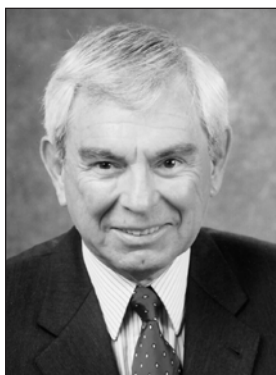


Whose Arbitration is This, Anyway? How Non-Signatories End Up Arbitrating

By Hon. Raymond F. Zvetina (Ret.)



Hon. Raymond F. Zvetina

You’ve no doubt read this before: “...[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”¹

So, if your signature doesn’t appear on a contract containing an arbitration clause, you can’t demand arbitration or be dragged into one, right? Wrong — at

least some of the time.

How can this be? How can non-signatories [we will use this term to mean persons or entities that have not signed a contract with an arbitration clause] – how can non-signatories push their way, or be pushed, into arbitration? The same way that they can, under certain circumstances, enforce or be found liable on a contract they haven’t signed. “This Court has made clear that a non-signatory party may be bound to an arbitration agreement if so dictated by the ‘ordinary principles of contract and agency.’”²

The exceptions to the perceived general rule that only a signatory to an arbitration agreement may be compelled to arbitrate fall into two broad categories: (1) situations where a contract could be enforced by or against a non-signatory under traditional principles of con-

(see “Arbitration” on page 10)

The Rapid Rise and Fall of the False Patent Marking Claim

By Craig Countryman

In the past year or so, patent plaintiffs flooded courts with false marking claims based on a previously generally ignored provision of the patent marking statute, 35 U.S.C. § 292. Following a 2009 federal circuit decision, this provision seemingly opened up broad prospects for recovery based on penalty per each mismarked item. Just as quickly, however, this promise of lucre was met with two defenses: the need to show intent to deceive and courts’ discretion in limiting the damages to amounts necessary to repair the harm or deter a wrongdoing.



Craig Countryman

(see “Marking” on page 6)

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President's Letter

By Mark C. Zebrowski, President ABTL San Diego



Mark Zebrowski

Many legal publications contain articles on professional civility. I suggest that civility in our personal affairs will go a long way toward civility in our professional lives.

Our June 28, 2010 dinner program featured Professor John Yoo. Among other things, Professor Yoo is a summa cum laude graduate of Harvard University;

a graduate of Yale Law School; a former clerk for both the Court of Appeals for the District of Columbia Circuit and for the United States Supreme Court; former general counsel of the United States Senate Judiciary Committee; an author of articles and books on foreign affairs, national security and constitutional law; a recipient of numerous professional awards and recognitions; and a professor of law at the University of California, Berkeley School of Law. Professor Yoo also served as a deputy assistant attorney general in the Office of Legal Counsel of the United States Department of Justice from 2003-2005 where he worked on issues involving foreign affairs, national security and the separation of powers. And yes, he wrote controversial legal memoranda based on his research and analysis.

Professor Yoo's presentation was "Great Presidents and the Supreme Court" based on his newest book, *Crisis and Command: A History of Executive Power from George Washington to George W. Bush*. The July issue of *California Lawyer* included a review of the book, and the August issue contained this in a California

lawyer's letter to the editor: "While I'm all for freedom of speech, it's unfortunate the *California Lawyer* publicized John Yoo's pathetic attempt to redeem himself, even if it was in the form of a negative book review. . . . Yoo should've been disbarred and fired from U.C. Berkeley. . . . Rather than give them any assistance in warping history's view of their misdoings, we should shun them."

Are we as lawyers promoting civility when we publicly advocate that someone be denied freedom of speech, disbarred, fired and shunned for his or her opinions, much less his or her legal analysis?

Contrast that to this from country western singer Emmylou Harris: "As citizens we have to be more thoughtful and more educated and more informed. I turn on the TV and I see these grown people screaming at each other, and I think, well, if we don't get our civility back, we're in trouble."

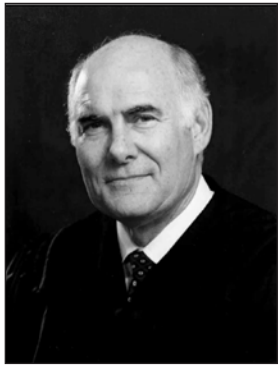
Who represents civility, the lawyer or the country western singer?

I understand there are ABTL members who disagreed with our chapter hosting Professor Yoo and refused to attend his presentation. I suggest that personal and professional civility call for us to do better. We as lawyers can and should demonstrate leadership in listening to, considering and discussing different points of view with respect and perhaps even a desire to learn and understand. I suggest doing so will enhance the reputation of our profession and help improve the communities in which we live. And I suggest those who chose to boycott Professor Yoo missed a terrific, informative presentation from an accomplished and civil lawyer.

Thank you for considering these thoughts, particularly if you disagree. ▲

Brown Bag Lunch: Inside the Courtroom of Judge Jeffrey Miller

By Lois M. Kosch



Judge Jeffrey Miller

On July 21, 2010 the Honorable Jeffrey T. Miller opened his courtroom at the federal courthouse for a brown bag lunch presented by ABTL-San Diego, the Federal Bar Association and the Litigation Section of the State Bar of California. Judge Miller, who was appointed by President Clinton in 1997 and recently assumed senior status, shared helpful tips for those handling matters in his courtroom as well as general advice on navigating federal court.

Three-Day Rule

Before his appointment to the federal bench, Judge Miller served as a San Diego Superior Court judge from 1987 to 1997, and the first insider tip shared at his brown bag presentation related to a rule he imported from his time on the Superior Court – the so-called “three-day rule.” At one time the San Diego Superior Court would not schedule motions unless counsel was prepared to file the moving papers within three days. Judge Miller still enforces the three-day rule. As such, counsel wishing to schedule motion hearings should not call to schedule unless they will be ready to file the moving papers within three days of obtaining the hearing date.

