ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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What's New With the Bailout Bill and Its Impact on the State and Federal Courts?

By Margaret M. Mann and Lori Peters, Sheppard Mullin Richter & Hampton LLP

Margaret M. Mann

As part of its continuing efforts to promote financial stability and restore the health of the economy, the United States Treasury has continued to develop new applications for the funds allocated to the Troubled Asset Relief Program (*"TARP"*), established in October 2008 by the Emergency Economic Stabilization Act of 2008 (*"EESA"*). In mid-October 2008, the Treasury announced it would forego its initial plan to buy troubled assets from financial institutions and would instead use the TARP funds to inject capital directly into banks. To date, $195.3 billion has been invested directly into qualifying financial institutions, both publicly traded and non-public, under the Treasury's Capital Purchase Program ("CPP")[1]. To date, CPP funds have been invested in 359 financial institutions in 45 U.S. states and Puerto Rico.

On February 10, 2009, the Treasury unveiled its new "Financial Stability Plan" for promoting economic recovery. The Financial Stability Plan includes a plan to purchase troubled assets from financial institutions, as originally contemplated by the EESA. The plan also further develops

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A Conversation With The Honorable Janis L. Sammartino

By Sarah Weber, Hulett Harper Stewart LLP

On January 21, 2009, the Honorable Janis L. Sammartino opened Courtroom 6 in the federal courthouse for a brown bag luncheon presented by the Association of Business Trial Lawyers. At the luncheon Judge Sammartino offered numerous insights into practice in her courtroom and the San Diego legal community, of which she has been an integral part for over 30 years.

Hon. Janis L. Sammartino

Background

Judge Sammartino is a San Diego area native, growing up in Oceanside. She graduated *magma cum laude* from Occiden-

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Inside

President's Letter

By Edward M. Gergosian, President ABTL

These are challenging times for all, and the impact has been keenly felt in our industry. Longstanding law firms have closed their doors. Recent layoffs led to what was called Black Thursday when on February 12 over 800 lawyers and staff received pink slips. Our own organization has suffered – we can no longer count the esteemed Heller Ehrman firm as one of our members.

Yet, as the new president of ABTL San Diego, I am pleased to report that ABTL San Diego has never been stronger or more relevant than it is today. ABTL provides the forum for informal bench and bar interaction, while offering its members substantial and timely continuing legal education.

Edward M. Gergosian

First, our dinner programs are a tremendous resource. As past president Mark Mazzarella is fond of saying, "Where else can you get dinner, a speaker and MCLE credit for $65?" And not just any speaker - in the last year our speakers have included famed trial lawyers Mark Geragos and Robert Bennett, our local federal magistrates, Judge Norbert Ehrenfruend, witness to the Nuremberg trials, and most recently, three of the U.S. Attorneys dismissed by the Bush administration. Upcoming speakers include the Honorable William Wilson of the Eastern District of Arkansas (on March 26), Harry Schneider, counsel for Osama Bin Laden's driver (on May 11), and a panel of our Superior Court judges in mid-June.

Four times a year, ABTL hosts free brown bag luncheons with members of our local bench. Judges Janis Sammartino, William Hayes, Kenneth So, Steve Denton and Anthony Battaglia all opened their courts to ABTL lawyers in the past year for an opportunity to meet the judge over lunch and receive another hour of MCLE credit. ABTL's next brown bag lunch is on April 14 with the newest U.S District Court Judge in the Southern District, Michael Anello.

Last fall ABTL put on its bi-annual Trial Skills Seminar, which featured San Diego's most talented trial lawyers presenting a mock trial on the mortgage crisis. The all-day seminar offered 6.75 MCLE credits, included lunch and cost just $195.

ABTL continues to grow. In 2007, ABTL established the Leadership Development Committee, a group of young lawyers from our member firms who this past month put on the LDC's first and well-received nuts and bolts seminar on "Technology and the Courts." The LDC aims to present these nuts and bolts seminars at least three times a year – look for the next one in mid-June. Last December, ABTL, established the Judicial Advisory Board, a body that will enhance the bench's contributions to ABTL.

Last but hardly least, every year the ABTL chapters in California put on a statewide Annual Seminar, considered by attendees to be among the best in legal education. This year the San Diego chapter is organizing the event, which will be held in Colorado Springs at the Broadmoor Resort on the topic of litigating in the current economic global ecomony.

