ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

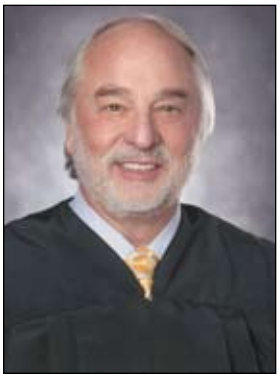
abtl REPORT

Volume XVIV No. 1 *Spring 2012*

Bag Lunch: Inside the Courtroom of Judge Joel M. Pressman

By Ross H. Hyslop

On January 18, 2012, Judge Joel M. Pressman invited ABTL members to a brown bag lunch presentation in his courtroom, where he discussed his approaches to case management, law and motion, civility and decorum, and trials. Judge Pressman spent nine years as a Superior Court Judge in Vista before moving to downtown San Diego, where he has presided over an independent calendar (IC) department for the past two years.



Hon. Joel Pressman

Case Management

Judge Pressman handles approximately 750 cases on his docket. Having practiced as a civil litigator for many years before his appointment to the bench in 2001, and in particular having had substantial trial experience when he was a practicing attorney, Judge Pressman emphasized that he understands the pressures attorneys face on a daily basis. Consequently, he wants his courtroom to be comfortable for attorneys, and "as easy as possible to try a case." For example, he places no restrictions on attorney *voir dire* and will let counsel ask as many questions as they wish "until you ask one stupid question," at which point he will intervene.

Despite his desire for comfort, Judge Pressman dislikes anyone appearing in court in casual clothes, and will excuse anyone from his courtroom who is wearing jeans or clothes he deems "too casual." He also will not allow any attorney

(see "Pressman" on page 10)

Product Manufacturer May Not Be Held Liable in Strict Liability or Negligence for Harm Caused by Another Manufacturer's Product.

By Christian S. Scott

Christian S. Scott

Many will see the recent California Supreme Court decision in *O'Neil v. Crane Co.*[1], as a victory for asbestos manufacturers defending strict products liability claims. While the court's holding is useful to defendants against these types of claims, many will do well to recognize its limits.

Facts

On January 12, 2012, the Court held that a product manufacturer may not be held liable in

(see "O'Neil v. Crane Co." on page 16)

Inside

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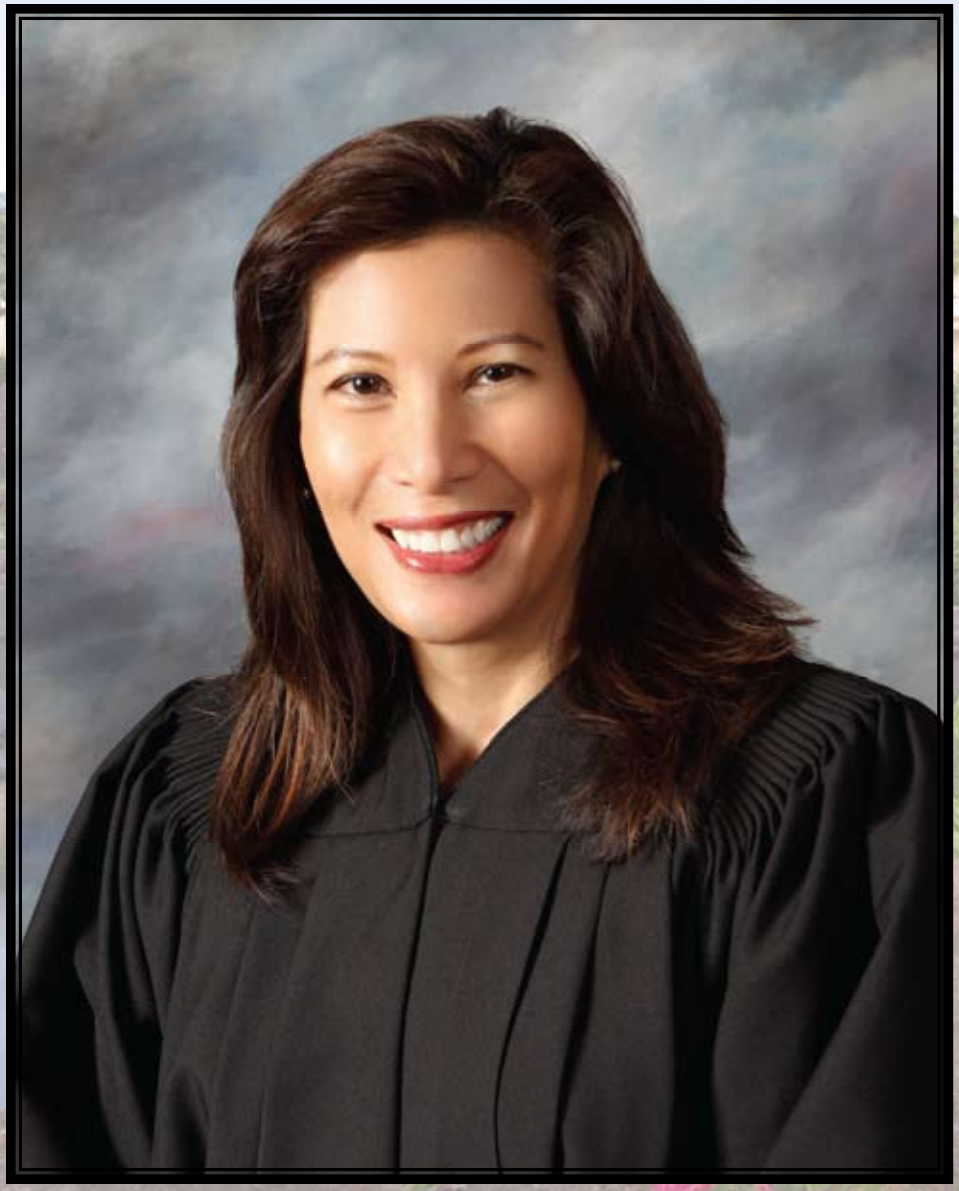