(see “Miller” on page 15)

GOT RESOLUTION?



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Tips From The Trenches: “The Judicial Perspective”

By Mark C. Mazzarella



Mark Mazzarella

In the past, *Tips from the Trenches* has summarized interviews with many of the most talented and successful trial lawyers in California on various topics which are central to successful trial practice. This edition of *Tips from the Trenches*, as well as those that follow during the balance of this

year, shifts focus to the other side of the bench to feature “tips” from highly respected and experienced trial judges, who were also exceptional trial lawyers.

Future articles will return to the interview format used in the past. For this issue, however, I have summarized the five most frequent admonitions I have heard judges give to lawyers over the past 32 years, both in trial and during CLE programs regarding the “do’s” and “don’ts” of jury trial practice. With apologies to Mr. Carson, I will count them down from number five to number one.

5 Be Yourself

It can be tempting, especially to those of us who make it a practice to study how the best trial lawyers act, what they say, and how they say it, to feel the urge to imitate those whom we admire the most. But sage trial judges are uniform in their advice to lawyers to “be yourself.”

Some lawyers can incorporate humor effectively into every phase of trial; for others, attempts at humor lead to nothing but awkward silence. When some attorneys show emotion, it

seems contagious; while efforts to display emotion by others appear contrived. Each lawyer has his or her own strengths. Each is comfortable with a different type of presentation. Lawyers certainly can change and improve their presentations within the limits of their personal comfort zone. But to try to create a persona for trial which does not come naturally is inviting disaster.

Jurors notice everything about the lawyers who appear before them during the days and weeks of trial. They will comment on their ties or haircuts, the way they relate to their clients, how frequently they pour themselves a glass of water, how they walk, stand or talk, and myriad other details. They will detect any feigned personality traits, or awkwardness. And, if they do, it will make them wonder about the lawyer’s sincerity. That is certainly not a good thing.

Take comfort in the knowledge that there is no one formula which makes for a great trial lawyer. Some are outgoing. Some are quiet. Some are emotional. Some are machine-like in their approach. What is important is that each lawyer incorporates his or her natural personality into his or her presentation.

4 Don’t Underestimate Your Jury

While there may be rare exceptions, most trial judges have acquired tremendous respect for juries over their years on the bench. Not surprisingly, they are quick to urge trial lawyers to do likewise. This “respect” should be manifested in a number of ways.

The first way to show jurors respect is obvious. Judges frequently caution trial lawyers, “Don’t talk down to your jury.” A lawyer can’t be arrogant or condescending toward jurors, and expect them to like or respect him or her.

The False Marking Statute

Federal law requires patent holders that sell products covered by their patents to mark the patent number on the product, or notify potential infringers that they are infringing, in order to recover damages for pre-suit infringement of their patents. Some companies have sought to comply with this “marking” requirement, found in 35 U.S.C. § 287, by listing all the patents they own on each of their different products. Such companies often hold hundreds of patents and produce many different products, and it is easier for them to use such a generic list rather than to conduct an individual assessment for each product and customize its labeling.

This practice has recently been called into question by court decisions interpreting another provision of federal law—the false marking statute. It forbids marking an “unpatented article” with a patent number “for the purpose of deceiving the public” and authorizes a fine of “not more than \$500 for every such offense.” Anyone may bring a *qui tam* suit to enforce the statute and can recover half the fine, with the other half going to the United States.

The false marking statute was little used until two federal circuit decisions reversed the lower courts’ settled interpretation of section 292. First, *Clontech Labs. v. Invitrogen Corp.*¹ held that a product marked with multiple patent numbers is an “unpatented article” under § 292 if even one of the listed patents does not cover the product. Then, *Forest Group, Inc. v. Bon Tool Co.*² held that each mismarked item sold triggers a separate fine under section 292. The upshot was that companies who over-listed patents on their products could now face fines of up to \$500 for each unit of product sold. The result? A torrent of false marking lawsuits—over 100 in the first half of 2010—which is probably more than the previous total filings since the statute’s enactment.

These decisions have left companies two ways to defend themselves against false marking claims: (1) argue they lack the “intent to

deceive” required by the statute and (2) argue that the court should exercise its discretion to award a small penalty. These arguments present strong defenses and will make it difficult for plaintiffs to prevail, even if the prospect of defeat may not stop plaintiffs from filing.

Intent to Deceive

Most companies that have recently been sued have not put the patent numbers on their products in order to deceive anyone. The explanation is often either: (1) the company was careless about keeping its labeling current and some of the marked patents have expired, meaning the product is now “unpatented,” or (2) the company knew not all the patents on the label covered the product but thought that at least one of them might cover it. These practices may be cutting corners but are not an effort to discourage competition or deceive the public.

“The upshot [after two federal circuit decisions] was that companies who over-listed patents on their products could now face fines of up to \$500 for each unit of product sold. The result? A torrent of false marking lawsuits—over 100 in the first half of 2010—which is probably more than the previous total filings since the statute’s enactment.”

But when the avalanche of false marking suits began this January, it was unclear whether these companies could avoid a finding of the intent to deceive. The leading federal circuit case discussing intent was *Clontech*, which appeared to equate intent to deceive with knowledge the marking was false. In *Clontech*, the defendant knew the marked patent covered a method of making the product rather than the product itself. In litigation, the defendant gave

Marking

continued from page 6

no explanation for why the patent was marked but claimed the marking did not hurt anyone because a quick look at the patent would show it did not cover the product. The defendant also argued overmarking bestowed a benefit by giving the public more information about the defendant's patent portfolio. The court rejected these arguments and explained that "the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity is enough to warrant drawing the inference that there was a fraudulent intent."

