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**Class-action settlements in an ever-more-crowded field**

Courts get tougher on procedure and defendants play one plaintiff against the other.  
**TARA MOHSENIE AND JAHAN SAGAFI**

As the class-action field becomes more crowded, courts are careful to ensure that the various procedures are followed precisely. In this increasingly complex area, plaintiffs’ lawyers have to settle the case for less than full value. In addition, judges have been increasingly attentive to the substance of class-action settlement agreements. While sometimes that can create a barrier for lawyers, in many cases it actually strengthens the plaintiff’s hand. This article aims to summarize key issues in class-action settlement procedure. The observations and recommendations in this article apply to class actions under Fed. R. Civ. P. 23 and Cal. Civ. Proc. 382, as well as collective actions under section 216(b) of the FLSA and “hybrid” class actions (wherein FLSA and state law claims are brought together in the same action). They will also likely be useful in PAGA representative actions. For ease of discussion, we refer to all of these representative actions as “class actions.”

**Problem #1: Reverse auctions**

A reverse auction is where Plaintiffs A and B are pursuing overlapping (or virtually identical) claims in two proceedings (often with one in state court and the other in federal court), and one plaintiff agrees to a settlement of low value because the plaintiff’s lawyer either does not realize how valuable the case is or he just wants to earn a fee (unfortunately, it happens). The trick here is that the defendant is smart enough to play the plaintiff’s hand. This article aims to summarize key issues in class-action settlement procedure.

Reverse auctions appear to be increasingly common. As more plaintiffs’ attorneys enter the fray, there is a greater chance of two overlapping actions being pursued. In addition, defendants appear to see overlapping actions as an opportunity to misdirect, wiping out two cases for less than the price of one.

There are a few things you can do to minimize the chance of a reverse auction. First, coordinate with counsel in overlapping cases. Try to get a discovery coordination order on file in both cases, so you can collaborate with the other plaintiffs’ attorney, and avoid being in the dark about the other case. If the other lawyer won’t “play nice,” you can intervene in their case to help monitor it. If they reach a bad settlement, try to explain how it’s deficient, but at this point you should expect to have to fight. It’s time to intervene and explain to the court why preliminary approval is not justified.

**Intervention**

Intervention is a delicate matter. Usually, a plaintiff filing off a reverse auction has a strong argument that she should be allowed to intervene. Under Fed. R. Civ. P. 24(a)(2), to intervene, (1) your motion must be timely, (2) you must present a protectable interest, and...
(3) that interest must not already be protected by existing counsel.1

In intervening, it is useful to also make the substantive arguments about the flaws in the proposed settlement. That way, regardless of the outcome of the intervention motion, the court is aware of the defects and can take them into account in deciding whether to grant approval. Ideas about potential defects are listed below.

How does the Court know whether to approve the settlement?

For settlements with a Rule 23 or Cal. Civ. Proc. section 382 component, class members generally need the opportunity to opt out if they don’t like the deal, so court approval is a two-step process: preliminary approval, then notice goes out to the class so class members can opt out or object, followed by final approval, where the court considers updated information, such as class members’ responses. For FLSA-only or PAGA settlements, generally it’s a one-step process, because there’s generally no opt-out right. Either way, in approving a settlement, the court must at least satisfy itself that the class settlement is within the “ballpark” of reasonableness2 or the “range of reasonableness”3 – ultimately, the settlement must be “fair, reasonable, and adequate.”4 For FLSA settlements, the court “must scrutinize the settlement for fairness and determine that the settlement is a fair and reasonable resolution of a bona fide dispute over FLSA provisions.”5 In practice, these various standards converge on the common-sense question – Is this settlement a fair deal for the class members?

The remainder of this article addresses deficiencies with settlements that all plaintiffs’ attorneys should avoid.

Problem #2: Settlement amount is too low or not explained

The first thing you should look at is the settlement amount. Is it high enough, when compared to the total exposure the defendant faces for the claims being released (not just for the claims pled in the complaint or actually litigated – the release may be broader). In recent years, courts are much more active in scrutinizing your math, to ensure that the claims are being valued appropriately and the discount factor is reasonable. In calculating damages, be sure to extrapolate from the data you have to the whole liability period. That generally means extrapolating forward from the end date of the data to a reasonable preliminary approval date – often six

See Class Actions, Page 10
months or more. Judge Chhabria of the Northern District of California forcefully made this point in denying preliminary approval of the proposed $12,250,000 settlement in Cotter v. Lyft, Inc., which resulted in a revised settlement of $27 million.

Problem #3: Overly broad or vague releases

Another item that defendants push for is a broad release. Courts are increasingly monitoring releases for overbreadth and vagueness, and have recently denied preliminary approval due to defective releases. Releases must “directly track the allegations in the complaint,” i.e., be tied to the “factual predicate” alleged in the complaint. Releases of additional claims not pled or litigated are red flags. This is because the settlement is an exchange of money (and perhaps injunctive relief) for “peace” – a release of claims by the class members. So long as the class members are getting paid fair consideration for their releases, the settlement should pass muster. But where the release extends beyond the scope of what’s being “bought” by the defendant, the settlement runs afoul of these principles.

Problem #4: Passive FLSA releases

Because only those plaintiffs who expressly join an FLSA collective action are bound by its results, courts consistently reject settlements that release claims of individuals who have not affirmatively opted into the litigation. This is in stark contrast to true class actions, which are opt-out, and allow for class members who do nothing to release their claims.

Problem #5: Cease-fire

Defendants are often wary of possible future litigation. It is important to remember that plaintiffs’ counsel cannot agree not to represent particular clients in the future.

Problem #6: Overly restrictive confidentiality provisions

Another aspect of a settlement agreement that defendants often try to sneak in relates to confidentiality. This can come in many forms. A defendant might even request that the whole settlement be filed under seal. Do not agree! Thankfully, courts are scrutinizing confidentiality provisions very carefully, citing the public policy behind the FLSA and the goal of making employees aware of their rights. Some limitations may be acceptable, such as a joint press release, or plaintiffs’ counsel’s agreement to respond to press inquiries in certain ways. Defendants sometimes request that plaintiffs agree to limits on counsel’s ability to refer to the litigation (not just the settlement) in the future. But counsel must be allowed to market their experience and to refer to litigation in public court filings addressing their adequacy for appointment as class counsel. In fact, Cal. R. Prof. Conduct 1-500 prohibits attorneys from agreeing to (or even proposing agreement to) a restriction on their right to practice law. So BASF Ethics Opinion 2012-1 prohibits defense lawyers from demanding (and prohibits us from agreeing to) settlement terms that prevent us from “disclosing public information regarding [our] handling of a particular type of case.”

Problem #7: Attorneys’ fee requests inadequately documented

Courts appropriately look carefully at attorneys’ fee applications. Not only should your motion trump the value you created and the reasonableness of the percentage you are requesting, but also, it is generally wise to provide a lodestar “cross-check” - submission of time summaries of the contemporaneously recorded time records. Explain how duplicative work was avoided and work was “pushed down” to the lowest-cost lawyers and support staff.

Conclusion

“Class action settlements are different from other settlements.” Oh, how true! Because they’re not just a matter of private contract, but implicate the rights of individuals not present in court, judges properly exercise great oversight of class action settlements. This scrutiny can often be used by plaintiffs’ attorneys to our clients’ advantage. If your defendant is pressing for concessions in the class settlement agreement, try a little research into the issues, and call on your fellow social justice warriors for input. Those efforts can go a long way in securing the best result for the class possible.

See www.plaintiffmagazine.com for complete article including endnotes.

Tara Mohseni is a newly admitted attorney and graduate of UC Hastings College of the Law. She found her passion for furthering employees’ rights in the workplace through experiences like participating in the Workers’ Rights Clinic at the Employment Law Center, and working as a law clerk at The Dolan Law Firm. She also participated in the UC Hastings Alternative Dispute Resolution team, and served as a symposium editor for the Hastings Women’s Law Journal. Tara currently works at Otten & Golden LLP, primarily in the class-action practice group, prosecuting employment discrimination and wage and hour cases.

Jahan C. Sagafi is the partner in charge of the San Francisco office of Otten & Golden LLP, where he represents employees in class actions asserting wage and hour, discrimination, and other claims. Mr. Sagafi is active in the legal community, having served on the boards of Alliance for Justice, the San Francisco American Constitution Society (ACS) chapter, the ACLU of Northern California, and Public Advocates. Earlier in his career, he was a partner at Lieff, Cabraser, Heimann & Bernstein and clerded for the Honorable William W. Schwarzer of the Northern District of California. He is a frequent speaker and writer regarding employment litigation, class action antipredatory, and other issues.
Why class counsel must think like a trial lawyer
There are many obstacles on the way to class certification, but Spokeo isn’t one of them

By Dan LeBel

Successfully prosecuting a class action is often compared to the physical act of threading a needle. The procedural hurdles to obtaining class certification and the technical requirements of the statutes commonly in play provide defendants with seemingly endless opportunities to convince the court to dispose of—or hobble—your case.

Clearing each potential obstacle requires vision and patience but doesn’t have to be the hyper-technical process class counsel often make it out to be. Many class-action specialists deeply enjoy the intellectual nature of navigating the procedural maze of certification and dissecting the latest wave of case law following a Supreme Court ruling on Rule 23, Article III standing, or their favorite federal statute. And planning and building a case that will pass through the eye of the needle can lead to a morose, intellectual approach that lacks heart. This is a great danger in a hotly contested, long-running action.

Plaintiffs’ counsel often think of class-action litigation as a different animal requiring a different skill set from say personal injury litigation—more technical, less emotional. There is of course an emphasis on procedure and substantive law and a focus on distilling the facts down to the bare necessities and what can be shown to be common on a classwide basis. But executing on the fundamental principles of preparing any plaintiffs’ case so that it has an emotional appeal can make the difference in whether the case survives long enough to pass the procedural and substantive tests. Below we sketch out a few common obstacles of the moment (mandatory arbitration and class action waivers aside) then present some fundamental techniques and concrete strategies to navigate to the other side.

See Class Counsel, Page 14
Some real problems

Defendants’ emotional appeal: “There’s been no injury”

The concept of the “no injury” class action is a favorite frame for class action defense counsel. In this defense theme, the corporate defendant is merely an innocent victim of the plaintiff (who has conspired with class counsel) or of class counsel (who uses the plaintiff as a pawn in a shakedown lawsuit). Defendants use this frame especially when it is clear that the defendant’s conduct is illegal. The reasoning goes something like: defendant’s violation of a statute is merely a “technical violation,” it’s the plaintiff or her attorneys who are the real bad actors here for harassing the defendant with the lawsuit; therefore defendant’s illegal acts should be excused.

Turning the focus from defendant’s illegal conduct to the plaintiff, defense counsel argues that the plaintiff (and sometimes each potential class member) must prove an injury to something other than his or her legal rights. There is some instinctive appeal to it as few people want to be pulled into “frivolous” conflict.

The obvious flaw to the “no injury” theme is that many, if not the vast majority, of consumer protection laws were enacted because a legislature decided that the common law was inadequate to inhibit some specific business acts and took action by creating new law. For example, the Fair Debt Collection Practices Act (the “FDCPA”) made calling a consumer’s telephone before 8 a.m. or after 9 p.m. to attempt to collect a debt illegal. Congress enacted a statutory scheme to discourage offensive collections activity with statutory penalties of up to $1,000 for each violation and attorney fee-shifting in favor of prevailing consumers.