Please join us for an intimate interview with

CHIEF JUSTICE TANI CANTIL-SAKAUYE

by Justice Richard Huffman

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President's Letter

Celebration of the Trial Lawyer

By Hon. M. Margaret McKeown

United States Circuit Judge, Ninth Circuit Court of Appeals, President ABTL San Diego

Hon. M. Margaret McKeown

It is a privilege to serve as the ABTL president for the coming year. You might ask, what is an appellate judge doing as head of a trial lawyers' organization? A good question. Before joining the bench in 1998, I was a trial lawyer in Seattle and Washington, DC for almost twenty five years. As an appellate judge, I review hundreds of trial transcripts every year and see the trial court from a different perspective. I also sit as a trial judge by designation in the Southern District of California and the Western District of Washington, my two court homes. So it is no surprise that my inaugural note is a celebration of the trial lawyer.

Trials are the most public face of the law. While more and more lawyering occurs outside of the courtroom every year, there is more and more pressure to put courtrooms on display, especially through televised proceedings. For the non-lawyer public, the trial reigns supreme. From the Salem Witch Trials to *Brown v. Board of Education,* from the John Brown trial to the O.J. Simpson trial and beyond, trial lawyers have played a high-profile role in shaping American history. More than just the grit filling history books though, "trials are the most entertaining of all American spectacles, always better than the theater, and . . . much more thrilling than movies." John Waters, American Filmmaker, in *Lawyer's Wit and Wisdom* 154 (Bruce Nash & Allan Zullo eds., 1995). Thus, it should be no surprise that the American fascination with trial lawyers has spawned countless television shows, movies, and literature.

For many Americans of my generation, watching *Perry Mason* (CBS 1957-66), provided a first glimpse of the legal profession in action. *Perry Mason*, an American classic, depicts a master defense attorney who not only gets his clients off, but often unmasks the real perpetrator in open court. Ranked near the top of the American Bar Association's list of 25 Greatest Legal TV Shows, *Perry Mason* was but the first of many dramatic renditions celebrating the work of the trial lawyer. More recently, HBO's five season epic *The Wire* (2002-2008) depicts a slice of urban life in Baltimore: policing the illegal drug trade; labor unions; schools; news media; and more. With all the shoot 'em up drama one would expect from an HBO hit series, where does the very first scene in the very first episode of *The Wire* take place? A courtroom.

It is not just criminal law that so captures our cultural imagination but business law as well. For example, John Grisham's 23 novels—many of which have been made into movies and television series—typically star corporate lawyers battling it out in the courts. Grisham is a master of fictionalizing legal drama, of developing heroic or villainous litigators on the pages of his books. So too are the lawyers in Scott Turow's novels. But, of course, not all great trial lawyers are fictional.

In the informal hierarchy within the legal profession, "[a]t the very top are the litigators . . . . They're the judicial combatants who invest their egos and their personal wealth in the cases they bring into the court rooms." John A. Jenkins, *The Litigators: Inside the Powerful World of American's High-Stakes Trial Lawyers* (1989). Successful trial lawyers are a special breed who combine the poise and control of an actor, with the intellect and precision of an academic, and the ability to think and act on the fly of a race car driver. They deserve the recognition they get, and more. Although relatively few cases actually go to trial—fewer than two percent of federal civil suits filed make it to the trial phase—those that do, establish the law, and the market rate for other similar cases. Thus, trial lawyers

(see "President's Message" on page 4)

President's Message

continued from page 3

have been called "the shock troops of the profession, the ones called in when all else has failed." Emily Couric, *The Trial Lawyers* (1988). Who are these "shock troops" at the top of the field? Here are three, very different historic examples of leading American trial lawyers.

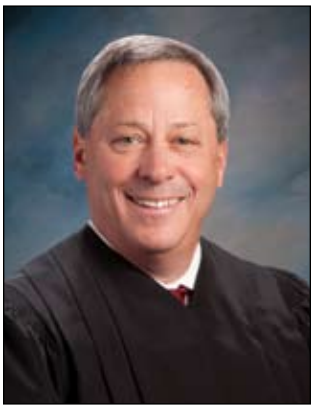
Clarence Darrow (1857-1938) grew up in small town Ohio before attending the University of Michigan Law School. Darrow's career ran the gamut from author and activist to corporate counsel to the Chicago and North Western Railway company. Over the course of his long and distinguished practice, Darrow transitioned from corporate lawyer to labor lawyer to criminal lawyer. Darrow is probably best known for his high-profile trial work in politically charged cases including the Scopes Monkey Trial (1925) and the criminal defense of teenage killers Leopold and Loeb (1924). The Scopes trial in particular is well-known even today: it pitted Darrow against William Jennings Bryan in a challenge to a law prohibiting the teaching of evolution theory in public schools and universities. Although he did not always win his cases, Darrow had an abiding faith in the American justice system and once said, "Justice has nothing to do with what goes on in a courtroom; Justice is what comes out of a courtroom." According to Darrow, "The only real lawyers are trial lawyers, and trial lawyers try cases to juries." Of course, times have changed.

Thurgood Marshall (1908-1993) was born the great-grandson of a slave and ended his career as the first African-American Supreme Court justice. In 1930, Marshall sought admission to the University of Maryland Law School but was denied because he was black. Undeterred, Marshall went to Howard University Law School. Just three years later, in one of his first cases as a young lawyer, Marshall successfully sued the University of Maryland to admit an African American applicant. It was the beginning of a long and illustrious career serving justice and advocating racial equality through the courts.

