

Daubert

NORTHERN CALIFORNIA

REPORT

Volume 22 No. 1

SPRING 2013

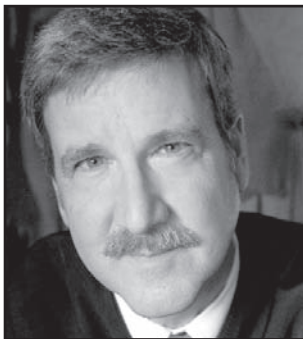
Sargon and the Science of Reliable Experts

Some have suggested a sea change in rules governing the admission of expert testimony as a result of the Supreme Court's decision in *Sargon Enterprises, Inc. v. University of Southern California*, 55 Cal.4th 747 (2012). The suggestion is likely animated by the contrast of *Sargon's* approving invocation of *Daubert*

v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) with the Court's earlier polite refusal to adopt *Daubert* in *People v. Leiby*, 8 Cal.4th 587 (1994). The federal courts had shifted away (*i.e.* in *Daubert*) from the 'general acceptance' test after a revision to Federal Rules of Evidence 702 in 1975, because neither the text of the rule nor "the Advisory Committee Notes to Congress, nor the Legislators during floor debates made any mention of *Frye* or the 'general acceptance' test." Leslie Morsek et. al., "Get on Board for the Ride of Your Life! The Ups, the

Downs, the Twists, and the Turns of the Applicability of the 'Gatekeeper' Function to Scientific and Non-Scientific

Continued on page 2



Hon. Curtis E.A. Karnow

The Breadth and Power of SLAPP Motions

The California Anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, set forth in CCP § 425.16, is expanding and contracting at a feverish pace. Enacted in 1992 as a deterrent to the filing of meritless lawsuits which prevent or punish the exercise of petition or free speech rights, section 425.16 has been amended four times and interpreted by nearly 500 published opinions. The anti-SLAPP statute's unique discovery stay, immediate appeal provisions, the unavailability of leave to amend, and one-sided mandatory attorney-fee provision make the anti-SLAPP special motion to strike the most powerful dispositive motion available to California civil litigation attorneys. This article seeks to give guidance to both defense lawyers who want to use this powerful tool and plaintiff's lawyers who need to avoid or defeat anti-SLAPP motions.

Section 425.16 creates a two-prong test for anti-SLAPP motions. The first prong is whether the challenged cause of action "arises from any act in furtherance of the constitutional right of petition or free speech in connection with an issue of public interest." (CCP § 425.16, subs. (b)(1),(e)). If not, the motion must be denied as a matter of law. If it does, the second prong is whether the cause of action is legally sufficient (would survive a demurrer) and substantiated by competent admissible evidence that, if credited by the trier of fact, would entitle plaintiff to judgment as a matter of law. *Wilcox v. Superior Court* 27 Cal.App.4th 809, 823-824 (1994). The second prong requires the plaintiff to produce competent admissible evidence to support each and every essential allegation of the claim including causation

Continued on page 6



James J. Moneer

Also in This Issue

<i>Adrian J. Sawyer</i>	Trust Litigation:	
<i>Julie A. Stockton</i>	A Starter Kit	p. 3
<i>Howard M. Ullman</i>	On ANTITRUST	p. 7
<i>James Yoon</i>	On PATENTS	p. 9
<i>Roger Heller</i>	On CLASS ACTIONS	p. 11
<i>Rick Seabolt</i>	Letter from the President	p. 12

Continued from page 1

Sargon and the Science of Reliable Experts

Expert Evidence: Kumho's Expansion of Daubert," 34 Akron L. Rev. 689, 700-03 (2001)(notes omitted). See also, *People v. Venegas*, 18 Cal.4th 47, 76 n.30 (1998). There is a visceral thing here, too: it has been commonly accepted deep in lawyers' bones that (as a result of *Daubert's* impact in federal courts) state courts were more open than federal courts to certain expert testimony. (E.g., W. Schwarzer, et al., Federal Civil Procedure Before Trial, Ch. 1-D ¶ 1:1060 (2012). So, with *Sargon's* emphatic instruction to trial courts that they act as "gatekeepers" (invoking *Daubert's* iconic term), it has been supposed that state courts will now tend more to restrict expert testimony. Perhaps; I couldn't possibly say. But it is worth stepping back, just a bit, to tease out what *Sargon* did and did not address.

First a short refresher on *Sargon*. Our Supreme Court reversed the Court of Appeal, in effect affirming the wise trial judge who had tossed out speculative expert testimony on lost profits. Plaintiff had asserted that but for the defendant University's failure to conduct a clinical study of a new dental implant, plaintiff would have realized zillions (well, up to over a billion) in profits. The expert had selected putatively comparable firms to generate the profit ratios, without doing much to explain the selection criteria.

Much of the language in *Sargon* suggests the ordinary application of extant California law. For example, the Court remarked that experts may not rely on speculative bases; and they cannot rely on facts not in evidence. This does not shock us. The Court repeatedly relied on familiar statutes, such as Evidence Code §§ 801 and 802, including in a clause that invokes the 'gatekeeper' role for trial judges. E.g., 55 Cal.4th at 769 ("Under California law, trial courts have a substantial "gatekeeping" responsibility"). And *Sargon's* adverse reaction to the gulf that separated the expert's conclusion and his bases was a pretty routine application of state law: trial judges have always been required to decide whether or not the expert's bases actually support his opinion. *Lockheed Litigation Cases*, 115 Cal.App.4th 558, 563 (2004)(cited with approval in *Sargon*).

But the Court goes out of its way in a footnote to alert us that on one specific matter, California law has not shifted. This is noteworthy for two complementary reasons. First, of course, it confirms the status quo at least in that area. But secondly, it suggests the Court may be aware that its embrace of *Daubert* may otherwise be seen as a shift. Here's the note:

In *People v. Leaby* (1994) 8 Cal.4th 587, 604...., this court held that the "general acceptance" test for admissibility of expert testimony based on new scientific techniques (see *People v. Kelly* (1976) 17 Cal.3d 24...) still applies in California courts despite the United States Supreme Court's rejection, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579...., of a similar test in federal courts. Nothing we say in this case affects our holding in *Leaby* regarding new scientific techniques.

Sargon, 55 Cal.4th at 772 n.6 (citations abbreviated).

The distinction is between new scientific techniques

and other expert testimony. The *Kelly* test had been developed deliberately to make courts laggard in the adoption of new science; courts were not to be the test-bed for new techniques. Not unless a technique was "generally accepted" would the courts even consider its use at trial. But much expert testimony — such as that in *Sargon* — never involves such new techniques, and so is never subject to the *Kelly* test. *People v. Bui*, 86 Cal.App.4th 1187, 1195 (2001).

So if *Sargon* leaves in peace the law on novel scientific techniques, what might it have in mind for the rest of expert testimony? Maybe nothing but a reminder that judges must always keep speculation away from the jury; and that is one reasonable reading of the case. After all, the strict holding of the case can likely be explained just with that reasoning.

But it is also possible that *Sargon* has more to say; perhaps also a new angle on what speculation entails.