ABTL offers real value to its members. Just by attending the San Diego chapter's dinners, brown bag lunches and the bi-annual Trial Skills seminar, a member can earn over 25 MCLE credits in two years. By attending the annual seminar, an attorney can obtain almost all their MCLE credits for a year. And at each of these events, ABTL also provides its members the opportunity for informal bench-bar interaction.

ABTL San Diego needs your support to pursue its mission. If you have ideas about how ABTL can improve please email them to me at Abtlsandiego@aol.com OR ed@gergosian.com. I look forward to serving as your president during 2009. ▲

Tips from the Trenches: Arrogance, The Silent Killer

By Mark Mazzarella, Mazzarella Caldarelli LLP

This installment of "Tips from the Trenches" features interviews with two of the greatest trial lawyers whoever struck fear into the heart of a defendant -- Joe Jamail and Browne Greene. The topic, as the title suggests, is arrogance. More specifically, it is how arrogance by witnesses, parties and/or lawyers is a poison that can cause the most forgiving juror to want to exact a pound of flesh, and can topple the strongest case.

Joe Jamail and Browne Greene have had extraordinary success as plaintiffs' lawyers. Mr. Jamail is best known for the $10.85 billion verdict he obtained in *Penzoil vs. Texaco.* Yet the *Pennzoil* case is only one of several nine figure verdicts obtained by Mr. Jamail, along with nearly 100 seven figure verdicts and settlements. Mr. Greene, whose firm, Greene, Broillet & Wheeler, has had more million dollar verdicts than any other firm in California, also personally has well over 100 seven figure verdicts and settlements to his credit.

I asked both the same question -- Mr. Jamail a few years ago, and Mr. Greene several times, most recently this month -- "How do you consistently achieve huge verdicts in cases that simply don't seem to support the awards?" I couldn't help but wonder, for example, how Mr. Jamail obtained a $10.85 billion award in the *Pennzoil* case, in which Texaco allegedly interfered with Pennzoil's agreement to purchase Getty Oil, when at the time, Pennzoil was only worth about $1.5 billion and Getty Oil only about $1 billion. I also had in mind a $3.7 million verdict Mr. Greene obtained a few years back for a model who suffered facial burns when a fire breathing demonstration "backfired." During the model's interview with a couple of movie producers in a high rise in Beverly Hills, the producers asked her if she had any special talent. She told them she was a fire breather, and volunteered to bring her equipment up to their office and show them what she could do. They suggested that perhaps the parking lot would be a better venue. She agreed. Unfortunately, during the demonstration, the winds shifted and blew the flame back onto her face, causing her facial burns. The scaring was not horrendous, but it put an end to her modeling and acting aspirations, which had not yet produced any appreciable income. What amazed me was not just the amount of the verdict, but the fact that the jury placed the entire fault on the defendants.

Mark Mazzarella

When I asked Mr. Jamail and Mr. Greene what motivated the juries to give them such large verdicts they had surprisingly similar answers.

JOE JAMAIL

Mr. Jamail (who is known to say whatever comes to mind) said, "Today's law schools teach students how not to get emotionally involved in their cases. That's b/*?! s/*?!. If you're not emotionally involved, your client is not getting your best effort." His objective is to get everyone in the courtroom emotionally involved in the case, and then steer those emotions in the direction that leads the jury to find his client has been wronged, and justice can be served with nothing less than a crushing blow to the defendant. According to Mr. Jamail, Texaco's witnesses and their out-of-town counsel, with their three-piece,

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In re Tobacco II: How Will California Supreme Court Rule?

By Christopher J. Healey, Esq. and Jaikaran Singh, Esq. of Luce, Forward, Hamilton & Scripps LLP

The California Supreme Court recently held oral argument in the *In re Tobacco II Cases*. There, the Court will decide the following legal issues: (1) In order to bring a class action under the California's unfair competition law (Bus. & Prof. Code, section 17200 *et seq.*) ("UCL"), as amended by Proposition 64, must every member of the proposed class have suffered "injury in fact," or is it sufficient that the class representative alone comply with that requirement; and (2) In a class action based on a manufacturer's alleged misrepresentation of a product, must every member of the class have actually relied on the manufacturer's representations? *In re Tobacco II Cases* (2006) 142 Cal.App.4th 891 (review granted in 146 P.3d 1250). The Court's decision on these issues will almost certainly have a significant impact on UCL class action practice.

