimes when the judges start talking, that lends support to their friends in parliament starting a discussion. And sometimes the legislative or executive branches don't work quite as well because of nationalistic interests, whereas judges talk to each other because we have a commonality. It also segues into a lot of work I'm doing in Pakistan and Afghanistan. I've been to Pakistan about 14 times, I don't know how many times to Afghanistan. So that whole region is of interest to me right now.

Q: What have you been doing in Afghanistan? How did all of this start?

A: Initially it was a private partnership that was formed through Robert O'Brien and a colleague of mine and myself where we wanted a bipartisan effort. In particular we wanted to empower young Afghan students who might be leaders in their country and bring them to the United States or have study tours. That segued more into a quest on behalf of women's rights. It dawned on us very early that while women weren't the complete solution, they were a solution in terms of just the right thing to do. Afghanistan had not really pushed women forward. They were losing, first of all, half the brain power of their country. My wife will tell you that women account for seventy percent of any country's brain power. But more importantly, besides just the right thing to do, it offered an opportunity to right the corruption cycle. Women hadn't bought into this corruption cycle. The men were used to it.

It offered an opportunity because a woman who had

fought hard for [an American education position] would fight tenaciously to keep that position. And it was a way to stop the Taliban and some of the fundamentalist ideas. So of the 14 or 16 people we have coming here [as a result of the last trip], I think over half are women. When I first started, the [Afghan] Supreme Court Justice, Justice Azimi, told me that he had no women [to send to the program], and I told him that we have no money. We then found two women. So it was a humble start. Now we are rolling. We've got a lot of tremendous candidates and over half of those candidates are women. So we try to keep a balance, but it's no longer women being in the minority. There is a strong push for women's rights.

Q: When you say candidates, these are candidates to be judges in Afghanistan?

A: No, they are candidates to come to the United States to get an LLM or a visiting professorship. They come for one year. And many of the law schools in the country have volunteered their resources: Chapman, Whittier, but in particular Chapman, have been very active in sponsoring these students. Harvard, Boston College, Utah, so many schools across the country, have lent a hand by giving their resources. Then the State Department matches that with \$25,000. So if you get a \$40,000 tuition waiver and then the State Department gives \$25,000 for living expenses you've got this wonderful combination of resources.

Q: Do you have any other projects that are dear to your heart right now?

A: I've been to Armenia a lot. Georgia is instituting a jury system. I've got probably 12 to 14 trips into Georgia alone. Malawi. Headed for Indonesia because apparently there's some intolerance amongst different religious faiths, and we're going into the remote areas of Java, and the Sudanese, and Borneo. I was just on the phone getting some malaria pills before you came.

Q: Where the issue is religious intolerance, what do you hope to change?

A: I think we were raised sometimes to think that government has all the solutions, and I've come to believe the opposite. I think change takes place through ordi-

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*-Q&A: Continued from page 4-*

nary people doing ordinary things that then grow. I've come to believe that the strength of our county is really the volunteerism. It starts at the bottom and it seems, tends to work up. The great solutions don't come from the top and work down. It's one person at a time. And one of the reasons I'm so interested in the rule of law is my having been involved in a war in Vietnam and getting shot up and spending a year in different hospitals. Before we send our young men and women into combat I just think everything should be done diplomatically and in the rule of law area. I think Hillary Clinton's really right about that. And Condoleezza Rice was also. We need to try all these diplomatic approaches before we go to war. So before I send the young kids out there I want to make awfully certain that I've done my part.

Q: For a trip out of the country, how much of that is self-funded?

A: The State Department buys my plane ticket and the lodgings are paid for by the State Department or the government. Sometimes it is different agencies like the Justice Department or USAID or, sometimes if I am doing anti-money laundering work, it's the Treasury Department. Anti-money laundering can be as important as human rights because a terrorist group might be shipping money through the Bank of Malawi, and you want to get money laundering laws in place to stop that.

Other times it is just a humanitarian effort. In Bosnia, right after the conflict, we had a heck of a time just with judges. Every judge was removed in Bosnia, 249 judges were put back in place and we flew over about 12 times and trained every judge, 20-to-30 at a time. Once I got involved I found that there are so many projects that the United Nations is involved in. Especially our country. We are really a leader.

Q: For each of these projects, does somebody in the government agency contact you and ask you to volunteer?

A: Yes, they call you. They know you have been someplace and hopefully you have done a good job. [In that case], your reputation has grown both in

terms of competency and in willingness. And the demands are extraordinary. I might get a call saying that I need to board a plane in four days if I can. Sometimes I can't. Sometimes I am in trial and my professional responsibilities here come first. But oftentimes I can get on that plane. Hopefully I fly out on a Friday night so it's one week out of my life. That's my vacation time; that's how I spend it.

Q: Do you have any projects in the United States that you're working on?