(see "President's Message" on page 5)

Brownbag Lunch: Inside the Courtroom of Magistrate Judge Mitchell D. ("Mitch") Dembin

By Robert C. Rodriguez



Hon. Mitchell D. ("Mitch") Dembin

On January 26, 2012, ABTL sponsored a brown bag luncheon with Magistrate Judge Mitch Dembin. Judge Dembin's law clerks and staff were also present and participated in the discussion. The event offered an excellent opportunity for local attorneys to have an intimate conversation with the newly appointed judge about the way he handles his courtroom.

Judge Dembin offered that his first 10 months in his new position have flown by. He joked that he did notice that immediately after his appointment, he was instantly more popular in the legal community (even among lawyers he knows do not like him), and that his jokes instantly became a lot funnier. On a more serious note, Judge Dembin noted that he currently handles 270 civil cases in addition to his busy criminal docket. At the outset, he also stressed the importance for attorneys on both sides to maintain cooperation in their cases. He said the system really does depend on cooperation.

Background

Prior to his appointment, Judge Dembin spent a large part of his legal career working in the U.S. Attorney's Office in San Diego, where he primarily handled white-collar crimes. Before that, he handled organized crime cases in the U.S. Attorney's Office in Boston. In addition, early on his career he also worked as a private practice civil attorney doing both plaintiff's and defense personal injury matters.

Judge Dembin developed a particular expertise in cybercrimes and other high tech crimes while at the San Diego U.S. Attorney's Office. In fact, after leaving the office and just before receiving his appointment, he started his own com-

(see "Dembin" on page 6)

President's Message

continued from page 4

Before his appointment to the Supreme Court, Marshall already had embarked an historic legal career including a judgeship on the Second Circuit Court of Appeals, and a stint as Solicitor General of the United States. Marshall argued more Supreme Court cases than anyone before him, and with unparalleled results: he won 29 out of 32 cases. Perhaps most significantly, Marshall played a key role in reshaping American history when, in 1954, he successfully argued *Brown v. Board of Education,* securing a 9-0 Supreme Court decision that overturned the "separate but equal" doctrine.

Arthur Liman (1932-1997) grew up in New York City where he developed his trial skills as an Assistant U.S. Attorney. Later, Liman served as counsel for the New York state investigation into the 1971 Attica Prison uprising, and as chief counsel for the Senate's investigation of the Iran-Contra Affair. Although he is probably best known for his extensive public service, Liman has been described as "the ultimate corporate lawyer." Liman spent much of his career as a corporate litigator at Paul, Weiss LLP in New York. It was his experience, reputation, and prestige as a big firm trial lawyer that ultimately allowed him to become such an influential public interest lawyer. The Liman public interest fellowship is named after him. And in turn, his high-profile public interest work attracted more clients. According to Liman, "You have to enjoy [trial work]" . . . ."You have to enjoy the battle. You have to get satisfaction out of it."

Hats off to the ABTL trial lawyers, litigators and advocates who follow in the footsteps of these legends.

Dembin

continued from page 5

puter forensics firm, assisting lawyers handling cybercrime cases. In fact, he attributes his appointment in large part to the technical knowledge regarding cybercrimes, gained while at the U.S. Attorney's Office.

Judge Dembin was thrown a softball question from the audience, asking whether he enjoys music. It is fairly well known in the legal community that he has played in several bands over the years (the name of his current band is "Limited Jurisdiction"). He even offered that one of the court security officers has played bass in one of his bands.

Early Neutral Evaluation Conferences

With regard to Early Neutral Evaluation (ENE) conferences, Judge Dembin does not have a hard and fast rule that will require the Chief Executive Officer (CEO) of a company to appear as the person with "full settlement authority" even if there is a multimillion dollar demand. However, he will require that whoever is present on behalf of the company be someone who either has full settlement authority or can get the person with such authority on the telephone while at the conference. He believes that if his position on this is changed in the future, it is because litigants have abused this flexibility and forced him to change his policy.

Case Management

With regard to complex cases where the pleadings remain at issue and are contested for several months, he is receptive to the parties' request for a Case Management Conference for purposes of outlining a discovery plan even though the pleadings haven't completely been hashed out yet. This is particularly important because some district judges will require that cases be tried within 18 months, and if the complaint isn't even "at-issue" until a year after the case is filed, this offers little time to complete a discovery plan.

Discovery

Because of his technology background, Judge Dembin takes particular issue with joint discov-

(see "Dembin" on page 7)

Dembin

continued from page 6

ery plans that represent that neither side anticipates any disputes with regard to Electronically Stored Information (ESI) or electronic discovery. He wonders whether the sides really don't anticipate disputes or whether there is this informal agreement between the sides that neither side will challenge the other side on this issue. He warned that he will not be sympathetic to parties who claim that they did not anticipate any ESI disputes, but later come to him needing assistance resolving a dispute. Conversely, if the two sides make a genuine effort to predict and anticipate any ESI disputes and outline them, then Judge Dembin will go to great lengths to assist the parties in their disputes.

Civility and Professionalism

While Judge Dembin is sure that there are going to be discovery disputes and differences of opinion between zealous advocates on both sides of a case, he will not tolerate excessive gamesmanship. He offered an example of a jointly filed motion to compel wherein one party said that the sides had met and conferred with regard to the discovery disputes, though the other side said they had not. At this point he was not happy with the lawyers, and immediately required the parties to come in and discuss the motion with him.

Judge Dembin is often amazed that given the opportunity, attorneys, especially ones that treat each other with civility, are often able to resolve disputes without his participation. One time he couldn't make a conference call with two parties locked in a hotly contested dispute because he had a scheduling conflict. To his surprise, the parties telephoned him after his conflict ended and said that they had worked the dispute out on their own. He advised attorneys, especially younger attorneys, to never lose sight of professionalism and civility as they represent their clients.