False marking plaintiffs took a broad view of the decision, arguing they could prevail on the intent prong in any case by simply showing knowledge of falsity. The federal circuit emphatically rejected that argument in *Pequignot v. Solo Cup Co.*³ holding that knowledge of falsity only creates a presumption of intent, a presumption that can be overcome when the defendant presents evidence that it had a purpose other than to deceive the public. *Pequignot* should dispose of many of the recently filed false marking cases.

In particular, *Pequignot* found no intent to deceive where the defendant knowingly continued to mark expired patent numbers on its products because it would have been expensive to immediately stop doing so. The defendant, Solo Cup, sold plastic cup lids marked with an expired patent number. The lids were manufactured using expensive molding equipment that would have to be replaced to stop marking the patent number. After discovering the problem, Solo and its outside counsel developed a plan to replace the moldings as they wore out in the ordinary course of business with new ones without the patent number. But the old moldings had several years left before they were due for replacement. In the meantime, Solo knew it was marking expired patents. Nonetheless, the court held that Solo successfully rebutted the presumption of intent by "cit[ing] the specific advice of its counsel, along with evidence as to its true intent, to reduce costs and business disruption." The court noted that the presumption of intent was weaker here because the products had once been covered by the expired patents.

The marking was therefore accurate when it started.

Pequignot also found that using equivocal language when marking negates intent to deceive. Solo marked several other products with the warning that "[t]his product may be covered by one or more U.S. or foreign pending or issued patents. For details, contact www.solocup.com." Some of those products were covered by a patent, but others were not. The language had been added at the advice of outside counsel, and Solo removed it while the case was pending. The court found that, here too, there could

“In particular, *Pequignot* found no intent to deceive where the defendant knowingly continued to mark expired patent numbers on its products because it would have been expensive to immediately stop doing so.”

be no intent to deceive. The language was not literally false. It was thus "highly questionable" there could be intent to deceive because "the public would not reasonably be deceived into believing the products were definitely covered by a patent." In addition, the language was added at the advice of counsel, and it was added to all products—rather than just those that were patented—"because the alternative was inconvenient from a logistical and financial perspective." Finally, the customer could determine whether the product was actually patented by pursuing the contact information on Solo's website.

Pequignot's approach is sensible, but it leaves defendants with an awful lot of leeway. After all, the purpose of the marking statute, section 287, is to require patentees that sell products covered by their patents to incur the cost of determining and communicating what patents cover them because they are in the best position to quickly and cheaply make such a determination. Patentees that put expired

Marking

continued from page 7

or irrelevant patents on the products, or that employ equivocal language, are externalizing the very costs that the marking statute requires them to bear. Still, the better solution is not to judicially rewrite the false marking statute to cover such conduct, but for Congress to amend the marking statute to make such marking insufficient to recover of pre-suit damages for infringement.

Calculation of Damages

There is little guidance regarding how courts should determine the appropriate statutory penalty in the rare post-*Pequignot* case where liability will be found. *Bon Tool* stressed that “the statute provides district courts the discretion to strike a balance between encouraging enforcement of an important public policy and imposing disproportionately large penalties for small, inexpensive items produced in large quantities.” But the court stopped short of discussing the

factors to be considered when exercising that discretion. Some district courts have imposed fines that amount to a shockingly high percentage of the product’s price or the defendant’s profit margin. But the total fines in those cases were small. It is difficult to imagine a court would apply the same percentages to recently filed cases similar to *Pequignot*, where there were 21.7 billion mismarked items. Indeed, *Bon Tool* explicitly stated that “[i]n the case of inexpensive mass-produced articles, a court has the discretion to determine that a fraction of a penny per article is a proper penalty.”

So how should district courts go about calculating the appropriate statutory penalty? There are two main possibilities. First, the court could tie the penalty to the cost that someone would have to incur to determine the defendant’s product was not actually patented. This would track the purpose of the statute because it would require the patentee to bear the costs it improperly shifted to the public. In cases where the only problem was that the marked patents were expired, damages would be minimal. It is easy to determine a patent’s expiration date by

(see “Marking” on page 9)



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Marking

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running a Google search to determine its filing and issuance dates and then applying the statutory formula for calculating its expiration date. Alternatively, damages could be higher in cases where the product was marked with a long list of unexpired patents, and a more extensive analysis would be required. Damages could be mitigated in these cases, however, if the marked patents clearly did not cover the product—for example, if, as in *Clontech*, the patents covered

“*Pequignot’s approach is sensible, but it leaves defendants with an awful lot of leeway. After all, the purpose of the marking statute, section 287, is to require patentees that sell products covered by their patents to incur the cost of determining and communicating what patents cover them because they are in the best position to quickly and cheaply make such a determination.*”

only manufacturing methods. Ironically, focusing on the cost to the public would make damages lowest in the cases that have been most attractive for plaintiffs to file—those where the determination of mismarking requires little effort.

Second, the court could instead tie the penalty to an amount needed to deter the defendant’s conduct, regardless of the actual cost to the public. This would entail examining the defendant’s profit margins on the product and any evidence it put forth regarding the cost savings of continuing its false marking. For example, the district court in *Pequignot* noted that it would have cost \$500,000 to replace the rings in its molding equipment used to mark the pat-

ent numbers. So, if Solo had been found liable, a total penalty of over at least that amount would have been necessary to deter its conduct. Otherwise, Solo could falsely mark, pay the fine, and still come out ahead. The deterrence approach is attractive because it carries out the statutory goal of eliminating false marking altogether. But if the public isn’t really being harmed by false marking, then why should the courts go out of their way to deter it? Higher, deterrence-based fines may just be passed on to customers as higher prices on future sales of the product. And they give the plaintiff—who, these days, is rarely someone who was actually trying to enter the market for the mismarked product—a windfall.