In our example, the consumer seeking to enforce the statute shouldn’t have to put on evidence to show that receiving collections calls at 1 a.m. caused harm. Congress has already found the conduct harmful and prescribed a penalty. But many defendants would argue there’s “no injury” caused by the violation of the statute by a 1 a.m. collections call unless the plaintiff proves something along the lines of: she was asleep at the time of the call, she heard and was awakened by the call, she knew at the time she heard it...
that it was a call from a debt collector, and so on. According to defendants, despite the language of the statute and Congressional intent, there’s “no injury” until proven otherwise.

But success in bringing classwide claims often relies on a statutory scheme such as the FCDA, putting aside the issue of individualized proof because gathering and presenting individualized evidence to show the particular harm suffered by each member of a 10,000-person class would render the class treatment untenable.

SCOTUS: Tolerance for blurred lines

The Roberts’ Court has repeatedly demonstrated a penchant for producing lengthy opinions that fail to provide clear instructions to litigators and the lower courts but produce fodder for either side to claim victory! At some point in history if you were a plaintiff’s attorney filing a class action you could be pretty sure you had both the facts and the law on your side. Today’s ever-changing playing field based on Supreme Court interpretation of issues such as rule 23, arbitration agreements, and Article III standing, creates uncertainty whether the courts will agree that the law is on your side.

Needless to say, this presents substantial issues for a plaintiff’s attorney faced with the possibility of a decade-long case. The most recent of these cases with the potential for wide-ranging impact but which seems to do little to clarify the law is Spokeo, Inc. v. Robins (2016) 136 S.Ct. 1540. If you’ve read any articles about class-action litigation in the past 10 months, you’re probably familiar with Spokeo; already, not only the most cursory details will be provided here.

In Spokeo, defendants challenged plaintiff’s standing under Article III of the Constitution claiming there was no “case or controversy” where plaintiff alleged a violation of the Fair Credit Reporting Act but failed to establish any particular concrete harm flowing from that statutory violation. With no concrete harm, standing cannot exist and therefore neither does jurisdiction in the federal court system. Spokeo claimed its statutory violation was antithetical to harm. It argued that, when it published false information about plaintiff, this worked in plaintiff’s favor because the falsehoods were more favorable to him than the true facts.

Defendants had been making the “no injury” argument for years in one form or another. So when the Supreme Court took up Spokeo there was much trepidation that the Court might issue an expansive opinion. Worst case scenario would be that Congress lacked power to enact statutes providing Constitutional standing where there previously was none and therefore statutory damages were not available unless the class representatives as well as each member of a potential class individually prove they were harmed in order for a class action. This could have meant extinction for private enforcement of a wide swath of federal regulation meant to protect consumers.

Fortunately, the eight-justice Supreme Court only went so far as to send the case back to the Ninth Circuit, explaining that plaintiffs could lack standing to pursue some violations of the Fair Credit Reporting Act, but the Ninth Circuit’s treatment established that plaintiff suffered a “particularized” injury but must also determine whether it was also “concrete.” Of course this only adds to the apparent tightrope putative class representatives must walk in alleging facts sufficient to support plaintiff’s claims, but not so specific that the allegations could not be extrapolated to the class as a whole. In its failure to provide a decisive ruling, the opinion provides useful language for both sides that the lower courts will have to parse.

Certainly, there are some gains to be made here. In a back-door way, the ruling undermines C A F A (the Class Action Fairness Act), because if the defendant removes a case from state court under C A F A but the federal court determines there’s a lack of standing due to Article III, the plaintiff and class may then be free to pursue their claims back in state court. But more importantly, I believe considerable opportunity exists in alleging and arguing for a concrete injury to present a compelling case that illustrates to courts (and the public) why our consumer protection statutes are important and how corporate conduct that violates those statutes causes real harm to real people.

**Strength and opportunities**

Let’s now turn to how we can bolster our cases by digging into the heart of our case and countering defense tactics with a strong offense. Rather than weakening the class action, I will attempt to show that embracing the emotional undertone of the case will fortify the case against a variety of things that could otherwise cause failure.

**Your client**

First, before litigation is initiated, ensure the named plaintiffs care about her case! A large percentage of class actions involve conduct where the plaintiffs and others were harmed in a way that is not “catastrophic” or life changing. More typically, a class action is based on a defendant’s cheating many people out of small sums of money. So while the total loss may be enormous, each victim of the conduct has only a small stake in the litigation. The likelihood of putting forth a potential class representative who lacks the determination to stick the case out to the end is exacerbated by the race to the courthouse to be “first to file” - a race where there seem to be dozens of more participants each year. When the law firm’s goal is to find a client – any client – as soon as possible in order to be first to file, it’s obvious things can go wrong.

Second, even if wonderful potential class representatives come to the law firm, class counsel (consciously or not) often minimize their direct contact with them. Lead counsel may communicate through paralegals or associates, and even then, only when necessary to gather or pass along critical information. Of course this is a logical and efficient approach from a business standpoint, but results in lost opportunities.

The proposed class representative acts as a stand-in for, and must be typical...
of, the absent class members. If defendant’s spotlight on the named plaintiff uncovers distinctions that defeat her ‘typicality,’ then the class can’t be certified.

As such, class counsel doesn’t want the named plaintiff to have any rough edges that would make her stand out from the other members of the proposed class.

Great trial lawyers know they must be able to stand in their client’s shoes so that they may better tell their story. Class counsel too often miss this opportunity to bring authenticity to the claims in the case. If the client doesn’t care about the case, or the client cares but her advocate cannot effectively convey it, why should the court care?

Prepping the class rep for depo

One of the biggest surprises in my career came when I became dissatisfied with the way I had learned “depo prep” at the class-action specialist plaintiffs’ firms I worked for following law school. I decided to try Don Keenan and David Ball’s “Reptile” techniques in prepping my clients for their testimony. Many of the partners I worked under were skilled at crafting technical arguments but light on trial experience.

My old way of preparing clients was pretty straightforward. Start with something like: “Your deposition is not the place to tell your story. We have other ways to get your story before the court . . .” Next, work on client-control: “If the question is, ‘can you tell me what time it is?’ the answer is ‘yes’ not ‘it’s 9:30 a.m.’” Then lead a tour of all the terrain defense counsel could be expected to cover, checking off the elements of our causes of action and class certification to ensure that the plaintiff was able to articulate favorable responses. I’d try to uncover potential surprises, reveal defense attorneys’ common scare tactics and I’d generally have a good time doing it. It’s a controlled, satisfying experience. You put in a lot of work and feel like you’ve done all you can for the good of the case. But the overall tenor of these sessions has something of the feel of a tutor prepping a student for an exam — I felt like there was something important missing.

The “Reptile” method is more akin to a talk-therapy session. There is a progression and three phases of preparation: (1) Questions, (2) Establish the Major Truths, and (3) Role-Playing. (If you’re not already familiar, I recommend buying See Class Counsel, Page 20.)
or borrowing the book before the next time you prepare a client for testimony.) The one aspect of preparation I want to highlight in this article for its surprising efficacy in the class-action context is during the “Questions” phase, uncovering any guilt feelings the plaintiff may have related to the case or the events that led to her filing the case.

My previous assumption was that the plaintiff’s feelings about the case were pretty straightforward. The plaintiff was ripped-off and had enough anger and indignation toward the defendant’s conduct to commit to take on the responsibility of representing a class of similarly situated consumers against the defendant, and that was all I needed to know as far as plaintiff’s feelings about the transaction. I had thought “victim’s guilt” (where the plaintiff blames herself for the wrong conduct of the defendant) was something that only happened in other types of cases. The dynamic is well known to experienced personal injury attorneys or prosecutors. A pedestrian run down by a drunk driver in a crosswalk might think, “I should have reacted more quickly.” Or a sexual assault victim has thoughts like, “Maybe I shouldn’t have been out so late. It would have never happened if I hadn’t dressed that way.”

But class-action plaintiffs who were victims of false advertising, illegal fees, or debt collection abuse often have these same feelings to one degree or another. And if they’re there, you’re a lot better off unearthing them during preparation than learning about them for defense counsel to exploit.

I was amazed the first time I followed this method of preparation. A client who had purchased a product and suffered “only” economic harm was sobbing in my conference room over her guilt in having bought the product. She would have had no way of knowing in advance that the product was defective, but logic isn’t the source of our emotions. I’ve found that where the case has been brought the case and seeks to represent readers who specialize in personal injury or employment law, I believe the class-action community has much to learn from you.

Uncovering the guilt, helping your client explore it, and then get past it can be a powerful experience, one that brings you closer to the client and improves your ability to tell their story in an authentic way. Doing that makes it relateable to a wider audience and triggers the desire in your audience (whether jurors or judge) to do something to make it right.

Getting clients’ emotions on the table and unearthing their feelings of guilt not only helps the plaintiff and her counsel tell a compelling story, but also makes the client more dedicated to the cause. This is important where the plaintiff may have only a nominal economic interest, the defendant may try to “buy-off” or harass the plaintiff, and the case might well go on for a decade.

Know your audience

Due to the issues discussed above—and many others—the trial court is in position to dispose of, or severely limit, your case. The court must care about your case. The court’s interest, the defendant may try to “buy-off” or harass the plaintiff, and the case might well go on for a decade. And of course this point is highly applicable in the class-action context where many appeals are taken. But often overlooked is the related point that there’s a strong possibility that multiple trial court judges will rule at some point in your case. Because most judges show little deference to the “rule of the case,” this factor can prove dispositive. And even the same judge will be willing to revisit a previous decision. Further, a magistrate judge ruling on discovery or assigned to provide an advisory opinion on a particular motion such as class certification, must care about your case. The court’s law clerks must care. Your mediator must care. As a consequence, it’s often not good enough to clear a particular hurdle once; there’s a heightened need to maintain a solid foundation to survive the scrutiny of potentially different personalities and preferences.

Tell your story

Accepting the theory that class counsel would be well-served in presenting a compelling story built on at least equal treatment of emotional, factual, and legal foundations, it raises the question: how do we do it? One powerful technique is using some variation of a “Brandeis Brief” early and often in the case.

Named for Justice Louis Brandeis while he was an attorney representing the State of Oregon before the Supreme Court, the “Brandeis Brief” focuses on citation to sources drawn on the hard and social sciences instead of an analysis of citations to the applicable law. I use the term more loosely.

The most effective briefs on behalf of class actions include a thorough analysis of the law, yes, but should also tell the story of the living, breathing, human who brought the case and seeks to represent the class. While this may be obvious to readers who specialize in personal injury or employment law, I believe the class-action community has much to learn from you.

Because of the nature of class certification, the proposed class representative

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must be interchangeable with any other class member as far as the claims brought, the harm suffered, and (to a great degree) the relief sought. The named plaintiff must be a round peg—just like each class member.

**Conclusion**

In sum, it’s a time where having the facts and the law on your side may not be enough to assure classwide victory. Class counsel have long emphasized the persuasive fundamentals of logos (appeal to logic) and ethos (appeal to honesty and authority), but shied away from pathos (appeal to emotion). A return to the emotional underpinning of persuasion will help to advance our cause case-by-case as well as at the policy-making level.

**Endnotes:**

1. 15 U.S.C. 1692 (c)(a)(1)

Based in San Francisco, Daniel LeBel prosecuted complex securities, antitrust, and consumer law cases against some of the country’s largest corporations for national litigation firms prior to opening his own practice. The LeBel Law Practice focuses on providing a client-centered approach to consumer class actions and prosecuting individual automobile dealer fraud and “lemon” law cases. Don’s writings on class-action litigation have been published internationally.