Pro Per Litigants

Judge Dembin acknowledged that it is very difficult dealing with pro per litigants. Unlike attorneys, these litigants usually struggle to communicate the issues with the judge, in large part because they are so emotionally involved in the case. He realizes that he needs to have great patience with such litigants. Similarly, one particular challenge Judge Dembin has faced from day one deals with prisoner's habeas corpus petitions. The main difficulty lies in sifting through the papers and trying to figure out what the prisoner's complaint really is. He knows there is a lot at stake with these petitions and he really makes a great effort to determine what the issues are.

Criminal Docket

One particular area where the judge spends a great amount of time is search warrant requests. Judge Dembin views these decisions as critically important because in some respects they are "non-reviewable." Once he has granted a search warrant to break down the door of someone's house, even if that evidence is later inadmissible in court, the experience of having your door broken down and your home searched will not be erased.

Judge Dembin acknowledged that San Diego's magistrate judges may seem harsher with regard to bail and posting bond requirements than some other districts. However, he explained that the court's jurisdiction is in close proximity to two major metropolitan cities (Mexicali and Tijuana) across the border that defendants could potentially flee to, meaning that the Southern District has to have stricter bail and bond procedures than most other federal districts.

Conclusion

In all, Judge Dembin seems excited about his new position, and ready for the challenges that come with it. He shared with the audience that in his view, magistrate and district judges are there to provide an important community service, and that the positions really are "service" positions and not offices meant for personal reward or prestige.

Robert C. Rodriguez is an Associate with Wilson Turner Kosmo LLP. His legal practice encompasses complex litigation matters filed against corporations, with extensive emphasis in the areas of automobile product liability and warranty. Mr. Rodriguez can be reached at rrodriguez@wilsonturnerkosmo.com.

New and Noteworthy

The U.S. Supreme Court Reaffirms the Enforceability of Arbitration Agreements

In *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (U.S. Jan. 10, 2012), the Supreme Court has again enforced an arbitration clause and class action waiver in a consumer contract. In doing so, the Court solidified the holding of its recent landmark decision of *AT&T Mobility v. Concepcion*, 563 U.S. ___, 131 S.Ct. 1740 (2011) that under the Federal Arbitration Act (the "FAA") arbitration agreements must be enforced according to their terms. Indeed, *CompuCredit* demonstrates a growing consensus on this point. While the Court decided *Concepcion* by a 5-4 majority, 8 out of 9 justices formed the majority in *CompuCredit*, with only Justice Ginsberg dissenting. Justice Scalia wrote the majority opinions in both cases.

CompuCredit, however, does not merely repeat *Concepcion*. The Court in *Concepcion* held that the FAA preempts state law refusing to enforce arbitration terms (such as class action waivers) that some argue favor corporate defendants over consumers. The Court in *CompuCredit* expands this by holding that the FAA also trumps federal law implying a statutory right to a civil action in a court of law. Unless some other federal law expressly prohibits arbitration, the FAA requires that arbitration agreements be enforced. As for state law, the FAA preempts any implied or express statutory right to a judicial action.

The class action plaintiffs in *CompuCredit* obtained credit cards through a form application containing an arbitration provision enforceable under the FAA. The plaintiffs sued in federal court in California claiming CompuCredit violated the federal Credit Report Organization Act (the "CROA"), 15 U.S.C. § 1679 *et seq*. by allegedly misrepresenting the credit limits and by claiming that credit cards could be used to rebuild poor credit. CompuCredit moved to compel arbitration and enforce a class action waiver.

The plaintiffs opposed the motion, arguing that the CROA granted them a statutory right to a judicial action. Specifically, the plaintiffs relied on a provision of the CROA stating that consumers: "have a right to sue a credit repair organization that violates" its provisions and that this right cannot be waived. The U.S. District Court for the Northern District of California agreed with the plaintiffs and denied the motion to compel arbitration, holding that "Congress intended claims under the CROA to be non-arbitrable." The Ninth Circuit Court of Appeals affirmed, holding that CROA's "right to sue" provision "clearly involves the right to bring an action in a court of law."

The U.S. Supreme Court disagreed, and reversed the decision of the ninth circuit. The Court began by repeating from *Concepcion* and other precedent that the FAA "establishes a liberal policy favoring arbitration agreements." "It requires courts to enforce agreements to arbitrate according to their terms."

The Court then went on to add that this "is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." According to the Supreme Court, the CROA's "right to sue" provision does not override the FAA. Instead, it means only that consumers "have the legal right, enforceable in court, to recover damages from credit report organizations that violate CROA." The parties "remain free to specify" how this legal right can be pursued, including by arbitration. "Because the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms."

This decision reaches well beyond the CROA. Prior to *Concepcion*, the plaintiffs' class action

(see "New & Noteworthy" on page 9)

continued from page 8

bar argued that class action waivers are unenforceable as unconscionable under state law. Deprived of that argument post-*Concepcion*, they now focus on the argument that plaintiffs have unwaivable statutory rights that trump any agreement under the FAA. In California, for example, plaintiffs argue that the Consumers Legal Remedies Act (the "CLRA") grants an unwaivable statutory right to a class action in a court of law. *See Fisher v. DCH Temecula Imports*, 187 Cal. App.4th 610 (2010); *Gentry v. Superior Court*, 42 Cal.4th 443 (2007). Similarly, plaintiffs also argue that they have an unwaivable right to a public injunction in a court of law under both the CLRA and California's Unfair Competition Law (the "UCL"). *See Cruz v. Pacific Health Systems, Inc.*, 30 Cal. 4th 303, 316 (Cal. 2003); *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 1082 (1999).