Both approaches have their merits and drawbacks. Whichever prevails, it is important that courts and parties choose an approach that promotes the purposes of the statute as warranted by a showing of harm or undeterred wrongdoing.

Lessons Learned

The flood of false marking suits and *Pequignot’s* swift effort to curtail them represent the worst and the best aspects of the legal practice, respectively. The new class of false marking plaintiffs may have sought to cash in on a technicality, rather than focus on cases where companies’ marking practices actually harm the public by discouraging competition. However, many of the defendants are not entirely blameless, having been sloppy about their marking practices. But one could argue that their conduct hardly warrants harsh penalties. The federal circuit saw the problem coming in *Bon Tool* and took decisive action to eliminate it in *Pequignot*.

Craig Countryman is an attorney in Fish & Richardson P.C.’s San Diego office. Mr. Countryman’s practice includes intellectual property and civil litigation.

1 406 F.3d 1347 (Fed. Cir. 2005).
2 590 F.3d 1295 (Fed. Cir. 2009).
3 608 F.3d 1356 (Fed. Cir. 2010).

Arbitration

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tract and agency, and (2) situations where the doctrine of equitable estoppel comes into play.

Traditional Bases for Non-Signatory Arbitration

Third Party Beneficiary

In *Spear, Leeds & Kellogg v. Central Life Assur. Co.*³ non-signatory insurance companies that suffered losses as a result of an New York Stock Exchange member's complicity in fraud by a customer were permitted to arbitrate claims as third party beneficiaries of member's agreement with New York Stock Exchange to abide by its rules, which provide for arbitration of all disputes between members and non-members.

In *Borsack v. Chalk & Vermillion Fine Arts Ltd.*,⁴ defendants A and B signed a license agreement by which A gave B an exclusive license to cast and sell Erte sculptures. The agreement contained an arbitration clause. Plaintiff claimed he was entitled to a finder's fee from B, and A and B then executed an addendum providing that for each new Erte sculpture produced, five additional casts would be delivered to plaintiff. After six and a half years the defendants stopped providing the casts. Non-signatory plaintiff sued for breach of contract. The court held that he sued as a third party beneficiary of the amended license and therefore had to take the burdens or limitations (i.e. arbitration) with the benefits of the contract. (Note: Why did plaintiff resist arbitration so vigorously? Probably because the arbitral venue was in London, home of defendant A.)

Assignment

In *Chatham Shipping Co. v. Fertex Steamship Corp.*,⁵ defendant charterer hired steamship owner A to carry cargo, with the right of A to substitute another vessel. The charter agreement contained an arbitration clause. Owner A substituted owner B's vessel to perform the contract and defendant accepted. Non-signatory

owner B was allowed to pursue claims against defendant charterer in arbitration on the ground that assignment of the contract containing an arbitration clause carries with it the right to arbitrate.

Agency

In *Dryer v. L.A. Rams*,⁶ a pro football player sued the L.A. Rams and four individuals (alleged to be owners, operators and managing agents) for breach of his employment contract by dropping him from the active roster. The court held that the non-signatory individuals sued as agents of the signatory LA Rams on the contract containing the arbitration clause were entitled to arbitrate the claims.

In *American Builders Assn. v. Au-Yang*,⁷ in an arbitration brought against builder by contract signatory claimant, the arbitrator ordered joinder of claimant's undisclosed principal. The appellate court held that while the arbitrator was correct that an undisclosed principal may prosecute an arbitration claim in his own name, the issue of the party's status as an undisclosed principal should have been decided by the court and not the arbitrator.

Alter Ego

In *Rowe v. Exline*,⁸ an ex-corporate officer sued the corporation and two directors as alter egos for breach of a settlement agreement executed by the corporation. The court held since alter ego is premised on the theory that the individuals are the corporation, the non-signatory defendants were entitled to the benefit of the arbitration provision regarding the contract cause of action.

Subrogation

In *Lumbermens Mut. Cas. Co. v. Borden Co.*,⁹ defendant Vulcan entered into a contract to provide engineering services to Borden's chemical plant. The contract had an arbitration clause. Plaintiff insurance company settled with its insured Borden for losses caused by accidents at the plant and then pursued a subrogation claim against Vulcan as the alleged



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cause of the accidents. Vulcan successfully argued that since the insurance company's claim was derivative from Borden, it stood in Borden's shoes and was therefore subject to arbitration under the contract.

However, in *Valley Casework Inc. v. Comfort Construction Inc.*,¹⁰ the fourth district reached an opposite conclusion. The insurance company for Comfort, the general contractor, settled with the owner of an apartment complex for defective kitchen cabinets assembled and installed by Comfort's subcontractor Valley. It then pursued a subrogation claim in arbitration against Valley under the arbitration clause in the contract between Comfort and Valley. Valley opposed, arguing that it could not cross-claim against component suppliers in the arbitration. The court, as a matter of first impression, ruled that arbitration was not available to the non-

signatory insurance company here where there were other equitable subrogation issues to be resolved.¹¹

“The court, as a matter of first impression, ruled that arbitration was not available to the non-signatory insurance company here where there were other equitable subrogation issues to be resolved.”

In *Equistar Chemicals, LP v. Hartford Steam Boiler Inspection & Ins. Co. of Connecticut*,¹² Hartford insured Trigen's generator located at Equistar's ethanol plant. Trigen and

(see "Arbitration" on page 12)

Arbitration

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Equistar had a services agreement containing an arbitration clause. Hartford paid Tristar for damage to the generator caused by an Equistar employee and pursued a subrogation claim against Equistar in arbitration. The Illinois appellate court declined to follow Valley Case-work and ruled that a subrogee's claim against a third party should be tried "within the limitations agreed to by the subrogor and the third party."