Christopher J. Healey

Jaikaran Singh

Background of the UCL and Proposition 64

The UCL prohibits five separate wrongs: (1) unlawful business practices; (2) unfair business prac-

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tal College in Los Angeles and then attended Notre Dame Law School. After law school Judge Sammartino worked in the San Diego City Attorney's Office where she served as senior chief deputy city attorney and developed an expertise in land use issues. Judge Sammatino was appointed to the San Diego Municipal Court in 1994 and then the San Diego Superior Court in 1995. On the Superior Court she served in the family law division and as a civil trial judge. She was the Superior Court's assistant presiding judge from 2004 to 2005 and became the second woman to serve as the Court's presiding judge in 2006. In 2007 Judge Sammartino was appointed to her current position as federal district judge for the U.S. District Court for the Southern District of California.

Judge Sammartino is extremely active in the California and San Diego legal communities. Her memberships include, in addition to the Board of the San Diego Chapter of the Association of Business Trial Lawyers, the San Diego Judges Association, the American Inns of Court's Louis M. Welch Chapter, the National Association of Women Judges, California Women Lawyers and the Lawyers Club of San Diego. Judge Sammartino also recently became the chair of the newly created ABTL Judicial Advisory Board, which will provide advice and recommendations on a variety of issues to the Board of Governors.

Southern District News

Judge Sammartino began her presentation by offering the Southern District's annual report and explaining that the Court saw an increase in cases in 2008. This increase was predominately in the criminal area, but also showed a slight uptick on the civil side. Judge Sammartino reported that the Court is excited that they will break ground on the new courthouse in 2009 and that the project is expected to immediately employ 500 people as it gets underway.

Judge Sammartino was also happy to note that she is no longer the newest judge in the 13-judge Court, with the confirmation of District Judge Michael M. Anello last fall.

Court and Chambers Organization

When Judge Sammartino joined the Court, as happens with each addition of a district judge, the other district judges selected 12 cases from their calendars to reassign to her. Now that she is past the new judge phase, she is assigned cases off the wheel. In the Southern District the district judges work with all the magistrate judges. Judge Sammartino stated this was a good system that keeps the judges on their toes.

Judge Sammartino has three law clerks. Two work exclusively on civil cases, of which there are fewer cases but they are typically more complex than criminal cases. She assigns civil cases to her clerks based on odd and even case numbers.

Judge Sammartino is not involved in discovery issues. Those issues are handled exclusively by the magistrate judges assigned to the case. She did state that she will occasionally have an issue brought to her from the magistrate that is border-line trial strategy. Judge Sammartino noted that in a way she misses getting down in trenches on discovery disputes, like she did as a civil trial judge in San Diego Superior Court. She provided knowledgeable advice to the crowd by cautioning counsel not to go to the mat on every discovery issue and to stay focused on the bigger picture of the case.

Oral Argument and Tentative Decisions

Although oral argument is not required, Judge Sammartino considers it to be very important. Her first impression based on the briefs is also very significant. She does not generally issue written tentative rulings, but does read her tentative ruling at the start of a hearing. She allows the tentative to sink in for a moment and then has questions for both sides. Judge Sammartino wants the attorneys to know her views in detail before they present their arguments, but she also stressed that her tentative is most definitely just a tentative. She noted that she has changed her mind since being appointed to the federal bench and cautioned counsel not to rest on the tentative decision. Judge Sammartino stated she enjoys hearing from good advocates about good issues, and has found this to be the norm in most of her cases.

Judge Sammartino is also open to the use of visual and audio aids on important key motions, but asked counsel to make sure to provide notice to the opposing side and to always have paper

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backup copies for the judge (and copies for opposing counsel) with page numbers for ease of following along. Judge Sammartino recalled a case where counsel provided her with a tutorial on DVD before the hearing, which she found very useful and helpful. She shared that she loves patent cases because they provide an opportunity for her to learn new things and that she has had a lot more patent cases than other judges, though she has not taken a patent case past a *Markman* hearing.

