

# abtl REPORT

ORANGE COUNTY

Volume I No. 2

May 1999

## Q&A with the Honorable William F. McDonald, Orange County Superior Court

[Editor's note: In each issue we hope to include an interview with one of our judges. This time, we are fortunate to feature Judge William F. McDonald. Judge McDonald is the Supervising Judge of the Complex Civil Panel of the Orange County Superior Court and a member of our Board of Governors.]

**Q.** How do you like sitting on the Complex Civil Panel? How does it compare to your other assignments?

**A.** I have to confess I have enjoyed all of my judicial assignments. However, I have enjoyed some more than others. When I first went on the Complex Civil Panel, I had reservations. I had enjoyed the fast pace of the Expedited Trial Panel and thought I might have difficulty in adjusting to handling fewer cases at a much slower pace. However, the cases are very



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## California Supreme Court Moves State Predatory Pricing Law Toward Alignment With Federal Law By Joel Sanders

California's murky laws relating to predatory pricing have become clearer. The California Supreme Court, in its recent decision in *Cel-Tech Communications Inc. v. Los Angeles Cellular Telephone Co.* (April 8, 1999, 1999 D.A.R. 3360), clarified California law on predatory pricing and moved it closer to alignment with federal antitrust law. Although significant differences remain between the California and federal approaches to predatory pricing, it is no longer so obvious that state courts are the more plaintiff-friendly forum.

Plaintiffs file below-cost pricing claims in California under the Unfair Practices Act (Bus. & Prof. Code §§ 17000 *et seq.*) and the Unfair Competition Law (Bus. & Prof. Code §§ 17200 *et seq.*). The Court clarified the standards for such claims under both statutes. The Court held that (1) such claims under the Unfair Practices Act require a



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Joel Sanders is a partner in the San Francisco office of Gibson, Dunn & Crutcher LLP. Gibson, Dunn represented the defendant in the *Cel-Tech* case.

### UPCOMING EVENTS

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## LETTER FROM THE PRESIDENT

by Thomas R. Malcolm



I admit it. I practiced a long time ago in a galaxy far, far away – Orange County during the 1970's. Our economic engines were real estate development and the defense industry. Our name-

sake, Orange Grove's, were still plentiful and progress seemed to come at a manageable pace. This was a much less stressful time. The central meeting place for most of the Judges and Lawyers in the county was the Elks Lodge in Santa Ana. It was here the bar association would conduct its annual meetings and host its seminars. Over and above the legal education, there was a lot to be gained if you attended these gatherings. Soon you met most of the Judges or learned from others what to expect when you appeared before them in their courtrooms – a decided benefit. Also, because the bar was so close-knit, if you didn't soon know the other lawyers in the county personally, you knew them by their reputations or their reputations were only a phone call away. During these times, due to the paucity of lawyers and as a result of the county's unprecedented growth, most law practices were thriving. Any thought of regimented client development activity was unheard of. I think I may have just described Shangri-La.

This bucolic dreamscape began to change with great velocity in the 1980's. For those of us who were Business Trial Lawyers here during those years, the practice became more like a roller coaster ride, undulating up and down with the county's economic cycles. Rather than being continuously busy, most business trial attorneys I knew complained that it's been either feast or famine. Their family members are sick and tired of their complaining that they are "stressed" because they are too busy, only to soon be followed by their griping that their practices are in the doldrums. I'm told these extremes have become a fact of life and we need to learn to live with them – to achieve an emotional equilibrium. If you succeed in doing this, please advise me how. I need your secret.

Now, upon the eve of the next millennium, the legal landscape in Orange County bears little resemblance to what I experienced in the 1970's. It is impossible to know more than a fraction of the 11,000 lawyers practicing here today. Arrowhead Pond is the only venue which immediately comes to mind as able to accommodate this flock. I do not know the present number of Judges in the County. I do know that I do not know all of them.

