ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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Lawyers as Storytellers, Part III

by Mark C. Mazzarella, Esq. of Mazzarella, Dunwoody & Caldarelli LLP

As discussed in the previous installments of "Lawyers as Storytellers," the essentials of a compelling story are character development, the description of the conflict between the characters, and the resolution of that conflict. The key to effective storytelling as lawyers is to develop the characters and the conflict in a way that leaves room for just one resolution, the one favoring your client.

Mark C. Mazzarella

To do that, the lawyer has to tell an emotionally-compelling story which must be resolved in his or her client's favor if injustice is to be avoided. On occasion, one party's case is so compelling that little effort or skill is required to achieve the desired result. More often, both sides have the opportunity to tell a compelling story. Whether that potential is fulfilled depends upon how early and how consistently a winning storyline is identified and nurtured. The process should begin with the initial client interview and never stop.

• Initial Case Evaluation: Plaintiff's lawyers tend to appreciate the value of storytelling more than defense lawyers because their livelihood depends upon it. If they take cases that have jury appeal, they make money. If they take cases that don't, they sell real estate on the side. But defense lawyers who, in theory, get paid whether they win or lose, often don't give a lot of thought to whether

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New California Employment Laws

by Jennifer N. Lutz, Esq. of Klinedinst, Fliehman & McKillop

The state legislature and Governor Gray Davis kept busy during the recently adjourned legislative session as they acted on a stack of employment-related bills. Below is a summary of new laws that will change the face of employer/employee relationships as well as employment litigation in California.

California Becomes First State With Paid Family & Medical Leave

Jennifer N. Lutz

Employee leaves of absence will soon become more complicated in California. Governor Gray Davis signed SB 1661 (Kuehl) – making California the first state to offer employees paid family and medical leave. SB 1661 provides up to six weeks of family temporary disability insurance ("FTDI") benefits in a 12-month period

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California Legislature Passes Groundbreaking Reforms of Residential Construction Defect Law

by Roger C. Haerr, Esq. of Luce, Forward, Hamilton & Scripps LLP

Over the summer, the California Legislature passed and Governor Davis signed a groundbreaking reform of residential construction defect law, SB800. The law will affect every new home and condominium sold in California after Jan. 1, 2003. As discussed below, the extensive legislation will require every builder and its lawyer to be aware of new construction standards, to revise sales documentation, and to strictly comply with complex claim procedures.

Roger C. Haerr

The law, which represents a compromise after nearly a year of intense negotiations, makes two significant reforms to construction defect law. First, it establishes statutory definitions and standards for construction defects. Second, it requires homeowners to first give notice to their builder of a claim, which in turn gives the builder the absolute right to make repairs before the homeowner can sue for defects. If the builder fails to comply with any of the strict claim requirements, the homeowner may proceed to file a suit.

Under existing law, the determination of whether a problem constituted a construction defect was subject to a contest of expert opinion. The recent California Supreme Court *Aas* decision barred recovery in tort for defects that did not result in injury or property damage. Most claims were subject to a minimum 4-year and maximum 10-year statute of limitation. For claims involving common interest developments, there is already a complex pre-litigation process.

Under the new law, there are performance standards for every building system and component of the home. In addition, there are a number of defects that do not require injury or damage, thus overturning the *Aas* decision. Finally, claims are not only enforceable by the original homebuyer, but also by subsequent buyers.

The new law also requires that a builder provide a minimum limited warranty for one year. The law provides only a floor — but not a ceiling — on the warranty the builder can provide. Thus, the builder may, but is not required to, offer greater protection for longer time periods in its express warranty. The homeowner is statutorily required to follow all reasonable maintenance guidelines communicated in writing by the builder.

At the time the sales agreement is executed with the homeowner, the builder may make a binding election to use alternative dispute resolution procedures such as mediation. The builder must record in title and provide in its sales documentation the procedures and rights of the homeowner.

The new law imposes a complex procedure that the homeowner must follow before bringing suit against the builder. In summary, the homeowner must send a written notice to the builder setting out the nature of the claim. The builder must acknowledge the claim in writing and may then elect to conduct inspection and testing; it also must provide construction documents requested by the homeowner. The builder then may offer a repair accompanied by an offer to mediate the dispute. If the builder fails to follow any of the strict requirements within the times specified, the homeowner may proceed with a lawsuit.

Finally, the new law specifies one-year, two-year and four-year limitation periods for bringing certain claims. Unless a shorter period is specified, no action may be brought more than 10 years after substantial completion. However, the limitation periods may be tolled as a result of repairs or claims. ∆

Trilogy of High Court Cases Reaffirm Broad Plain Language Construction of Anti-SLAPP Law

by James J. Moneer, Esq.

In its ten year life, California's anti-SLAPP statute, Code of Civil Procedure section 425.16, has been amended twice and interpreted by over 70 published decisions, including six from our High Court. The scope of section 425.16 has expanded significantly over the past 10 years and it appears that this trend, while showing no signs of retreat, may be reaching a plateau. This article examines three recent California Supreme Court cases rejecting various attempts to read limitations into the statute.