A: Gosh, yeah. (Laughter.) Lots of them, but mostly they are court projects. For instance, trying to get tattoos off of gangbangers. If you can get a tattoo removed from a hardcore gang veteran and that person goes back to the community, they're a walking billboard of success. Some young kid looks at them and says, you know, that's a pretty tough guy, but he's getting jumped out or dropping out. I am also trying to get probationers to check in and take personal responsibility to coordinate with probation. Sometimes, as a judge, we sentence them and lose track of that person and we get a violation. Well, why aren't they checking in and seeing me once a month? I think that that coordination between probation and the judge means something.

My wife, who I am extraordinarily proud of, worked with me in Africa in 2004 because some terrorist groups were running money through the Bank of Malawi. I rarely take her places, but Malawi seemed like a safe place. After being there for three or four days, she told me she was quitting her job. I asked her, "Now that you've cut our family income in half, can I ask why?" She said: "Well the kids here are getting one meal a day, the average wage of a male working on the roads is 80 cents, they're eating mice on a stick, most of them have stunted growth, and I'm going to devote myself and my life to the children of Malawi." And that's what she did. She quit her very prestigious job and she doesn't take a cent.

She has a program called Direct Connections to Africa and she probably supports between 8,000 to 10,000 kids right now in the Mangochi area who would not have any support otherwise. In fact, her group is so remote that she's building her second school in a region where the elephants have killed 30 villagers in the area.

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I'm very proud of her and, as we both say, we came in with nothing and we're probably going out with nothing, so that's fine.

**Q:** When did your wife start the Malawi project?

**A:** I think that she started in 2007. She makes sure that people are directly connected. So when you ask whether I have a local project, it is supporting her. I can't get involved, of course, in fundraising or anything like that [due to judicial ethics], but she'll have a potluck dinner and I go to that. And I go with her every year to Malawi for two-and-a-half weeks.

*The ABTL thanks Judge Carter for his time and looks forward to Part II of this interview in a future issue.*

♦Christina Von der Ahe is an associate at Orrick, Herrington & Sutcliffe LLP.

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***-Design Patents: Continued from page 1-***

bottle design. A design patent would provide immediate protection against copying by competitors, regardless of whether consumers associate the design with the company. The company would then have fourteen years to form that association – and thus create trade dress rights in the bottle – by investing in marketing and advertising.

As many attorneys know, a functional invention cannot be protected by a utility patent and also receive trade secret protection. Especially under the first-to-file system just instituted by the America Invents Act, an inventor seeking utility patent protection must file a patent application as early as possible. But once the Patent Office publishes the patent application, the invention is no longer secret and any trade secret rights that the inventor may have possessed are lost. At the end of the patent's twenty-year term, the inventor is left with no protection whatsoever. But does the law allow businesses to protect an ornamental design with both a design patent and trade dress?

The situation is not so bleak for innovators seeking long-term protection for their ornamental designs. Design patents and trade dress lack the inherent in-

compatibility of utility patents and trade secrets.

***Constitutional Bases Of Design  
Patent And Trade Dress Law***

Design patents and trade dress tend to cover the same subject matter – they both protect the “look and feel” of a product. However, two completely different constitutional provisions implement these independent rights. Patent protection stems from the Patent and Copyright Clause, which grants Congress the “Power To . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .” (U.S.Const. Art. I, § 8, cl. 8.) This provision provides no foundation for trademark rights, which led to an interesting decision in 1879 where the Supreme Court struck down legislation that attempted to create statutory trademark rights under this provision. (*See Trade-Mark Cases*, 100 U.S. 82 (1879).) Congress successfully passed a federal trademark statute in 1881 only by invoking its broad powers under the Commerce Clause. (*See Trademark Acts of 1881 and 1905*, 21 Stat. 502 and 33 Stat. 724.)

The distinct constitutional bases of patent and trademark law account for the most significant difference between design patent and trade dress rights: the duration of those rights. The Copyright and Patent Clause mandates that patent protection last only for a limited time period. By contrast, the Commerce Clause contains no such restriction, and trade dress rights can last into perpetuity.

***Trade Dress***

Traditionally, the public has associated trademark protection with logos, designs and phrases. Trade dress rights emerged out of a comparatively recent expansion of the universe of things that can function as source identifiers. This shift stems from a broad interpretation of the Lanham Act's definition of a trademark as “any word, name, symbol, or device.” (15 U.S.C. § 1127.) As the Supreme Court noted in *Qualitex*, “almost anything at all . . . is capable of carrying meaning.” (*Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 162 (1995).) For example, the Supreme Court in *Two Pesos* determined that the dining atmosphere of

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a restaurant could yield trade dress rights. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992). In addition, General Motors successfully gained trade dress rights for its design of the HUMMER. (*General Motors Corp. v. Lanard Toys, Inc.*, 468 F.3d 405 (6th Cir. 2006).) Even smells and sounds have yielded rights in some cases. (*See In Re Clark*, 17 U.S.P.Q.2d 1238 (TTAB 1990) [registering a particular smell associated with applicant's yarn as a trademark]; U.S. Trademark Registration 0916522 [depicting the registration for the sound of the NBC chimes in connection with broadcasting of television programs].)