Despite the fact that the lawyer population grows each year, the number of lawsuits

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ASSOCIATION OF BUSINESS TRIAL LAWYERS



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## **From Drugs to Tire Tread: Daubert Test to Admit Expert Testimony Applies to Technical, Not Just Scientific, Experts**

*Kumho Tire Co., Ltd. v. Carmichael*, 119 S.Ct. 1167

(March 23, 1999)

**By Richard A. Derevan & Sean M. Sherlock**

In 1923 the United States Court of Appeals for the District of Columbia decided *Frye v. United States*, 293 F. 1013 (1923), which held that expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community. The *Frye* test of admissibility of expert opinion in federal courts held sway until 1993, when the U.S. Supreme Court held in its celebrated *Daubert* decision that the *Frye* test had been superseded by the Federal Rules of Evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). (California state courts, however, continue to adhere to the *Frye* approach, what in California is referred to as the *Kelly/Frye* doctrine. See, *People v. Kelly*, 17 Cal.3d 24 (1976); *People v. Leahy*, 8 Cal.4th 587 (1994)).

By rejecting *Frye's* general acceptance test, the *Daubert* court did not open the floodgates to expert testimony — far from it. Indeed, the Supreme Court emphasized that the trial judge "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." To do that, the Supreme Court instructed trial courts to preliminarily assess whether the theories or techniques underlying scientific expert testimony are scientifically valid and whether that reasoning or methodology can be properly applied to the facts in issue.

To guide the trial courts in carrying out this instruction — but emphasizing that its list of factors was not definitive — the Court identified four factors for a trial court to consider in deciding whether a particular expert's testimony passed muster: (1) whether the theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of

error of a particular scientific technique; and (4) whether the technique is generally accepted within the relevant scientific community. Trial courts have broad discretion in applying these factors and determining whether expert testimony is admissible. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

Since *Daubert* was decided, however, a debate has raged whether it applies only to *scientific* expert testimony, or whether it applies to *technical* and other types of expert testimony as well. The Circuit Courts of Appeals have reached differing conclusions on this score. See e.g., *Desrosiers v. Flight International of Florida, Inc.*, 156 F.3d 952, 960 (9th Cir. 1998) (admission of accident reconstruction expert testimony was proper under either *Daubert* standards or the broad parameters of reliability, relevance, and assistance to the trier of fact under Federal Rule of Evidence 702); *Watkins v. Telsmith, Inc.*, 121 F.3d 984 (5th Cir. 1997) (engineer's testimony on design of conveyor system was properly excluded under *Daubert* analysis); *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir. 1996) (engineer's testimony on automobile roof crashworthiness was properly admitted, because *Daubert* factors not applicable where expert testimony is based solely upon experience or training).

In *Kumho Tire Co., Ltd. v. Carmichael*, 119 S.Ct. 1167 (March 23, 1999), the United States Supreme Court put an end to this debate, coming down squarely for the proposition that *Daubert* applies to all expert testimony. In *Kumho*, plaintiff sued a tire manufacturer and distributor for injuries resulting from an accident caused by a tire blow-out. Plaintiff alleged that the tire was defective. Defendant moved to exclude testimony of plaintiff's tire expert on grounds that his reasoning about the cause of the blow-out was not sufficiently reliable. The district court, applying *Daubert's* teachings, excluded the testimony, and granted summary judgment to defendant, even though it regarded the expert's opinion as "technical," rather than "scientific" in nature. The Eleventh Circuit reversed, holding that the *Daubert* analysis of reliability does not apply to expert opinions that are other than "scientific" in nature.

The Supreme Court reversed the Court of Appeals. It held that the district court's "gatekeeping" obligation, as enunciated in *Daubert*, applies not

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***If you have not attended any of the 1999 ABTL Dinner Programs, you have missed the opportunity to meet the following Judges:***

**HONORABLE GAIL ANDLER  
HONORABLE ANDREW P. BANKS  
HONORABLE DANIEL BRICE  
HONORABLE MARJORIE CARTER  
HONORABLE MARY F. ERICKSON  
HONORABLE SHEILA FELL  
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HONORABLE STUART WALDRIP  
HONORABLE EDWARD WALLIN  
HONORABLE JOHN WATSON  
HONORABLE JOHN WOOLEY**

*(Daubert: Continued from page 3)*

only to expert testimony based on scientific knowledge, but also to all expert testimony, whether it is based on "technical" or "other specialized" knowledge. This conclusion flowed both from the plain language of Federal Rule of Evidence 702, which explicitly applies to "scientific, technical, or other specialized knowledge," and to the Court's practical conclusion that it would be difficult to administer evidentiary rules depending on distinctions between "scientific," "technical," and "other specialized knowledge" because there is no clear line that separates one from the other.