After graduating from the University of California at Berkeley with distinction, Don earned his law degree and Civil Litigation concentration at Hastings College of the Law. He’s practiced throughout California and has been admitted pro hac vice in courts across the country. In addition to private practice, Don LeBel represents individuals who otherwise would not receive legal representation pro bono through local nonprofit legal aid organizations and promotes consumer rights through work with the National Association of Consumer Advocates (“NACA”).

When not practicing law, Don seeks balance by spending time with his daughters, snowboarding, and seeking out new sports and adventures.

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PAGA procedural amendments

Same statute, new requirements for Labor Code violations

BY LISA MAK

The Private Attorneys General Act ("PAGA") of the California Labor Code allows aggrieved employees to file representative lawsuits to recover civil penalties on behalf of themselves, other aggrieved employees, and the State of California for Labor Code violations. Enacted in 2004, the purpose of PAGA was to increase enforcement of the Labor Code by “deputizing” citizens to act as private attorneys general and allowing them to pursue civil penalties on behalf of the State. This private enforcement mechanism was meant to help address the reality that labor enforcement agencies could not keep up with the growth of the labor market and the number of Labor Code violations occurring in workplaces.

In order to bring a valid PAGA claim, the employee has to meet the formal notice and waiting requirements specified under Labor Code section 2698, et seq. This involves submitting a PAGA claim notice to the Labor and Workforce Development Agency ("LWDA") and giving the agency time to review the notice and decide whether it wishes to investigate the claim. Within a specified time period, if the LWDA chooses not to investigate, or does not otherwise respond to the claim notice, the claimant employee is then entitled to bring a PAGA lawsuit in court. Any civil penalties recovered from an employer in a PAGA action are divided with the LWDA, with the agency receiving 75 percent and the aggrieved employees receiving 25 percent. Attorneys’ fees can also be recovered for successful PAGA claims.

PAGA creates leverage for plaintiffs

In recent years, PAGA has been a useful tool for plaintiffs to file lawsuits on behalf of a group or “class” of employees who have suffered Labor Code violations, such as unpaid wages, missed meal and rest breaks, non-compliant wage statements, and overtime violations. PAGA claims can be added to traditional class action lawsuits, or stand alone as a “PAGA only” representative action. The ability to recover large civil penalties and attorneys’ fees from employers can create important leverage in PAGA cases. Plaintiffs can also potentially conduct broader discovery in PAGA cases due to the representative nature of such claims.

A major benefit of PAGA actions is that plaintiffs do not need to satisfy the strict and often onerous class-certification requirements of traditional class actions. This was decided under the 2009 California Supreme Court case of Arias v. Superior Court. California courts have held that PAGA claims cannot be waived under an arbitration clause, even though other types of class actions can be waived.

In the 2014 case of Iskanian v. CLS Transportation Los Angeles LLC, the California Supreme Court held that an employee’s waiver of a representative PAGA claim in an arbitration clause of an employment contract was unenforceable, as it was contrary to public policy given that a PAGA dispute is between the employer and the State. Iskanian also held that such a rule prohibiting waiver of a PAGA claim in an arbitration agreement was not preempted by the Federal Arbitration Act. The Iskanian rule was reinforced in the recent case of Hernandez v. Ross Stores, in which the Fourth District Court of Appeal held that an employer cannot compel an employee to arbitrate individual aspects of his PAGA claim while maintaining the representative PAGA action in court. Thus, even with the increased difficulties of certifying employment class actions and the proliferation of forced class-wide arbitration clauses, PAGAs remain a viable and powerful way to hold employers accountable for large-scale Labor Code violations.

Last year, as part of Governor Jerry Brown’s approved budget, the California legislature passed SB 856, which made some important procedural amendments to PAGA. The bill became effective on June 27, 2016, and was part of Governor

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Brown’s plan to increase oversight and enforcement of PAGA claims by the LWDA. Practitioners should be mindful of meeting these new procedural requirements in PAGA cases.

**New filing requirements for PAGA claims**

The amendments require PAGA documentation to now be filed online, along with the implementation of new filing fees. New PAGA claim notices now must be filed online on the Department of Industrial Relations (“DIR”) website, with a copy of the claim notice sent by certified mail to the employer. 

Due to the enactment of AB 1506 in 2015, an employer has 33 days from the filing of a PAGA claim to “cure” certain defects on wage statements (e.g., the legal name of the employer, the dates of the pay period). The amendments now require that all employer cure notices or other responses to a PAGA claim must also be filed online, with a copy sent by certified mail to the aggrieved employee or his or her representative.

There is now a $75 filing fee for a new PAGA claim notice and any initial employer response to a PAGA claim, including cure notices. Previously, the filing fee was $3. The filing fee may be waived if the party is entitled to pauperis status. As of now, the LWDA does not have an online payment system to process filing fees, so the fees should be paid by check, made out to the LWDA, and sent by regular mail to the LWDA office in San Francisco.

**Review time for PAGA claims**

The amendments have increased the time for the LWDA to review an employer’s PAGA claim notice and for an employer to file a PAGA lawsuit. Previously, the LWDA had 30 days to review an employer’s PAGA claim notice to decide whether to investigate the claim. The time for the LWDA to review such a notice has now been extended from 30 days to 60 days. If the agency investigates the claim, it has 120 days to issue citations to the employer.

For PAGA claims filed on or after July 1, 2016, the LWDA may also extend its deadline to issue citations to employers to up to 180 days, as opposed to 120 days.

Previously, a plaintiff could not file a civil PAGA lawsuit until 33 days after sending the claim notice to the LWDA. This occurs when the LWDA notifies the plaintiff that it does not intend to investigate the claim, or does not notify the plaintiff either way. Under the new rule, a plaintiff cannot file a civil lawsuit until 65 days after sending the claim notice to the LWDA. Note, however, that employers still only have 33 days to cure wage statement violations.

**Submission of litigation information to the LWDA**

Finally, the amendments have created new requirements on the submission of court complaints and proposed settlements in PAGA actions to the LWDA. How the LWDA will use such information remains to be seen.

When a plaintiff files a new PAGA lawsuit in court, a file-stamped copy of the complaint must be provided to the LWDA within 10 days of filing the lawsuit.

Courts previously had to review and approve proposed settlements that included PAGA claims. That is still the case, although the amendments now make clear that court approval is required for settlement of a PAGA action regardless of whether the settlement includes an award of PAGA penalties.

A copy of the proposed settlement of a PAGA action must be provided to the LWDA at the same time that it is submitted to the court. If there is a court judgment or any other order awarding or denying PAGA penalties, a copy of that judgment or order must also be provided to the LWDA, within 10 days after entry of the judgment or order.

While the amendments do add some extra time and cost for PAGA filings, these new requirements do not seem to create significant obstacles for plaintiffs, especially in light of the high penalty amounts that could possibly be obtained from a PAGA action. Governor Brown had initially considered far more sweeping changes to the PAGA statute to “stabilize” the handling of PAGA cases. This had included requiring plaintiffs to provide more details in PAGA claim notices; allowing employers to request that the LWDA investigate a PAGA claim notice; and giving the Director of the DIR an opportunity to object to proposed PAGA settlements. The amendments ultimately passed, as described above, were much more modest. The amendments passed also did not include additional funding or the creation of a “PAGA Unit” for the LWDA to increase its oversight and involvement for claims, which means that PAGA enforcement actions will likely primarily remain with plaintiffs and their attorneys.

It remains to be seen what the impact, if any, of these amendments will be on PAGA claims enforcement by the LWDA and litigation by private plaintiffs in the courts. It is also uncertain whether the new requirements for submission of PAGA complaints and settlements to the LWDA will have any effect on the litigation and settlement process. In the meantime, practitioners should pay attention to these new requirements when filing and litigating PAGA claims.

**Lisa P. Mak**

Lisa P. Mak is a trial attorney at Minami Tamaki LLP in the Consumer and Employee Rights Group. Ms. Mak has many years of experience representing employees across a broad range of industries for all types of employment disputes, including claims for discrimination, harassment, retaliation, defamation, and wage and hour violations. She is an active member of the California Employment Lawyers Association and has been selected as a Super Lawyer Rising Star since 2015. For more information, visit www.minamitamaki.com.
It all starts with your retainer agreement – get it right!

A review of the rules for contingency-fee retainer agreements

By Thomas C. Zaret

In California, retainer agreements in personal-injury or wrongful-death matters must comply with Business and Professional Code section 6147. All Medical Injury Compensation Reform Act ("MICRA") contingency-fee agreements must comply with Business and Professions Code section 6146. A lawyer's failure to comply with the statute renders the retainer agreement voidable at the client's election. If a retainer agreement is voided for failure to follow the applicable statute, the attorney is only entitled to recover quantum meruit ("reasonable fee") for the attorney's services and costs incurred in successfully prosecuting the matter. (Gutierrez v. Girard (2011) 194 Cal.App.4th 925, 932-933.) All attorney fee agreements are strictly construed against the attorney. (Severin v. Worson v. Bolinger (1991) 235 Cal.App.3d 1569, 1572.)

Business and Professions Code Section 6147 sets forth the rules applicable to contingent-fee contracts. The section mandates that all contingency-fee retainer agreements be in writing and that the client be provided with a copy of the signed contract. Section 6147 requires that a contingency-fee contract include: (1) A statement of the contingency-fee rate that the client and attorney have agreed upon; (2) A statement of how disbursements and fees incurred related to the litigation or settlement will affect the contingency fee and the client's ultimate recovery; (3) A statement of any additional expenses the client might have to compensate the attorney for; (4) A statement that the fee arrangement is negotiable between the attorney and client and not fixed by law; (5) A statement that the fee rates are the maximum limits for the contingency-fee rate and that the attorney and client have the option to negotiate a lower rate if the claim is subject to Section 6146 — MICRA; and (6) A statement of the fee shall be negotiated between the attorney and the client.

Business and Professional Code Section 6148 also requires that attorneyscli assess the nature of legal services that will be provided as well as the responsibilities of both parties to perform the contract. (Bus. & Prof. C. Section 6148, subdivision (a)(2), (3).) One should spell out in detail the nature of the dispute for which you are being retained to represent the client. This becomes increasingly important should another dispute arise that requires separate representation for the client. It is important to note that should a dispute arise, any ambiguity in a fee contract will be interpreted in favor of the client, not the attorney. (Mayhem v. Beninghoff (1997) 53 Cal.App.4th 1365, 1370.)

Are attorneys' fees capped?

Attorneys' fees obtained through actions on behalf of minors or incompetent adults require court approval. (Family Code § 6892; Probate Code § 2644(a).) Many, but not all, courts cap such fees at 25 percent of net recovery. However, Local Rules capping these fees, such as former LASC Local Rule 10.79(c)(3), have now been preempted by California Rules of Court, rule 7.955(d). Thus, if the contingency-fee agreement calls for a fee in excess of 25 percent, a court has discretion to approve it after evaluation of the factors set forth in rule 7.955(b).

The contingency-fee contract must set forth how costs will affect the calculation of the fee, i.e. whether costs are to be taken from the client's gross or net recovery. The contingency-fee contract must set forth the circumstances under which the client could be required to pay the attorney for work which is related to the matter covered by the retainer agreement at issue, but not covered by the retainer itself. That is, appeals, motions for new trial, the defense of cross-claims against the client, etc.