Equitable Estoppel as a Basis for Compelling Arbitration

Equitable estoppel is fast becoming the most frequently invoked rationale for compelling arbitration by or against a non-signatory party. Traditional equitable estoppel prevents a party, due to his or her own conduct, from

claiming a right to the detriment of another party when the latter was entitled to rely and did in fact rely on the conduct. The clearest example of a "pure" equitable estoppel found by the author is *In Re Transrol Navegacao, S.A.*¹³ There a charterer of a vessel ran it aground. The ship owner sued the charterer's guarantor in France. The guarantor persuaded the French court to dismiss the proceedings on the ground that the owner could arbitrate the matter in New York. When the owner did arbitrate, however, the guarantor refused to participate, claiming it was not a signatory to the charter agreement that contained the arbitration clause. Characterizing the guarantor's conduct as "playing fast and loose" with the judicial system, the court held the guarantor estopped to deny that it was subject to arbitration. (The court also invoked the doctrine of "preclusion of inconsistent positions," calling it a variant of equitable estoppel.¹⁴)

(see "Arbitration" on page 13)

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Non-Signatory Compelling Signatory to Arbitrate Through Equitable Estoppel

Few equitable estoppel cases are as blatant or prototypical of classic equitable estoppel as *Transrol*. The majority appear to involve situations where a signatory plaintiff sues a signatory defendant along with one or more non-signatory defendants, and the non-signatories seek to compel arbitration of the claims against them. Among the most frequently cited cases of this variety is *M.S. Dealer Svc. Corp. v. Franklin*.¹⁵ There, a car buyer sued the dealer and a service corporation alleging they conspired to defraud her by charging an excessive amount for the service contract. The purchase contract between buyer and dealer contained an arbitration clause. Non-signatory service corporation filed a petition to compel arbitration. In the process of reversing the denial of the petition, the eleventh circuit stated that equitable estoppel allows a non-signatory to compel arbitration (1) when a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the non-signatory, or (2) when the signatory to the written agreement raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract. It held that the car buyer was equitably estopped from avoiding arbitration of her claims against the service corporation because her claims made reference to and presumed the existence of the service contract charge contained in the retail installment contract and her claims against the service corporation and dealership were based on the same facts and were inherently inseparable because the defendants were alleged to have colluded. The claims were “intimately founded in and intertwined with the obligations imposed by the [contract].”¹⁶

The “intimately founded in and intertwined with the underlying contract obligations” language of *M.S. Dealer* and its predecessor, *Sunkist Soft Drinks Inc. v. Sunkist Growers Inc.*,¹⁷ was adopted by two California courts applying federal law, first in *Metalclad Corp. v.*

*Ventana Environmental Organizational Partnership*¹⁸ (equitable estoppel required signatory plaintiff which sued signatory corporate subsidiary and non-signatory parent for breach of contract and fraud based on the same contract and inseparable facts to arbitrate its claims against the non-signatory parent corporation) and later in *Boucher v. Alliance Title Co. Inc.*¹⁹ (equitable estoppel required a signatory employee who was terminated by a signatory transferor company to arbitrate contract and tort claims against the non-signatory transferee company).

Just this past July the California Sixth District Court of Appeal asserted categorically that in the arbitration context the equitable estoppel doctrine, though developed under federal law, applied with equal force in the law of California, and reiterated the “intimately founded in and intertwined with” standard.²⁰ It also held

“*Few equitable estoppel cases are as blatant or prototypical of classic equitable estoppel as Transrol. The majority appear to involve situations where a signatory plaintiff sues a signatory defendant along with one or more non-signatory defendants, and the non-signatories seek to compel arbitration of the claims against them.*”

that where the equitable estoppel doctrine applies, the nonsignatory is not a “third-party” within the meaning of Code of Civil Procedure Section 1281.2(c) (giving the court discretionary authority to refuse to enforce arbitration if a party is also a party to litigation in a pending court action “with a third-party” arising out of the same transaction and there is a possibility of conflicting rulings on common issues of law or fact).²¹

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The fifth circuit's adoption of the "intertwining claims" theory in *Grigson v. Creative Artists Agency, LLC*,²² however, provoked a vigorous dissent from Circuit Judge Dennis. Quoting Professor Williston's dictum that "[N]early anything can be called estoppel. When a lawyer or a judge does not know what other name to give for his decision to decide a case in a certain way, he says there is an estoppel." Judge Dennis inveighed against what he called a "spurious estoppel theory" and stated his belief that many of the "equitable estoppel" cases should be decided on the basis of implied in fact contract or other traditional contract and agency grounds. Nonetheless, equitable estoppel continues to be the theory *du jour* in most reported cases.

Signatory Compelling Non-Signatory to Arbitrate Through Equitable Estoppel

As previously indicated, the great majority of equitable estoppel cases involve a non-signatory compelling arbitration by a signatory. There, at least, the party compelled did sign a contract agreeing to arbitrate certain claims. In the converse situation, where a signatory seeks to compel arbitration by a non-signatory, the latter has not agreed to arbitrate at all, and the issue becomes more problematic. Nonetheless, there are a number of cases where a non-signatory has been compelled to arbitrate under an equitable estoppel principle (including *Transrol*, discussed above).

In *International Paper Co. v. Schwabedissen Maschinen, etc.*,²³ a signatory defendant manufacturer compelled arbitration by a non-signatory plaintiff buyer of an industrial saw because the plaintiff's claims were based upon a contract between the manufacturer and his distributor containing an arbitration clause and buyer's "entire case hinges on its asserted rights under [that contract]." The court held in effect that the plaintiff could not claim all the benefits of the contract (such as suing on it) and shirk its burdens.