The Supreme Court explained, however, that not all the *Daubert* factors necessarily come into play each time an expert proposes to give testimony. Its list of factors, according to the Supreme Court, was intended "to be helpful, not definitive." Giving two examples how the factors might apply in disparate settings, the Court said that it would be appropriate to ask of an engineering witness how often his or her experienced-based methodology has produced erroneous results, or whether the methodology is generally accepted in the relevant engineering community. On the other hand, a witness whose testimony is based purely on experience — such as a perfume tester able to distinguish between 140 odors — might be simply be asked "whether his preparation is of a kind that others in the field would find acceptable."

*Kumho Tire* will reverberate throughout the federal system as its teachings are applied in the ever-changing fact patterns brought to district courts. The Supreme Court recognized that it could "neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue." In light of *Daubert* and *Kumho Tire* this chore will be left to the district courts on a case-by-case basis, given the broad latitude they have in fashioning the procedures by which to decide how to test an expert's reliability. Opportunities for creative lawyering abound!

♦ **Richard A. Derevan & Sean M. Sherlock of  
Snell & Wilmer**



(McDonald: Continued from page 1)

interesting. They frequently present very complicated (complex?) issues and I thoroughly enjoy digging into them. I would not have the time to do so on the regular civil panel. Also, the attorneys on complex evince a much higher level of professionalism and courtesy to one another. Perhaps that is because we have a relatively small group of attorneys appearing on most of our cases. Since they are dealing regularly with one another, they have learned how to get along. For example, we rarely have discovery disputes.

*Q. We understand the Complex Civil Panel is in the process of moving. What are the details?*

A. The Complex Civil Panel is scheduled to move about the first of 2000. The Superior Court has taken over the old modular Federal Courthouse on the southwest corner of Civic Center Plaza. The interior of the building will be modified to provide five courtrooms instead of the current three. The Complex Panel will occupy four of the five courtrooms. We hope to be able to function as a completely self contained unit, with our own support staff, including research attorneys, filing clerks, and the like. We should have room for our own law library, working file storage, and the like. Our current plans are to try to make the courtrooms as high tech and user friendly as possible. This means we either shall have, or at least have the wiring capabilities for, Real Time reporting, computer setups, modems, video display systems, electronic exhibit storage and display devices (CDS) and the like. In doing this we hope to have the flexibility to adapt to new technology. We recognize that whatever we put in initial shall immediately be obsolescent.

There are some problems. We have recently learned the roof leaks, the electrical wiring needs to be replaced, and the HVAC system needs a major overhaul. The cost of taking care of these items will have some impact upon what else we can do to the facility.

*Q. What, if any, trends do you see developing in complex civil litigation?*

A. The most obvious trend is an increasing diversity in the type of cases being handled in complex. Traditionally, the bulk of our cases have

been construction defect cases. They are still the largest part of our inventory. However, we are seeing more and more mass tort cases and business litigation cases including state law intellectual property cases. Our ability to handle these types of cases should improve with the new facility. Medical devices and environmental pollution cases will continue to be an important part of our inventory also.

*Q. What advice would you give lawyers that might assist them in presenting complex cases more effectively and efficiently to the trier of fact?*

A. Organization! Organization! Organization! In addition, the lawyer should attempt to break the case down into simple, easy to understand issues and develop the presentation accordingly.

*Q. Similarly, what advice would you give lawyers regarding the use of technology in presenting complicated (and sometimes boring) evidence at trial?*

A. The current and future Complex Civil Panel courtrooms support a wide variety of technology aids to effective presentation. These include video display devices and input devices such as Elmos, video and audio tape recordings, and computer and CD exhibit inputs. All can be utilized to make a presentation more interesting and informative for the jury. Use them to the maximum extent possible. With the possible exception of video taped depositions, all are relatively inexpensive now. It does not cost much more to burn an image on a CD than it does to make a copy. It costs a lot less than putting the same exhibit on display board. The result is much easier to access and present. Video taped depositions may be expensive, but if you are likely to use the deposition, either for impeachment or substantively, showing the video of the deposition is much more effective than reading from a written transcript.