Let's try a hypo. An expert has this opinion: defendant Danny's car could have stopped before it hit the now injured Peter plaintiff. Two branches feed this opinion: facts and theory. The facts are these: Danny saw Peter ten seconds before impact; it takes a second to process and another second to hit the brakes; given Danny's speed and the braking power of the brakes, the car would have come to a complete stop in five seconds — which is enough to avoid the accident. The theories are these: force = mass * acceleration; human action is a function of nerve impulses, and they travel at a certain speed; brakes work in a certain way; and so on. The opinion is obviously unreliable if either the facts or theories are unsupported.

Setting aside the facts, let us turn to the theories: The distinction I use between case-specific 'fact' and general 'theory' is probably equivalent to the distinction between the "minor premise" and the "major premise" in a key article relied on in *Sargon*, Edward J. Imwinkelried & David L. Faigman, "Evidence Code Section 802: The Neglected Key to Rationalizing the California Law of Expert Testimony," 42 Loy. L.A. L. Rev. 427, 434 (2009) (hereinafter Imwinkelried). How do we know if these are reliable? Does force really equal mass times acceleration? Is human action the product of nerve impulses or demonic inspiration? In state courts, we have typically looked to see if the theories (e.g., thermodynamics and neurology) were 'generally accepted' in the relevant scientific community. The impetus under *Kelly* was to look to the expert community and leave the matter there. *Leaby*, 8 Cal.4th at 602-03. But what we had forgotten — perhaps until *Sargon* — was that the rule was meant to *block* putative 'science' as to which there was no consensus; it is something else entirely to *accept* in the courtroom a theory just because there is some consensus.

Justice Breyer, in a case cited with approval by *Sargon* (*Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 151 (1999)), put it this way:

It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of

Continued next page

Continued from page 2

Sargon and the Science of Reliable Experts

Daubert's general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.

Specialization, and so the contrivance of expertise, is endemic. It is not therefore evil: we really do know more than we did, there are more areas of legitimate expertise, and it is increasingly difficult for any person to master the entirety of a traditional area (such as 'medicine' or 'law' or 'physics'). But we are now sufficiently numerous and balkanized that any theory will collect adherents: and they are free to conduct their discipline as they wish, complete with conferences, magazines, web pages, and on. Doctrine 'generally accepted' by one of these cults will not just for that reason be admissible.

But neither can we wait for a methodology to be *universally* accepted; it won't happen, universal consensus is impossible to prove, and anyway the rules of evidence contemplate conflicting expert views.

So what sort of consensus is enough?

Sargon's emphasis on reliability is helpful. Previously, some state courts might have stopped their review of expertise after what I think of as a *horizontal* look: whether the methods are generally accepted, which often meant the identification of peers of the proffered expert. *Sargon*, like *Kumbo Tire*, backs us up one level, and may invite a *vertical* bird's eye review of the methodology.

How then to describe that vertical perch used to evaluate whether a discipline, methodology or practice is reliable, whether or not embraced by experts in the pertinent discipline? In other words, how do we distinguish astronomy from astrology? *Sargon's* invocation of *Daubert* gives the clue: The discipline and materials relied on must be *scientific*. Astronomy is a science; astrology isn't. *Daubert* assumes "that trial judges would undertake their own assessment drawing upon the features of 'good science' and 'the scientific method.'" Gary Edmond & David Mercer, "Conjectures and Exhumations: Citations of History, Philosophy and Sociology of Science in US Federal Courts," 14 Law & Literature 309, 310 (2002). See also "Admitting Doubt: A New Standard for Scientific Evidence," 123 Harv. L. Rev. 2021, 2023 (2010) (objecting that "*Daubert* tasks judges with separating good science from bad"). One of the important *Daubert* factors was acceptance in the relevant community, to be sure, but it was the relevant scientific community.

I doubt *Daubert* could be more clear on what it thought of as the scientific approach, for it expressly relies on Karl Popper's work in defining a scientific proposition as one which can be refuted. (*Daubert*, 509 U.S. at 593. See generally, Karl R. Popper, *Conjectures And Refutations: The Growth of Scientific Knowledge* (1963) (hereinafter Popper.)) We must be able to at least conceive of empirical tests which can disprove or falsify a position; else the proposition is not science.

We tell ourselves stories all the time, and have faith con-

Continued on page 5

Trust Litigation: A Starter Kit

As a business litigator, you may face the opportunity or frankly, the need, to litigate a case arising out of a trust. Trust litigation, as opposed to the intricate, tax law-intensive work carried out by our colleagues who plan trusts and estates, is rightly seen as an engaging area of practice, with its own nuances, pace, concerns, and — this is quite important — rules. The stakes can be as high as any bet-the-company-case, as proven by the *Robertson v. Princeton* litigation, but the stakes are frequently coupled with a deeply personal dynamic that calls on us as advocates not just to exercise our analytical skills and forceful litigation tactics, but also to recognize and control emotional decision drivers that often differ significantly from our business cases. Think of it this way: most trusts, even large charitable foundations, grew out of the efforts of an individual or family, and represent a statement of purpose to that family or the community at large. What could be harshly competitive in business litigation becomes imbued with a larger sense of purpose and often familial identity in the trust context.



Adrian J. Sawyer

This article is intended to provide an overview of some of the differences the business litigator can expect in trust litigation. It will address the purpose and workings of the Probate Courts and the structure of the probate code, and note the areas that are, like civil litigation generally, governed by the Code of Civil Procedure.

Understanding the Lay of the Land

Although the Probate Courts are no longer separate courts, but rather divisions within the Superior Courts, they have their own character as courts of equity, and their jurisdiction is laid out in the Probate Code. The Probate Courts have exclusive jurisdiction over all proceedings concerning the internal affairs of trusts, such as petitions by beneficiaries charging a trustee with breach of fiduciary duty, and concurrent jurisdiction with the Superior Court over proceedings related to trusts. (See Prob. Code § 1700.) The Probate Court, however, sits as a court of equity. Therefore, there is no right to a jury trial in proceedings concerning the internal affairs of trusts, and the Probate Code specifies that all remedies in the Trust Law are deemed equitable. Note, however, that these remedies are not exclusive — one still has access to all available remedies under statutory and common law, to the extent not displaced by the Probate Code.

A trustee is a fiduciary, bearing a duty similar to that of a corporate director, Justice Cardozo's "punctilio of honor

Continued on page 4

Continued from page 3

Trust Litigation: A Starter Kit

the most sensitive.” And the Probate Court is charged with authority over the trustee in the exercise of his or her duties, as well as authority over the relationships between the beneficiaries and the trustee, and construction of trusts when there is doubt or controversy as to their meaning. This does not mean that every trustee of every trust is required to report to the Probate Court on a regular basis. In some trusts, such as trusts created by will (testamentary trusts), this is indeed the case, but many trusts are created by the trustor during life (inter vivos), and make no provision for regular accountings to the Court. But if there is a suit concerning the affairs of a trust, be it over an alleged breach of fiduciary duty by the trustee or the rights of a beneficiary, it will come within the ambit of the Probate Court. This is because the Probate Court has general jurisdiction over trusts, including the broad power to fashion equitable remedies that are not specified in the Probate Code. (See Prob. Code § 800.)