Trade dress protects the non-functional aspects of an object's sensible characteristics, including "features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques." (*Two Pesos*, 505 U.S. at 765, n. 1.) Trade dress rights exist if, when consumers see the protected characteristics, they immediately recognize that the good or service comes from a particular source. It is irrelevant whether consumers understand the nature of the relationship as long as they recognize the connection to a single producer. (*See Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 387 (5th Cir. 1977) [holding that a court should only judge whether an association between a product and source actually exists, and should never "sit to assess the quality of products sold in the open market"].) Thus, as long as the trade dress owner continues to use the protected characteristics and the public continues to recognize them as a source identifier, trade dress rights can last in perpetuity. Protection can be claimed under the federal Lanham Act, under state statutes, and under the common law. Trade dress rights share the same rationale as trademarks, namely, preventing consumer confusion and protecting an owner's goodwill.

### ***Design Patents***

Patents seek to promote scientific progress by providing inventors with an exclusive, but temporally limited, monopoly over the manufacture, sale and use of their inventions. Congress designed the system as a bargain between society and the inventor. The inventor gains an exclusive monopoly over the manufacture, use and sale of the invention. In return, socie-

ty obtains a detailed and early disclosure of the invention as well as the right to use the invention after the patent expires. Utility and plant patent protection usually lasts for 20 years from the date of the application, while design patents are generally more limited, lasting for 14 years from the date of issuance. (35 U.S.C. § 154 (Utility and Plant Patent); 35 U.S.C. § 173 (Design Patent).)

Design patents represent a subset of patentable inventions. They protect the non-functional, ornamental features of an article of manufacture. (35 U.S.C. § 171.) Unlike utility patents, which encourage innovation in functional or utilitarian technology, design patents promote progress in the decorative elements of industrial design. (*See* 1. J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 6:11 (4th ed. 2012) (hereafter McCarthy); *Avia Group Int'l, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1563 (Fed. Cir. 1988).) Design patents do not protect "articles that are purely and only artistic such as a photograph, a painting or a sculpture. Rather, they protect the ornamental design for utilitarian objects such as a microwave oven, an athletic shoe or a watch face design." (McCarthy § 6:11.) Design patents also receive different remedies than other patent forms, such as disgorgement of an infringer's profits under 35 U.S.C. § 289. This remedy is something that design patents and trade dress share. (*See* 15 U.S.C. § 1117.)

### ***The Tension Between Design Patents And Trade Dress***

Providing perpetual trade dress protection to items that have, or formerly had, design patent protection may appear to "stretch" the exclusive rights of the design patent beyond its fourteen-year term and breach the inventor's promise to allow society to eventually use the invention without legal reprimand. (McCarthy § 6:12.) In other words, if inventors successfully protect an aesthetic characteristic of their invention through both design patent and trade dress, the public loses the right to use the invention after the patent monopoly period has ended. Thus, "[a]lthough the designer has been encouraged to disclose his or her design, the public's access remains restricted even though the patent inspired monopoly period has expired." (*Winning Ways, Inc. v. Holloway Sportswear, Inc.*, 903 F.Supp. 1457, 1461 (D. Kan.

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1995).)

In addition, granting “trade dress protection to an item for which a [design] patent has expired creates tension because the product may have obtained secondary meaning precisely because the product was patented.” (*Id.* at 1460-61.) The trade dress rights then fail to have an independent basis, as they emerged solely because of the monopoly granted by patent law. This reinforces the impression that the trade dress rights are simply an improper extension of the design patent rights, rather than a right existing on its own. (*Id.* at 1461.)

Despite the tension between design patents and trade dress, an ornamental design can be protected by both because they provide different protections and for different reasons. The *Mogen David* case is instructive.

In *Application of Mogen David Wine Corp.*, the predecessor of the Federal Circuit compared design patent and trade dress protection in a wine bottle:

The purpose of the federal design patent laws is to encourage the creation of ornamental designs. The inventor receives, for a limited period, a federal right to exclude others from making, using, or selling the patented design throughout the United States. Upon expiration of the design patent this federal right no longer exists. Thus the inventor loses this exclusive right or interest. Federal trademark laws, independent in origin from design patent law, have the dual purpose of protecting both the trademark owner and the public from confusion, mistake and deception.