In *WAMU Finance Group, LLC v. Bailey*,²⁴ a man obtained a loan and purchased

insurance under a contract containing an arbitration clause. His wife sued the lender on the contract itself, but then opposed the lender's attempts to compel her to arbitrate. The court said that a party should be estopped from asserting the lack of signature of a contract to preclude enforcement of the contract's arbitration clause "when he has consistently maintained that the other provisions of the same contract should be enforced to benefit him." "Restated, the doctrine of estoppel prevents a party from 'having it both ways.'"

As these two cases illustrate, if you arrogate to yourself the rights under the contract by suing on it as if you were a party, you have "bought the whole package," including the arbitration clause.

Absent similar facts, however, compelling a non-signatory to arbitrate is considerably more difficult than the obverse. We have previously discussed the "intimately founded in and intertwined with" rationale used by non-signatories to compel arbitration by signatory plaintiffs. In *Thomson-CSF, S.A. v. American Arbitration Assn.*,²⁵ the signatory plaintiff attempted to persuade the court that the principle worked in

“**Nonetheless, there are a number of cases where a non-signatory has been compelled to arbitrate under an equitable estoppel principle.**”

reverse so as to compel a non-signatory parent corporation to arbitrate plaintiff's claims against it. The second circuit did not buy this attempted inverse application of the "intimately intertwined" rationale and reversed the district court's grant of a motion to compel arbitration.²⁶

Conclusion

Generally speaking, one who has not signed a contract containing an arbitration clause

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will not be able to demand arbitration or be subject to arbitration. However, there are a limited number of exceptions to this general rule, consisting of those situations where a non-signatory to a contract can enforce or be held liable on it under ordinary contract and agency principles, as well as situations giving rise to traditional equitable estoppel or an incrementally expanding variation of equitable estoppel based primarily on the intimacy of the interrelation between the facts of the claim alleged and the obligations of the underlying contract containing the arbitration clause. ▲

Hon. Raymond F. Zvetina (Ret.) arbitrates and mediates a wide range of civil matters at JAMS. (See complete bio at www.jamsadr.com/zvetina)

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- 1 *AT&T Technologies, Inc. v. Communications Workers of America*, (1986) 475 U.S. 643, 648.
 - 2 *Thomson-CSF, S.A. v. American Arbitration Association*, (2d Cir. 1995) 64 F.3d 773 at 776.
 - 3 (2d Cir. 1996) 85 F.3d 21.
 - 4 (SDNY 1997) 974 F.Supp. 293, 299
 - 5 (2d Cir. 1965) 352 F.2d 291, 294.
 - 6 (1985) 40 Cal.3d 406, 418.
 - 7 (1990) 226 Cal.App.3d 170, 176.
 - 8 (2007) 153 Cal.App.4th 1276, 1284-1285.
 - 9 (SDNY 1967) 268 F.Supp. 303, 313-314
 - 10 (1999) 76 Cal.App.4th 1013.
 - 11 76 Cal.App.4th at 1023-1024.
 - 12 (2008) 399 Ill. App. 771, 779-781.
 - 13 (SDNY 1991) 782 F.Supp. 848, 853.
 - 14 782 F.Supp. at 832-833.
 - 15 (11th Cir. 1999) 177 F.3d 942, 947.
 - 16 177 F.3d at 948. (This quoted language appears frequently in equitable estoppel cases.)
 - 17 (11th Cir. 1993) 10 F.3d 753, 757.
 - 18 (2003) 109 Cal.App.4th 1705, 1716-1718.
 - 19 (2005) 127 Cal.App.4th 262, 271.
 - 20 *Molecular Analytical Systems v. CIPHERGEN Biosystems, Inc.*, 2012 WL 2698505. (Hn 40, 41 discussion.)
 - 21 *Id.* at HN 27 discussion.
 - 22 (5th Cir. 2000) 210 F.2d 524, 527-528, cert.den. 531 U.S. 1013 (2000).
 - 23 (4th Cir. 2000) 206 F.3d 411, 418.
 - 24 (5th Cir. 2004) 364 F.3d 260, 268.
 - 25 (2nd Cir. 1995) 64 F.3d 773.
 - 26 64 F.3d at 778-779.

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Judge Miller feels this rule allows motions to be timely set and, normally, motions are heard in his courtroom within four to six weeks.

Judge Miller and his staff strive to issue decisions on motions in a timely manner. However, if a significant amount of time has gone by it is perfectly appropriate to contact his chambers to inquire when a decision might be expected, he said. If a decision is needed for case scheduling purposes or other reasons, let his clerk know.

Oral Argument

Many attorneys have lamented the lack of opportunity for oral argument in federal court. Judge Miller recently polled other federal judges asking when they permit oral argument and under what circumstances. He found that judges' policies on oral argument vary quite a bit. However, he will want to hear oral argument on dispositive motions (including motions for summary judgment/summary adjudication and motions to dismiss). For other matters, he is open to oral argument. Judge Miller suggested that if an attorney feels strongly that he or she wants to be heard on a motion the attorney should let his law clerk know that he or she wishes to be heard. In that case, they will do their best to set the matter for oral argument. His only caveat is that oral argument is not usually helpful in cases involving a pro se litigant against a represented party, and, in such cases, oral argument may be less likely to be calendared.

Federal courts customarily issue comprehensive orders and decisions for significant motions. It is not Judge Miller's practice to issue tentative rulings; instead, he prefers to focus on the points raised at oral argument and thereafter issue a written ruling.

He does not impose any hard and fast time limits on oral argument. In his view, the opportunity to hear oral argument is a luxury and he enjoys the give and take of the exchange. On the day of the brown bag Judge Miller heard argument on a motion for summary judgment that lasted nearly an hour.