The language of the CLRA and the UCL, however, is similar to the language of the CROA. The CLRA states that a consumer "is entitled to bring an action," including a class action, and that any waiver of this right is unenforceable. Similarly, the CLRA and the UCL state that plaintiffs have the right to seek injunctions on behalf of the public. Like the CROA, the CLRA and the UCL do not expressly preclude arbitration. Thus, according to the U.S. Supreme Court in *CompuCredit*, the parties "remain free to specify" how these legal rights can be pursued. Because the CLRA and the UCL are silent on whether claims under them can proceed in an arbitrable forum, "the FAA requires the arbitration agreement to be enforced according to its terms."

NLRB Concludes Class Action Waivers in Employment Arbitration Agreements Violate the National Labor Relations Act

(*D.R. Horton, Inc. and Michael Cuda* **(2012) 357 NLRB No. 184.)**

In 2011, the United States Supreme Court concluded that a California law barring class action waivers in consumer arbitration agreements violated the Federal Arbitration Act (*AT&T Mobility v. Concepcion* (2011) 131 S.Ct. 1740), and many suspected this result would soon be extended to uphold class action waivers in employment arbitration agreements. Indeed, many anticipated *AT&T* would essentially overrule the California Supreme Court's conclusion in *Gentry v. Superior Court* (2007) 42 Cal.4th 443 that such class action waivers would often be unconscionable and, thus, unenforceable in the employment context. However, the National Labor Relations Board (NLRB) recently concluded in *D.R. Horton Inc. and Michael Cuda* (2012) 357 NLRB No. 184 that such class action waivers in mandatory arbitration agreements in the employment context violates the National Labor Relations Act (NLRA), thus interjecting considerable uncertainty regarding class action waivers.

In *D.R. Horton*, an employee attempted to initiate a class arbitration under the Fair Labor Standards Act (FLSA) alleging he and similarly situated superintendents had been misclassified as exempt and denied overtime. The employer argued the arbitration agreement the employee had signed as a condition of employment expressly precluded class or collective actions, so the employee filed an unfair labor practice charge with the NLRB alleging the agreement's prohibition on class or collective actions violated the NLRA. In a case of first impression for the NLRB, the Board concluded the class action waiver violated the NLRA.

The Board first concluded that employees who join together to bring employment-related claims on a class-wide or collective basis in court or before an arbitrator are engaging in "concerted activity" under NLRA Section 7. From this, the Board concluded the arbitration agreement's provision expressly precluding employees from joining together, whether in civil court or in arbitration, to litigate work-related conditions es-

(see "New & Noteworthy" on page 18)

Congratulations

ABTL San Diego 2012 Officers

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Pressman

continued from page 1

or party to lean or sit on the jury box during witness examinations or when addressing the jury, but only requires attorneys to ask permission once to step into the well.

Judge Pressman emphasized that civility is very important, and that he is particularly disappointed when he sees *ex parte* applications with vitriolic e-mails attached. He also has seen the difficulty of drafting protective orders in trade secret cases, and in that process has "learned a lot about computers and imaging."

Judge Pressman holds Case Management Conferences on Fridays at 8:30 a.m. and 10:00 a.m.

Law and Motion

Judge Pressman's law and motion calendar is presently setting hearings about three months out after filing. Noticed motion hearings are set on Fridays at 10:30 a.m. and must be reserved by contacting his IC clerk. Tentative rulings on law and motion matters are normally available after 4:00 p.m. on the Thursday before the hearing.

Judge Pressman schedules *ex parte* hearings on Tuesdays, Wednesdays and Thursdays from 8:30 a.m. to 9:15 a.m., by reservation only, with papers and applicable fees due by noon the previous day. *Ex parte* hearings are scheduled through his IC clerk. Ordinarily, he schedules five *ex parte* hearings per day. He will open up Mondays for TROs if need be.

When working up a motion, he likes to read the reply brief first, if possible, but will start

(see "Pressman" on page 11)

Pressman

continued from page 10

with whatever he has and then see whether the reply comports with his impressions. Given his preference for reading the reply brief first, he prefers to receive reply briefs on motions sooner than five days before the hearing, but realizes that filing early is not always possible. For long briefs, he appreciates "executive summaries" at the beginning that review the salient issues and the relief sought.

Although Judge Pressman remarked that the budget for this fiscal year is "fine," the budget for 2013-2014 is unknown. All judges, he said, rely heavily on their research attorneys, particularly to work up discovery motions. Consequently, if additional budget cuts are mandated, possibly resulting in the loss of research attorneys who support judges, he predicts that will have a dramatic impact on the processing of cases and virtually end civil independent calendars.

The court's huge docket, as well as past budget cuts, have created a back log and associated delays on law and motion matters. These delays have had a substantial impact on the setting of trial dates, with the result that "continuances seem to be the order of the day." Although he tries to set cases for trial 12 months after filing, increasingly he is seeing more complex cases being filed, as well as anti-SLAPP motions, which necessarily push out trial dates. Consequently, attorneys and parties should expect there will be delays in getting a case to trial. As an example, Judge Pressman recently had to try a case that was threatened by the five year deadline.

Judge Pressman "hates demurrers," which he views as "unproductive" and a "huge waste of time" for the court. Ordinarily, his practice on considering demurrers is to review the demurrer and the complaint, and then conduct a "demurrer status conference" to "discuss whether the complaint or cross-complaint can be amended" in order to avoid or moot the demurrer. Even so, he has sustained demurrers without leave to amend. If the outcome or basis of a demurrer is particularly critical to the management of a case, such as one involving a dispositive statute

(see "Pressman" on page 13)

Update on Superior Court Imaging and E-Filing Project

By Jessica A. Chasin

Jessica A. Chasin

On February 9, 2012, the General Civil Litigation Section and New Lawyer Division of the San Diego County Bar Association presented an interactive brown bag luncheon regarding San Diego Superior Court's Imaging and E-Filing Initiative. The presentation featured Civil Presiding Judge Jeffrey Barton and Mark Schwartz, the Product Training and Research Manager for One Legal, LLC.