(*Application of Mogen David Wine Corp.*, 372 F.2d 539, 543 (Cust. & Pat.App. 1967).) Thus, trade dress merely served to identify and distinguish the wine bottle from those of others. A design patent, on the other hand, broadly prohibits the manufacture, sale or use of the wine bottle by anyone other than the patent holder. The *Mogen David* court noted that another entity was completely free to use the wine bottle design under trade dress law, as long as this use did not cause a likelihood of confu-

sion. (*Id.*) The registrant merely held the “right to preclude others from copying its trademarked product for the purpose of confusing the public as to its source.” (*Kohler Co. v. Moen Inc.*, 29 U.S.P.Q.2d 1241, 1243-44 (7th Cir. 1993).) A competitor “is free to copy [the registrant’s] design so long as it ensures that the public is not thereby deceived or confused.” (*Id.*; McCarthy § 6:11.) Thus, trade dress protection does not simply extend the monopoly conferred by a design patent.

### Modern Consensus

In the early years of the Lanham Act (the federal trademark statute), the Patent And Trademark Office determined that a configuration covered by a design patent was unregistrable as a trademark. (McCarthy § 7:91; *see, e.g., Ex parte Mars Signal-Light Co.*, 85 U.S.P.Q. 173 (Comm.Patents 1950).) Dual protection was denied because of the concern that the term of the design patent would be improperly extended in violation of the constitutional restriction. For example, in *Ex parte Minnesota Mining & Mfg. Co.*, the TTAB ruled that, “upon the expiration of a design patent, the subject matter becomes dedicated to the public, and that an extension of protection cannot be obtained under the form of trade mark or analogous protection.” (92 U.S.P.Q. 74, 76 (Chief Examiner 1652).)

This changed in 1959, when the USPTO allowed the registration of the PEPSI COLA bottle on the Supplemental Register even though it was protected by a design patent. (*See In re Pepsi-Cola Co.*, 120 U.S.P.Q. 468 (T.T.A.B. 1959).) Today, it is well understood in all circuits that a product’s design can be protected through both trade dress and a design patent. The Supreme Court in *Bonito Boats* stated that “[t]rade dress is, of course, potentially the subject matter of design patents.” (*Bonito Boats, Inc. v. Thunder Craft Boats*, 489 U.S. 141, 154 (1989).) McCarthy also noted that “[d]ual protection from both design patent and trademark law may exist where it is alleged that the configuration or shape of a container or article serves to identify and distinguish the source of goods—that is, acts as a trademark or trade dress.” (McCarthy § 6:11 and § 7:90-7:93.)

The Seventh Circuit addressed this conflict directly in *Kohler Co. v. Moen*. The court agreed with the *Mogen David* decision, noting that “the C.C.P.A., the Federal Circuit and the T.T.A.B. have since interpreted § 45 to allow trademark protection for qualifying product configura-

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tions.” (*Kohler Co.*, 29 U.S.P.Q.2d at 1243-44.) In *Kohler*, the court expressly rejected a constitutional challenge based on the Patent And Copyright Clause’s requirement that patents be granted for limited times. The court held that “trademark protection is not the equivalent of a perpetual patent because the nature and scope of trademark protection is significantly different from that of a design patent.” (*Id.*; McCarthy at § 6:8.)

***Conclusion***

Inventors of a useful or functional innovation are effectively required to choose between seeking utility patent protection, which is strong but limited in duration, and utilizing weaker but potentially perpetual trade secret law. Developers of ornamental designs for commercial products face no such dilemma. Despite the tension between trade dress and design patent rights, all courts today permit industrial designs to be protected by both trade dress and design patents. Therefore the creator of a valuable industrial design should usually pursue both forms of protection.

♦*Sean M. Murray, is a partner and Jesse Bolling is an associate of Knobbe Martens Olson & Bear*

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ord this year. However, I would encourage our membership to go to the PLC website and look at the available cases and ask yourself if you can spare a few hours a month to help someone in need of legal services—I can tell you from personal experience that the intangible benefits you receive by extending a hand to someone in need through PLC will greatly exceed the value of the billable hours you invest.

ABTL is also sponsoring an opportunity to have lunch with the Honorable Gail Andler in her courtroom on May 8<sup>th</sup> to discuss real-life ethics challenges and strategies for defusing conflict during interactions between counsel. This is another opportunity to interact with the bench in an educational, non-threatening environment that

will hopefully arm counsel with new strategies for their practice. The Honorable Nancy Stock has agreed to host a “Brown Bag” in her courtroom for our Young Lawyers Division, which is open to attorneys with ten years or less of experience. Details are located on page 12 of this Report.

For those looking for outdoor extracurricular activities, ABTL is also continuing its tradition of supporting Habitat for Humanity by staffing Build Days on Orange County housing projects with volunteer workers from our ABTL membership. We are currently scheduling for June 28, 2013. If anyone is interested in helping, please email Tom McConville at [tmconville@orrick.com](mailto:tmconville@orrick.com) for more details.

Thank you for your continued support and I look forward to seeing everyone at our spring/summer events and I welcome your thoughts and suggestions on how we can better serve the business litigation community. Feel free to email me at [mark.erickson@haynesboone.com](mailto:mark.erickson@haynesboone.com).