In terms of presenting oral argument, Judge Miller said that it is all right to underscore key

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points raised in the brief, but to also bring to the court's attention any new points or new authorities of which the court should be aware. If it sounds like counsel is just reiterating the brief he will likely jump in and begin asking questions. One of the least productive things an attorney can do during oral argument is to bring an old case that was not cited in the papers to the court's attention. This tends to bring argument to an end because the court and opposing counsel must have the opportunity to review the authority. Judge Miller encouraged attorneys to do their due diligence in preparing and filing briefs that include all relevant case law, rather than raising cases at argument that should have been included in the brief.

Judge Miller has no objection to counsel using Power Point during oral argument. However, it is better if counsel provides copies of the Power Point pages to the court in advance. Such presentations can be especially helpful in complex cases, especially those involving patent issues

or scientific concepts. In a routine case a Power Point presentation might be counter-productive to the extent that such presentations can preempt the normal flow of dialog between the court and counsel. Attorneys who wish to use a Power Point presentation in Judge Miller's courtroom should let his staff know in advance.

Judge Miller urged counsel to allow the court, when ruling on a motion from the bench, to complete the entire ruling including the underlying analysis. It is important that any judge articulate all necessary criteria, elements, or factors to be weighed by the court in reaching a decision. If a judge is interrupted while delivering a ruling he or she may lose the train of thought and the analysis delivered is incomplete, which can present problems if the case goes up on appeal.

Motions for Summary Judgment

Judge Miller does not require the filing of separate statements of undisputed fact with motions for summary judgment, but did note that they are helpful in pinpointing the evidence that supports a particular claim or element of a claim and can

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help to focus the motion. They can also make clear when there is an issue of material fact. When the court receives volumes of exhibits and materials in connection with a motion for summary judgment, a separate statement can quickly direct the court to the evidence that supports a party's position. Judge Miller's clerk, John Cieslak, said specific citations to evidence are most helpful to

“One of the least productive things an attorney can do during oral argument is to bring an old case that was not cited in the papers to the court's attention. This tends to bring argument to an end because the court and opposing counsel must have the opportunity to review the authority.”

the court, but that it is immaterial whether such citations are in briefs or separate statements.

In all motions, Judge Miller encouraged concise writing and urged attorneys to eliminate redundancies and repetitive arguments. He also advised to avoid personal attacks and/or characterizing arguments as “ridiculous” or “ludicrous.” Clerk Cieslak additionally advised that the court does not need “three paragraphs” setting forth the standard for a summary judgment motion, motion to dismiss or other routine motion. This is one area where counsel can easily pare down a brief.

Ex Parte Communication

Judge Miller issued a general note of caution to attorneys interacting with law clerks. He noted that attorneys must be mindful that discussion of administrative matters with law clerks does not “morph” into inappropriate ex parte communication. As such, it is not appropriate for an attorney

to inquire of a law clerk how the judge is likely to perceive a particular argument.

Senior Status

Judge Miller assumed senior status as of June 2010. As such he will reduce his caseload by about fifty percent, but will continue to take both civil and criminal cases.

Judge Miller's Standing Rules for Civil Matters may be obtained at: http://www.casd.uscourts.gov/uploads/Rules/Chambers%20Rules/District%20Judge%20Active/Miller_cvRules.pdf ▲

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New & Noteworthy Case Decisions

California Supreme Court Makes It Harder For Employers To Win Summary Judgment in Age Discrimination Cases

On August 5, 2010, the California Supreme Court limited the application of the “stray remarks” doctrine in California. (*Reid v. Google*, (2010) ___ Cal.4th ___). Under the stray remarks doctrine, which is accepted in many federal courts, evidence offered by a plaintiff that a co-worker or a non-decision maker made discriminatory remarks is not enough to defeat an employer’s motion for summary judgment.

For example, if a plaintiff is suing for age discrimination and the employer makes a motion for summary judgment, arguing that plaintiff’s termination was the result of poor performance and not discrimination, the plaintiff would not be able to present evidence that co-workers or a supervisor not involved in the termination decision made ageist comments in the workplace. Under the stray remarks doctrine, such evidence would be considered irrelevant because it didn’t come from the individual involved in the decision-making process leading to termination. The Reid

case makes it more difficult for California employers to rely on the stray remarks doctrine because the Supreme Court held that evidence of stray remarks is admissible and must be considered along with the “totality of the facts” in determining whether the plaintiff has presented sufficient evidence of discrimination to necessitate a trial on the merits.

Perhaps the most important learning lesson from this case is that trial courts continue to enjoy wide discretion in making determinations regarding the admissibility of “stray remarks.” In other words, some trial courts may interpret Reid to mean that everything said in the workplace can and will be used against you, if an employer is attempting to seek dismissal of a case on summary judgment. This case is yet another reminder of how important it is to train employees that they better be careful of what they say in the workplace, and to document and discipline employees who make unprofessional and inappropriate comments.

* * * * *

California Supreme Court Holds No Private Right of Action For Tip Pooling in Violation of Labor Code Section 351

On August 9, 2010, the California Supreme Court found there is no private right of action for violations of Labor Code section 351, which prohibits employers and their agents

from collecting part or all of any gratuity left for an employee by a patron. (*Lu v. Hawaiian Gardens Casino, Inc.* (2010) ___ Cal.4th ___.) Although many issues were raised by the

(see “Noteworthy” on page 19)

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appellate court opinion, the Supreme Court elected to decide only the issue of whether an employee could sue in a private action for an employer's alleged violation of Labor Code §351 based on the employer's practice of "tip pooling."