A. BACKGROUND

The anti-SLAPP framework turns on a two-step analytical process. On special motion to strike (SLAPP motion), the defendant has the initial burden of making a *prima facie* case that the cause of action arises from an act in furtherance of the defendant's exercise of petition or public issue speech rights. The defendant may meet this burden by showing that the cause of action is based upon any one of the four categories of conduct described in subdivision (e), broadly construed. Once the defendant makes the required *prima facie* showing, the burden shifts to the plaintiff to establish a probability of prevailing on the merits with admissible evidence sufficient to raise a triable issue of fact on all essential elements of each claim subject to the motion. The filing of the motion effects an automatic stay on all discovery in the action. An award of attorney's fees and costs to a prevailing SLAPP defendant is mandatory

Many courts have attempted to increase the defendant's initial burden of making a *prima facie* case in a variety of ways. Some courts have attempted to impose a separate public issue pleading requirement onto the official proceeding prongs set forth in the first two clauses of subdivision (e). In 1999, our High Court rejected a public issue pleading requirement for official proceeding activity and adopted a broad plain language construction. *Briggs v. Eden for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115-1122. More recently, courts have attempted to make public policy exceptions to the plain language of section 425.16 by engrafting concepts from the preamble like "valid exercise" or "lawsuits brought primarily to chill" on to the operative provisions of the statute.

James J. Moneer

In a recent trilogy of SLAPP decisions, our High Court rejected these attempted limitations, and made it eminently clear that the anti-SLAPP statute means exactly what it says.

B. NO INTENT TO CHILL, CHILLING EFFECT, OR PROOF-OF-VALIDITY REQUIREMENT

1. *Equilon Enterprises, LLP v. Consumer Cause, Inc.*

In *Equilon Enterprises, LLP v. Consumer Cause, Inc.* (2002) 29 Cal. 4th 53, Consumer Cause served a notice of intent to sue on Equilon Enterprises LLP based on alleged violations of Proposition 65. The notice was served on the Attorney General and local prosecuting authorities. Equilon did not ask for clarification of the notice but, instead, filed a lawsuit for declaratory and injunctive relief, seeking a declaration that the notice was defective in that it failed to describe the alleged toxic discharges with sufficient particularity. In addition, Equilon sought an injunction barring Consumer Cause from filing a Proposition 65 enforcement action. Defendant Consumer Cause filed a special motion to strike the complaint under section 425.16, which the trial court granted and the Court of Appeal affirmed.

The issue addressed by our High Court was whether the phrase "lawsuits brought primarily to chill" in the preamble of section 425.16 requires a defendant to demonstrate that the cause of action was brought with the intent of chilling defendant's exercise of petition or free speech rights as part of its *prima facie* case on special motion to strike. Our High Court held that the defendant has no such

(See "Trilogy of Cases" on page 9)

Amendments to Statute of Limitations and Timing For Summary Judgment Motions May Significantly Impact Practitioners

by Alan M. Mansfield, Esq., Rosner, Law & Mansfield

The California Legislature significantly extended the statute of limitations for certain tort claims and altered the procedures for bringing summary judgment motions when, on September 10th 2002, Governor Davis signed into law Senate Bill 688. S.B. 688 extended the statute of limitations for personal injury and wrongful death cases from one year to two years (with retroactive application of this extension for victims of the September 11th terrorist attacks), and extended the notice period from 28 days to 75 days for bringing summary judgment and summary adjudication motions, thereby allowing an opponent 61 days to prepare a response.

Alan M. Mansfield

Effective January 1, 2003, a new Section 335.1 of the California Code of Civil Procedure extends from one year to two years the statute of limitations for an action arising out of the "assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another." According to the preamble in S.B. 688, the Legislature extended this limitations period because "many such matters would be resolved without the need to resort to litigation if California's statute of limitations permitted such actions to be filed within two years, as the vast majority of other states provide for a longer time to resolve claims short of litigation." The example given as to the inequities caused by this short statute of limitations period involved victims of the terrorist acts of September 11th. Because of the particular injustice that might be worked against such victims, C.C.P. Section 340.10 was also enacted, retroactively applying the new Section 335.1 to such victims.

In addition, S.B. 688 extended the time frame for briefing a motion for summary judgment or summary adjudication of issues from the traditional 28/14/5 day schedule provided for in California Code of Civil Procedure section 437c(b) to "at least 75 days before the time appointed for hearing." Opposition and Reply Memoranda are still due 14 and 5 days, respectively, before the hearing. The preamble of S.B. 688 states that, because California law favors trial on the merits, "it is important to extend the time to respond to a motion for summary judgment to assure that all evidence is before a court before ruling on the motion. This Act will assure that frivolous actions are disposed of, and those that have merit can proceed to a fair trial."

While Section 437c(h) still permits the court to deny or continue such a motion to permit certain specified discovery, it was amended to make clear that an application for such a continuance can be made by ex parte motion at any time on or before the opposition deadline. This legislation also added a new Section 437c(i), providing that if a party unreasonably fails to allow such discovery to be conducted after a continuance is granted, the court shall grant a further continuance of the motion to permit such discovery, or deny the motion. As a result, unless the court orders otherwise, such motions must now be filed at least 105 days before trial (75 days for the motion to be heard, and no later than 30 days before trial under 437c(b)), and if any discovery disputes are likely, significantly longer than that.