There is a separate representation for the client. This becomes increasingly important should another dispute arise that requires separate representation for the client. It is important to note that should a dispute arise, any ambiguity in a fee contract will be interpreted in favor of the client, not the attorney. (Mayhem v. Beninghoff (1997) 53 Cal.App.4th 1365, 1370.)

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An example of an “unconscionable” fee is seen in In re Silverton (2005) 36 Cal.4th 81, 93-94. There, an attorney was disbarred for offering to promote a 50% contingency fee by dismissing fees and expenses, including entering into a fee agreement with personal-injury clients which gave the attorney the right to negotiate down any medical lien charged against the client’s recovery and keep the amount of the reduction for himself. If the attorney does not have malpractice insurance, this must be disclosed in writing at the time the lawyer is initially engaged unless the total amount of time the attorney reasonably expects to expend in representing the client is under four hours. (Rules of Professional Conduct, rule 3-400(A).) Thus, while not required to be contained in the retainer agreement itself, it is prudent to make this disclosure in the Retainer if the attorney does not have professional liability insurance.

- An attorney may not contract with a client to prospectively limit the attorney’s exposure for professional malpractice. (Rules of Professional Conduct, rule 3-400(A).)

Referral fees among attorneys

Referral fees are governed by Rule of Professional Conduct Section 2-200, “Financial Arrangements Among Lawyers.” (A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

(1) The client has consented to writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

(B) Except as permitted in paragraph (A) of this rule or rule 2-200 [sale of law practice], a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member’s law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member’s law firm by a client.

A member’s offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member’s law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Compliance with Rule 2-200 is nondelegable and is required even where the attorney being referred to is in the matter promises to obtain the informed written consent of the client for the referring attorney. (Mazur v. Sherman (2000) 85 Cal.App.4th 981.) Failure to comply with Rule 2-200 will prohibit any referral or fee splitting arrangement. (Comptag Corp. v. Lawrence 42 Cal.App.4th 553 (1996).

As noted, the client must consent to fee splitting in writing; however, the agreement between the two attorneys need not be in writing or signed by both attorneys. (Colen v. Brown (2009) 175 Cal.App.4th 302.) The client consent may come at any time before the division is made, including after the services are fully performed. (Id.) However, the best practice is to do so as soon as possible, and preferably in the retainer agreement itself.

Potential liability issues

 Might there be any possible liability for making a bad referral? There may be liability to the client for a “negligent referral,” referral to an incompetent or disbarred attorney, or failure to make a referral until after the running of the statute of limitations. (Mills v. Metzner (1979) 91 Cal.App.3d 31.) [Note: This is part of an article originally presented at the 2012 Consumer Attorneys of Southern California Las Vegas convention for consumer attorneys.]

Thomas C. Zoret is a sole practitioner in West Las Vegas. He has been practicing personal injury litigation for 31 years and has tried numerous personal injury cases. He has been profiled in the Los Angeles Daily Journal. He is an AV® peer review-rated attorney who has been recognized the last six years as one of Southern California’s Super Lawyers. He graduated from Michigan State University with a B.S. in Psychology in 1983 with honors, and he received his J.D. from the University of San Francisco in 1984. He is a frequent speaker on the subject of liens.

Millers v. Metzner (1979) 91 Cal.App.3d 31.}

PAGE OF RETAINER AGREEMENT

amount of recovery or the type of relief, if any, which Client seeks to obtain therefrom. Client authorizes Attorney to share any portion of Attorney’s fees with any other lawyer for any purpose, including as a referral fee.

NON-COVERED MATTERS: Client acknowledges that the LAW OFFICES OF CONSUMER ATTORNEY will not be handling any workers’ compensation action in connection with this case. Should the client so desire, the LAW OFFICES OF CONSUMER ATTORNEY will provide a referral for a workers’ compensation attorney.

Client acknowledges that this agreement does not cover medical malpractice claims, disputes with the client’s own insurance company regarding coverage, disputes with health care providers, determination of tax consequences of any sums received, preparation of special needs trusts relating to any sums recovered, or solicitation of any award, settlement or judgment. Client acknowledges that Attorney maintains errors and omissions insurance coverage applicable to the services to be rendered.

SIGNING OF CHECKS: The undersigned client hereby authorizes any lawyer member of the firm of LAW OFFICES OF CONSUMER ATTORNEY to endorse and sign the undersigned’s name to any document, paper, draft or check relating to the case for which this retainer is given, providing that the undersigned will be notified of said signature or endorsement as soon as practical. This right will only be used to expedite the undersigned’s case and the case has been settled with the Client’s express approval.

RETENTION OF FILE: Client Files at Conclusion: Client is advised that and consents that, at the conclusion of this matter, the undersigned client will be notified of said signature or endorsement as soon as practical. This right will only be used to expedite the undersigned’s case and the case has been settled with the Client’s express approval.

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The “sophisticated-intermediary” defense in products liability

Understanding and litigating this products liability defense, including the recent Keneser holding by the California Supreme Court

By Rajeey Mittal

“Telephone” is a popular children’s game in which one person whispers a short phrase or message into the ear of the next player through a line of participants, until the last player announces the phrase to the entire group. While the objective of the game is to have the message travel through the entire group unaltered, invariably, the final message announced to the group differs significantly from that spoken by the first player. This can be due to myriad factors, such as difficulty hearing or understanding the whispers of the preceding players, erroneous corrections after mishearing the phrase, and even intentional alterations by whimsical players.

While the game is often played by children in a party or playground setting, it is often invoked as a metaphor for the inherent unreliability of information in the further removal it is from its primary source.

In California, a plaintiff injured by a consumer product can bring an action against anyone in the chain of distribution of the product. In other words, a plaintiff can sue the manufacturer of the product to the distributor that dispersed it to retailers around where the plaintiff purchased it and hold that manufacturer liable for the injuries the product caused.

Indeed, in asbestos cases specifically, the California Supreme Court recently held that the owner of a premises where one is exposed to asbestos owes a duty even to the members of that exposed person’s household who are secondarily exposed to asbestos from the dust; everyone in the household member who carries the asbestos fibers home from the premises unwittingly (Kesner v. Superior Court of Alameda (2016) __ Cal.4th __ Haas v. BNSF Railway Co. (2016) __ Cal.4th __)

The “sophisticated-intermediary” doctrine

In 2016, California officially adopted the “sophisticated-intermediary” doctrine. The affirmative defense is available in products-liability failure-to-warn actions to suppliers of hazardous raw materials who supplied their product to an intermediary; usually a manufacturer who incorporates the raw material into a finished product. The finished product eventually ends up in the hands of an end user who actually purchased the product that was purchased by the original plaintiff who purchased it at a retail store. It is this finished product that allegedly caused the plaintiff’s injuries.

Adopted by the California Supreme Court in Webb v. Special Elec. Co., Inc. (2016) 65 Cal.4th 167, the sophisticated-intermediary defense is implicated by the answer to the question: when a company supplies a hazardous raw material for use in a finished product, what is the scope of the supplier’s duty to warn ultimate users of the finished product about risks related to the raw material?

The key language here is “ultim ate” or “downstream” users. That is, the supplier always owes a duty to warn the ultimate user of the hazards of its raw material. Therefore, despite the doctrine’s name and the role of the intermediary, the finished product’s immediate purchaser, or vendor, is the one answering the question of whether this duty has been satisfied. It should be noted that, in the finished product, the raw material supplier is not required to give actual warnings to downstream users who will encounter the product. (Id. at p. 187.)

The first prong

As to the first prong of the defense, the Supreme Court explained that “generally the supplier must have provided adequate warnings to the intermediary about the particular hazard.” (Webb, 65 Cal.4th at p. 187.) It continued, “To establish a defense under the sophisticated-intermediary doctrine, a product supplier must show not only that it warned or sold the finished product. The finished product was manufactured by Johns-Manville from asbestos supplied by defendant Special Electric Company, Inc. (Special Electric), resulting in Webb’s development of mesothelioma, presumably caused by inhalation of asbestos fibers.” (63 Cal.4th at pp. 177-179.) Plaintiffs alleged the product was not a hazardous raw material supplied that it knew or should have known about the particular danger.” (Bittker v. Janssen Pharmaceuticals, 66 Cal.4th 63 Cal.4th at pp. 189-190.) Therefore, the sophisticated-intermediary defense is the only one available to hazardous raw material suppliers whose material is inherently dangerous, such as asbestos.

The court then examined the origins of the sophisticated-intermediary doctrine, a product supplier must show not only that it warned or sold to a knowledgeable intermediary, but also that it actually and reasonably relied on the intermediary to convey warnings to end users.” (Id. at p. 189, italics added.) The court cited Webb v. John Crane, Inc. (2013) 220 Cal.App.4th 1270, 1274 (“a recent case involving asbestos products sold to the Navy,” the Supreme Court of Appeal held that, “to avoid liability under the sophisticated-intermediary defense, there must be some basis for the supplier to believe that the ultimate user knows, or should know, of the item’s hazards.” (Id., at p. 189, quoting Pfeifer v. John Crane, Inc., 2015) 63 Cal.4th 500.) Further and similarly, the Supreme Court stated that “the sophisticated-intermediary doctrine is not, [a] matter of law, sufficient to aver liability; there must be a sufficient reason for believing that the intermediary’s sophistication is likely to operate to prevent the user, or that the user is likely to discover the hazards in some other manner.” (Id., quoting Pfeifer at pp. 1296-1297.)

Webb was an asbestos case in which plaintiff Webb was exposed to asbestos from his work with asbestos-cement pipe manufactured by Johns-Manville Companies (Johns-Manville) with raw asbestos supplied by defendant Special Electric Company, Inc. (Special Electric), resulting in Webb’s development of mesothelioma, presumably caused by inhalation of asbestos fibers. (63 Cal.4th at pp. 177-179.) Plaintiffs alleged the product was not a hazardous raw material supplied that it knew or should have known about the particular danger.” (Bittker v. Janssen Pharmaceuticals, 66 Cal.4th 63 Cal.4th at pp. 189-190.) Therefore, the sophisticated-intermediary defense is the only one available to hazardous raw material suppliers whose material is inherently dangerous, such as asbestos.

According to the second prong of the defense, the Supreme Court explained that neither a warning to the intermediary nor intermediary sophistication, on its own, is sufficient to avoid liability. (Id., at pp. 184-85.) Therefore, the sophisticated-intermediary defense is the only one available to hazardous raw material suppliers whose material is inherently dangerous, such as asbestos. The court then examined the origins of the sophisticated-intermediary doctrine, a product supplier must show not only that it warned or sold to a knowledgeable intermediary, but also that it actually and reasonably relied on the intermediary to convey warnings to downstream users who will encounter the product.
discharge its duty to warn end users about known or knowable risks in the use of its product.” (Ibid. at p. 187.) If, as a result, the user is adequately warned of the danger, the duty of care, is to act reasonably in this context, to take reasonable steps under the circumstances to prevent the injury. Once the user gets the warning. (Ibid. at p. 187) “[i]n failure-to-warn cases, whether asserted on negligence or strict liability grounds, there is but one unitary theory of liability which is negligence based—the duty to use reasonable care in promoting a warning”].)

Third, if the manufacturer does not provide a warning to the end user directly, then it “may discharge its duty to warn end users” by following the Webb-two-step scheme: (a) give “adequate warnings to the product’s immediate purchasers,” i.e., the intermediary, or “[e]nbulf to a sophisticated intermediary that it knew or should be aware of the specific danger; and (b) actually and reasonably rely “on the purchaser to convey appropriate warranties to downstream users who will encounter the product.” (Ibid. emphasis added.)