*Q. What do you consider the biggest mistake(s) lawyers make in law and motion?*

A. The biggest mistake lawyers make in Law and Motion is not listening to the Judge. Whether it is

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*(McDonald: Continued from page 5)*

by a posted tentative, an oral tentative at the hearing, or just by opening comments at the start of oral argument, most judges will tell you which way they are leaning and why. If you are on the losing end of the tentative or comments, gear your presentation to the concerns of the judge and try to persuade the judge to change and go your way. Do not just rehash what is in your written papers. If your writing did not work, the odds are that your argument won't be effective if you simply recite the same thing orally. If you are on the winning end of the tentative or comments, ask the judge if she or he has heard anything that might change her or his mind. If not, submit. If yes, argue, but again, gear your argument to the articulated concerns. Do not just regurgitate what is in your written papers.

**Q.** *What tips would you give lawyers to improve the overall effectiveness of their writing?*

**A.** Write as if you were writing for that very demanding high school English teacher we all had. Short paragraphs, short sentences, short words. Keep it simple, keep it focused..

**Q.** *What advice would you give young lawyers just starting out in business litigation?*

**A.** You have the basic tools. Now you have to learn how to use them. If your firm's billing requirements permit, sit in on trials involving some of the well known trial lawyers in the county. Some of the best in the country practice in Orange County. When you have a Law and Motion matter or a status conference, do not just do your case and leave. Stick around and watch the others. Learn from what you see. Join the ABTL and an Inn of Court. Be an active participant in the Inn of Court presentations. As Judge Woolley has suggested, go to the theater and watch the actors on the stage. A lawyer can learn a lot from watching good actors. A trial is theater and frequently is the best show in town.

**Q.** *If you could choose any job in the world other than a judge, what job would you choose and why?*

**A.** This is a tough one. I love my job. I have a lot

of hobbies, old sports cars, golf, and the like. However the question is specific to "job". I enjoy teaching and doing research. I currently teach California Civil Procedure at Western State. I have done a great deal of research on the Celtic civilization of ancient Europe, especially its legal system, the Brehon Laws. My research is continuing. I have lectured on the Brehon Laws and hope to do more lecturing on the subject. I am also working on a paper on the Brehon Laws. Thinking about all this, the answer to your question is that I should like to teach a combination of law and anthropology.

## DO YOU HAVE SOMETHING TO SAY?

If you are  
interested in  
submitting  
material for  
publication in any  
upcoming issues of  
the ABTL Orange  
County  
Report, please  
contact the  
Executive Dir.,  
Rebecca Cien, at  
323.939.1999, or  
submit your  
material directly to  
[abtl@earthlink.net](mailto:abtl@earthlink.net).



*(Malcolm: Continued from page 2)*

continues to drop. According to Orange County Superior Court Judge Thomas Thrasher, the number of "all other civil filings" (which encompass business cases and excludes personal injury) has declined rather dramatically from a high of about 11,000 in 1989 to 7,000 last year. (The good news is that this latter number has stabilized the last two years.) So, as you can see, Orange County is no longer the Shangri-La of the '70's.

Due to the number of fine business trial lawyers from small, medium and large firms practicing in our specialty, the competition for business is intense. So, it is necessary to include as part of your survival kit, the need to engage in aggressive client development. I don't care how talented a business trial lawyer you may be, you are not going to attract clients these days if you sit in your office and wait for the phone to ring. This presents more of a problem for those just starting their careers. Typically, these lawyers are buried with work from above so they have to somehow try to balance their workload and their family lives. The specter of the additional challenge of client development can be almost too much to bear, yet it's a catch-22 because if these attorneys are striving for a partnership, the perception that a lawyer is capable of producing clients is one of the most important evaluation criteria these days.

Today's competitive environment in the county has some things in common with what it was like to practice business trial law in Los Angeles during the 1970's. Then, Los Angeles had about the same number of lawyers and Judges that Orange County has today. The competition was just as fierce as it is today in Orange County.

I do not believe that it was a mere coincidence that the ABTL was formed in Los Angeles in 1973. The business trial lawyers in Los Angeles then had a central meeting place to meet most of the Judges that they would appear before and get to know many of the lawyers within their specialty. ABTL served as a "magnet" for the Judges due to the high quality of its programming featuring the very best of panelists. ABTL's draw for the lawyers was the quality of the programs, the presence of the Judges and the opportunity to meet with their fellow business trial lawyers.