These new timing rules will likely have a significant impact on practitioners, particularly those who practice under the fast-track rules of the San Diego Superior Court. Assuming the Complaint is promptly served and opposing counsel receives a standard extension of 15 days to answer the Complaint, the parties will have approximately seven months to make the case at issue, conduct relevant discovery and resolve motions to compel before the summary judgment motion is filed. When expert designations and discovery are added to this timing equation, parties will have a relatively short time frame to

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Summary Judgment Motions

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complete all relevant discovery that may be necessary to support or oppose the issues raised by summary judgment or adjudication motion.

The independent calendar judges of the San Diego Superior Court have recently met to discuss various unresolved issues surrounding the new statute. The judges reached consensus regarding the handling of cases in which there is a currently scheduled trial date that would make compliance with the new, longer notice period impossible (but in which a summary judgment motion could be heard under the old rules). The judges agreed that such cases will not be affected by the new rules, and that summary judgment motions that are timely filed under the old rules will be heard before trial. Some judges plan to begin listing the cut-off date for summary judgment motions in the Case Management Conference order.

Judge Wayne Peterson, former Presiding Judge and now an independent calendar judge speaking on behalf of the IC program, says that the independent calendar judges understand that the interpretation of the new rules is an important issue to the trial bar. The judges are working internally to reconcile the new summary judgment rules with other considerations -- including timing constraints imposed by fast track and the county's pilot mediation program -- that may potentially conflict with the new rules. The independent calendar judges will meet again in early January 2003, at which time they expect to continue to address how to best resolve any such conflicts.

For the time being, however, there remain unanswered questions, especially for those practitioners facing a trial date in the first few months of 2003. For example, if a party files a summary judgment motion in December but does not schedule the hearing until January, which timing and continuance rules are in effect, and what is the impact on the trial date? What if a court grants the continuance required under Section 437c(h) this year, and the party thereafter fails to cooperate in discovery under the new rules? Counsel may desire to consult with each other and the court promptly regarding the timing of any anticipated motions so as to avoid scheduling complications.

The Legislative preamble of S.B. 688 states: "Summary judgment is a drastic procedure and should only be granted when an action is without merit and both sides have a fair opportunity to address the merits of an action or when the action lacks a triable issue of fact." While all concerned will need to see how these new rules play out, in all likelihood either fewer summary judgment motions will be filed or many complex cases may not be ready for trial within of the twelve-month time frame contemplated by the fast-track rules. Counsel should therefore create their discovery and trial plan even more carefully in light of these new deadlines. Δ

Employment Laws

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for employees who take leave to care for a sick child, spouse, parent, or domestic partner with a serious health condition, or to bond with a new child. Employees will be eligible to receive 55% of their wages during their absence, up to a maximum of $728 a week. The maximum will be adjusted annually. The new benefit will be funded by a payroll tax on employees. FTDI will be administered through California's unemployment compensation disability insurance program.

The bill originally called for employers and employees to share the costs. Under the final version of the law, employees will be permitted to start taking time off as of July 1, 2004, although mandatory employee contributions will begin on January 1, 2004. The payroll deductions will average approximately $27 a year and range up to $70 a year for those earning more than $72,000 annually.

The law includes critical limitations:

- There is a seven day waiting period after the employee first requests FTDI before an employee may qualify to receive benefits;
- The employee must produce a medical certification;
- The employee is not eligible for benefits if he or she is receiving unemployment or other disability benefits;
- The employee is not eligible for benefits for any day that another family member is able and available to care for the ill or injured family member; and

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Employment Laws

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•Employers may require an employee to utilize up to two weeks of earned but unused vacation leave before receiving any FTDI benefits.

Importantly, the FTDI program does not govern eligibility for, or the terms and conditions of, any family or medical leave. Rather, the FTDI program only provides for compensation during such a leave. Employees' leave rights (including job protection) continue to be governed by existing state and federal family and medical leave laws (i.e., the federal Family & Medical Leave Act, the California Family Rights Act, and California's Pregnancy Disability Leave).

Similar to disability insurance contributions, employers will be responsible for processing employee contributions under FTDI. Additionally, employers will likely encounter more employees seeking leave for longer time periods, and may have increased costs associated with hiring and training replacement employees.

Governor Davis Signs Bill Revising California's Law Regarding Background Checks

Last year, California passed the Investigative Consumer Reporting Agencies Act ("ICRAA"). ICRAA set out a number of burdensome requirements for employers who conduct background or reference checks on applicants or employees. Two bills — AB 1068 (Wright) and AB 2868 (Wright) — signed by Governor Davis on September 28, 2002, effective immediately, clarify some of the requirements.

•An employer conducting reference checks without the help of an outside agency need not comply with ICRAA.

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• An employer conducting background checks (as opposed to reference checks) without the help of an outside agency generally need not comply with ICRAA, unless the information collected is a matter of public record (such as a criminal record).

• An employer conducting an internal investigation (e.g., sexual harassment investigations) need not comply with ICRAA. Employers should note, however, that: (1) they remain obligated to comply with the Labor Code, which provides employees with a right to review their personnel files; and (2) both federal and state law are unclear as to whether an employer conducting an investigation through an outside agency must give a copy of the investigation to the employee involved.

• An employer using an agency to conduct background or reference checks must comply with ICRAA. Although ICRAA previously mandated that employers who obtain an investigative consumer report provide the applicant or employee with a copy of the report, the new law requires only that employers provide the applicant or employee with a means (such as a "check box") to request a copy.