Judge Barton kicked off the program with an update on the status of the court's imaging and e-filing project. The project is a two part process. The first part, imaging, is the process of converting all of the court's paper files into electronic images that will be available online. The driving force behind the imaging initiative is to increase public access to the courts, even as budgets are dramatically shrinking. Due to budget cuts, the clerk's office hours have been shortened and court staff has been steadily shrinking. This has lead to an inevitable decrease in public access to court documents. Imaging helps alleviate this problem by dramatically decreasing the amount of time the court's staff needs to dedicate to dealing with the incredible amount of paper the court receives every day. For example, once court documents are electronic, they do not have to be physically taken to chambers before an argument. Members of the bar or the public who wish to view court documents can do so from the convenience of a computer at their home or office, thus making decreased clerk's hours less of a problem. All downtown independent calendar departments are now imaged and party-filed documents are now available online. Documents are also still available for viewing in the clerk's office through public kiosks.

The second part of the project, the e-filing initiative, is still a work in progress. The vendor selected to implement the project is One Legal, LLC. One Legal currently handles the e-filing system for the Orange County Superior Court. While the program is still in development, Mr. Schwartz provided a preview of some of the features practitioners can expect once the system is up and running. These features include, of course, the convenience of filing court documents right from the office. There will likely be several useful search features allowing users to easily and reliably search for information by document, case, judge, or attorney. Litigants are also likely going to be able to set up a system whereby documents are automatically e-served on all parties at the same time they are filed.

For practitioners wanting to familiarize themselves and their staff with the e-filing system, One Legal will come to your office and conduct a free training session. Additionally, One Legal is in the process of setting up a San Diego Advisory Board to help the company develop San Diego's e-filing system with the features most helpful to end users. Anyone interested in serving on the Board should contact Mr. Schwartz at (415) 475-6254 or mschwartz@onelegal.com.

Jessica A. Chasin is an Associate with Wilson Turner Kosmo LLP. She specializes in defense side employment law.

Article Submission

If you are interested in writing an article for the ABTL Report, please submit your idea or completed article to Lois Kosch at lkosch@wilsonturnerkosmo.com.

We reserve the right to edit articles for reasons of space or for other reasons, to decline to submit articles that are submitted, or to invite responses from those with other points of view.

Authors are responsible for Shephardizing and proofreading their submissions.

Articles should be no more than 2500 words with citations in end notes.

Pressman

continued from page 11

of limitations issue, for example, he may agree to shorten the ordinary hearing schedule.

Judge Pressman is available to the parties during *ex parte* hours to discuss discovery disputes before the filing of motions to compel. Although *ex parte* appearances are not required before filing a motion, Judge Pressman encourages such a discussion to efficiently resolve discovery impasses whenever possible. *Ex parte* papers on discovery issues should outline the parameters of the issue and the relief sought, including whether the moving party seeks an order shortening time. When motions to compel are filed, Judge Pressman invites the parties to court for a discussion oriented to the informal resolution of the motion.

If a case has extensive motion practice on discovery matters, on rare occasions he may be forced to send it to a special master. However, since he is sensitive to the increased costs of using a special master, he has historically been very reluctant to impose such extra costs on parties who cannot afford it. Given the generalized impact of budget cutbacks on staffing and support for all courtrooms, Judge Pressman thinks that use of discovery referees will be more and more common in the future. He is not hesitant to order depositions if the parties cannot agree, and will be happy to provide assistance to parties experiencing discovery challenges.

Although Judge Pressman views demurrers with disdain, he has no hesitation granting summary judgment in the appropriate case. In summary judgment oppositions, he views the "shotgun approach" (objecting to virtually everything on numerous grounds) as "not productive," so he tends to skim over them. This style of objections, he observed, is very cumbersome and time-consuming for research attorneys, who spend an inordinate amount of time on them. Rather than the shotgun and "cut-and-paste" approaches to objections, he recommended using precise and focused objections to evidence.

In response to questions from the audience, he said that color pictures can be helpful on summary judgment motions, but that no one has ever submitted portions of a videotaped deposition for his consideration. He felt that, although it would be "acceptable" for a party to submit video-taped excerpts of a deposition with a summary judgment motion, and he may well watch the video, he thinks it would be faster to review the deposition transcript than to watch the video.

Settlement

When Judge Pressman was presiding in the Vista court, he had good success in settling cases. However, he has not presided over very many settlement conferences since coming downtown. He noted that, if the parties would like to have him conduct a settlement conference on a case pending in his courtroom, the applicable rules specify that they must sign a waiver before he can serve in that role. He reported that, under a newly-implemented program, Judge Lisa Foster is now in charge of judicial settlement conferences, which are excellent opportunities to have a judge conduct a settlement conference. Participation in the program requires a "demand" and a "response." Under Judge Foster's program, the parties can be referred for settlement discussions at any time, such as at a Case Management Conference or Trial Readiness Conference, but the court must formally refer the case to Judge Foster in order to participate.

In class action cases, Judge Pressman will review proposed settlements with a "fine tooth comb," particularly when it involves a "claims-made recovery." As a practicing attorney, he routinely filed, litigated and settled class action cases, particularly representing consumers in anti-trust litigation, so he is well-versed in the processes and procedures. Given this experience, he can readily see whether the parties are skirting the rules or proposing a settlement with little or no benefit to class members. If a proposed class action settlement will not provide any recovery to members of the class, he will not approve it.

Trial

Having tried many cases as a practicing attorney, and obtaining numerous "significant dollar verdicts," Judge Pressman emphasized that trial counsel must "remember your audience when you're trying a case." As a trial attorney,

(see "Pressman" on page 14)

Pressman

continued from page 13

you must "realize when neither the judge nor the jury are listening." Treating courtroom staff well is also critical. When he first became a judge, he was surprised at how much judges talk to each other about attorneys practicing in their courtrooms. "Judges talk to each other a lot," he said, and "word spreads quickly" when lawyers lie, irritate the court, or otherwise engage in poor conduct, which can adversely affect the reputation of an attorney "throughout the county." Although he wishes he could do more lawyer critiques post-trial, he concluded that "good attorneys get recognized by the bench."