Julie A. Stockton

Starting Out:

The Petition and the Players

Take a hypothetical case in which the beneficiary of his mother’s trust comes to you and asserts that the trustee has committed a wrong, whether making a self-dealing investment, failing to follow the directions of the trust, or some other misfeasance. You remember this from law school, and heartily set about preparing a state court complaint alleging breach of fiduciary duty. Couldn’t be simpler, right?

To begin with, your complaint should not exist. In Probate Court you will file a petition, verified by the beneficiary under penalty of perjury. Specifically, the Code requires “a petition, objection, response, report, or account filed pursuant to the code shall be in writing, signed by the a petitioner, objector, or respondent...” and that “[v]erification of a document shall constitute signature of that document, unless expressly provided to the contrary.” A trust petition is filed under Probate Code section 17200. The petition will look very much like a complaint. It will contain the same kinds of factual allegations and enumerated causes of action. But it must be filed in the Probate Court, and venued in the county that is the “place of administration” of the trust, usually where the trustee resides or where the trust corpus is located.

Notice, too, is different. You serve the defendant (really, the “respondent”) just as you would serve in any civil case. But you need to provide notice to other beneficiaries as well. The extent of notice in Probate Court may vary, and may even be addressed by Local Rule, as in Alameda County. In some cases, such as charitable trusts, the Attorney General must be notified. The method for service is governed by the Code of Civil Procedure. If it is ambiguous as to whether a particular party requires notice, constitutional due process principles apply. But here is the essential thing — notice in Probate Court is

often jurisdictional. All named beneficiaries must be given notice. Moreover, if the trust matter concerns the conveyance of property, then you must serve “each person claiming interest in, or having title to[,] or possession of, the property.” Your petition may ask the Court to make decisions that will impact the rights of other beneficiaries who are not even named as parties to your suit and are not otherwise before the Court. Take care to serve them, or the judgment you obtain may be voided in the future. And, at the very least, it will be subject to collateral attack. (See *Tulsa Professional Collection Services, Inc. v. Pope*, 485 US 478, 489 (1988).)

The time for notice is also different. The Probate Code provides that notice must be at least 30 days. And Probate Courts set the matter for hearing at least 30 days out. While for some simple petitions, this hearing could well be the hearing that decides the merits of the petition, for petitions alleging breach of fiduciary duty and raising factual issues it is likely to be more or less a status conference, at which the court will set the next appearance, either as a status conference or a merits hearing.

Once you have filed the petition and executed proper service, the respondent will file a response to your petition prior to the initial hearing. The response could be a verified response or opposition under the Probate Code. But it could also be a demurrer, because procedural issues not defined in the Probate Code, including the remedy where a petition fails to state facts sufficient to constitute a cause of action, are governed by the Code of Civil Procedure.

In addition to the respondent, you might hear from surprising corners. The Probate Code gives standing to any interested person to appear and to object, in writing or orally at the hearing. An interested person is defined as “[a]n heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.” But note that “[t]he meaning of ‘interested person’ as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.” (See Prob. Code § 48.) California case law defines an interested person as someone who had a pecuniary interest that would be impaired or defeated by probate of the testamentary instrument or benefited by setting it aside. The case law also recognizes standing for heirs at law — persons who would take under the intestacy statutes if the contested instrument were invalidated. In practice, this means that often family members or other interested parties will appear *in pro per* to object to the trust petition. But interested persons may also be represented, so be prepared for an element of surprise at the initial hearing on a trust petition.

Moving Towards the Trial

Now, about those factual issues: under Probate Code section 1000, discovery proceedings and law and motion are governed by the Code of Civil Procedure and applicable Rules of Court. You have the same discovery rights, and the same law and motion rights, as you would in a

Continued next page

Continued from page 4

Trust Litigation: A Starter Kit

business case in Superior Court. A motion for summary judgment will be governed by the same procedural rules and case law as in a civil proceeding. And ultimately, all issues of fact are tried under the rules applicable to civil matters. So you can propound interrogatories, requests for production, and requests for admission, take depositions, issue subpoenas, and so forth. But your discovery disputes and law and motion matters will be heard before the probate judge (or judges, as we in San Francisco are fortunate enough to have two probate judges, Judge Mary Wiss and Judge Lilian Sing). The probate judge may also preside at the bench trial of your matter. You can also move for single assignment, as we have done in particular cases, just as you might in a complex business case. In that case, the matter will be assigned to one of the complex judges, who will sit as a Probate Court for that case.

As you approach the trial on the merits, what will be the source of law? The Probate Code, the trust itself, and the common law will provide your rubric. Note that, while some provisions of the Probate Code apply only to wills, the rules of construction apply uniformly to both wills and trusts. Thus, a case interpreting a rule of construction can provide important guidance in trust litigation, even though the case concerned the application of the rule to a will. Further, similar to procedural rules, where there is a gap in the Probate Code's substantive law, the civil rules governing contract disputes are applicable.

In adjudicating the dispute at issue, the over-arching purpose of the Probate Court is to ascertain and give effect to the intent of the transferor. To achieve this goal, the Probate Court has broad equitable power, and may "in its discretion may make any orders and take any other action necessary or proper to dispose of the matters presented by the petition." (See Prob. Code § 17206.) But in the exercise of this equitable power, the Court remains guided by the Probate Code, the trust, and relevant precedent. The trust, for example, may allow the trustee to do something that is not allowed by the Probate Code, like purchase trust property, or may require the trustee to take action not otherwise required by the Probate Code, like hire an outside investment advisor. The trust instrument here is your touchstone, as it supersedes the Probate Code in those circumstances. The trust may, like section 102 of the Delaware General Corporations Law, provide an exculpatory clause. As a result, older cases that turn on finding that the Probate Court did not have jurisdiction are no longer good law.

Sometimes, the trust is clear, and the questions to resolve are purely factual. Often, of course, the trust is not so clear, or the passage of time may have rendered ambiguous a clause that was clear on its face at the outset (many trust cases arise out of trusts penned more than a half century ago). What then? Under the Probate Code, the court looks first to the instrument, then to the rules of construction in the Probate Code, and then, when the intention of the trustor is not indicated by the instrument, to extrinsic evidence "to determine the intention of the transferor." The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in

the instrument.

The Probate Code sets forth its own rules of construction, derived from the law of contracts. To start, the words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative. Preference is to be given to an interpretation of an instrument that will prevent intestacy or failure of a transfer, rather than one that will result in an intestacy or failure of a transfer. All parts of an instrument are to be construed in relation to each other and as so, if possible, to form a consistent whole. If the meaning of any part of an instrument is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument. These rules of construction apply where the intention of the transferor is not indicated by the instrument.