Notice of Mass Layoff, Relocation and Termination

On September 21, 2002, Governor Davis signed AB 2957 (Koretz), California's version of the federal Worker Adjustment and Retraining Notification Act (the "WARN Act"), which will take effect on January 1, 2003. This new law requires covered employers to provide 60 days written notice of any mass layoff, relocation, or termination of industrial or commercial operations to all affected employees, the Employment Development Department, the local workforce investment board, and the chief elected official of each city and county affected by the event. Employers that fail to provide the required notice may be liable for back pay, benefits, penalties, attorneys' fees, and court costs.

The WARN Act requires employers with 100 or more employees to provide written notice 60 days in advance of any covered "plant closing" or "mass layoff." The new California law generally tracks the WARN Act, but has a number of significant differences. California's law applies to any industrial or commercial facility that employs, or has employed, 75 or more persons within the 12 months preceding the layoff. By contrast, the WARN Act only covers employers with 100 or more "full-time employees". Under the new law, notice of a layoff is required whenever an employer lays off 50 or more employees at single work site. Under the WARN Act, notice of a layoff is only required if the layoff of 50 or more employees affects more than one-third of the employees at the single work site. In determining both coverage by the law and whether a covered event has occurred, the California law does not exclude employees with part-time schedules, whereas the WARN Act excludes employees who work less than 20 hours per week. Both laws exclude employees employed for fewer than six of the 12 months preceding the time in which notice is required.

Information required in the California notice tracks that required by the WARN Act. Similar to the WARN Act, the new state law also provides for aggregating separate layoffs occurring within any 30-day period. Finally, like the WARN Act, the new law provides only very limited exceptions, and provides for damages plus attorneys' fees awards to employees who are not provided with the required notice.

This new law will affect more California employers and more layoffs than those previously covered under the WARN Act. There are also subtle differences now between state and federal law which will require a careful analysis of any contemplated workforce reduction.

Expanded Age Protection Under FEHA

Governor Davis also signed into law AB 1599 (Negrete-McLeod). This law will expand the age discrimination provisions of the California Fair Employment and Housing Act to apply to employee training and benefits programs. It specifically overrules the holding of *Esberg v. Union Oil Co.*, which was decided earlier this year. This amendment will be effective January 1, 2003.

Absence Control Policies

SB 1471 (Diaz) will also become law effective January 1, 2003. This new law will provide that any employer policy that counts sick leave used to attend to an illness of a child, parent, spouse, or domestic partner as a basis for discipline is a *per se* violation of California law.

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Employment Laws

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Local Government Standards

AB 2509 (Goldberg) will permit local governments to enforce their own labor standards (i.e., living wage ordinances) on state-funded economic development projects.

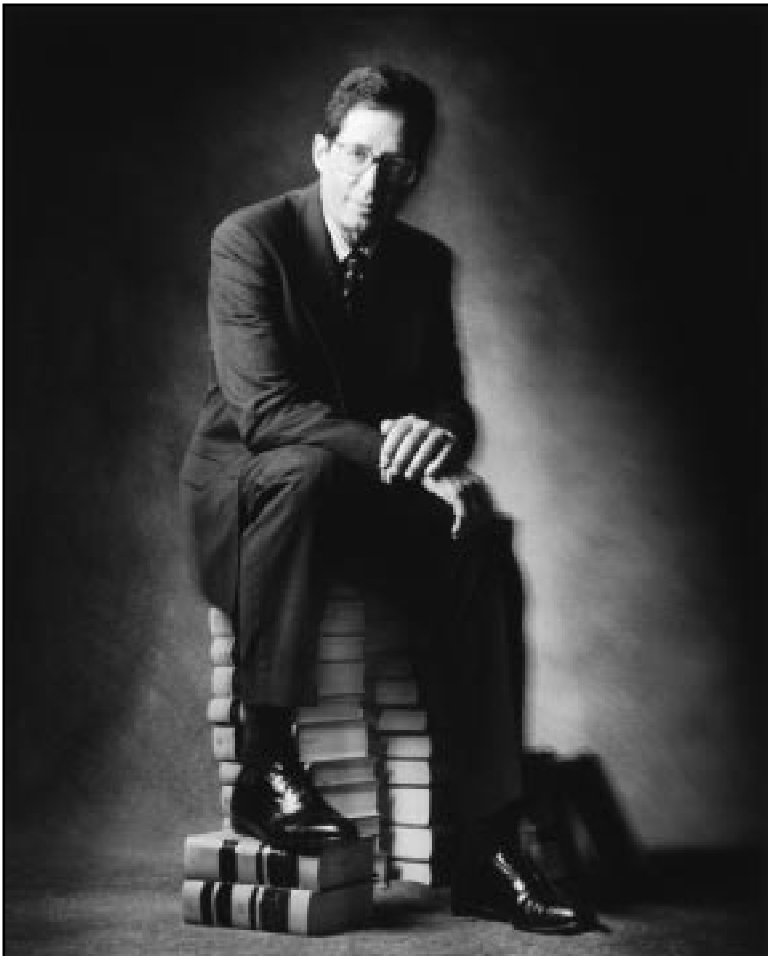
Tolling of Limitations

AB 1146 (Chan) will toll the limitations period within which a civil action must be filed in situations where the California Department of Fair Employment and Housing ("DFEH") has deferred its investigation of a complaint to the United States Equal Employment Opportunity Commission ("EEOC") or when after an investigation by the DFEH, the EEOC agrees to perform a substantial weight review of the determination of the DFEH or conducts its own investigation.