In order to get a hearing date, attorneys should contact the law clerk assigned to his or her case. Thursday and Friday afternoons are the Court's motion calendar. Fridays, however, are often busy with her criminal calendar so she prefers scheduling complex civil motions on Thursday. She also stated that she tries to be as flexible with her schedule as she can and is open to working with counsel and the magistrate judges on scheduling. Judge Sammartino emphasized that it is very important to her that all sides be provided with sufficient time and a full opportunity to be heard at oral argument.

She also noted that she always takes matters under submission before issuing a ruling and that there is a wide range in the amount of time it takes her to render a decision. If Judge Sammartino is not moved off the tentative then the decision can be rendered relatively quickly, but often the decision can take some time in order to provide her with sufficient time to mull the issues over in her mind.

Judge Sammartino noted she would never want to appear before a judge without ever having seen them in action before and urged new attorneys, or attorneys who have never appeared before her, to visit her courtroom during oral argument, even during the criminal calendar, to get a sense of how she runs the courtroom.

Briefing

Judge Sammartino asked counsel to be brief and concise in their writing and in oral argument. She emphasized the importance she places on full disclosure and cautioned counsel to always err on the side of full disclosure in their writing. It

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is not a good thing if she and her clerks discover negative authority before counsel has presented it in their briefing. She recognized that often it can be difficult to deal with negative authority, but encouraged counsel to spend adequate time distinguishing cases, and if that is not possible to explain why the case was wrongly decided.

For all submissions over 20 pages she requested counsel send a courtesy copy to her chambers. She and her staff appreciate binders for documents that have more than three exhibits.

Trials

Judge Sammartino told the audience her view that attorneys can never over prepare for trial and to leave no stone unturned. However, when you go to Court do not throw everything into the case for the jury or judge. She advised counsel to have the strength and vision to put in just what is needed. She stressed that although counsel can never over prepare for trial they can over-try their case.

Judge Sammartino stated that in her courtroom bench and jury trials are conducted similarly in terms of decorum. In a bench trial she wants the same simplified information that would be provided in a jury trial. Judge Sammartino noted that proceedings are a little less formal in a bench trial, but emphasized she wants her courtroom to be a comfortable place where formalities are observed. Since everyone will be spending so much time together a level of comfort is important to her.

In terms of practical operation during trial, Judge Sammartino prefers that the attorneys stay at the podium except during their opening and closing statements. During opening and closing she advised that attorneys should keep a respectful distance between themselves and the jury. She recalled that lots of older attorneys preferred the San Diego Superior courthouse because the courtrooms were so small that the attorneys were always close to their juries! Judge Sammartino also prefers to minimize side-bars, but recognized that they cannot be avoided. She is very cognizant and respectful of the jury's time and it is extremely important to her that it not be wasted.

In response to a question from a member of the audience, Judge Sammartino noted that she had tried cases "on the clock" while at the state court, but has not done so in the federal court. She said she will put cases on the clock if she feels it is warranted.

Jury Selection and *Voir Dire*

Judge Sammartino is not a big fan of jury questionnaires but stated that they can be useful in the right circumstances if they are not too time consuming. She does allow *voir dire* in the form of follow-up questioning if it is requested by counsel. She uses a modified Arizona method of *voir dire*, and noted that every court in the Southern District uses its own method. She did not keep the state court system because of her penchant for embracing change and new and different things. She also stated that she devotes substantial time to these issues at the pre-trial conference.

Judge Sammartino closed her informative presentation by complimenting the practitioners that come before her, noting their high degree of professionalism and civility that has been exemplified in her courtrooms. Judge Sammartino reminisced about the old days in the San Diego legal community when opposing counsel often broke bread and shared drinks. She provided more sage advice to the audience, which the ABTL stresses -- advocacy for your client does not require hostility to the other side. In fact, hostility is a disservice to your clients.

Finally, Judge Sammartino noted that all cases are important and that the judicial system does its best on each case, no matter how big or small. ▲

Bailout

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the Term Asset-Backed Securities Loan Facility ("TALF"), which has not yet been implemented.