Continued on page 12

Continued from page 3

Sargon and the Science of Reliable Experts

cerning all sorts of phenomena. We have ghosts, gods and atoms, Illuminati conspiracies, price-fixing conspiracies, beliefs on why blood congeals and wings fly, and how light behaves in space. All of these are conjectures about things we cannot see, all helpful narratives with which we sooth ourselves. Popper's point is that some of these conjectures are testable; and if we succeed in falsifying the theory, "we see very clearly that there was a reality — something with which it could clash." Popper, at 116. Theories, which start with stories and myths, *id.* at 50, can never be confirmed because tests are never exhaustive, *id.* at 105, but they can be disproved, *id.* at 114-15. This makes them scientific statements. *Ibid.* But Popper did believe in the notion of growth, or closer approximation to the truth over time, even if one can never know that a given theory is correct. This much is evident from the name of one of his essays, "Truth, Rationality, And The Growth Of Scientific Knowledge," Popper, *supra* note 10 at 215 *et seq.*; see also *id.* at ix (Preface to Second Edition). Only with scientific propositions do we have a lucid notion of what it means to be wrong; only scientific propositions deal with the relevant notion of reality. It is in this light that we can understand the elements traditionally associated with *Daubert* — they evoke this sense of science:

While there is no definitive "checklist or test," the following factors may be relevant in evaluating the reliability of expert opinion testimony:

- whether the methodology used can be (and has been) tested;
- whether the methodology has been subjected to peer review;
- whether there is a known potential rate of error;
- whether there are standards controlling the technique used;
- whether a known technique is generally accepted in the relevant scientific or technical community.

William Wegner, *et al.*, California Practice Guide: Federal Civil Trials & Evidence Ch. 8F-C. Whenever we are faced

Continued on page 10

Continued from page 1

Breadth and Power of SLAPP Motions

and damages. *Averill v. Superior Court* 42 Cal.4th 1170, 1176. (The defendant, however, has the burden of establishing any affirmative defense, which the plaintiff must rebut. *Mann v. Quality Old Time Service* 120 Cal.App.4th 90, 104 (2004).)

Plaintiff Cannot Evade Fees By Amendment or Dismissal

Once an anti-SLAPP is filed (which the defendant can do without meeting-and-conferring or giving any warning), the plaintiff cannot evade fees by amending or withdrawing the complaint. *Liu v. Moore* (1999) 69 Cal.App.4th 745, 749-751; *Simmons v. Allstate* (2001) 92 Cal.App.4th 1068, 1072-1073. Rather, the plaintiff must pay defense fees incurred through dismissal and for any subsequent fee motion. *Liu v. Moore, supra*; *Ketchum v. Moses* 24 Cal.4th 1122, 1141-1142 (2001). The SLAPP filer can avoid paying fees only by amending or dismissing with prejudice *before* the anti-SLAPP motion is filed. *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374. A significant exception to the no-amendment rule was recently expounded in *Nguyen-Lam v. Cao*, 171 Cal.App.4th 858, 870-874 (2009) (distinguishing *Simmons, supra*). In *Cao, supra*, a slander *per se* plaintiff sought leave to amend to allege necessary elements of falsity and malice (so the complaint could survive demurrer), elements for which the plaintiff adduced evidence in opposition to the anti-SLAPP motion. The Court carved out a limited right to amend to enable the plaintiff to meet her burden on prong two (claim has merit), but not to avoid prong one (claim arises from protected activity). *Id.*

The Nuclear Warhead — SLAPP Fees

The court must award a prevailing SLAPP defendant reasonable attorney's fees and costs, broadly construed to deter "abuse of the judicial process" with meritless lawsuits and "encourage[e] participation in matters of public significance." [CCP § 425.16, subd. (a)] *Ketchum v. Moses* 24 Cal.4th 1122, 1131-1138 (2001); *Robertson v. Rodriguez* 36 Cal.App.4th 347, 360-362 (1995). This includes fees incurred in the trial court (including any SLAPP-related discovery permitted by the court), appellate court, and enforcement of the fee award. *Dowling v. Zimmerman* 85 Cal.App.4th 1400, 1425-1426 (2001); *Lafayette Morehouse v. Chronicle Publishing* 39 Cal.App.4th 1379 (1995) (reaffirmed in *Berti, supra.*); *Wanland v. Mastagani, Holstedt & Chuirazzi* 141 Cal.App.4th 15, 20-21 (2006). (Note that slightly different rules apply in federal court see *Metabolife v. Wornick* (S.D. Cal. 2002) 213 F.Supp.2d 1223-1224). In contrast, a plaintiff prevailing on an anti-SLAPP motion may recover fees only by showing that the motion was a frivolous or delaying tactic. CCP § 425.16, subd. (c); *Carpenter v. Jack In The Box* 151 Cal.App.4th 454 (2007). A SLAPP defendant enjoys the same preference for attorneys fees as a successful civil rights plaintiff. *Computer Xpress v. Jackson* 93 Cal.

App.4th 993, 1018 (2001). A defendant who prevails on only some causes of action is entitled to fees for each cause of action, or part thereof, stricken. *Shekhter v. Financial Indemnity Co.* 89 Cal.App.4th 140, 149-151 (2001); *City of Colton v. Singletary*, 206 Cal.App.4th 751,772-774 (2012). A plaintiff who loses an anti-SLAPP motion must post a bond or undertaking to stay enforcement of a judgment for attorneys fees and costs pending appeal. *Dowling v. Zimmerman* 85 Cal.App.4th 1400, 1426-1434 (the author represented defendant Zimmerman).

An in depth discussion of anti-SLAPP fee jurisprudence and how to use expert declarations to support or oppose SLAPP fee motions is the subject of another article.

Claims Arising From Prior Litigation or Other Official Proceedings

Attorneys can easily get into malpractice and malicious prosecution quicksand by unwittingly filing SLAPP complaints, or by failing to recognize that an anti-SLAPP motion is the best means of quickly defending the action and recovering costs and fees. This section focuses on those areas most likely to cause such trouble. While subd. (e) identifies four areas of conduct that fall within the protected activity of the statute, the statute is really aimed at two basic categories of protected activity - petitioning activity and free speech in connection with a public issue or an issue of public interest. No showing of a public issue is required for the first two official proceeding prongs in subds. (e)(1) and (e)(2). *Briggs v. Eden Council for Hope & Opportunity* 19 Cal.4th 1106, 1115-1119 (1999). No public forum is required for public issue speech under subd (e)(3) in light of the 1997 amendment adding subd. (e)(4) to the statute. *Averill v. Superior Court* 42 Cal.App.4th 1170.

Defamation, Intentional Interference, and Other Torts

The landmark decision in *Briggs v. Eden Council for Hope & Opportunity* 19 Cal.4th 1106 (1999) is an excellent place to start. *Briggs* involved defamation, intentional interference, and negligent infliction of emotional distress claims filed by a landlord against a former tenant. The factual bases of the complaint alleged that the Eden Council counseled an African-American woman who rented an apartment from Briggs. After the tenant complained that Briggs was giving her a less favorable electricity offset than that given to a Caucasian tenant, the Eden Council assisted the former tenant in filing a complaint with HUD and in prosecuting a small claims action against Briggs. The complaint alleges that "during the HUD investigation, Eden Council employees referred to Briggs as a "male chauvinist" and a "racist redneck." First, no public interest showing is required for the first two categories of protected activity — the petition prongs. Any cause of action arising from an oral or written statement or writing made "before" or in connection with an issue under consideration or review by a Legislative, executive, or judicial body or any other official proceeding authorized by law is sub-

Continued on page 8

HOWARD M. ULLMAN

On ANTITRUST

Since the early 1980s, Chicago-style economics has infused much of U.S. antitrust thinking, rendering some offenses that used to be considered to be *per se* unlawful subject to the Rule of Reason, and thus effectively immunizing a large swath of behavior from antitrust condemnation. A recent decision by Judge Posner (a leading Chicago-school proponent) in the Seventh Circuit in *In re Sulfuric Acid Antitrust Litigation*, 703 F.3d 1004, 2012 U.S. App. LEXIS 26434 (7th Cir. Dec. 27, 2012), continues this trend by refusing to condemn out of hand what might previously have been viewed as a *per se* unlawful output reduction agreement.