Assault Victims

AB 2195 (Corbett) prohibits discharging or discriminating against an employee for certain activities relating to attending court or seeking assistance on account of being a victim of sexual assault. This law will also permit victims of sexual assault to use paid or unpaid leave to attend such activities.

Governor Davis also vetoed a number of bills which had drawn heavy opposition from California's employers. The Governor refused to prohibit mandatory arbitration of discrimination claims (SB 1538) and he refused to mandate severance pay to certain specified employees (AB 2989). New versions of these bills, and others impacting both employers and employees in California, will likely be on the legislative agenda next term. ∆



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burden under section 425.16 and rejected any standard that requires inquiry into the plaintiff's subjective motivations for bringing suit. The Court examined the Legislative history and public policy behind section 425.16 and harmonized the preamble with the operative provisions of section 425.16, noting that "Legislative intent must be gleaned from the statute as a whole." Our High Court also rejected plaintiff's argument that an intent-to-chill requirement is constitutionally compelled before attorney's fees may be awarded under subdivision (c), noting that courts have upheld many other statutory fee-shifting provisions that do not require any showing of bad faith or subjective intent. Finally, it would be anomalous to hold that the act of filing a notice of intent to sue — an act clearly covered by the litigation privilege of Civil Code § 47, subd. (b) — is not covered by the anti-SLAPP statute, which is designed to broadly protect the right of petition. Our High Court therefore affirmed the trial court order granting the defendant's special motion to strike.

2. *Navellier v. Sletten*

Navellier v. Sletten (2002) 29 Cal. 4th 82 is, perhaps, the most extreme case demonstrating just how far and wide anti-SLAPP territory extends. Although the facts of *Navellier* are quite complex, the majority again resolved the SLAPP triggering issue with a simple plain language construction. The cause of action in *Navellier* essentially arose from defendant's alleged fraud and breach of a settlement agreement not to sue. Consistent with Justice Haller's reasoning in *Chavez v. Mendoza* (4th Dist. 2001) 94 Cal.App.4th 1083, 1087-1090, our High Court held that section 425.16 covers any cause of action based upon the alleged improper filing of a lawsuit and that the question of whether the filing of that suit was improper or invalid is to be addressed on the merits in the second step of the SLAPP analysis. Because the breach of contract claim is "based upon" Sletten's act of filing counterclaims in breach of a settlement and release agreement not to sue, it "arises from" the making of a written statement or writing "before... a judicial proceeding" within the meaning of subdivisions (b)(1) and (e)(1). The claim for fraud was based upon Sletten's signing and execution of the settlement and release of claims agreement with the alleged intent not to abide by the terms of the release. The fraud claim was based on a "writing made in connection with an issue under consideration or review by a … judicial body" in the prior action under the plain language of subdivision (e)(2). Hence, both claims were based on acts sufficient to trigger the plaintiff's burden of establishing a probability of prevailing. Justice Brown's dissent launched objections based on public policy claiming that Sletten's act of filing a lawsuit in violation of a settlement and release agreement was not a "valid" exercise of First Amendment petition rights. But this reasoning is at odds with the majority opinion, which held there is "no proof of validity requirement" for triggering the SLAPP threshold.

C. PLAIN LANGUAGE CONSTRUCTION HAS LIMITS — "ARISING FROM" DOES NOT MEAN "IN RESPONSE TO"

City of Cotati v. Cashman (2002) 29 Cal. 4th 69 presents a unique fact pattern — dueling federal and state court declaratory relief actions based upon the same constitutional controversy. The City enacted a rent control ordinance on all mobile home parks. Three parkowners (Cashman et al.) filed an action for declaratory relief in federal court claiming that the ordinance violated the Fifth and Fourteenth Amendments to the United States Constitution.

In response, City filed a counter-declaratory relief action in state court claiming that the same ordinance is valid under both the United States and California Constitutions. City then moved to dismiss the federal court action on abstention grounds. Parkowners filed a special motion to strike City's state court action claiming that it "arose from" parkowners' filing of the federal complaint.

Based upon a broad plain language construction of section 425.16, our High Court reached a fundamentally different result and held that the City's state court action did not "arise from" the defendant's act of filing the federal suit merely because City's action was filed "in response to" the federal action. In so holding, our High Court interpreted the phrase "arising from" to mean "based upon" rather "in response to." If the latter interpretation were adopted, then all cross-complaints would be subject

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Storytellers

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they have a compelling story to tell, and therefore a high probability of success, until well into the case.

Whether representing plaintiff or defendant, the first question you should ask once you've learned enough facts to have a good feel for the case is, "When I stand up in front of a jury to begin my opening statement, will my story cry out for but one ending, that which benefits my client?" And the next question should be, "Does the story my opponent will tell have greater appeal?" Objective answers to these questions generally give you the best guidance as to whether you should take a case at all and, if you do, whether you and your client should be prepared to pursue the matter through trial or follow a litigation plan designed to position the case for the best possible settlement at the appropriate time. If the story you hope to tell, and that which you anticipate your opponent has to offer, are clear in your mind, planning your discovery and trial preparation will be considerably more efficient and effective.