Today, the need for the ABTL in Orange County is far greater than experienced by Los Angeles County Lawyers in the 1970's. The practice and the county are being transformed at hyper speed. Though real estate development is still a major force, the defense industry has been replaced by high tech and internet companies. One merely needs to gaze south toward the Irvine Spectrum to see the future of this county.

Practice at the Silicon Beach, as some have referred to Orange County, will require that lawyers keep pace with their innovative clients. Unless you have a palm pilot, a laptop, a satellite pager, a cable modem, and an iridium phone, you are going to have a tough time selling your services to this new generation of Orange County businesses. Clients expect you to be adept with power point presentations. Clients expect to be able to communicate with you via e-mail (which I'm told will soon be replaced by video mail), that you will have a well designed and useful website, and that they will have 24-7 access to you. And, I assure you that as soon as you have mastered all of this, it will be outmoded in less than 12 months. You will lose your client to the lawyer who has foreseen the next wave and is riding it.

This is where the ABTL comes in. What will be the next "hot" litigation area? How will new technology change trial presentations? Will internet filing turn paperless litigation into the norm? The ABTL is committed to presenting timely and current practice developments to the business litigator. The best in the field will tell you what is happening now and what is coming next. We want you to ride the next wave rather than merely being tossed in the surf.

The ABTL also provides you with an opportunity to connect face to face with the top lawyers and judges in our field. Personal relationships are more vital than ever in this profession. Though the "Elks Lodge" era is gone forever, professional reputation and interaction still play a central role in the life of the successful business litigator. So, make a note in your palm pilot that our next meeting is June 2, 1999, set your GPS for the Westin and get ready to ride the next wave at Silicon Beach.

♦ **Thomas Malcolm of Jones, Day, Reavis & Pogue**



*(Pricing: Continued from page 1)*

showing that the defendant priced below cost "with the purpose, i.e., the desire, of injuring competitors or destroying competition," as distinguished from an intent to increase one's own sales with the knowledge that other competitors will be hurt; and (2) such claims under the Unfair Competition Law require a showing, consistent with federal antitrust law, of injury to competition as distinguished from injury to competitors. The Court made clear that it is following the lead of what is now a long line of federal cases that view the proper role of antitrust laws as the protection of competition, not competitors.

### The Case

The defendant in the *Cel-Tech* case, Los Angeles Cellular Telephone Company ("LA Cellular"), was one of the two original facilities-based cellular service providers licensed by the FCC in the greater Los Angeles area. Since the filing of the case, a number of other wireless service providers have entered the market as a result of the FCC making available additional portions of the radio spectrum. At the time the case arose, however, AirTouch Communications was the only other facilities-based cellular carrier in the greater Los Angeles area.

LA Cellular, AirTouch, and resellers of cellular service competed for cellular subscribers. The competition included discounting cellular telephones, sometimes below cost. The up front cost of \$300 or more for a cellular telephone was a barrier to many people who wanted to subscribe. LA Cellular contended, and evidence showed, that it sold telephones below cost in response to competition from AirTouch agents.

The plaintiffs were four companies whose businesses included wholesaling or retailing cellular telephones in the Los Angeles area. They alleged that they had been injured, even driven out of business, by LA Cellular's below-cost telephone sales. There was no serious dispute that the competition between LA Cellular and AirTouch triggered the telephone discounting, but plaintiffs argued that LA Cellular must have known that the

discounting would force some equipment vendors out of business.

The case went to trial in 1995. After the plaintiffs rested, the trial judge granted LA Cellular's motion for judgment on all claims. He ruled that LA Cellular did not intend to injure competitors or competition, and therefore could not be liable on plaintiffs' claims under the Unfair Practices Act. He further ruled that plaintiffs' failure to establish a violation of the Unfair Practices Act or other law negated any claim under the Unfair Competition Law. That set the stage for the appeal.

### Unfair Practices Act

Two provisions of the Unfair Practices Act apply to below-cost pricing. Section 17043 prohibits below-cost pricing for the purpose of injuring competitors or destroying competition. Section 17044 prohibits the use of loss leaders where the effect is to divert trade from a competitor. Thus, the intent question as to both sections was at issue on the appeal.

The plaintiffs, drawing on tort law principles, argued that a general intent was sufficient to establish a violation of section 17043. In other words, the intent element would be satisfied if LA Cellular knew or should have known that its below-cost sales would injure competitors, regardless of whether that was LA Cellular's purpose.