For example, as a laboratory that tests raw asbestos fiber supplier, the seller-defendant must make the following showings: (1) it had a duty to warn the user; (2) that the user was required to do that because it warned the end user directly, then it by definition seeks to invoke the sophisticated-intermediary defense, which, per Webb, applies when the defendant contends that it “discharge[d] its duty to warn end users” by relying on an intermediary to do so. (Ibid. at p. 187.) Webb adopts this doctrine “as it has been expressly adopted by the majority of jurisdictions.” Rest 2d section 398, cmt. n (which addresses when warnings to a party in the supply chain are sufficient to satisfy the supplier’s duty to them in the finished product end users); and Rest 3d section 2, cmt. 1 (substantively the same as Rest 2d). (Ibid. at p. 185-187.) The manufacturer or suppliers, or the defendant, have no evidence that they warned the end user directly, then the only way to have discharged the duty is via the sophisticated-intermediary doctrine. And it is the Defendant’s burden of proof to show compliance: (1) an adequate warn- ing or sophistication; and (2) actual and reasonable reliance.

In practice: Discovery

Though the sophisticated-intermediary doctrine is a “two-part” test, in practice, attorneys often would flesh out the relevant facts surrounding three areas: (1) whether the supplier adequately warned the direct purchaser of the hazards of the product or sold to a knowledgeable intermediary; (2) whether the supplier actually and reasonably relied on that intermediary to convey warnings to downstream users; and (3) whether the supplier had a sufficient reason for believing that the intermediary’s sophistication is likely to operate to protect the user, or that the user is likely to discover the hazard in some other manner. (Webb, 63 Cal.4th at p. 189.)

As an example, I will consider a product that is commonly the subject of asbestos litigation: asbestos-containing dry-wall joint compound. Joint compound is either a dry powder that needs to be mixed with water or a pre-mixed dry product that is applied to seal joints between drywall boards during wall construction. Prior to about 1978, many joint compound manufacturers incorporated raw asbestos fibers supplied by a separate entity in their formulas. The joint compound was then distributed and sold to retail consumers, or wholesalers, who were injured via exposure to the asbestos during the stages of work with joint compound that may range from pouring and mixing the dry powder, sanding the product after it is applied to the wall, and cleaning the workplace. (Webb, 63 Cal.4th at p. 189.)

Facts such as the knowledge possessed by the entities in the chain of distribution regarding the hazards of asbestos and whether warnings were passed down the chain and ultimately conveyed to the end user are standard fare in asbestos litigation. While these are relevant to the sophisticated-intermediary defense, to narrow in on the elements that Webb makes or breaks the defense, one must dig deeper. California’s Form Interrogatory No. 13.1 is a good place to start for plaintiffs’ lawyers.

More targeted and detailed discovery may be warranted, as well. Did the supplier warn the intermediary at all? Did it rely on the intermediary’s own knowledge regarding the hazards of asbestos? What was the supplier’s understanding of the intermediary’s sophistication and, more importantly, what was the basis for that conclusion? Were there any relations between related trade organizations together and therefore receiving the same information as the supplier? If so, did they have past dealings in which information regarding asbestos hazards had been repeatedly conveyed, were the events in question during a time period when the hazards of asbestos were already widely known in the industry? If so, did the intermediary or suppliers to the above questions reveal an adequate warning provided by the supplier to the intermediary or adequate intermediary sophistication, the analysis proceeds and so should detailed discovery. Did the supplier actually and reasonably rely on the warned or sophisticated intermediary to convey the warnings to end users? How? Did the parties have a contract dictating that the warnings would be passed along? Did the supplier receive assurance from the intermediary that the warnings would be passed along? Did the supplier receive evidence of the manufacturer’s procedures for conveying warnings to its customers? How many suppliers actually distribute asbestos-containing joint compound to the public, and which? Did the manufacturer ensure that the warnings were conveyed to the end user, and if so, how? Did the supplier receive some objective indication that the warnings were conveyed to the user? What was the company’s understanding of the circumstances to assure that the warnings were conveyed to the end user? These are standard fare in asbestos litigation. While these are relevant to the sophisticated-intermediary defense, to narrow in on the elements that Webb makes or breaks the defense, one must dig deeper. California’s Form Interrogatory No. 13.1 is a good place to start for plaintiffs’ lawyers.

Finally, as Webb holds, the supplier must have had a sufficient reason for believing it would be passed along. Did the supplier believe that its warnings would be passed along? Past dealings and course of conduct may be relevant here, as well. Did the supplier believe that the warnings would be passed along? Did the supplier receive any indications that the warnings were passed along? Did the supplier receive any indications that the warnings were not passed along? Did the supplier receive any objective evidence that the warnings were not passed along? Did the supplier receive any reasonable basis for believing it would actually be passed along? Did the supplier receive any reasonable basis for believing it would actually be passed along?

In conclusion: summary judgment and adjudication

Having conducted comprehensive discovery on the many elements of the sophisticated-intermediary defense and the case goes to trial, it is likely to arise again in the context of summary judgment or summary adjudication motions.

A supplier defendant may move for summary adjudication of the failure to warn claim asserting that the elements of the defense have been satisfied. Simply put, if the supplier provided an adequate warning and there was a reasonable basis for believing it would be passed to the consumer, its hands are clean.

Alternatively, an opportunity for a plaintiff to file an offensive motion for summary adjudication may also present itself here. The facts of your particular case will be the ultimate determinant. Again, using the joint compound example, there is a backdrop of knowledge along the road the defendant must travel at which the defense can be halted. What was the supplier’s or manufacturer’s understanding of the circumstances to assure that the warnings were conveyed to the end user? That is anything but trivial, but to the extent their understanding was inadequate, the defense fails. Assuming there is evidence in the record supporting that basis, for believing it would actually be passed to the consumer, the supplier’s hands are clean.

In summary, Special Jury Instructions are complete statements of the law as so not to mislead the jury. First, any instruction should clarify to whom the supplier’s duty to warn is owed. It is always owed to the ultimate user and cannot be discharged via satisfaction of all the elements of the defense. An Instruction that does not make this clear—but rather is actionable only if the defendant says that, so long as the supplier defendant warned anyone in the chain of distribution or conveyed the warnings to the end user, its duty is satisfied. That is simply not true.

Second, Special Instructions on the issue of sophistication, unless the manufacturer was sophisticated on the hazards and the supplier knew of this sophistication. Accordingly, we ask, what was the level of the manufacturer’s sophistication? Perhaps it knew that asbestos should not be inhaled, but it was aware of the risk of cancer and death? If its level of sophistication is inadequate, the defense fails. Assuming there is evidence in the record establishing adequate warning or sophistication, the next step is determining whether the supplier actually and reasonably relied on the manufacturer to convey the warnings to end users and the basis for believing it would actually be done. Is there evidence regarding a contract or other assurance that warning language would be included on the finished product? Of course, the supplier must be aware of anything to determine whether warning language would be included on the finished product. Did it know of the finished product? Did it know of the finished product? Did it know of the finished product? Did it know of the finished product? Did it know of the finished product?

In sum, Special Jury Instructions present a ripe opportunity for obfuscation and confusion of the sophisticated-intermediary issue. It is imperative that the jury understand the defense and that the defense must be satisfied in order for the supplier defendant to pre- vail on the theory.

Conclusion

As mentioned at the outset of this article, the supplier’s duty to warn the ultimate user of its material’s hazards is to the ultimate user, and the focus should always remain on what warnings and information ultimate end up with that user. While the supplier defendant can discharge this duty, in part, by warning an intermediary in the chain of distribution, it cannot clean its hands of liability merely warning the intermediary or selling to a sophisticated intermediary and ethically expecting that the warning will make its way downstream to end users.

There must be a basis, and evidence in the record supporting that basis, for the supplier’s belief that information regarding the hazards of the finished product will be conveyed to the ultimate user of the finished product. Without such a basis, the supplier are simply playing telephone, except that our downstream to end users.

Riggs Mittel is an attorney with Waters Kel & Paul in El Segundo, California. He graduated from the University of Southern California, Gould School of Law in 2013, where he was a member of the Order of the Coif and received the American Jurisprudence Award in 2011 for the highest grade in Criminal Law. He has been practicing in the field of mass and toxic tort litigation for three years. He received his undergraduate degree, cum laude, in Psychology from Rutgers University in 2010. He is a member of the State Bar of California.

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Twelve concepts crucial to successful voir dire

The jury is the canvas upon which your case will be painted. Take special care in painting the minor impact, soft-tissue case

By Christopher B. Dolan

Many people say that your case is won or lost during opening argument. I believe it is won or lost to a great degree during voir dire. This is especially true in a low-speed, soft-tissue case. The jury is the canvas upon which your case will be painted, displayed and judged. Choose your canvas carefully, or your creation, your case, will fail. Use voir dire not only to determine who is unsuitable to sit in judgment of your client, but to exact a commitment to resist the skepticism and prejudices that the defendants will use to win their case.

Your introduction is critical. Don’t stand behind a podium, walk out in the open and greet the jurors. Introduce yourself and state that you are honored to represent your client. Introduce your client and have the client stand up and greet the jury. Thank the jury for appearing in response to the court’s summons. Advise them that this is your opportunity to determine who is best suited to serve in this trial. I explain that it is my job to determine if they hold some prejudice, resentment, or preconception that might interfere with their ability to be fair to my client. Remind them that they have taken an oath and that it is critical that they be completely candid in their responses, whether popular or not. I inform them that it takes time, justice can be slow, but this part of the trial helps to protect the integrity of our system. Explain that the parties will turn this dispute over to them to reach a decision and that they must decide it on the facts presented in this room rather than upon personal beliefs or preconceptions. I begin to explore their prejudices while interweaving the theme of my case with the ever-present reminder that the burden of proof is ever so slight. With regard to style, I prefer the Phil Donahue approach. People are used to a talk show format. Ask pointed questions. When you discover someone who can poison the panel, don’t run from them unless the issue is about to torpedo the whole case by stating that they know your client and do not believe anything they say; or that they are a claims investigator; or a radical orthopedist who believes that no one gets hurt in these types of collisions. Running from an unfavorable opinion creates a serious hazard and makes the jury think you are hiding something. If you confront it, respectfully as a recognized and valued opinion, you will learn more about your jury and be in a better position to eliminate or reduce bias. Thank jurors for expressing their unfavorable views and recognize that they feel them strongly and deeply. Praising their honesty will encourage others to come forward. Ask whether anyone else feels that way. Use the first aberrant juror to “out” the next. Ask these potential jurors if, given the strength of their feelings, knowing nothing more of the facts, they would require your client to meet a higher burden than that provided by the law. Ask whether, if they were your client, they would want twelve jurors like them sitting in judgment on this case. Other jurors, who do not hold such strong opinions, may distance themselves from their own tendencies when they see the ugliness of these opinions. Use your challenges later to rid the panel of aberrant jurors, especially those for which the other party has shown dislike. In clearing out the prejudice you reward and bestow your trust on those who have demonstrated objectivity.

Numerous dangerous prejudices have been cultivated by the insurance industry in order to defeat juror empathy and to encourage the rejection of a plaintiff’s claim for damages. This article will focus on only a few. I will identify and discuss subject areas, or “concepts,” critical to address, confront, and/or diffuse during voir dire.

Concept No. 1 – Who is responsible for their injuries?