As you evaluate the best way to tell your client's story, with the three components of storytelling clearly in mind, ask what facts will reveal qualities of your client that will make him, her or it a viable hero, what facts will paint your opponent's client as a villain, a dolt, greedy or an otherwise suitable antagonist, what facts will help characterize the conflict as one in which your client is the one who is reasonable and righteous, and what facts will demonstrate that any result other than the one you endorse will cause your client to suffer unfairly and/or will provide ill-gotten (and hence unjust) gains to your opponent. In the process, do everything you can to discipline yourself to avoid the trap into which many of us fall - focusing only on vilifying our opponent without due regard for the importance of objectively evaluating our own client's vulnerabilities. The best time to do this is early on, before you develop an emotional attachment to your client, or its cause, and lose your perspective.

• Jury Selection: One of the reasons the movie Titanic grossed close to $1 billion in theatres was that a certain segment of the population tended to return to the theatre time after time. Guess who? If you answered teenage girls, you were right. After all, first and foremost, Titanic was a romance, not just a tale of adventure set on the high seas. Had it featured swashbuckling pirates, battle scenes and a sufficient amount of gore to satisfy the movie-going expectations of today's teenage boys, it would have appealed to a very different audience. Trial work has some similarities. To some degree, you can adjust your story at the time of trial to appeal to the jury that has been selected. But it is much more effective if you are able to pick a jury that is likely to be moved by your story.

Every case will play well to certain audiences and poorly to others. Sometimes you want a jury that is particularly intelligent and well-educated. There are times when the ideal juror is as cold-hearted as Attila the Hun. Other times, you may want 12 jurors with the compassion of Mother Theresa. You may prefer wealthy people or poor, underachievers or overachievers, the privileged or the oppressed, experienced or naive. But in every case, you want jurors who will be emotionally, experientially and intellectually incapable of writing any ending to the story but yours.

The Bush/Gore presidential debates illustrate how people naturally view and interpret events in whatever way is required for them to be consistent with their view of the world. Psychologists call this the need for "cognitive consistency." Ninety-five percent of the Democrats thought Gore won all three debates; just as ninety-five percent of the Republicans thought Bush was the victor. Can you imagine if the debates instead had been a lawsuit wherein you represented the Republican, and the jurors were all Democrats? You wouldn't have a chance. The same analysis applies to a jury or bench trial, as reflected by the fact that all of the Appellate Justices who decided the Florida ballot counting dispute, in both the Florida Supreme

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Trilogy of Cases

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to a special motion to strike as a matter of law.

While our High Court ultimately held that section 425.16 did not apply to the City's declaratory relief action on the ground that the claim did not "arise from" defendant's act of improperly filing the federal suit, the Court squarely rejected the First District Court of Appeal's misguided attempt to impose a chilling effect requirement onto the operative provisions of section 425.16. ∆

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Court and United States Supreme Court, voted along party lines.

It is important to remember that, for example, Democrats usually become Democrats because their belief system is consistent with the Democratic platform. They don't first become Democrats and then change their view of the world. Similarly, most engineers that you will encounter during jury selection didn't become detail-oriented, linear thinkers because they became engineers. Most of them became engineers because their psychological makeup, life experience and interests led them in that direction.

In some cases, it's easy to predict what traits would be ideal for a juror who is to hear your story. In the O.J. Simpson case, for example (or any case that relies upon a finding by the jury that the police acted dishonestly), African-Americans who lived in South Central Los Angeles and had been subjected to abuse at the hands of the police, either directly or indirectly, were quick to accept the Dream Team's storyline as not only plausible, but probable. On the other hand, the viability of the prosecution's storyline depended upon the jury sharing Marsha Clark's fervent belief that occasional physical abuse was a natural precursor to murder. Pretrial research by both sides revealed that a typical Central District of Los Angeles jury would not share Ms. Clark's view in that regard. In the civil case, however, the largely white, well-off residents of West LA, who saw the police as their protectors, not their enemies, were quick to exonerate the police and to condemn any type of spousal abuse.

As lawyers, we are lucky; we have at least some input into who our audience is. Moviemakers, for example, don't pick their audience; the audience picks their movies. Imagine if a movie producer could pick the critics that reviewed his or her movie. If the producer had a good understanding of the key characteristics of his movie, he could identify the demographics of the ideal critic relatively easily. James Cameron would have preferred to have teenage girls write Titanic's reviews, not Boston longshoreman, because he knew Titanic was a love story.

The more clearly you define your storyline before trial, the easier it will be for you to pick jurors who will be receptive to it. The throw-everything-up-against-the-wall-and-see-what-sticks philosophy of litigation makes it virtually impossible to pick a receptive jury with a reasonable level of confidence.