Historically, output restrictions are normally accorded the same *per se* treatment as horizontal price fixing because they have, or are thought to have, the same anti-competitive effects. See *Antitrust Law Developments* (7th ed. 2012) at p. 105; *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 99 (1984).

In *Sulfuric Acid*, the Seventh Circuit held that a somewhat unusual output agreement is *not* subject to the *per se* rule against price-fixing or output-reduction agreements. The facts of the case are important and somewhat complicated. Some companies outside the United States (specifically, in Canada) produce — as an unwanted manufacturing byproduct — a waste chemical for which there is little or no market in their home country. There is, however, a U.S. market for the chemical and U.S. producers who manufacture it. Because the foreign companies have no U.S. distribution network, they signed up the U.S. producers as distributors (giving them exclusive territories), in return for “shutdown” agreements that preclude the U.S. producers from manufacturing their own supplies of the chemical. Absent the shutdown agreements, there would be an oversupply, and the foreign companies might sell into the United States at a loss. They might be willing to do that to avoid the environmental and storage costs they would otherwise incur, but then they could be (at least in theory) subject to antidumping proceedings brought by the U.S. manufacturers.

Judge Posner held that given the facts at issue, the shutdown agreements — which one might otherwise consider to be agreements among competitors or potential competitors and a *per se* violation of the Sherman Act — are subject to a Rule of Reason analysis. Although the agreements, in theory, still could be found to be unlawful under the Rule of Reason, the fact that the plaintiffs in *Sulfuric Acid* abandoned a Rule of Reason case suggests that they

thought it would be very difficult to win. After all, the agreements facilitated market entry, which is generally pro-competitive.

In applying the Rule of Reason, Judge Posner noted that this case was unique, “combining such elements as involuntary production and potential antidumping exposure.” *Id.* at *18. He rightly concluded that “[i]t is a bad idea to subject a novel way of doing business (or an old way in a new and previously unexamined context....) to *per se* treatment under antitrust law.” *Id.*

However, in reaching his conclusion, Judge Posner made some other remarks which are perhaps somewhat less persuasive. For one thing, in analogizing the Seventh Circuit’s analysis to that of *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (“*BMI*”), which allowed blanket music licenses to be sold without running afoul of the antitrust laws, Judge Posner wrote that the blanket copyright licenses were not a product, new or old, but a “contractual instrument” for marketing music, which was the product. *Id.* at *17. But that seems to beg the question of whether a “contractual instrument” for marketing is or could be an unlawful *per se* agreement. In the alternative, Judge Posner suggested that the foreign-supplied chemical could itself be the “new [*BMI*-type] product.” *Id.* However, that analysis seems to at least potentially open the door to an argument that any jointly-sold product is a “new product,” even if it is identical to other commodities being sold.

Additionally, Judge Posner noted that exclusive dealing agreements (where a distributor agrees not to carry competing lines) are not *per se* illegal, so “what difference should it make that the competing line is produced by the distributor himself? And so the shutdown agreements might be found to be an innocent species of exclusive dealing.” *Id.* at *14. There is a looseness to this language that may be exploited, or at least may invite potential exploitation, in unanticipated ways in future cases. The common wisdom is that two competitors cannot agree to curtail output simply by appointing one as the “distributor” of the other.

In short, the *Sulfuric Acid* opinion seems like the right result on the facts, but it opens the door to Rule of Reason arguments in the future about other arrangements whose status and pro-competitive effects may be less clear — or whose effects may be more clearly anti-competitive. Given the unusual and somewhat peculiar facts in *Sulfuric Acid*, considerable care should be taken in extending its holding to other output agreement scenarios.”

Mr. Ullman is of counsel with Orrick, Herrington & Sutcliffe LLP. hullman@orrick.com



Howard M. Ullman



Continued from page 6

Breadth and Power of SLAPP Motions

ject to the anti-SLAPP burden shifting procedure. In *Briggs*, the cause of action arose from Eden Council's oral and written statements to the tenant made "during the HUD investigation" and while assisting the tenant with the filing of a small claims action. The First Amendment right to petition involves the act of lobbying, testifying, suing, or otherwise seeking administrative action. *Id.* at 1115. Any communication designed to prompt government action is also protected by the statute. Thus, the statements fell within the anti-SLAPP statute, and also constituted activity protected by the absolute litigation privilege of CC § 47(b).

Medical peer review proceedings are also official proceedings that come under the protection of the anti-SLAPP statute and litigation privilege. *Kibler v. Northern Inyo County Hospital* 39 Cal.4th 192 (2006). More recently, in *Navellier v. Sletten* 29 Cal.4th 82 (2002), our High Court (ruling 4-3) held that fraud and breach of contract actions arising from the filing of a cross-complaint in violation of a settlement agreement fell within the ambit of the anti-SLAPP statute. "Any cause of action arising from the defendant's prior litigation activity may appropriately be the subject of a special motion to strike." On remand, the court found that the fraud action was barred by the litigation privilege of Civil Code § 47(b) and that the contract action was meritless because no damages could be shown. *Navellier II*, 106 Cal.App.4th 763 (2003). Even a declaratory and injunctive relief action can be subject to a SLAPP motion and barred by the litigation privilege. *Equilon Enterprises LLP v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53.

Business Litigation

More recent cases like *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1550-1554 and *Hawran v. Hixon* (2012) 209 Cal.App.4th 256 make clear that the anti-SLAPP statute can be used to strike pure business/employment disputes notwithstanding the recent narrow exemptions for commercial speech under CCP § 425.17(c). For example, *Haight Ashbury, supra*, was the first case to do away with the traditional "principal thrust/gravamen" test in mixed cause of action cases, where the claim arises from allegations of both protected and unprotected activity. *Haight Ashbury, supra*, struck an entire breach of fiduciary duty claim, based on 16 separate acts where only 2 of those acts constituted protected activity, under the anti-SLAPP statute, broadly construed. [CCP § 425.16, subd. (a)] Conversely, *Hawran* shows just how narrow the commercial speech exemption is to be interpreted in pure business/employment disputes.

This article is written simply to illustrate the sheer breadth and power of the anti-SLAPP statute in civil lawsuits. A full discussion of the anti-SLAPP statute's mixed cause of action jurisprudence and the commercial speech exemption under CCP § 425.17(c) are beyond the scope of this article.