The new Financial Stability Plan also introduces new programs under TARP. Although the Treasury outlined certain high-level elements of the Financial Stability Plan, many of the details of the programs that will comprise the Financial Stability Plan have yet to be announced.

This article describes the latest status of TARP as of February 12, 2009, including the new "Financial Stability Plan" proposed by the Obama administration. With this background,

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we offer predictions of what enforcement actions and litigation might arise in the future as a result of TARP.

Recent TARP Developments

1. TARP Expenditures to Date

As of February 6, 2009, the Treasury has spent $301.1 billion of the $700 billion allocated to TARP under the EESA. This includes $195.3 billion out of $250 billion allocated to the CPP for capital investments in financial institutions. The total TARP expenditures to date also include the Treasury's separate targeted investments in and loans to AIG Capital for $40 billion, Citigroup for $20 billion, the automotive industry for $20.9 billion and Bank of America for $20 billion.

On January 15, 2009, Congress cleared the way for release of the second $350 billion in funds allocable under the EESA. A total of $398.8 billion in TARP funds remains available to be spent by the Treasury.

2. Term Asset-Backed Securities Loan Facility

On November 25, 2008, the Treasury unveiled the Term Asset-Backed Securities Loan Facility program under TARP. TALF was originally intended to be launched in February 2009. To date, the Treasury has not provided an update with respect to the implementation time frame.

Under TALF, the Federal Reserve Bank of New York (New York Fed) would lend to investors the funds to purchase eligible asset-backed securities. TALF was designed to finance only certain newly issued, highly rated asset-backed securities collateralized by student loans, auto loans, credit card loans, and loans guaranteed by the Small Business Administration. TARP funds of up to $20 billion were to be used to purchase subordinated debt in a special purpose entity created by the New York Fed to purchase and manage any assets received by the New York Fed in connection with any TALF loans. The purpose of TALF was to provide incentives for investors to resume purchase of loans on the secondary market so as to free up the flow of credit to consumers.

As part of the Financial Stability Plan announced by Treasury Secretary Geithner on February 10, 2009, TALF has been dramatically expanded to increase the investment by the Treasury and to encompass commercial mortgage-backed securities, as set forth in more detail below under the heading "Financial Stability Plan" below.

3. CPP Term Sheet for Subchapter 'S' Corporations

On January 14, 2009, the Treasury unveiled terms for participation in the CPP by Subchapter 'S' corporations, which corporations had previously been excluded from the CPP due to tax regulations that make them unable to issue preferred equity securities. Subchapter 'S' corporations will issue notes to the Treasury on terms comparable with the preferred securities issued by publicly traded and non-public qualified financial institutions under the CPP.

4. Executive Compensation Requirements

Financial institutions receiving TARP funds are required to modify existing executive compensation arrangements to comply with the mandated restrictions imposed by Section 111(b) of the EESA, including agreements to:

- ensure that compensation does not encourage excessive risk taking;
- impose a clawback on compensation paid based on financial results or performance metrics later proved to be materially inaccurate;
- limit severance benefits to not more than three times the executive's average taxable compensation for the prior five years; and
- not deduct annual compensation to any senior executive in excess of $500,000.

On February 4, 2009, the Treasury adopted further executive compensation restrictions for institutions receiving TARP funds under future programs. The additional restrictions will not apply retroactively to institutions that have already received TARP funds or that will receive TARP funds under programs that existed prior to February 4, 2009.

The Treasury guidelines on executive pay distinguish between financial institutions participating in generally available capital access programs (e.g., CPP and Capital Assistance Program) and financial institutions needing more assistance than is allowed under a generally available capital access program (i.e., "exceptional assistance"). Banks falling under the "exceptional assistance" standard have bank-specific negotiated agreements with Treasury (e.g., AIG, Bank of America and Citi).

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5. Financial Stability Plan

On February 10, 2009, Treasury Secretary Geithner announced a re-framing of TARP, called the "Financial Stability Plan." The Financial Stability Plan, which is expected to be revealed in greater detail in he near future, will promote economic stability through expansion of TARP into several new and developing programs.