♦*Mark D. Erickson is a litigation partner at Haynes and Boone LLP in Irvine.*

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***-Aryeh: Continued from page 3-***

requirements to the defendant have been met; (3) the doctrine of fraudulent concealment, which revives the plaintiff’s claim if the defendant causes the claim to grow stale by actively working to conceal the wrongdoing; (4) the continuing violation doctrine, which the accrual date of a claim involving a continuing series of wrongs may be combined for statute of limitations purposes; and (5) the continuous accrual rule, providing that a series of wrongs by the defendant may trigger multiple claims, each with their own limitations period and accrual date.

***Pre-Aryeh Application of Equitable Exceptions to the Accrual Rules***

To understand the impact of the Supreme Court’s decision in *Aryeh*, one must go back to 1995, to *Stutz v. Reebok*, 909 F. Supp. 1353 (C.D. Cal. 1995), and the multitude of state and federal court litigation that has turned on the applicability or non-applicability of common law accrual rules in UCL actions.

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*Stutz* was one of the first cases to suggest that certain equitable exceptions to the accrual rules categorically do not apply to UCL claims. In that case, *Stutz* sued Reebok, alleging that the shoe company misappropriated trade secrets and infringed upon patents that *Stutz* owned. *Stutz* invoked the equitable exceptions to the accrual rules in response to Reebok's motion for summary judgment. The trial court rejected *Stutz*'s arguments, finding equitable tolling inapplicable because the evidence showed that *Stutz* had constructive, if not actual, knowledge of the potential claim against Reebok well before filing the complaint. *Id.* at 1363-1364.

In a separate analysis, the trial court also concluded that the discovery rule was not applicable to UCL claims, thus the statute begins to run when cause of action accrues irrespective of whether plaintiff knew of its accrual, unless plaintiff can successfully invoke the equitable tolling doctrine. *Id.* at 1363. In support of its conclusion, *Stutz* reasoned (both expressly and implicitly) that (1) federal antitrust laws do not permit delayed accrual based on ignorance of a claim, (2) judicial interpretations of the federal antitrust laws apply fully to California's antitrust act, and (3) interpretations of California's antitrust act are equally applicable to the unrelated UCL. *Id.*

On appeal, the Federal Circuit Court affirmed the trial court's ruling, holding that the equitable tolling doctrine did not apply because *Stutz* failed to produce any evidence of a fraudulent concealment by Reebok. *Stutz v. Reebok*, Nos. 96-1062 and 96-1083, 1997 WL 258883, at \*84 (C.A.Fed. May 16, 1997). Curiously, little mention was made of the separate (but potentially more significant) analysis that the discovery rule did not apply to UCL claims.

Seven years after *Stutz*, the Fourth District Court of Appeal took on a similar issue in *Snapp v. Malcolm Bruce Burlingame Robertson*, 96 Cal. App. 4th 884 (2002), where it found that a UCL cause of action accrued when the first allegedly wrongful conduct by the defendant occurred, even though the conduct continued over a period of time. *Id.* at 891. In making its ruling, the *Snapp* court did not discuss the potential application of the continuous accrual rule. The court also observed that the discovery rule did not apply to UCL claims, citing the holding in *Stutz*

and a federal case that relied on *Stutz*. *Id.*

State and federal courts were split after the Fourth District's decision – some subscribed to the belief that *Snapp* created an across-the-board presumption that the accrual rules (including the equitable exceptions) did not apply to UCL claims – while others believed that the *Snapp* decision was based on the facts at issue in the case, which showed that the discovery rule in particular did not apply to the plaintiff's claims. The only general consensus that developed was that the issue regarding the applicability of the accrual rules to UCL claims remained 'unsettled' in California.

In *Salenga v. Mitsubishi*, 183 Cal. App. 4th 986 (2010), the Fourth District cited its own holding in *Snapp* to hold that the discovery rule "does not apply to unfair competition actions." *Id.* at 996. Conversely, in *Broberg v. Guardian Life Insurance*, 171 Cal. App. 4th 912 (2009), the Second District Court of Appeal recognized the unsettled nature of the law before reversing the trial court's conclusion that the discovery rule did not apply to UCL claims. *Id.* at 920. In *Massachusetts Mutual v. Superior Court*, 97 Cal. App. 4th 1282 (2002), the Fourth District Court of Appeal noted that the UCL's statute of limitations probably runs "from the time a reasonable person would have discovered the basis for the claim." *Id.* at 1295. In *Dean v. United of Omaha*, No. CV 05-6067, 2007 WL 7079558 (CD. Cal. Apr. 27, 2007), the District Court refused to grant summary judgment on the plaintiff's UCL claims because California law was unclear regarding the discovery rule's application. *Id.* at \*14.