Malicious Prosecution

From these precepts it logically follows that any malicious prosecution and abuse of process claim would also be automatically subject to anti-SLAPP treatment by virtue of the petition/litigation activity at which these torts are aimed. Indeed, a line of cases culminating with *Jarrow Formulas v. La Marche* 31 Cal.4th 728 (2003) held that all malicious prosecution actions are subject to anti-SLAPP treatment because they necessarily arise from the maintenance of a prior lawsuit or administrative proceeding. A complaint is a writing made "before" a judicial body and frames the legal and factual issues to be considered and reviewed in a judicial proceeding. This meets the official proceeding prongs of subdivisions (e)(1) and (e)(2). While a malicious prosecution action is exempt from the absolute bar of the litigation privilege of CC § 47(b), malicious prosecution plaintiffs must contend with another potentially fatal defense — the advice of counsel defense. *Sosinsky v. Grant* 6 Cal.App.4th 1558 (1992). A malicious prosecution defendant can prevail on an anti-SLAPP motion by showing that the defendant consulted a lawyer, disclosed all material facts to the lawyer, and relied in good faith on the lawyer's advice.

Abuse of Process/CC 47(b)

Abuse of process claims are another danger area. Our High Court in *Rusbeen v. Cohen* 37 Cal.4th 1048 held that an abuse of process claim arising from both communicative and noncommunicative conduct of the defendant is subject to anti-SLAPP treatment and is barred by the absolute litigation privilege of CC § 47, subd. (b). Note that many attorneys unwittingly include abuse of process claims in actions for malicious prosecution or other torts, or file an abuse of process claim when they should file a malicious prosecution claim. This is a deadly mistake. See *Ramona Unified School Dist. v. Tsiknas* 135 Cal.App.4th 510.

Other Areas Where SLAPP May Potentially Apply

Other disputes are rife with potential SLAPP issues include HOA disputes or disputes between homeowners in a residential community. See *Ruiz v. Newport Harbor Community Assoc.* 134 Cal.App.4th 1356 (2006). Defamation and other actions against media defendants for statements published are also hot areas for SLAPP motions. An excellent public issue speech case under subd. (e)(4), which provides examples from all prior (e)(4) SLAPP cases is *Cross v. Cooper* (2011) 197 Cal.App.4th 357. Also, the 1996 Communications Decency Act creates a privilege for third publishers of defamatory material on the internet, so that a libelous statement that might be actionable against a newspaper, radio, or TV publisher is not actionable against an ISP when republished on a third party website. *Barrett v. Rosenthal* 40 Cal.4th 33 (2006).

SLAPP motions are nuclear. Depending on which court you are in, plaintiff only need to show that they can prevail on any part of their claim to defeat a

Continued on page 10

JAMES YOON

On PATENTS

On March 16, 2013, the United States patent system was fundamentally changed. On that day, the “first-inventor-to-file” provisions of the America Invents Act (AIA) took effect.

Prior to the AIA, the United States was one of the few countries in the world to use a “first-to-invent” system for patents. The U.S. “first-to-invent” system often resolved disputes regarding who was the original owner of a patented invention using a time consuming (and often expensive) patent office administrative proceeding called an “interference.” During an interference, the patent office would reward the ownership of the patented invention to the party who could demonstrate that its inventor was “first inventor in time” for a patented invention. Generally, these interference proceedings did not focus on which party filed the earlier patent application for a disputed invention.

After March 16, 2013, patent applicants will no longer be able to file interference proceedings to demonstrate that their inventor was the “first-to-invent” a disputed invention. Instead, the original ownership of a patented invention will belong to the party whose inventor was the first to file their patent application with the patent office. This change to a “first-to-file” system will have a number of significant effects on the United State patent system and will move the United States into alignment with the vast majority of the industrialized world which long ago adopted the “first to file” approach to patents.

For example, the “first to file” approach of the AIA will have a substantial impact on patent litigation. Prior to the AIA, the parties in a patent case would often vigorously contest the “priority” date of a patent. A patent plaintiff would seek to push the “priority” date of their patent back from its effective filing date to an earlier date such as the date the inventor “conceived” or “reduced to practice” the patented invention. The plaintiff would seek the earlier date in order to “swear behind” potentially invalidating prior art. If the plaintiff was successful in establishing the earlier “priority” date, the plaintiff could greatly increase its chance of winning the patent case by eliminating a defendant’s best prior art and invalidity arguments.

The possibility that a patent holder (plaintiff) could alter the “priority date” of their patent from the effective filing date for their patent to the “conception” and “reduction to practice” date of the invention by the inventor added substantial ambiguity and, thus, expense to patent litigation. Prior to the AIA, at the start of a patent case, there was no way for a defendant to know the “priority date” for a

patent. This lack of knowledge made it difficult for the defendant to assess the strength of a patent and/or to determine whether the prior art that it had identified was, in fact, “prior” to the priority date of the patent. The cost and ambiguity associated with the defendant’s lack of knowledge was compounded by the tactical decisions made by the patent plaintiff. These plaintiffs typically delayed taking a position on the “priority date” of their patent until they saw the prior art identified by the defendants. The plaintiffs would only seek to alter the “priority date” of their patent in situations where they believed they could eliminate important prior art identified by the defendants.

For patents filed after March 16, 2013, the AIA eliminate the above ambiguity. The AIA declares that the priority date of a claimed invention is the effective filing date of its patent application. The AIA further declares that “prior art” is all art that publicly exists prior the effective filing date (other than disclosures by the inventor or joint inventor within 1 year of filing). As a result, with the limited exceptions relating to the inventor (or joint inventors), a patent claim is now invalid if it was “patented, described in a printed publication, or in public use, on sale, or otherwise available to the public *before the effective date*” of the patent. 35 U.S.C. § 102(a) (emphasis added). It is important to note that the AIA eliminated geographic restrictions on prior art and, thus, art publicly available anywhere in the world can now be used to invalidate a patent.



James Yoon

The change to the AIA “first-to-file” system should increase the clarity of the U.S. patent system and reduce administrative and litigation costs associated with the old “first-to-invent” system. However, it is important to note that benefits of the AIA system will take a long time to manifest. The AIA does not impact the millions of pending patents and patent applications with an effective filing date prior to March 16, 2013. As a result, in the short term, the AIA will likely increase the cost of the patent system. For many years to come, companies, the patent office and the Courts will have to deal with two different systems: The pre-AIA “first to invent” system where the “priority date” of a patent (and the universe of prior art) is unknown prior to an interference proceeding or patent litigation, and the post-AIA “first to file” system where interference proceedings no longer exist and the “priority date” of patent is clear and publicly known.

James Yoon is a partner with the Palo Alto office of Wilson Sonsini Goodrich & Rosati. jyoon@wsgr.com



Continued from page 5

Sargon and the Science of Reliable Experts

with a series of factors, results from different cases are likely to be a matter of degree, *i.e.*, methods may be more or less ‘scientific’ in this *Daubert* sense. Scientific validity generally is probably a matter of degree. Frederick Schauer, “Can Bad Science Be Good Evidence? Neuroscience, Lie Detection, and Beyond,” 95 Cornell L. Rev. 1191, 1207 (2010).

Scientific theories try to explain the visible world through the use of an invisible one (Popper at 89), whether it be by the use of the four humours, luminiferous aether, or quantum mechanics. The doctrine of luminiferous aether, for example, despite its ancient (and pleasing) sound, was scientific: it was not only testable, but tested and disproved in 1887. This was the Michelson-Morley experiment which ultimately led to Albert Einstein’s establishment of the constant (and limiting) speed of light, among other things. Scientific theories are not necessarily right, but experts who tell you they are right can probably tell you how the theory could be disproved.