If, however, you have a clearly-defined theme, and are prepared to tell a carefully-crafted story, there a few very simple ways to identify the qualities you want in your jurors. Remember, good storytelling, at least in its most basic sense, first involves the development of the characters, particularly the protagonist and the antagonist. Before selecting a jury, sit down for a moment and write down the names of all of the key witnesses. Ask yourself, "What qualities, statements or actions will make this witness attractive or unattractive?" Then ask, "What type of juror will be attracted to those characteristics, and what jurors will be put off by them?" Again, assume that the plaintiff was a struggling young entrepreneur who was driven out of business

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by a large corporation. If you are the plaintiff's lawyer, your headline for the case would read something like, "Soulless Corporation Crushes Hardworking Single Mother of Four." The defense headline might say, "Neophyte's Lack of Knowledge and Experience Proves Fatal Despite Corporate Mentoring." With this in mind, guess who wants jurors who are working-class folks, women, parents and those who have been fired from a job?

You can use this same process to identify the conflict you will unfold, and the jurors who are likely to side with one party or another given the nature of the conflict. You can even use this technique to pick jurors who will readily adopt your view of the appropriate resolution of that conflict. But not without first clearly establishing in your own mind what lies at the heart of the conflict.

• Opening Statement: The opportunity to present vivid and emotion-laden images is easier in closing argument where substantial editorializing is permitted, than in opening statement where, at least in principle, it is not. But the facts, if truly the makings of a good story, and if well-organized and told, will speak for themselves, even in an opening statement free of the slightest hint of argument.

There are many ways to tell a story in opening statement other than the classic structure of 25% character development, 50% conflict and 25% resolution. But everything being equal, the classic structure works very well. After all, it's been used successfully for thousands of years by writers whose audiences can get up and leave anytime they want; a luxury your jurors don't have. If you have the irresistible urge to be creative, go for it. But like the playwrights whose work breaks from tradition, sometimes you'll be hailed as a genius; sometimes you'll fall flat.

Whether or not you stray from the classic storytelling structure, always keep these few simple rules in mind:

1. Remember, as David Hume said 300 years ago, "Reason is, and ought only to be the slave to the passions." Or as applied to the marketing arena by Herman Wheeler in the last century, "You don't sell the steak, you sell the sizzle." There must be an emotional chord to your story for the jury to be moved by it. Without one, you may have a tough battle to overcome.

2. Ask why it would be unfair or unjust for your client to lose. If you can't state the answer in 25 words or less, you need another storyline. As strange as it sounds, jurors are more motivated to avoid an unjust result than to assure a just one. After all, it's human nature that we don't remember every punishment we received as a child, but we remember the ones we didn't deserve.

3. Can you imagine the interest, intrigue, suspense, fright, sorrow or other passion that would be aroused by a movie whose characters are lifeless? Can you think of any story told in any form that moved you without first introducing you in some detail to the character of the main players? Your opening statement can't treat the parties and key witnesses like bit players. Instead, the story must revolve around them. Explain the parties' desires, fears and motivations. Bring your story down to the human level where jurors can care about it.

4. Don't trot out every fact, just those that are truly essential to communicate the reason why an adverse result would be unfair or unjust. This truly is a time when "less is more." Keep in mind those beer and truck ads. Excruciating detail is boring and unemotional. The jury who is just then hearing about the case for the first time will follow your theme better if it is not too factually complex.

5. Tell the story well, but don't become part of it. You diminish your opening statement if anything you do takes the jurors' minds away from the world you are creating with your words. If they think you're not being straight with them, that will capture their focus. If you attack the opposing counsel or parties, you and they become the players, and the conflict to resolve becomes yours, not your client's.

• Witness Examination: To prepare a witness for direct examination, most lawyers outline all of the facts that they want to elicit from a particular witness, and then sit down with the witness and review the questions and answers to make sure that the witness is prepared to testify to each fact on cue once he or she takes the stage. If the character of the witness is developed at all during the course of the testimony, it is usually by inference from what the witness did or said. But research tells us that the content of a witness's statement plays a relatively small role in the formation of a jury's impression of that witness. A study conducted by Dr. Albert

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Mehrabian, which has been cited more frequently over the past 30 years than any other research in the area, found that only 7% of a person's impression is based upon the content of what he says, while 93% is based upon a combination of his voice, facial expressions and body language. What a person says is important, but how that message is delivered often has more impact on the witness's character development.

Whenever possible, you should conduct your witness preparation in front of a video camera using liberal amounts of mock questions and answers. A camera, VCR and monitor, with all the necessary accessories, can be purchased for as little as $500. It is one of the best investments you can make. When I first started using videotaped witness preparation, I expected it would enhance the process somewhat, but I have been amazed at the impact. Without the benefit of seeing his or her own testimony, I found that my input regarding body position, facial expression, voice and other aspects of impression formation, resulted in meager progress by most witnesses. But on every one of the countless occasions when I have coupled my comments with the visual reinforcement available through the use of a video camera, I have found the witness's progress to be truly remarkable.

Witnesses who refuse to accept that they are argumentative or evasive quickly see that they are when they see the video replay. Witnesses who want to introduce every detail into an answer understand the value of brevity when their approach is contrasted with a more direct approach on the TV screen. Best of all, during a video-enhanced witness preparation session, in which the witness sees his or her improvement, the witness develops confidence, which translates to credibility on the stand — credibility which is essential if your characters are to be perceived as wearing the white hat.

First, I tell my witnesses to think of whoever asks a question as if he or she were the foreperson of the jury who was given permission by the Judge to ask whatever questions were on the jurors' minds. If I keep driving this home during witness preparation, most witnesses are able to keep the jury focused on the story by avoiding sarcasm, argument or evasiveness and similar distractions.