### **Background in Aryeh**

The dispute in *Aryeh* arose from photocopier lease agreements between Jamshid Aryeh and Canon that were entered into in November 2001 and February 2002. Mr. Aryeh paid a monthly payment to Canon to lease and maintain each leased copier.

Shortly after entering the agreements, Mr. Aryeh noticed discrepancies between the meter readings taken by Canon and what he felt was the actual number of copies made on each copier. When Canon failed to respond to Mr. Aryeh's complaints, he started to compile his own record of the copies that he made. Mr. Aryeh concluded that the discrepancy was the result of

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test copies that Canon technicians were running during service visits – allegedly over 5,000 copies over the course of 17 service visits between February 2002 and November 2004. The test copies resulted in Mr. Aryeh exceeding the monthly allowance under the agreements and owing excess copy charges to Canon. Mr. Aryeh sued Canon in 2008, asserting class allegations and an alleged violation of the UCL.

Following a series of demurrers, the trial court sustained Canon's third demurrer without leave to amend and dismissed Mr. Aryeh's claims with prejudice. The trial court's order made clear that the primary basis for the dismissal was the running of the statute of limitations. Interpreting *Snapp*, the trial court stated that the clock on UCL claims starts running when the first violation occurs. Because Mr. Aryeh's second amended complaint alleged that the first alleged overbilling occurred in February 2002, Mr. Aryeh's UCL claim was effectively barred by the four-year statute of limitations.

A divided Second District Court of Appeal affirmed the trial court's ruling – agreeing that neither the discovery rule nor the continuing violation doctrine applied to UCL claims.

### **The Supreme Court's Decision in *Aryeh***

On paper, *Aryeh* presented a narrow and specific set of issues for the Supreme Court. First, may the continuing violation doctrine, under which a defendant may be held liable for actions that take place outside the limitations period if those actions are sufficiently linked to unlawful conduct within the limitations period, be asserted in an action under the UCL? Second, may the continuous accrual doctrine, under which each violation of a periodic obligation or duty is deemed to give rise to a separate cause of action that accrues at the time of the individual wrong, be asserted in such an action? Third, may the delayed discovery rule, under which a cause of action does not accrue until a reasonable person in the plaintiff's position has actual or constructive knowledge of facts giving rise to a claim, be asserted in such an action?

The court seized upon the opportunity to resolve the eighteen-year split among state and federal courts and rejected a long line of cases that categorically fore-

closed the application of the equitable exception to accrual rules in UCL claims.

Reversing the Second District's decision, the Court reviewed the language and the legislative history of the UCL to conclude that the overarching intent of the legislature when it enacted the UCL was to subject UCL claims to common law accrual rules, including the equitable exceptions. *Aryeh*, 55 Cal.4th at 1192-1194. The Court specifically rejected the analysis in *Stutz*, observing: First, that California's antitrust law was not exclusively modeled on federal law, and that the *Stutz* court's interpretation of federal antitrust law in support of its decision was at best instructive, not conclusive in that instance. *Id.* at 1194-1195. Second, the Court noted that the *Stutz* court appeared to assume (without any explanation) that prior decisions interpreting antitrust law would apply equally to a UCL claim. *Id.* at 1195. The Court stated that the application of the common law accrual rules to the UCL, as with any other statute, is based on "the nature of the right sued upon ... and the circumstances attending its invocation control the point of accrual." *Id.* at 1196.

### **The Implications of *Aryeh***

For defense counsel, the silver-lining of the *Aryeh* decision is in what the Court did not express in its opinion - that there exists a general presumption that each of the equitable exceptions apply in each case. Rather, the Court recognized: (1) that the accrual rule is the default rule for UCL claims; and (2) that the applicability or non-applicability of each equitable exception still depends on the nature of the allegations in complaint. *Id.*

Applying the rule to the case at bar, the Court in *Aryeh* concluded that Mr. Aryeh could invoke the continuous accrual doctrine by alleging that Canon continually breached its ongoing duty to not overcharge its customers. *Id.* at 1200. Further discussion by the Court noted that the continuing violation doctrine did not apply, preventing Mr. Aryeh from recovery for all of Canon's overcharges. *Id.* at 1198. Notably, the Court also suggested that the UCL claims would be time-barred if Mr. Aryeh's complaint was based on a single allegation of fraud committed at the time the contracts were formed - as opposed to a continual breach of Canon's duty to not overcharge. *Id.* at 1201.

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The immediate effect of the *Aryeh* decision will be on UCL claims that allege an ongoing wrongful conduct. In such situations, the assertion of a statute of limitations defense ‘on the pleadings’ may be defeated if plaintiffs allege additional facts that affect the accrual of the UCL claims. In practice, the Court’s denunciation of the legal analysis in *Stutz* once again shows the importance of going beyond the holding to examine the legal and factual basis for each authority that you cite in a motion.