He also recognized that most lawyers only have "so many trials" in them, as he did, and that it is often difficult to "keep the edge." The challenges associated with everyday practice have encouraged him to make his courtroom a welcoming one.

He ordinarily sets 10 cases per trial day, with most cases settling before trial.

Judge Pressman uses a six pack jury selection process, with 12 prospective jurors in the box plus six alternates.

Trial Readiness Conferences are heard on Fridays at 9:30 a.m., and trials are set on Fridays at 9:00 a.m., unless otherwise designated by the court.

Judge Pressman posts his courtroom "Policies and Procedures" on the Superior Court's website (www.sdcourt.ca.gov). Among the rules he imposes are an "Advance Trial Review Order" ("ATRO") and "Trial Requirements."

The ATRO requires the parties to meet in person and arrive at stipulations and agreements for the simplification of trial issues. The parties must also discuss the court's specifications for the marking, handling and use of evidence/exhibits (including deposition testimony); submission of a jointly prepared case summary and witness list for reading to the jury; filing of written *voir dire* questions that will expand on

(see "Pressman" on page 15)

Pressman

continued from page 14

the scope of the court's *voir dire*; preparation and presentation of joint jury instructions (CACI preferred) and proposed alternative instructions; motions in limine filing deadlines and rules; witnesses and readiness issues; and additional orders, such as the potential exclusion of evidence for failure to follow the court's rules.

Judge Pressman's "Trial Requirements" rules require the parties to prepare and present to the court at the trial call a "Joint Trial Notebook," which must contain the following: (1) Table of Contents; (2) Joint Trial Readiness Report; (3) Motions In Limine / Oppositions with an index of the motions; (4) Joint Witness List with a short sentence describing the witness (i.e. "Dr. Joe Smith, an internist from Mercy Hospital"); (5) Joint Exhibit List; (6) Trial Briefs; (7) Joint Statement of the Case; (8) Proposed *Voir Dire* questions counsel want the Court to ask; (9) Jury Instructions in sequential order with a post-it note indicating who objects to the instruction; (10) Special Verdict Form – either an agreed-upon form or each side's proposed form, which should follow CACI as closely as possible and include all causes of actions and all parties, on pleading paper without the firm name.

Facts at a Glance

- At the beginning of his career, practiced criminal and civil law for 10 years in San Francisco
- Partner with San Diego law firm of Kolodny & Pressman from 1983 – 2001, focusing on business, corporate and real estate litigation.
- As an attorney, handled a wide array of civil cases, including personal injury, partnership disputes, securities fraud, broker-dealer negligence, antitrust, employment and construction defect cases; pursued several class action cases on behalf of consumers, including an antitrust case against cellular phone companies U.S. West and Airtouch for price fixing in the San Diego area.
- Appointed by Governor Gray Davis to the San Diego Superior Court on December 26, 2001, filling the vacancy created by the retirement of Judge David Moon.
- Assigned to IC Department 66
- B.A. from the University of California, Berkeley
- J.D. from Hastings College of the Law
- In 1991, received the San Diego Trial Lawyers Association's "Outstanding Trial Lawyer" award.
- ABOTA member since 1999.

Ross H. Hyslop is a partner at Pestotnik + Gold LLP and the Membership Chair of ABTL San Diego. His practice primarily includes complex business and commercial litigation, unfair competition, false advertising, fraud, consumer and employment class actions, trade secrets, and employment counseling/litigation. (hyslop@tprglaw.com).

ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO
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Editor: Lois M. Kosch
(619) 236-9600
lkosch@wilsonturnerkosmo.com

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O'Neil v. Crane Co.

continued from page 1

strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the product. During World War II, defendants Crane Co. and Warren Pumps LLC sold parts to the United States Navy for use in the steam propulsion systems of warships. Because the steam flowing through these systems was extremely hot and highly pressurized, the pipes and attached components required insulation to prevent heat loss and protect against accidental burns. Navy specification required the use of asbestos-containing insulation on all external surfaces of the steam propulsion systems. Asbestos was also used an an internal sealant within gaskets and other components of the propulsion system.

Patrick O'Neil served in the U.S. Navy and his work exposed him to airborne asbestos fibers. O'Neil developed mesothelioma, a fatal cancer of the lining of the lung caused by asbestos exposure. He later died and his family filed a wrongful death action against several companies that had allegedly supplied asbestos-containing products to the Navy. Crane moved for nonsuit on all causes of action arguing there was no evidence O'Neil had been exposed to asbestos from any Crane product, and no evidence that any product defect or failure to warn by Crane was a substantial factor in causing O'Neil's mesothelioma. Warren Pumps joined Crane's motion and also sought nonsuit on the grounds that no evidence showed O'Neil had been exposed to any asbestos from the repair or maintenance of a Warren pump. Plaintiffs argued that even if O'Neil was not exposed to asbestos released from a Crane or a Warren product, these manufacturers bore responsibility for his injuries because their products originally included asbestos-containing components, and it was foreseeable that these parts would wear and be replaced with other asbestos-containing components, and that these repair and maintenance procedures would release harmful asbestos dust.

(see "O'Neil v. Crane Co." on page 17)

O'Neil v. Crane Co.

continued from page 16

Appeal

The trial court granted the defendants' motions and dismissed all claims against Crane and Warren. On appeal, the decision was reversed. The court of appeal announced a broad definition of strict products liability: "[A] manufacturer is liable in strict liability for the dangerous components of its products, and for dangerous products with which its product will necessarily be used." [2] Even though it was replacement gaskets and packing that caused O'Neil's disease, the court concluded these replacement parts were "no different" from the asbestos-containing components originally included in defendants' products.