Next, I explain to my witnesses that sometimes I am reminded during witness examination of the news coverage of the Vietnam War that I saw nightly in my youth. It seemed our forces always were seeking to take or defend a different hill somewhere in Vietnam. No one ever explained why Hill 267 needed to be taken or Hill 112 defended. It seemed every hill needed to be conquered or defended simply because it was there.

Left to their own devices, witnesses often tend to follow the same approach to their testimony. They will argue points that are irrelevant or defend actions that are indefensible. In the process, they lose the personal credibility they will need when it comes time for the jury to decide how the real conflict in the case will be resolved.

I tell witnesses to ask themselves into which of three categories each line of questioning falls. First, does it really matter? In other words, should we be willing to suffer any credibility casualties defending that hill? If not, yield ground. After all, discretion is the better part of valor. Second, assuming it is a hill that we would like to defend if we could, is it a hill that can be defended? Or will our position be overrun no matter how hard we fight? The longer a witness hangs on to an indefensible position, the more damage he does to his case. And third, is it a hill that we need to defend if our story is to hold together? Our resources should be devoted to defending those "hills" that fall into this third category. If we have taken casualties defending hills that didn't matter, or fighting battles that couldn't be won, our forces will have been weakened, perhaps critically, when it comes time for the last stand.

If, during the examination of witnesses, you concentrate on developing the witnesses' character consistent with the role they play in your story, and if you are able to focus the conflict on an issue which you can win (since you haven't wasted resources defending meaningless hills or hills that could not be defended), the resolution you want is likely to follow. Using our example, if the young entrepreneur is painted as a diligent, honest, hardworking and intelligent young woman, and the defendant as an unscrupulous, or, at a minimum, uncaring, greedy corporation, and if the conflict has focused on, for example, the issue of why it would be unfair for the plaintiff to lose the time and money she invested in reliance on the defendant, the conflict resolution

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will be quite predictable.

• Closing Argument: You might think that if there were ever a time during trial to tell your whole story, it would be during closing argument. If so, you have fallen into one of the most common, and deadly, of the traps to which trial lawyers succumb. I have characterized this phase of the trial as "closing argument," rather than "summation," because that is what you should do. You do not want to just summarize the story you have told during the preceding weeks. Instead, you want to anticipate and address those issues that the jury might consider most important when they decide whether your story or your opponent's makes sense, and you want to explain why there is only one way to resolve those issues — yours.

Closing argument is not the time to simply rehash the facts. Rather, it's the time to address concepts, using the facts to do so. Relying again upon our hypothetical, in closing argument, if you represent the plaintiff, you want to highlight why a young businesswoman must be entitled to rely upon statements made by those who presumably know what they are talking about, and why it would be inherently unfair, and unacceptable in our society, if people were able to benefit from their own lies or half-truths. Talk about the American Dream, and how it is unobtainable unless those in power do not misuse that power when they interact with those who are vulnerable. Empower the jury by explaining that they ultimately are the conscience of the community. Reach out for their emotional brains. If you reach them, their rational brains will follow.

As in opening statement, your goal in closing argument is to make sure that the jury enters deliberations wearing lenses through which they will see the case as you wish them to see it, and through which your opponent's case will either be invisible or unpersuasive. In an occasional case, this objective may be served by an extensive review of the facts. In most, however, relatively few facts will need to be recited. The emphasis will be upon how the jury instructions, common sense and ultimate fairness demand a resolution in your favor.

Again, let's refer to our example to illustrate how this works. Assume your client, the young entrepreneur, purchased a franchise from the defendant franchisor, and that she did virtually no research into the business, apart from reading the defendant's promotional materials that she received at a franchise fair at the Convention Center. Also, assume that before she started her own business, she had worked her way up from an entry-level position to branch manager of a business in a completely different industry where she was quite successful.

During her testimony, you can anticipate she will be cross-examined about her lack of formal education. If, during discovery, you have found that 80% of defendant's successful franchisees have no formal education, you and your client should recognize that "hill" is not only unimportant, since whether or not someone has a formal education appears to be irrelevant to his or her success in this line of business, it is also a hill that could not be defended even if you wanted to defend it. The fact is, the young woman has no formal education, and a few night adult-education business classes won't put a different light on the subject. If she insists on quibbling over whether attendance at Learning Annex programs constitutes "formal education," she will do more harm than good, and her story will take a dramatic turn in the defendant's direction as the debate revolves around her education instead of the defendant's lies. Remember, you must stay focused on what is important to your storyline - not theirs.

The art of effective storytelling cannot be outlined in an article such as this like assembly instructions for a child's toy. It truly is an art. But the concepts outlined in this, and the two preceding installments of "Lawyers as Storytellers," will help lay a foundation upon which you can build. But first, if you are like most lawyers, you will need to trust in the fact that, as marketeers often note, "People buy on emotion and justify with facts." For some, this realization comes easily. Others require a leap of faith. Still others cling to their totally logical, rational, analytical approach as if life depended upon it. If it is a struggle for you to incorporate effective storytelling techniques into your practice and necessarily jettison some of the technical or factual detail you would use otherwise, bear in mind that the more difficult the process is for you, the more you are in need of adopting it. It may not be easy, but it will be worth the effort. ∆

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