♦*Robert T. Matsuishi is an associate in the Orange County office of Payne & Fears LLP.*

**Brown-Bag Lunch  
with the  
OC Superior Court  
Civil Complex Panel**

**June 24, 2013**

**Orange County Superior Court  
Civil Complex Center  
751 West Santa Ana Blvd.,  
In Santa Ana  
Department CX-105  
at 12:00 noon**

The brown-bag lunches invites ABTL members with less than 10 years in practice to interact with members of our local bench.

To reserve your spot, please email [abtloc@abtl.org](mailto:abtloc@abtl.org) or call 714.516.8106

There is no cost to attend this event, but space is limited.

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and expert witness costs, plaintiffs and defendants are not on equal footing in FEHA cases. While a trial court has discretion to award attorney fees in FEHA cases, it has been long recognized that “a trial court should ordinarily award attorney fees to a prevailing plaintiff, unless special circumstances would render an award of fees unjust.” (*Young v. Exxon Mobil Corp.* (2008) 168 Cal. App. 4th 1467, 1474.) However, a prevailing defendant in a FEHA action “may recover attorney fees only when the plaintiff’s action was frivolous, unreasonable, without foundation, or brought in bad faith.” (*Baker v. Mulholland Security & Patrol, Inc.* (2012) 204 Cal. App. 4th 776, 782.) The *Baker* case held that this same standard applies to the recovery of expert witness costs in FEHA cases. (*Baker, supra*, 204 Cal.App.4th at 783.) Because the playing field is not level with respect to attorney fees under FEHA, plaintiffs have traditionally faced little risk in prosecuting discrimination claims.

In discrimination cases, the plaintiff has the initial burden of showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion. If this burden is met, then the plaintiff establishes a presumption of discrimination. (*Harris, supra*, 56 Cal. 4th at 214.) The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. (*Id.*) The plaintiff must then show that the employer’s proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff has the burden of offering any other evidence of a discriminatory motive. (*Id.* at 214-215.) However, the *Harris* court noted that this framework presupposes a single motive for the adverse employment decision and does not account for “mixed motive” cases, e.g., cases where the finder of fact determines that there were both discriminatory and non-discriminatory reasons for the action. (*Id.* at 215.) Thus, the court set out to answer the question: what should the trial court do when an employee has been terminated for a discriminatory motive *and* a non-discriminatory motive?

**Facts of the *Harris* Case**

The plaintiff in *Harris* had a “preventable” accident that damaged the bus she was driving shortly after

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***-Harris Decision: Continued from page 12-***

starting her training period for a Santa Monica bus service. The performance evaluation guidelines for the bus service indicated that preventable accidents were an indication of “unsafe driving,” and that drivers who drove in an unsafe manner would not pass their probationary period. The plaintiff completed her training period and became an at-will probationary driver, but had a second preventable accident. The plaintiff also failed to timely report to work on two occasions. Her supervisor noted in her three-month performance review that “further development” of her performance was needed.

About six months into her employment, the plaintiff mentioned to her supervisor that she was pregnant. Her supervisor seemed displeased with the news, and asked her to obtain a doctor’s note clearing her to work. On the same day that the plaintiff brought the note to her supervisor, her supervisor received a list of probationary employees whose performance was unsatisfactory. The plaintiff was on the list, and she was terminated.

The plaintiff filed a lawsuit claiming sex discrimination. The defendant responded with an affirmative defense stating that there was a legitimate, nondiscriminatory reason for the plaintiff’s termination.

At trial, the defendant requested that the jury be given BAJI No. 12.26. That instruction stated that if both a discriminatory and non-discriminatory reason for terminating the employee existed, then the employer would not be liable if the defendant could establish by a preponderance of the evidence that the legitimate reason for terminating the employee (i) was an actual motivation for the termination and (ii) would have been a sufficient reason for the termination “standing alone.”

The trial court did not give the instruction. Instead, the jury was given CACI No. 2500, which stated that the plaintiff had to prove that her pregnancy was a “motivating factor/reason for the discharge.” “Motivating factor” was further defined as “something that moves the will and induces action even though other matters may have contributed to the taking of the action.”

The jury found that the plaintiff’s pregnancy was a motivating reason for the defendant’s decision to discharge her and awarded her \$177,905 in damages, of which \$150,000 were for “non-economic loss, including mental suffering.” The court then awarded plaintiff \$401,187 in attorney’s fees.