California Supreme Court Ruling

The court of appeal's decision was ultimately reversed. The California Supreme Court concluded defendants were not strictly liable for O'Neil's injuries because (a) any design defect in defendants' products was not a legal cause of injury to O'Neil, and (b) defendants had no duty to warn of risk arising from other manufacturers' products.[3]

The court reaffirmed the *Geenman v. Yuba Power Products, Inc.*[4] formulation requiring proof that the plaintiff suffered injury caused by a defect in the defendant's own product. Regardless of a defendant's position in the chain of distribution, the basis for his liability remains that he has marketed or distributed a defective product and that product caused the plaintiff's injury.

The court rejected plaintiffs' argument that the defendants had a duty to warn O'Neil about the hazards of asbestos because the release of asbestos dust from surrounding products was a foreseeable consequence of maintenance work on defendants' pumps and valves. Although Crane and Warren gave no warnings about the dangers of asbestos in the gaskets and packing originally included in their products, O'Neil never encountered these original parts. His exposure to asbestos come from replacement gaskets and packing and external insulation added to defendants' products long after their installation on the Navy vessel: "[N]o case law ... supports the idea that a manufacturer, after selling a completed product to a purchaser, remains under a duty to warn the purchaser of potentially defective additional pieces of equipment that the purchaser may or may not use to complement the product bought from the manufacturer."[5]

The court identified two exceptions to the general rule that a product manufacturer may not be held strictly liable for harm caused by another manufacturer's product. The exceptions to this rule arise when the defendant bears some direct responsibility for the harm, either because the defendants's own product contributed substantially to the harm, or because the defendant participated substantially in creating a harmful combined use of the products. The court rejected plaintiffs' argument that manufacturers should be strictly liable when it is foreseeable that their products will be used in conjunction with defective products or replacement parts made or sold by someone else: such a "rule would require manufacturers to investigate the potential risk of all other products and replacement parts that might foreseeably be used with their own product and warn about all of these risks. It does not comport with principles of strict liability to impose on manufacturers the responsibility and costs of becoming experts in other manufacturers' products. Such a duty would impose an excessive and unrealistic burden on manufacturers. (citations omitted)"[6]

Further, the court rejected plaintiffs' argument that the defendants owe a duty of care under a negligence standard. "Expansion of the duty of care as urged here would impose an obligation to compensate on those whose products caused the plaintiffs no harm. To do so would exceed the boundaries established over decades of product liability law."[7]

Impact

The scope and applicability of the *Crane* decision to product liability claims outside of the asbestos litigation context remains to be determined. No evidence was presented that asbestos, as opposed to some other type of insulation material, was needed in order for the valves to function properly. And no evidence was presented that the defendants ever made or sold the asbestos-containing replacement parts. Counsel

(see "O'Neil v. Crane Co." on page 18)

O'Neil v. Crane Co.

continued from page 17

representing component parts manufacturers may potentially benefit from this decision, but it should be recognized that this unique set of facts may not be present in most situations especially those falling outside of the asbestos litigation context.

Christian S. Scott is an associate with Wilson Turner Kosmo LLP. His legal practice encompasses complex litigation matters filed against corporations, with extensive emphasis in the areas of product liability, warranty and general business litigation. Mr. Scott can be reached at (619) 236-9600 or sscott@wilsonturnerkosmo.com.

(Endnotes)

1 53 Cal. 4th 335 (2012)
2 *Id*. at 346-347.
3 *Id.* at 348.
4 59 Cal. 2d 57 (1963)
5 *O'Neil* at 352.
6 *Id*. at 363.
7 *Id*. at 365.

New & Noteworthy

continued from page 9

sentially prohibited "concerted activity" and thus, violated substantive rights under Section 7 of the NLRA. Interestingly, and perhaps setting up a further split in authority that may prompt further review, the Board specifically declined to follow two federal court decisions that held class action waivers do not violate the NLRA.

The Board next concluded that its holding did not violate the FAA because it was simply applying general labor law principles and invalidating an overbroad restriction on "concerted activity," and was not unfairly singling out arbitration agreements. The Board noted that the FAA specifically authorizes courts not to uphold unenforceable arbitration provisions and observed class action waivers violate the NLRA rendering the arbitration agreement void as against public policy. The Board next distinguished the Supreme Court's *AT&T* decision noting that it involved consumer, not employment agreements, and more specifically the Court had not analyzed whether its ruling also applied in the NLRA context.

However, the Board also attempted to suggest is ruling was narrow and limited. For instance, it suggested it only applied to employees covered by Section 7, but it bears noting that Section 7 is not limited to union employees. The Board next suggested it was not mandating class arbitration in the employment context, but was simply prohibiting advance class action waivers, and it noted it was not challenging an employer's ability to require arbitration on an individual basis of future employment disputes. In this regard, the Board noted employers could mandate individual arbitration agreements, provided they did not include class action waivers that might preclude concerted activity and violate the NLRA.

(NOTE: The NLRB's decision further underscores the current legal uncertainty regarding the enforceability of class action waivers in arbitration agreements in the employment context. This decision arguably creates a conflict between the NLRB and the FAA (and with federal court decisions, including AT&T). There also remains the as-of-yet unresolved issue of whether how California courts will apply AT&T in the employment context, and the recent California appellate court decision suggesting AT&T does not extend to PAGA-related collective actions adds still more uncertainty. Until these legal issues are resolved, employers considering implementing or enforcing arbitration programs containing class action waivers should contact their legal counsel.)

Correction

In the Winter 2011 issue of ABTL-Report, Mark Mazzarella's Tips from the Trenches: Technology in the Courtroom article mistakenly referred to San Diego attorney Ken Fitzgerald as Ken Sullivan. We apologize for the error.

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