The first issue to be addressed is the identity of the person responsible for taking them away from their lives and bringing them to the thankless task of jury service. Advise them that the parties have been unable to resolve their disputes and, for good reason, your client felt it necessary to bring the matter to the court for resolution. It is helpful to remind jurors that this is the method provided by our society for the peaceful resolution of conflicts. Ask whether anyone thinks that people should avoid bringing a lawsuit if they believe that they have been injured as the result of a collision. You might introduce the subject by stating:

“My client is the plaintiff. She is the party who has filed this action. This action concerns and brings the following issues: whether plaintiff was injured as the result of a collision; whether the defendant was at fault; whether defendant is insured and, if so, by whom; whether a lien should be placed on the recovery for medical bills; the extent of plaintiff’s injuries; and the amount of damages to be awarded to plaintiff.”

Ask if anyone feels so much resentment about being required to appear for the length of the trial, that they might be unfair to either party, or might allow it to interfere with their ability to listen attentively or reach an impartial judgment. Find out whether they have ever been parties to litigation. Because of business people who have been sued numerous times and resent anyone bringing an action. Ask any former plaintiffs about the type of case in which they were involved and whether they were satisfied with the outcome. This will help the jurors with the concept of the “other” identified, see Concept No. 2. Ask whether their experience would cause them to favor one side or the other, or would affect their ability to listen to, and decide the facts in this case. Get a commitment from them to separate their experience from your client. It is important that they divorce themselves from the prior experience in front of the panel. Identify individuals with prior juror service, and ask them if that experience was favorable or unfavorable. Determine whether it was a criminal or civil case, and if they resent that they may have to serve again. Determine if they reached an outcome and whether that juror was the foreperson. (Juries tend to give more weight to the opinions of experienced jurors and the fact that they were foreperson reveals them as an opinion leader or consensus builder so you need to carefully monitor their prejudices.)

Concept No. 2 – The “other” Identified

Perhaps one of the most dangerous challenges facing a trial lawyer is the common juror belief that your client’s loss has not actually happened because the juror has never had such an experience. This emotional disconnect discourages juror empathy and allows jurors to punish plaintiffs for making claims that are “outrageous.” It permits jurors to render an opinion devoid of any personal risk involved in receiving a similar rejection in their own lives, because this will never happen to them or someone they know. Some people seek to deny your client’s injury as a way of reducing their own sense of vulnerability. It is essential to demonstrate that collisions affect members of the jury, their friends and family. Put the face of their mothers, brothers and friends on the plaintiff. Even if that juror is challenged for cause, you will have educated the rest of the jury.

Delve into the details of any collisions and/or litigation in which the juror, a friend or family member has been involved. By demonstrating the sheer number of people who have been involved in, and/or injured in, automobile collisions, you have gone a long way to removing the “otherness” of your client’s experience. Be careful to weed out any jurors who may resent your client for doing something that they find distasteful — filing suit. On the other hand, many jurors who themselves have not sued, or know someone who has not sued, regret the decision not to sue as they, or their relation, still experience pain. This approach also demonstrates an interest in the jurors and furthering your relationship with them.

Sometimes a juror has settled an accident claim with an insurance company.

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While you may not ask about insurance, you may ask about the settlement. If the case settled, ask whether they were satisfied with the result. If so, this juror can be dangerous to your case. If they were able to resolve their case and felt good about the experience, they may think that reasonable people settle and greedy people go to trial. They also have a preconceived notion of the value of a case based upon their own experience.

Explore the jury’s collective experience with injury as well. Go back to the people who indicated they knew individuals who had suffered injuries in collisions. Determine the type of injuries. Some people have had loved ones die in collisions. Ask if they could resolve their case and felt good about the overall experience. If so, ask how many years it has been, in order to show the jury that real people suffer for a long time from these injuries. Make sure that jurors with related experience commit to evaluating the case based only on the facts you present in trial.

After canvassing the jury for collisions and collision-related injuries, explore any neck or back injuries from other causes. Ask if they have ever heard the term “soft-tissue injury.” Define it and take ownership of the term. State that a soft-tissue injury is where muscles, ligaments, and parts of the body other than the bones have suffered injuries such as tears, ruptures, strains and lacerations. Determine who has suffered a soft-tissue injury in the back. Let those who have had injuries that have persisted convince the others that these injuries are real. Use your jurors as teachers so that you don’t have to impose your theory on them.

**Concept No. 3 – Individual responsibility**

Many jurors will adopt the view that people need to accept responsibility for their own actions and their own lives. The defense will suggest that your client should do so. Own this defense theory before they speak. Ask whether anyone feels that your client should just “suck it up” or “tough it out.” Live with the pain and not seek to hold someone else responsible for it. Ask how they might react if someone wronged them, or a loved one, and refused to make them whole. The concept of individual responsibility has become twisted to the point that injured persons are seen as sleazy victims out to seek monetary gain through opportunistic behavior.

Exploring the concept with the jury can diffuse the defense’s ability to convince them of the strength of the argument. In the end, ask for a commitment that they will not, based on the concept of personal responsibility, hold your client or the defendant to a higher standard, or treat them with skepticism, either for denying responsibility for the collision, or for deciding to go to court to hold the other person accountable.

**Concept No. 4 – People who look good aren’t injured**

The fourth concept is the belief that people who can walk and talk are not seriously injured. I usually begin by recounting my mother’s refrain that “you can’t judge a person’s insides by their outsides.” I ask the jurors whether they have a preconceived notion that injured people look or act a particular way. I do this to get the issue out there, get them to consider it, and again, get their commitment to be led by the evidence, not by prejudice.

**Concept No. 5 – Stereotype of rear-end-collision plaintiffs and their attorneys**

The insurance industry has waged a campaign through the media to convince the public that your client is a faker, you are a money-grubbing liar, and this is a scam. Deal with it straight up and you will gain credibility, stay away from it and you may get slapped with the stereotype. I like to state the obvious: “We have all seen negative stereotypes projected in the media about certain types of people. Certain ethnic groups are classified as lazy, opportunistic, and/or criminal. Certain professions are classified as lazy, opportunistic, and/or criminal. Certain politicians, the cab driver, the plumber with his backside exposed, the greedy stock broker, the get-rich-quick con-merchant is held in disdain. These stereotypes and prejudices are not facts or evidence and have no place in a courtroom. Attorneys are stereotyped as well. We are the butt of jokes – joke books written about attorneys. Many people have preconceived notions about lawyers. We get called ‘ambulance chasers,’ ‘crooks,’ ‘liars,’ ‘wannabes,’ ‘instigators of controversy.’ While there will always be individuals that will live up to those stereotypes, on the whole, we work hard and are accomplished people. I can state my opponent is none of these things and neither am I.”

Follow this up with questions concerning their notions about attorneys who represent plaintiffs, and whether they have had any personal experiences with attorneys which might influence their decision-making ability. Ask whether they are aware of any prejudices against individuals seeking compensation for losses in court and how they feel about that.

**Concept No. 6 – The burden of proof**

This is your chance to reinforce your relatively light burden. By this time you have determined who has had prior jury service and whether it was in a criminal or civil case. It is a critical time to distinguish the burden of proof from your preponderance of the evidence standard. Call out, by name, the jurors who have sat on criminal trials. Describe the difference between the proof standards. Demonstrate the difference by moving your hands up and down
to show how slight your burden is compared with the “beyond a reasonable doubt” standard. Using an example such as O.J. Simpson, who was found not guilty in the criminal prosecution because of the heavy burden of proof, but liable in the civil trial by a preponderance of the evidence, can be effective.

I like to get individual commitments from jurors who have served in criminal trials, promising that they will not use the higher standard in this case.

Concept No. 7 – No one paid for my pain

Jurors are sometimes reluctant to compensate someone for an injury of a type for which they themselves may never have received compensation. Those who have been injured, or know people who have been injured, and who have not been compensated, may be unwilling to compensate your client. This is especially true for jurors with back injuries that were not caused in a compensable event. Those jurors with personal or familial experiences involving old football injuries, industrial accidents, disease, chemotherapy, burns as children, diabetic amputation, or the like, may deny recovery out of jealousy or resentment. In conducting your examination, gauge whether they will see your case through the filter of their own tragedy. I suggest asking about all injuries that they have sustained, as well as those sustained by loved ones. Find out whether they or their loved ones continue to experience pain, and if so, whether jury service would detract from any care they may need to render. Ask whether the fact that this individual had no redress against another party would influence their ability to be fair to your client.

Concept No. 8 – The relative value of injury

People have difficulty determining the value of injury. Many have had no experience in determining the value of pain and suffering. Some have experience from prior dealings with their own collisions. Some have had worker’s compensation claims. Some have read about large verdicts that offended them. Find out who is dead set against awards for pain and suffering and/or who may have an artificial ceiling on an award unless you prove an intentional act or malice. It is important that you raise the issue because many people don’t even know they have this prejudice unless you expose it.

Ask whether, if you prove that the defendant’s negligence caused the collision, and your client is entitled to compensation for property damage, wage loss and medical expenses, any jurors believe that they could not, and would not, award damages for pain and suffering. Find out whether anyone believes that it is wrong to compensate people for pain caused by the negligence of another; or whether there is a maximum, or floor, that they would or would not award for those injuries.

Ask whether those who have suffered pain would judge your client’s injuries against their own, or those of a loved one, and think that your client should feel grateful that they were not worse. Remind them that this case is about your client’s injuries, and the facts and evidence demonstrating this injury, pain, and suffering. The jury must be reminded that its role is to weigh these facts and determine what that injury means to your client and her life and ultimately, if they find the defendant responsible, to compensate your client for the injury and pain your client has suffered.

Some jurors may have had an on-the-job injury and made a worker’s compensation claim. Workers compensation does not compensate claimants for pain and suffering. It is important to discuss this difference with jurors who have had a worker’s compensation claim. This may allow you to determine whether their experience would color their ability to listen to these facts and follow the law in this case, despite not having been compensated for that type of damage themselves.

Concept No. 9 – Tort reform

Many potential jurors believe that there are too many frivolous lawsuits. They do not know what that means, but they think that an epidemic of “those complaints” has occurred. Likewise, many believe that verdicts are out of hand and driving up insurance rates. You have to address this right up front. Your willingness to do so will demonstrate that your case is not one of those frivolous cases.

I usually start by asking the jurors if anyone thinks that there are too many lawsuits being filed, and if so, why. Separate those with personal experience from those who have just heard it in the news or through those nice letters that their insurance companies send them. For those with personal involvement that has been business-related, ask if they were motor vehicle cases or business lawsuits. Ask if they are aware that the majority of litigation involves businesses suing businesses and that injury complaints have been on the decline. Ask whether they know anyone who has filed a frivolous lawsuit, and whether they believe your client’s lawsuit is frivolous. Ask whether, if the case were frivolous, they think the court would have let it get this far in the legal system. Ask if they believe that this type of case should not be brought to court. Ask if they were involved in any of the recent insurance-sponsored initiatives to limit citizens’ rights to bring lawsuits. Ask whether they have given time or financial support to any organization designed to limit the number or type of lawsuits that can be brought. Ask if they think that people should not have the right to file lawsuits.

Ask if they believe that some other system is preferable to ours. Ask whether their beliefs will affect their ability to be fair and impartial to your client.
Voir Dire Concepts, continued from Previous Page

Appellate Reports

Cal Supreme Court rules in Augustus v. ABM that the Brinker standard applies to rest breaks and that “on call” rest breaks are not compliant with the law.