The Court did not rule on the permissibility of the tip pool at issue, but did hold, after discussion of the history of section 351, that that section did not provide a private right of action such that private plaintiffs may not sue for violations of that section.

However, the Court's ruling may be more interesting for what it did not do. The Court did not take up the question of whether section 351 could form the basis for an action for violation of California's Unfair Competition law, Business and Professions Code section

17200 et seq. (The appellate court in this case had held that an Unfair Competition action could be based on section 351.) In addition, the Supreme Court did not bar all claims for tip pooling, holding in dicta that its findings did not foreclose the availability of other remedies, including a common law action for conversion to recover unlawfully withheld tips. The Court also invited the state legislature to create a private right of action which would allow individuals to sue for section 351 violations.

- *Lois M. Kosch*
- *Leonid M. Zilberman*
Wilson Turner Kosmo LLP

Tips

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Speak to the jurors as equals. If unfamiliar terminology or concepts need to be conveyed, explain them in a way that isn't insulting, by, for example, incorporating your explanation seamlessly in your questions to a witness or in your opening statement. During voir dire, the trial lawyer may want to acknowledge that most people have no reason to be familiar with all of the terms or concepts that will be incorporated into the trial, and perhaps even that the trial lawyer wasn't before he or she became involved in the case. On the other hand, don't beat an issue to death. Unnecessary repetition is insulting to a jury.

A less obvious, but equally important, way to show the jury respect is to respect the jurors' time. Jurors give up their family, friends, jobs, hobbies, and most of the rest of their lives to sit

as jurors. They don't like to have their time wasted. Judges are quick to note that jurors are no different than judges in their disdain for those who seem to think their time is more important than anyone else's. Witness examinations, opening statements and closing arguments that take more time than necessary because they are not well prepared, discuss irrelevant points, or are repetitive can be perceived not just as a sign of the trial lawyer's incompetence, but also, as a sign of disrespect for the jury's intelligence and time.

3 Be Nice

In the heat of battle, it is easy to become angry, confrontational, sarcastic, or just not very nice, especially if that is how

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opposing counsel acts. But judges all agree that trial lawyers must resist those temptations.

First and foremost, we need to keep in mind that nobody likes a bully. Studies show that when one person behaves badly toward another, those who witness the conduct typically have two reactions. First, their impression of the attacker diminishes. Second, their view of the attacked person is enhanced. Those who behave

Article Submission

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professionally and with dignity will be more likeable than those who don't. Since, as experienced judges and trial lawyers agree, whoever the jury likes most is most likely to win, it's not a good idea for a trial lawyer to behave in ways that will make him or her unlikeable.

Moreover, aggressive or discourteous behavior will redirect the focus from the point a trial lawyer is trying to make to the trial lawyer personally. Distractions can be fatal under any circumstances. When the distraction also creates a negative impression of the lawyer causing it, the lawyer's case suffers even more.

Courtesy and respect should be shown not just to the judge and counsel, but to witnesses, court staff and clients as well. Remember, whenever a trial lawyer is in the courthouse, and perhaps even near it, the eyes of one or more jurors usually are upon him or her. Act accordingly.

2 Be Prepared and Organized

In the last edition of "Tips from the Trenches" Harvey Levine noted that to "take control of the courtroom" a trial lawyer must demonstrate that he or she is familiar with the trial process and is prepared at all times to do what needs to be done efficiently and fluidly present his or her case within "the rules." This admonition is echoed by trial judges with virtual unanimity.

Trial judges know from personal experience as the triers of fact, as well as from thousands of jurors' comments over the years, that persuasion requires both credibility and an organized presentation. Neither credibility nor understanding can be achieved if a trial lawyer frequently fumbles through notes, searches awkwardly for exhibits, or is admonished periodically by the judge for failure to abide by one rule or procedure or another.

There is no substitute for preparation. The most talented and experienced trial lawyers may be able to present an excellent case with relatively little preparation. However, as good as they may be when unprepared, they undoubtedly would be even better with preparation. However, most trial lawyers don't have the

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raw talent, intellect or experience to ‘wing it.’ If documents are not organized, examinations well thought through and prepared, and arguments anticipated and readied, it will be obvious to judge and jury and the client’s case will suffer. It’s as simple as that.

Less is More

Most lawyers cringe at the thought that the trial judge might put time limits on, or otherwise restrict, their ability to put on their case as they deem best. Many discount the court’s assertion that lawyers better serve their clients with a more focused, and hence shorter, presentation, as a thinly veiled effort to clear their dockets. Judges, of course, are concerned about court congestion; but to ignore the almost universal admonition not to waste the jury’s time, or confuse jurors with unnecessary and often irrelevant testimony and documentation, is a mistake.

It seems the more experience a judge has trying cases from both counsel’s table and the bench, the more adamant he or she is that trial lawyers can’t expect jurors to have the patience or insight to sort through hours or days of marginally relevant, and frequently unnecessary, details, to find and focus upon the truly dispositive facts. That, as experienced trial judges note, is the trial lawyer’s job.

Don’t wait for the first day of your next trial to make sure you truly “know your case.” That is, do you know exactly what facts you **must** prove to win? Do you know what witnesses **must** testify to establish those facts? Have you identified the documents that **must** be admitted into evidence to establish those facts? Once you know the answer to these questions, before calling any witnesses who are not on your “must” list, or asking them any questions that are not necessary, or introducing any additional documents, ask yourself, “Why?” If you do, and if you have confidence in your pre-trial assessment of what you really need to prove in order to win your case, you’ll find that an enormous amount of potential trial time will end up on “the cutting room floor.” Your trial judge will be most appreciative,

and your jury will follow your story line right through to the ending you have written. ▲

Mark C. Mazzarella is a trial attorney with Mazzarella Caldarelli LLP, and is a former President of ABTL San Diego.

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