So, is *Sargon’s* emphasis on *Daubert* a shift in the law? Well, it calls out the need for scientific justification of the disciplines subject of expert testimony, and I like to think even state judges have always had this at least implicitly in mind: I see no recent reported cases on the use of astrology or phrenology, although I am aware of complaints from various parts of the bar that some admitted testimony is no better. Let us settle at least on this for now: *Sargon* gives us a renewed emphasis on logic, 55 Cal.4th at 772, a mandate to test the basic premises of a discipline for signs of science. *Sargon* may, in its approving invocation of Imwinkelried’s article and its analysis of Evidence Code § 802, countenance the trial judge’s hard look “into the reliability of an expert’s major premise” (Imwinkelried at 446) that is, trial judges may, and must, determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert’s general theory or technique is valid. (Imwinkelried at 449)

Deciding whether or not an “expert’s general theory or technique” is valid may be a bit more than state trial judges are used to outside the *Kelly* “novel technique” context. (Recall that *Sargon*, Evidence Code § 802, and the Imwinkelried article may all apply whether or not *Kelly* is implicated.)

A final practical note: a conundrum outside the trial context. Judges often have a pretrial hearing to determine whether an expert may opine. The patient judge in *Sargon* had an 8 day hearing. Having this much time at trial is remarkable enough in our overburdened courts, but we have no similar procedures for other contexts in which judges are asked to rely on expert testimony, such as summary judgment and class action certification motions. Before trial, the parties have had the chance to conduct expert discovery, find a supplemental expert when the other side surprises, and to research proposed expert testimony. At a pretrial hearing, the judge’s and parties’ questions flesh out the reliability issues.

There is nothing like this in motion practice. Motions are often filed long before the expert disclosure deadlines, parties have a short period to respond and usually none to examine the other side’s witness. Yet judges must rule on the admissibility of expert declarations; and these rulings are frequently case determinative.

There may be no good answer here. Expert declarations will have to carry their own water, and burdens of proof will continue to have a decisive impact. Judges may have some flexibility to entertain live witnesses in certain types of hearings, and they can generally postpone hearings to allow for some discovery, but with our present underfunded and understaffed courts, these options will not be readily embraced.

After this note was completed the Court of Appeal decided *Garrett v. Howmedica Osteonics Corp.*, ___ Cal. App.4th___ (2d App.Dist., No. B234368a filed 3/6/2013), in which these very contrasts between trial and motion practice were noted. *Garrett* suggests that because of the liberal construction due to papers filed in opposition to summary judgment motions (including expert declarations), *Sargon’s* gate keeping function is not to be as strictly applied to those papers.

Counsel are invited to propose — some experiments.

This article is designed only to open issues for discussion, and provides no indication on how I or any other judge would rule in a specific case.

Curtis E.A. Karnow, Judge Of The Superior Court, County of San Francisco.

Continued from page 8

Breadth and Power of SLAPP Motions

SLAPP motion. *Mann v. Quality Old Time Service* 120 Cal.App.4th 90, 106 (4th Dist./ Div. 1 2004). But see *City of Colton v. Singletary* (4th Dist./Div. 2 2012) 206 Cal.App.4th 751, 772-774, *contra*. SLAPP motions can be beat, but they are risky and expensive to oppose. For the plaintiff, they can create an expensive and lengthy detour through the court of appeal before discovery even begins. The best way to avoid SLAPP problems is to screen your complaints and appeals before they are filed. If you must file a claim that comes under the SLAPP statute, develop the facts and conduct the discovery necessary to oppose the motion. An expert can assist with this, and can also assist in bolstering or attacking a fee motion from a successful anti-SLAPP defendant.

Mr. Moneer has been handling all aspects of anti-SLAPP cases for both plaintiffs and defendants since 1994. He has been recognized as an expert in anti-SLAPP law by the Court of Appeal in Ramona Unified School Dist. v. Tsiknas 135 Cal.App.4th 510, 523-525 (2005). He is seminar panelist on The Rutter Group’s anti-SLAPP seminars and on the Pincus Professional Education anti-SLAPP workshop. He has been lead counsel in five published SLAPP Appeal decisions including one before the California Supreme Court. He frequently testifies as a fee expert for both sides in SLAPP cases and teaches anti-SLAPP law at the University of San Diego School of Law.

ROGER HELLER

On CLASS ACTIONS

What do we do with the leftover money? Class practitioners regularly face this question when negotiating and implementing class settlements. They can also face it when implementing class judgments. Likely driven in part by the magnitude of the funds often at issue, courts are applying increased scrutiny to this issue, and in particular to proposals to disburse residual funds to third party *cy pres* recipients. While a uniform set of standards has yet to emerge, recent case law highlights some important issues — philosophical and practical — and provides lessons that class practitioners on both sides should be mindful of.

Typically, funds from a class settlement or judgment are intended to be distributed to all class members or to those who submit claims. Funds remain, however, when class members cannot reasonably be located or the value of claims is less than the total settlement fund or judgment. Courts agree that, where practicable, residual funds should be directed in a manner that benefits the class, but exactly how that principle applies in practice varies by circumstances and, to some extent, jurisdiction.

Recent decisions reinforce that practitioners should consider the appropriateness of a secondary distribution to class members before turning to third party options. See *In re Lupron Marketing and Sales Practices Litig.*, 677 F.3d 21, 32 & n.6 (1st Cir. 2012) (citing ALI guidelines favoring secondary distribution “unless the [residual] amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair”); but see *In re Baby Products Antitrust Litig.*, 2013 U.S.App. LEXIS 3379, * 19 (3d Cir. Feb. 19, 2013) (declining to adopt ALI guideline as one-size-fits-all rule). Among the questions class practitioners should be prepared to address on this issue are: (a) when is the residual sufficiently small to justify other uses of the funds; and (b) have class members been “fully compensated” such that further payments to these individuals would constitute a windfall to the prejudice of any other, non-participating class members?

When distribution to class members is impracticable, *cy pres* awards are viewed as a superior alternative to, say, reversion to the defendant, because they retain the deterrent value of the settlement or judgment while, at least in theory, still benefiting the class, even if not entirely directly. Viewed as a fiction by some skeptics, this notion is nevertheless at the heart of the recent case law, as courts have labored to develop standards to help ensure that *cy pres* awards will benefit class members.

Ninth Circuit courts, in particular, have increasingly scrutinized the substantive “nexus” between proposed uses of *cy pres* funds, on the one hand, and the makeup of the

class and class claims, on the other. For example, in *Kellogg*, where plaintiff alleged defendant misrepresented nutritional benefits of its cereals, the court rejected a provision directing funds and other benefits to unnamed charities engaged in “feed[ing] the indigent.” While this was a “noble goal,” the court found the requisite “nexus” lacking and reversed approval of the settlement. *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012); see also *Nachsbain v. AOL LLC*, 663 F.3d 1034, 1040 (9th Cir. 2012) (rejecting two local charities as recipients where class was nationwide, and rejecting a third charity where “it was not clear how this organization would benefit the plaintiff class.”).