By JEFFREY I. EHRLICH
Augustus v. ABM, Security Services, Inc.

(2016) Cal 4th

Who needs to know about this case? Lawyers handling claims that a California employer failed to give employees a proper rest break.

Why it’s important: Reversing the Court of Appeal, the Supreme Court holds that (a) the Brinker “reliefed of all duty” standard applies to rest breaks, in addition to meal breaks; and (b) that under this standard, so-called “on call” rest breaks are not compliant with California law. The Court reinstated a $90 million judgment in favor of the plaintiff, class which had been entered on summary judgment.

Synopsis: ABM employs thousands of security guards at residential, retail, office, and industrial sites throughout California. Augustus, a former ABM guard, sued ABM in 2005, alleging that it failed to provide her with lawful rest breaks. The trial court subsequently consolidated the matter with similar actions filed by two other ABM guards. Plaintiffs filed a master complaint, which alleged ABM’s failure “to consistently provide uninterrupted rest periods” as required by state law. During discovery, ABM acknowledged it did not relieve guards of all duties during rest periods. In particular, ABM required guards to keep their radios and pagers on, remain vigilant, and respond when needs arise, such as escorting tenants to parking lots, notifying building managers of mechanical problems, and responding to emergency situations.

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- Two-time CalAAA Appellate Lawyer of the Year

California law governing working conditions stems from two sources, Wage Orders issued by the Industrial Welfare Commission (“IWC”) and the Labor Code. As relevant here, Wage Order no. 4, subdivision 12, provides, in relevant part, “Every employer shall authorize and permit all employees to take rest periods.Authorized rest period time shall be counted, as hours worked for which there shall be no deduction from wages.” In addition, Labor Code section 226.7 prohibits employers from “requiring any employee to work during any meal or rest period...” The Court held that the rest-break provision in Wage Order 4 is most logically construed to forbid on-duty or on-call rest breaks. The Court held that the IWC could have allowed on-duty rest periods, as it did for some meal periods, such as lunch breaks.
In December 2014, Drobot and his companies used the attorneys for defamation and related claims, based on their statements to the media. The lawsuit alleged, in essence, that Drobot had falsely stated or implied that Drobot and his affiliates had been engaged in a scheme to purchase and use cheap counterfeit screws that were implanted in patients instead of FDA-approved hardware, and that the counterfeit-screw scheme was related to the federal charges for which Drobot pleaded guilty. Given the practical realities of rest periods, an employer cannot satisfy its obligations under Wage Order 4, subdivision 12(A) while requiring that employees remain on call.

The Court held that the attorneys’ statements to the media involved issues of public interest, and so fell within the scope of the anti-SLAPP statute. The Court held that the motion was properly granted because Drobot and his co-plaintiffs could not establish that they were reasonably likely to prevail on the merits of their claim. This was because the lawyer’s statements to the media fell within the absolute privilege of the California Constitution (disclosure (d) for “a fair report” of the contents of a judicial proceeding).

The Court explained that the media typically relies on the fair-report privilege, but that it also protects those who communicate information to the media. As relevant here, the Court explained that an attorney cannot make defamatory statements in a complaint and then report the same alleged facts, as facts, to the media with impunity. The statements protected by the privilege must be a report about the proceedings themselves, or what was said in those proceedings. Hence, the attorneys would be privileged if the fair-report privilege as long as their statements would be understood by a reasonable listener or viewer to be a description of what had been alleged in the complaint, as opposed to statements of fact.

The Court noted that the media reports are viewed in their entirety, in the context in which they were made, the only reasonable conclusion is that the statements refer to the allegations in the Cavaleri complaint.

Short(er) takes:


Patricia Barry, an attorney, was disciplined by the State Bar. She filed a lawsuit in the Superior Court against the State Bar, alleging that the discipline was retaliatory and discriminatory. The Bar filed an anti-SLAPP motion, which was granted.

The trial court’s order was reversed on appeal, however, based on Barry’s argument that the courts lacked subject-matter jurisdiction over her claim against the Bar. The Supreme Court reversed. It held that the absence of subject-matter jurisdiction meant that Barry could not prevail on her claims against the Bar, and that this ruling was sufficient to satisfy a ruling against Barry, including a fee award, under the anti-SLAPP statute.


Plaintiff Whittney Engler suffered personal injuries following a knee surgery after using a Polarcare cooling machine. In an earlier published opinion in the case, the Court remanded the damage award as excessive and as the result of inflammatory comments by Engler’s trial counsel. On rehearing, the Court affirmed this aspect of its earlier decision. Its new decision also includes a published discussion of the requirements of section 998, in which the Court held that, because Engler’s 998 demands did not comply with the statutory requirements, she was not entitled to cost shifting, under the statute. The statute provides that an offer under section 998 must include “a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted.” Engler’s offer did not include any acceptance provision. The Court held that the acceptance provision was mandatory, and that the failure of Engler’s offer to include any language that satisfied the provision meant that her offer was not valid and therefore could not trigger any cost shifting under section 998.

New trial; trial court obligation to grant where jury verdict is “unnecessarily unsound.” Ryan v. Crown Castle NG Networks, Inc. (2016) __ Cal.App.5th __ (Sixth Dist.).

Ryan sued Crown Castle NG Networks (“Crown”) for breaching its agreement to provide him with stock options as a term of employment. The jury was instructed to determine the value of the options if it found for Ryan on any of his contract-related claims, and to award him damages for lost compensation, but only if it ruled on behalf of Ryan on any of his tort claims. The jury’s special verdict accepted two of Ryan’s contract-based claims, but did not determine the value of his options. It also awarded him $72,522 in damages, but rejected his tort claims. Crown moved for new trial, but the trial court denied the motion, stating that it was unable to substitute its judgment for that of the jury. The trial court not only has the power to grant a new trial when one is warranted, but is under a duty to do so when the record shows that the jury’s verdict was “unnecessarily unsound.” Here, the court should have granted a new trial because the jury failed to award damages on the contract-based claims it sustained, and awarded damages under the tort claims that it rejected.

Jeffry J. Ehlich is the principal of the Ehlich Law Firm, with offices in Encino and Clarendon Hills, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.
Profile: Joseph Brent
The former prosecutor enjoys challenge of tough liability cases

By Stephen Ellison

“I always thought you can make the most impact in a socially responsible way through being a plaintiffs’ lawyer. That’s what I wanted to do,” said Joseph Brent, the principal for San Rafael-based Brent, Fiol & Pratt LLP. “But when I came to California (from Chicago), I was totally unfamiliar with how the system worked out here and how the courts worked here, and I told myself I need to get some experience.”

“I was fortunate enough to get a job at a good law firm in San Francisco, and while there, I did defense work. I handled a plaintiffs’ class action there too, at a good law firm in San Francisco, and I got a lot of experience about five years there, I left and started my own practice.”

Brent followed his stint with the Cook County state’s prosecutor’s office by becoming a partner at the Chicago-based firm of Fumagalli, Tescon, Hyman & Brent, Ltd. While there, he focused his trial practice on personal injury and class action cases before relocating to the West Coast in 2010.

Brent’s decision to move west came upon the very suggestion from his sister and brother-in-law. “They really encouraged me to come out to California to practice law, and so I took the plunge, he said. “And I can tell you, the Illinois bar is a lot easier than the California bar. So that was a daunting thing for me. The passage rate in Illinois was between 85 and 90 percent, and California is about 50 percent.”

Due diligence

After gaining the necessary experience while working at a boutique firm in San Francisco, Brent decided to go it on his own, and after that first case basically put his practice on the map, he maintained the momentum.

Another case referred to Brent was passed over by a number of different firms. It involved a young man crossing the street who was hit by a police vehicle that was purportedly responding to a call but did not have its lights and siren on. The police report put the plaintiff 30 to 50 feet outside of the crosswalk, basically speeding through the intersection.

“T here was no chain of custody that was appropriate for the testing done on the blood. Then, the police report had my client well out of the crosswalk, and that really was not the case; it was totally made up,” Brent recalled.

One witness in the case was an illegal immigrant from Guatemala who shortly before trial had to be extradited. He had been sent back to Guatemala, and Brent’s firm went down there to bring him back to the U.S. so he could testify in the case.

“We had people go to Guatemala, and then we had him re-admitted for the purpose of giving his testimony in the case,” Brent said. “That case was all over the place.”

Cruel run over by taxi

More recently, Brent went to trial in a case involving a man riding his electric bicycle in San Francisco. The bike conked out on Sixth Street, Brent said, and his client had been walking it across the street when a yellow cab ran him over. A police officer claimed to be an eyewitness to the accident and said the cyclist had taken a sudden left turn in front of the taxi cab, and there was nothing the cab driver could do.

“We got video from the cab, and it showed not only that the police officer was not anywhere in the cab frame, but also that the cab was speeding,” Brent said. “If it had just been going the speed limit, the accident would have been completely avoided.”

Brent got a $1.5 million verdict.

Finally, one of Brent’s most memorable cases involved “a star-crossed bicycle accident.” Nextdoor CEO Nirav Tolia pleaded no contest to leaving the scene of an accident. For Brent’s part, the civil case ended up settling for an undisclosed amount. “The irony is clear: Here’s this CEO outing this company for its neighborly values, and in a situation that calls for the precise values he’s touting, he runs away,” Brent said.

Visually savvy

In trial, Brent’s approach typically centers on telling his client’s story through visuals, rather than through a long, drawn-out narrative. He believes whole-heartedly in showing the jury exactly what happened to his client and putting them at the scene so they may see what it looked like. That technique, he said, is very helpful to explaining why the defendant is at fault.

“So in the (taxi cab) case, we had the video broken down frame by frame so (the jury) could go through it themselves and see what could be seen,” Brent said. “His firm also uses computer-generated animations in cases where reconstructing accident scenes and property flaws better illustrates a defendant’s wrongdoing.”

“I can tell you that. Chef’s work is so much supporting my move, and they have been walking it across the street when a yellow cab ran him over. A police officer claimed to be an eyewitness to the accident and said the cyclist had taken a sudden left turn in front of the taxi cab, and there was nothing the cab driver could do.”

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In the criminal case, a judge reduced the charge from a felony to a misdemeanor and ultimately Tolia pleaded no contest to leaving the scene of an accident. For Brent’s part, the civil case ended up settling for an undisclosed amount. “The irony is clear: Here’s this CEO outing this company for its neighborly values, and in a situation that calls for the precise values he’s touting, he runs away,” Brent said.

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Toxic-tort litigation
A ruling on the “sophisticated-intermediary defense” highlights a good year for toxic-tort plaintiffs at the California Supreme Court

BY RAPHAEL METZGER

In 2016 the California Supreme Court continued its venerable tradition of affording justice to workers who suffer debilitating occupational diseases from industrial exposure to toxic chemicals.

In Webb the court limited the scope and applicability of the sophisticated-intermediary defense, which had allowed chemical manufacturers to shift the blame for injuries caused by their toxic chemical products to California employers.

In Ramos the court limited the scope of the component part defense, precluding its application to industrial injuries caused by occupational exposure to manufacturers’ industrial products not incorporated into finished end-use products.

In Bristol-Meyers the Court investigat-ed the specific-jurisdiction doctrine to allow plaintiffs to sue in California the manufacturers of toxic chemical products who conduct substantial business activities but who are not amenable to general jurisdiction in this state.