***The Harris Court’s Decision***

The *Harris* court first determined how to interpret the phrase “because of” in Cal. Gov. Code § 12940(a). Though the statutory language clearly requires a causal relationship between the discrimination and the adverse employment action, the *Harris* court recognized that the level of causation necessary required clarification. (*Harris, supra*, 56 Cal. 4th at 214.) The court considered three clarification options. First, the defendant advocated a “but for” test, which would require the plaintiff to prove that she would not have suffered the adverse employment action “but for” the discriminatory motive. Second, the plaintiff argued that the court should adopt a “mere motivating factor” test, which would allow a plaintiff to recover if the discriminatory motive was present, regardless of whether there were other legitimate motivating factors. Or third, which the court adopted, the discriminatory motive must be a “substantial factor” in the adverse employment action. (*Id.* at 225.) The court held that the plaintiff must establish that the discriminatory motive was a substantial factor in the adverse employment decision before the burden will shift to the defendant to establish that there was also a legitimate motive for the decision. However, the court declined to state exactly what evidence would establish that discrimination was a “substantial factor” in the employer’s decision. (*Id.* at 232.)

The *Harris* court then turned to the remedies available to a plaintiff in a “mixed motive” case where both discriminatory and legitimate motives had been proven. In order to prevent a “windfall” to the plaintiff who could be legitimately terminated, the court held that the plaintiff in such cases could not recover back pay, front pay, an order of reinstatement, or noneconomic damages. (*Harris, supra*, 56 Cal. 4th at 233.)

However, the court noted that “it would tend to defeat the preventive and deterrent purposes of the FEHA to hold that [proof of a legitimate motivation for the adverse employment action] entirely absolves an employer of liability when its employment decision was substantially

***-Continued on page 14-***

**-Harris Decision: Continued from page 13-**

motivated by discrimination.” (*Harris, supra*, 56 Cal. 4th at 225.) Thus, the court held that a plaintiff may obtain declaratory relief, injunctive relief, and/or attorney fees in “mixed motive” cases. (*Id.* at 234-235.) The court concluded that the availability of these remedies would further the ultimate goal of FEHA, which is to eliminate discrimination in the workplace. (*Id.*)

**Impact on Litigation (and Beyond)**

The *Harris* decision is likely to have a significant impact on the settlement of discrimination cases. It will be more difficult for employees to prove their discrimination claims now that they have the burden of establishing that discrimination was a substantial factor in the employer’s decision. The unavailability of damages where there is a legitimate reason for the adverse employment action will also be a significant hurdle for plaintiffs. But by leaving the door open for the possibility of an award of attorney fees (and probably expert fees) in mixed motive cases, particularly in light of the liberal standard for awarding such fees in FEHA cases, *Harris* has given plaintiffs with substantial evidence of discrimination a strong tool for negotiation.

It is difficult to determine the impact *Harris* will have on the number of discrimination cases that are prosecuted, or on how those cases will be resolved going forward. In almost every case where a current or former employee brings a discrimination claim against an employer, the employer raises the employee’s performance as a defense. The employer will dig deep into its records to uncover every incidence of tardiness, insubordination, and substandard work product to prove that an adverse employment decision was based upon the employee’s performance, and not a discriminatory motive. On the other hand, the employee will produce every positive performance review, salary increase, and e-mail from the employer expressing even the faintest of praise as evidence that he or she was a model employee who must be the victim of unlawful discrimination. The finder of fact is nearly always encouraged to choose the more plausible story. For this reason, juries may rarely determine that an employer’s discriminatory motive was a substantial factor in an adverse employment decision, but that the employer was also motivated to take the same action on legitimate grounds. Because these mixed-motive decisions may be unlikely, there may not be much change in the net number of discrimination

cases that are prosecuted if plaintiffs believe they can discredit the employer’s version of the facts.

In light of the *Harris* decision, plaintiff’s attorneys should be more vigilant than ever when conducting their initial investigation. In many ways an attorney’s interview with a potential employment law plaintiff is very similar to an interview with a potential employee: chances are there’s a lot about the employee’s past that they’re not telling you. Now that it is clear that a discriminating employer can evade many damages if there is a legitimate reason for the adverse employment action, it is important to find out as much as possible about the “real” reason for the action, no matter how “air-tight” the discrimination portion of the case may seem.

As for attorneys who advise employers, *Harris* does not necessarily include any new lessons. It does, however, highlight the importance of documenting employee performance (or lack thereof) and implementing policies and procedures to eliminate unlawful discrimination in the workplace.

**Conclusion**

It may take years for employment litigators to see the full impact of the *Harris* decision. Plaintiff’s attorneys with colorable cases of discrimination may be emboldened to press forward with discrimination claims regardless of the employer’s stated reasons for adverse employment actions because they may be able to recover their attorney fees. But the unavailability of damages in cases where the employer can show a legitimate reason for the adverse employment action may cause plaintiff’s attorneys to shy away from discrimination cases. There will likely be an overall decrease in weaker discrimination claims, but it may be more difficult for employers to settle the stronger cases.

Meanwhile, the *Harris* case gives employment litigators even more reason to be vigilant in their practice. Counsel for employees need to do their best to get both sides of the story before they file their lawsuit, and counsel for employers need to inform their clients of the need for clean documentation and smart policies and procedures.

♦*Patrick Reider and Tamar G. Arminak are partners at Arminack Reider APC.*

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