There has also been a discernible shift in focus from the nature of the recipient itself to the purposes for which the funds will be used. In *Lane v. Facebook*, 696 F.3d 811 (9th Cir. 2012), the Ninth Circuit rejected an objector’s challenge on the ground that the proposed recipient was created in connection with the settlement rather than an established organization. *Id.* at 821-22. (finding that, while the Ninth Circuit has typically required *cy pres* recipients to have “a substantial record or service,” there was a “direct and substantial nexus” between plaintiffs’ online privacy claims and the provision’s requirement that funds be used for education regarding “protection of identify and personal information online”); *In re Easysaver Rewards Litig.*, 2013 U.S. Dist. LEXIS 15738, * 31-32 (approving distribution to San Diego schools in nationwide class case because the research for which the funds were earmarked would benefit internet users well beyond San Diego). Premised on a virtuous goal of directing class relief to class members, perhaps one unintended consequence of the increased focus on “nexus” is that some important, traditional *cy pres* beneficiaries, like legal services organizations, could see a reduction in funding from this source.

The Ninth Circuit’s *Kellogg* decision raises another issue. Arguably, it creates a new rule that parties may have to disclose, at least in some circumstances, proposed *cy pres* recipients and uses prior to the deadline for class member objections. See *Kellogg*, 697 F.3d at 867; but see *In re Baby Products*, 2013 U.S.App. LEXIS 3379 at * 39 (finding notice sufficient where possibility of later *cy pres* distribution disclosed and interested class members could object when proposed recipients were identified).

Kellogg and the other recent cases serve as an important reminder that, in the class settlement context, provisions governing residual amounts may be non-severable, and unless practitioners exercise great care — both in structuring the disbursement of residual funds among class members and/or third parties, and in identifying third party recipients and uses — they run the risk of having an otherwise good settlement rejected entirely.

Mr. Heller is a partner in the San Francisco office of Lief Cabraser, Heimann & Bernstein. Rheller@lcb.com



Roger Heller

Letter from the President

I am delighted to update you as the 2013 President of the ABTL's Northern California Chapter. My goal is to build on the work and accomplishments of my predecessors and assure that the Chapter is even better and stronger at year-end than it is now. Success seems likely because of the incredibly talented and dedicated group of lawyers and judges who serve as officers and governors of this great organization. Let me highlight what we've done and what we plan to do this year.

We're off to a strong start. Our Program Co-Chairs Tom Mayhew and Dan Bergeson planned our dinner programs with the premise that our attendees are experienced, sophisticated trial lawyers. They sought to pick the best possible speakers and to select topics that lend themselves to a "deep dive." Our January dinner program on "Impeachment!" broke dinner program attendance records dating back to 2007, just before the financial crisis. The speakers displayed material unavailable anywhere else outside of actual trial. Bob VanNest demonstrated his video impeachment of Oracle CEO Larry Ellison in the *Oracle v. Google* trial. Cris Arguedas demonstrated her cross-examination strategy with her outline for the cross-examination of Barry Bonds' girlfriend. Our March program on "Mock Trials" explained the strategy and process now regarded as essential to prepare for modern high-stakes trials. Our website's Calendar of Events tab at www.abtl.org



Rick Seabolt

provides the dates of the remainder of this year's programs. Of special note: On August 20, U.S. Supreme Court Justice Antonin Scalia and Professor Bryan Garner will discuss the subject of their newest and frequently cited book, "Reading Law: The Interpretation of Legal Texts."

Membership is up. As highlighted on the Membership tab on our website, Membership Co-Chairs Ben Riley and Larry Cirelli have assured that virtually every major San Francisco litigation firm is an ABTL group member. If you have not joined or renewed, do it now. Certain events, such as the dinner with Justice Scalia, likely will be open only to members who have joined or renewed early in the year.

The ABTL's 40th Annual Seminar will be held on October 3-6, 2013 at the Ritz-Carlton, Laguna Niguel – a spectacular setting. Our Chapter Seminar Co-Chairs Allson Tucher and Bruce Ericson are working with the other four ABTL chapters to present a program on "The Art and Craft of Storytelling." Entertainment will be provided by The Capitol Steps.

If you have an idea for a program, be sure to contact me or one of the other officers, Daralyn Durie, Drew Bassak or Diane Doolittle, by email or telephone — or, best of all, in person during the reception before one of our dinner programs.

Rick Seabolt is a past Chair of the State Bar of California Litigation Section, a partner in Duane Morris LLP's San Francisco office.

Continued from page 5

Trust Litigation: A Starter Kit

The ultimate question in resolving whether something was permissible or not is what the trustor intended. This is a unilateral intent, rather than bilateral intent as with contracts — a "meeting of the minds" is not required. However, just as with contracts, the inquiry starts with the trust instrument and the rules of construction. Where there is ambiguity, extrinsic evidence comes into play.

With all those questions in mind, you will move towards trial in much the same way as in any civil case. There may be issues such as undue influence, duress, or fraud, to resolve along the way. Those issues could be the subject of another article, or many, as the history of trusts is full of interesting scenarios, with high stakes often played out against a backdrop of family drama over generations, or of great civic works gone awry. We hope, however, that the foregoing has given you some insight into how to approach one of these disputes in the event you have the privilege of being entrusted with one.

Adrian Sawyer is a partner and Julie Stockton is an associate at Kerr Wagstaffe LLP.

ASSOCIATION OF BUSINESS TRIAL LAWYERS



c/o Michele Bowen, *Executive Director*
P.O. Box 696 • Pleasanton, California 94566
(925) 447-7900 • www.abtl.org

OFFICERS

Rick Seabolt, *President* • Daralyn J. Durie, *Vice President*
Andrew Bassak, *Treasurer* • Diane Doolittle, *Secretary*

BOARD OF GOVERNORS

Aaron L. Agenbroad • Daniel B. Asimow • Hon. Carlos Bea
Daniel J. Bergeson • William Bernstein • Krystal N. Bowen
Rachel S. Brass • Hon. Steven A. Brick • Hon. Gerald J. Buchwald
Jeffrey R. Chanin • Frank A. Cialone • Lawrence M. Cirelli
Hon. Carol A. Corrigan • Bruce A. Ericson • Marcie Keenan Farano
Hon. Robert B. Freedman • Hon. Beth L. Freeman
Hon. Susan Y. Illston • Hon. Teri L. Jackson
Hon. James P. Kleinberg • Hon. Richard A. Kramer
Hon. Elizabeth D. Laporte • Hon. Patricia M. Lucas
Hon. Socrates P. Manoukian • Thomas B. Mayhew • Anna S. McLean
Hon. Marla J. Miller • Mark C. Molumphy • Hon. Dennis Montali
Tim L. O'Mara • Michael K. Plimack • Benjamin K. Riley
Elizabeth S. Salveson • Michael A. Sands • Martin S. Schenker
Hon. Richard G. Seeborg • John S. Siamas • Hon. Mark B. Simons
Hon. Fern M. Smith (Ret.) • David S. Steuer • Alison M. Tucher
Marshall C. Wallace • Diane L. Webb

EDITORIAL BOARD — ABTL REPORT

Frank Cialone, Editor-in-Chief
(415) 421-6500

Columnists

Peter Benvenuti • John Green • Roger Heller
Trent Norris • Chip Rice • Walter Stella
Howard Ullman • Kate Wheble • James Yoon