Lastly, in Lanier and Howes the Court extended the duty of care in the handling of toxic chemicals on the part of manufacturers and employers to members of a worker’s household who are exposed to toxic chemicals brought home by exposed workers. Altogether, it was a good year in the California Supreme Court for injured workers and their families.

Webb v. Special Electric

Perhaps the most important case of 2016 was the California Supreme Court’s opinion on the sophisticated-intermediary defense in Webb v. Special Electric Company, Inc. (2016) 63 Cal.4th 147. For years this defense had been the bane of plaintiffs’ toxic-tort attorneys. In Webb, our Supreme Court adopted the defense, but did so in a manner that is actually quite favorable to plaintiffs; the court identified so many factors that typically present disputed issues of fact that it will be exceedingly difficult for defendants to obtain summary judgment based on the defense.

Webb was a truck driver who developed mesothelioma from occupational exposure to asbestos from delivering asbestos pipe to job sites. Special Electric Company, Inc., brokered the sale of raw crocidolite asbestos to Johns-Manville Corporation, which made asbestos-containing Transite pipe. Webb sued Special Electric for failing to warn of the toxic hazards of its asbestos.

A jury found in favor of plaintiff, but Special Electric moved for judgment notwithstanding the verdict, arguing it had no duty to warn a sophisticated purchaser like Johns-Manville about the health risks of asbestos, and the trial court granted the motion. A divided panel of the Court of Appeal found error and the California Supreme Court granted review.

While the court adopted the sophisticated-intermediary defense, it found that “[a]lthough the record clearly shows Johns-Manville was aware of the risks of asbestos in general, no evidence established it knew about the particularly acute risks posed by the crocidolite asbestos Special Electric supplied.” Moreover, the record did “not establish as a matter of law that Special Electric actually and reasonably relied on Johns-Manville to warn end users . . . about the dangers of asbestos.” Finding that substantial evidence supported the jury verdict, the court held that the trial court erred in granting judgment notwithstanding the verdict.

In so doing, the Supreme Court adopted a two-part test for applicability of the defense. “Under this rule, a sup-plier may discharge its duty to warn end users about known or knowable risks in the use of its product if it: (1) provides adequate warnings to the product’s immediate purchaser, or sells to a sophisticated purchaser that it knows is aware or should be aware of the specific danger, and (2) reasonably relies on the purchaser to convey appropriate warnings to downstream users who will encounter the product.”

Asbestos has been a component of brake pads and linings, clutch facings and various gaskets for many years. Millions of brakes or clutches made in the United States, a Chinese manufacturer used it as late as 2012, forcing the recall of thousands of cars.
The court observed that “the sophistication of a product’s purchaser, standing alone, may not be sufficient to discharge the seller’s duty to warn.” As the Second Restatement explains, providing thorough warnings to the immediate purchaser is “not required in cases where it is evident that the seller from the nature of the product supplied, should reasonably assume that the product is not the ultimate consumer of the product.” However, “the sophisticated user doctrine requires that the supplier must have reasonably known that the product was not the ultimate user of the product.” (Id. at p. 150.)

“Under the sophisticated-intermediary doctrine’s first prong, generally the supplier must have provided adequate warnings to the intermediary about the particular hazard.” (Id. at p. 188.) “In some cases the buyer’s sophistication can be a substitute for actual warnings, but this is limited to situations only if it is clear that the buyer had knowledge about the material supplied that it knew or should have known about the particular hazard.” (Id.) “This narrow exception to the duty to warn is consistent with... recognition that knowledge of a product’s risks is the equivalent of prior notice. If a purchaser is so knowledgeable about a product he should have known about the product’s particular dangers, the seller is not required to give actual warnings.” (Id. at p. 188.)

To establish a defense under the sophisticated-intermediary doctrine, a plaintiff must show that “(1) the product arrived at its destination in a defective condition and caused injury to the plaintiff, (2) the defendant sold the product to the supplier, and (3) the supplier has sufficient knowledge of the danger to warn the ultimate user.” (Id.) “The third factor for assessing the reasonableness of relying on an intermediary explores whether it was feasible for the product to convey warning directly to end users.” (Id.) “Similarly, the first two factors focus on the product and the intermediary, this factor focuses on what the supplier can reasonably be expected to know about the ultimate user’s knowledge of the product.” (Id.) “The court noted that relevant concerns for the second factor–the likelihood that the intermediary will warn–include, for example, the expertise level of the intermediary.” (Id.) “If the goods are packaged it is entirely feasible for the manufacturer to include and appropriate warning on the package.” (Id.)

Importantly, the court held that “[t]he inquiry will typically raise questions as to the nature of the product to which the warning is to be given.” The court also held that “[i]f the sophisticated user defense, the sophisticated-intermediary defense applies to failure to warn claims sounding in either strict liability or negligence.” (Id. at p. 187.)

Ramos v. Bentrign Specialties, Inc.

In Ramos v. Bentrign Specialties, Inc. (2014) 201 Cal.App.4th 1040, the court noted that the Supreme Court held that the component-part defense does not exonerate suppliers of toxic industrial materials that cause an injury when used by workers in industrial manufacturing processes. Ramos was a metal-founding worker who developed interstitial pulmonary fibrosis. He used numerous suppliers that supplied industrial products for use in the foundry’s manufacturing process, asserting that the products, when used in their intended fashion, produced harmful fumes and dust that were a substantial cause of his lung disease. The defendant suppliers demurred, relying on Meston v. Western States Metals (2012) 205 Cal.App.4th 81, a decision of Division 3 of the Second Appellate District, which held that under the component-parts doctrine, a supplier of materials was not liable for injuries suffered under circumstances similar to those in Ramos. In reliance on Meston, the trial court sustained defendants’ demurrer without leave to amend.

The Court of Appeal in Ramos disagreed with the analysis and conclusion in Meston. The Court agreed with the reasoning of the recent parts doctrine was not applicable because Ramos’ injury had not been caused by a finished product into which the supplier product had been incorporated but instead by the supplier product itself. The Supreme Court granted review to resolve the direct conflict between the Court of Appeal decision and Meston. The Court agreed with the reassessment of the Ramos court’s decision and affirmed, writing: “As the Court of Appeal observed, the plaintiff’s injury was caused by defendants by the component parts doctrine does not apply when the product supplier has not been incorporated into a different finished or end product but instead as here, itself allegedly causes injury when used in the manner intended by the product supplier.” (Ramos, 63 Cal.4th at p. 504.)

Bristol-Myers Squibb Company v. Superior Court

Bristol-Myers Squibb Company v. Superior Court (2016) 1 Cal.5th 783, is an important decision that the California Supreme Court issued in August on the issue of personal jurisdiction. Bristol-Myers, a pharmaceutical manufacturer, conducts significant business and research activities in California but is not incorporated or headquartered here. Complaints were filed in San Francisco Superior Court for 678 persons – 96 California residents and 582 nonresidents, all of whom claimed to have taken the drug Plavix and suffered adverse consequences.

Bristol-Myers moved to quash service of summons on the ground that the court lacked personal jurisdiction over Bristol-Myers because it was neither incorporated nor headquartered in California, but that the company’s extensive California activities were sufficiently related to the nonresident plaintiffs’ suits to support the invocation of specific jurisdiction under Franchise Companies Inc. v. Seafoods, Inc. (1996) 14 Cal.4th 434. Accordingly, the Supreme Court affirmed the judgment of the Court of Appeal which held that Bristol-Myers was subject to personal jurisdiction on the basis of specific jurisdiction.

Kesner v. Superior Court (Pneumo Abex) and Haver v. Bristol-Myers

The California Supreme Court closed out the year with a blockbuster decision issued on December 1st in two “take-home” asbestos exposure cases: Kesner v. Superior Court (No. S215934) and Haver v. Bristol-Myers Company (No. S215939).

The plaintiff in Kesner filed suit, claiming that he suffered exposure, in part, from clothing his uncle wore home from work at Pneumo Abex. The trial court granted Pneumo Abex non-suit at the start of trial after concluding that the company did not owe a duty to household members such as Kesner. The First District Court of Appeal reversed. While acknowledging the danger of limitless liability, the court said “the balance falls far short of terminating liability at the door of the employer’s premises.”

The plaintiff in Haver alleged that she was injured when a manufacturer of the clothing of her former husband, who allegedly came into contact with asbestos while employed at RNSP Railway Co. predecesor, Santa Fe Railway, in the 1970s. BNSF moved to dismiss the complaint, relying on Campbell v. Ford Motor Co. (2012) 298 Cal.App.4th 145, the trial court sustained the demurrer without leave to amend, and the Second District Court of Appeal reversed.
A minor compromise
Where the funds go when resolving a minor’s claim requires due consideration

By Miles B. Cooper

The lawyer sat with his client’s parents in the mediation room. They discussed the final offer and determined it was acceptable. Time to settle their minor child’s case. The parents turned to the lawyer. “That’s a lot of money for a 12-year-old. Can you tell us more about that structure thing you were talking about?”

“Sure,” said the lawyer. “We should talk about it and the process we now need to go through. The court restrictions on what can be done with the money.”

Minor’s settlement funds will be set up. The typical method is blocked accounts and structured settlements. Courts are also agreeable to certain 529 plans – savings plans for college tuition.

• Blocked accounts

A blocked account requires court approval to release bank funds. These accounts require little effort on a lawyer’s part for frustating for a parent – unfamiliar with bank rules – to try to get one set up with a bank manager – unfamiliar with court rules. Additionally, the lawyer will often get a call when the minor turns 18 and needs the account unblocked. Interest on blocked accounts also tends to be awful.

• 529 Plans

The IRS created a tax-advantaged method to save for college, known as a 529 plan. The interest earned is not taxable, one advantage over a blocked account. The interest rate tends to be better than blocked accounts and many structures as well. The funds can be disbursed as one sees fit instead of a rigid structure schedule. But the funds can only be used for certain educational expenses. If using this tool for a minor, one will need a special tool known as a California Uniform Transfer to Minor’s Act (CUTMA) 529. Not difficult, but a nuance.

Otherwise the parent technically owns and controls the 529 (and could theoretically gift it to someone else.)

Earn your keep

The court also determines whether the attorneys’ fees requested and costs are appropriate for the work performed. Don’t be shy about outlining the risk, expense, and time spent handling the case – some courts are not shy about cutting fees. This goes into the supporting declaration. If the case is particularly difficult and one will be seeking a higher fee than usual, consider making a motion to approve the fee at the beginning.

A good settlement looks easier at the end than at the beginning. By law, costs in minors’ cases are deducted before fees are taken. In cases where both the parent and child are receiving funds, make sure they understand that the more money allocated to the minor, the lower the overall fee. Courts are more likely to approve the compromise, appreciate that the clients were counseled on it, and it is in accord with one’s ethical duties (even if it is not in one’s own financial interest).

Outro

The lawyer and family discussed the various options available. After a few days reviewing various structure proposals and 529 plans, the family decided on what was right for their child. The court approved the petition a couple months later.

Miles B. Cooper is a past president of the San Diego Bar Association. A monthly column emanating from Miles’s experience, wisdom, and an interest in promoting the public good. He represents people with personal injury and wrongful death cases. He has represented victims and survivors in all manner of personal injury claims in all manner of personal injury claims.

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Los Angeles Times - November 21, 2014

L.A.’s Catholic Archdiocese Reaches $10 Million Settlement With Sex Abuse Victims
abc News - March 15, 2013

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Randall H. Scarlett, Esq.

SCARLETT LAW GROUP
(800) 262-7576
www.scarlettlawgroup.com
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