Plaintiffs' position was close to strict liability for below-cost sales. Presumably a company "should know" that its below-cost prices may capture sales from a competitor. Indeed, that is often the point of lowering one's prices.

The general intent standard advocated by plaintiffs would have created liability for numerous unsuspecting businesses, especially when considered in light of the measure of "below cost." The Unfair Practices Act looks at a defendant's fully allocated costs in making this determination. Surely many, if not most, businesses sell some items below their fully allocated cost. If liability could be imposed upon them because they should have known that their prices would divert business from a competitor, it would certainly chill discounting.

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(Pricing: Continued from page 8)

LA Cellular argued that section 17043 requires a specific intent to injure competitors or competition. It pointed out that the statute used the word "purpose," which implied something closer to specific intent than general intent. It also argued that the plaintiffs' interpretation would create broad liability under the Unfair Practices Act.

The California Supreme Court noted that no case had expressly considered this question. After a careful consideration of the words "purpose" and "intent," it adopted the defendant's position by a 6-1 vote. It held "that to violate section 17043, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition." (1999 D.A.R. at 3362.)

As to the loss leader statute, section 17044, the plaintiffs argued for an even broader standard of liability. They argued, based on the statutory language of that provision, that it contained no intent requirement. In other words, a defendant could be liable for any below cost sales that diverted trade from a competitor, regardless of intent. This truly would have been strict liability for sales below fully allocated cost.

The California Supreme Court, however, again by a 6-1 vote, rebuffed plaintiffs' position. It noted that plaintiffs' interpretation was inconsistent with legislative history as well as a line of cases dating back 50 years. The Court held that the loss leader provision carries the same intent requirement as section 17043, the below-cost provision.

#### Unfair Competition Law (Section 17200)

California's Unfair Competition Law (Business & Professions Code §§ 17200 *et seq.*) proscribes business acts or practices that are "unlawful, unfair or fraudulent." LA Cellular's conduct was not unlawful under other statutes, and the plaintiffs had never contended it was fraudulent, so the issue on appeal was whether it could be "unfair."

Until *Cel-Tech*, the courts had provided almost no help defining "unfair" under section 17200. In the words of the Court, prior definitions had been "amorphous" and provided "little guidance." (1999

### **ABTL - ORANGE COUNTY DINNER MEETING SCHEDULE 1999**

**Wednesday, June 2, 1999**  
**"Detecting the Hi-Tech Case"**

*with*

**Bill Anthony**

Orrick, Herrington & Sutcliffe

*and*

**Rod Dorman**

O'Melveny & Myers

Westin South Coast Plaza  
6 p.m. Reception/7 p.m. Dinner & Program

**Wednesday, September 1, 1999**  
**"Professor Charles Whitebread  
USC Law School"**

Westin South Coast Plaza  
6 p.m. Reception/7 p.m. Dinner & Program

**Wednesday, December 1, 1999**  
Topic & Speakers to be announced

Westin South Coast Plaza  
6 p.m. Reception/7 p.m. Dinner & Program

D.A.R. at 3366.)

LA Cellular argued that if its conduct did not violate the Unfair Practices Act, which provided specific standards for determining the legality of below-cost sales, then it could not have been "unfair" under the more general provisions of the Unfair Competition Law. The plaintiffs argued that the Unfair Practices Act could not anticipate all circumstances in which below-cost pricing might be unfair. The plaintiffs contended that the conduct here was unfair because LA Cellular allegedly "subsidized" the below cost equipment sales with profits from its regulated sales of cellular service.

The Court rejected LA Cellular's position. It concluded that compliance with the Unfair Practices did not automatically immunize the

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## What do

**Michael E. Tigar**

Defense Atty for Terry McNichols, the Oklahoma Bombing;

**David Balabanian**

McCutchen, Doyle, Brown & Enerson;

**Maxwell Blecher**

Blecher & Collins;

**James Brosnahan**

Morrison & Foerster;

**Judy Clark**

Defense attorney for Susan Smith and the Unibomber;

**Joe Genschlea**

Weintraub, Genschlea & Sproul;

**Vernon W. Hunt**

Hunt & Adams;

**Raoul D. Kennedy**

Skadden, Arps, Slate, Meagher & Flom LLP;

**John Keker**

Keker & Van Nest;

**Harvey R. Levine**

Levine, Steinberg & Miller;

**Eugene Majeski**

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below-cost sales from challenge under the Unfair Competition Law. The Court ruled that for another statute to create a safe harbor from an unfair competition action, it "must actually 'bar' the action or clearly permit the conduct." (1999 D.A.R. at 3365.) The Court therefore returned the case to the trial court for retrial on the section 17200 claim.

In a move that neither side had requested, the Court went on to define "unfair," at least in the context of an action by a competitor alleging anticompetitive practices. In formulating its definition, the Court turned to federal antitrust law. It noted the similarity between section 17200 and section 5 of the Federal Trade Commission Act.

The Court noted, citing the U.S. Supreme Court, that the antitrust laws are intended to protect "*competition*, not *competitors*." (1999 D.A.R. at 3366.) "Injury to a competitor is not equivalent to injury to competition; only the latter is the proper focus of antitrust laws." (*Id.*) Explicitly drawing from the body of federal case law interpreting Section 5 of the FTC Act, the Court announced its definition of "unfair" in a suit by a competitor under section 17200: "the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (1999 D.A.R. at 3367.)

The Court went on to advise caution in evaluating complaints that a competitor's prices are too low. It noted that "[p]ricing practices are not unfair merely because a competitor may not be able to compete against them. Low prices often benefit consumers and may be the very essence of competition." (1999 D.A.R. 3367.) The opinion again cited federal antitrust cases for the proposition that courts should not prohibit vigorous competition, even price competition, "nor render illegal any decision by a firm to cut prices in order to increase market share." (*Id.*)

The Court's explicit adoption of federal antitrust principles into section 17200 is a

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significant restriction on competitor claims. There is a well-developed body of federal case law that defines the conditions under which below-cost pricing can be found to injure competition, as opposed to merely injuring competitors. This body of law generally holds below-cost pricing does not injure competition, i.e., cannot be predatory, unless there is a dangerous probability that the defendant can later raise prices enough to recoup the losses it sustained by selling below cost. See *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993). Under federal law, at least two conditions must be present for below-cost pricing to be unlawful: (1) the below-cost pricing must have the intended effect of either driving competitors from the market or causing them to raise their prices to supracompetitive levels and (2) after the intended effects occur, the defendant must be able to sustain a price increase at supracompetitive levels long enough to recover the losses incurred by selling below cost. *Id.* at 225. In other words, under this standard the *Cel-Tech* plaintiffs could not prevail unless they could show that LA Cellular was likely to recover its losses on the below-cost telephones by later being able to charge higher than competitive prices for telephones as a result of having driven the plaintiffs and other competitors from the market.

#### Practical Effects of Cel-Tech Decision

The *Cel-Tech* decision substantially narrows the grounds for state predatory pricing claims. It makes clear that claims under the Unfair Practices Act require a showing of a specific purpose, a "desire," to injure competitors or destroy competition. An intent to take market share from one's competitors is not enough. It will be difficult in most cases for plaintiffs to make the necessary showing.

The unfairness prong of section 17200 (the Unfair Competition Law), which until *Cel-Tech* had been considered sufficiently vague to encompass almost any type of claim against a competitor, has been narrowed in competitor cases to those types of claims that would be cognizable under federal antitrust principles. This focus on injury to *competition*, as opposed to *competitors*, will help to rationalize this area of unfair competition

jurisprudence.

The *Cel-Tech* decision reduces the advantages to plaintiffs of filing predatory pricing claims under state law rather than federal law. The substantive standards for such claims under section 17200 now seem to be the same as under federal law, and treble damages are not available under section 17200. Section 17200 provides only for injunctive relief and restitution.

Plaintiffs, of course, can seek treble damages under the Unfair Practices Act, but recovery on those claims faces the hurdle of proving that the defendant acted "with the purpose, i.e., the desire, of injuring competitors or destroying competition." There is an intent element for predatory pricing claims brought under Section 2 of the federal Sherman Act, but if the defendant has monopoly power only general intent, not specific intent, need be proven. More plaintiffs may choose to file their predatory pricing claims in federal court, a forum traditionally considered hostile to such claims, but one where at least they have a chance at treble damages without necessarily having to prove specific intent.

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