In addition, the Treasury has said it will soon be announcing the details of a comprehensive plan that will:

• reduce mortgage rates through continuation of purchasing as much as $600 billion of government sponsored enterprise ("GSE") mortgage-backed securities and GSE debt;

• commit $50 billion to prevent avoidable foreclosures of owner-occupied "middle class" homes by helping to reduce monthly payments;

• establish loan modification guidelines;

• require all Financial Stability Plan recipients to participate in foreclosure mitigation programs; and

• build flexibility into Hope for Homeowners and the FHA.

The anticipated expenditures under the Financial Stability Plan show a marked increase from prior Treasury initiatives, and are expected to far exceed the remaining $398.8 billion of TARP funds. Full implementation of the Financial Stability Plan could require up to $1.5 trillion or more.

Litigation Issues

TARP, in all of its permutations since the enactment of the EESA, has created the potential for various types of civil and criminal actions. To date, litigation relating to TARP has involved securities litigation and FOIA claims. See *e.g.* (a) *Fox News Network, LLC v. United States Department of the Treasury*, United States District Court, Southern District of New York, Case No. 08 Civ. 11009 (RJH) (Fox News suit under the Freedom of Information Act to obtain, on an expedited basis, government records regarding the Treasury's use of public funds in connection with TARP), (b) *John Paul Fulco, Trustee f/b/o Lucia Forastiere Irrevocable June Forastiere Backe C.A. No. Children's Trust v. Joseph Cassano et al*, Chancery Court of Delaware Case No. 4920 (double derivative action brought against the former President and CEO of AIG Financial Products Corp. alleging breach of duty of loyalty), and (c) *Bernard Stern, M.D., IRA et al v. Bank of America Corporation et al*, Chancery Court of Delaware Case No. 4316 (shareholder class action alleging breach of fiduciary duty in connection with Bank of America's stock-for-stock acquisition of Merrill Lynch). We suspect other suits will be filed of the types described below. These could include:

• Commercial Disputes

• Breach of contract actions for purchases and sales of loans on the secondary market, which loans were 'market' when made, and have subsequently become troubled assets.

• Removal of troubled assets from institutions' balance sheets has not been implemented since the enactment of the EESA, in part because of the difficulty in valuing troubled assets. This difficulty has not gone away, but rather has been pushed to the private sector under the Financial Stability Plan. Risk of failure to accurately value assets for purchase could contribute to disputes under agreements for asset purchases and sales.

• Under the Financial Stability Plan, TALF funds will only be available for purchase of AAA-rated asset-backed securities. The ratings systems used by agencies to determine AAA status have been exposed as flawed, and accused of contributing to the current economic crisis. This apparent unreliability of the ratings system could result in problems and/or disputes arising from purchases of assets on the secondary market under TALF.

• Restrictions on use of capital, including limitations on acquisitions by financial institutions may restrict growth and promote additional bank failures, leading to receivership proceedings and bankruptcy litigation.

• Securities litigation

• Shareholder derivative suits stemming from participation in CPP as restrictions on dividends and repurchase and other conditions take effect.

• Also, restrictions on use of funds may disincentivize financial institutions from participating in TARP programs, and financial institutions who determine not to participate would perhaps be targeted for shareholder derivative suits and/or breach of fiduciary duty.

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Arrogance

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pinstripe suits and haughty Wall Street demeanor, did the trick.

Mr. Mazzarella: What was the theme that had such a powerful effect on the *Pennzoil* jury?

Mr. Jamail: It wasn't a theme, it was the people. On the Texaco side, there were a whole lot of arrogant, self-impressed, fancy Wall Street executives and their out of town lawyers with their three piece pinstriped suits and Italian briefcases, who thought they could do anything they wanted to do to whoever they wanted to do it to. On the other one hand, Pennzoil had a bunch of people that were down to earth, hardworking types.

Mr. Mazzarella: Was the result a matter of the Texaco witnesses and attorneys not being very likeable, while the Pennzoil witnesses were likeable?

Mr. Jamail: That was a big part of it. If the jury doesn't like you and your client, it's going to be pretty hard to win a case. And, the same, of course, is true for the other guys. Jurors look for reasons for things to turn out well for those they like, and bad for those they don't. And there isn't much that will make the ordinary guy in the jury box dislike someone faster than arrogance.

Mr. Mazzarella: What is so special about arrogance?

Mr. Jamail: Nobody likes somebody else to make them feel small. And that's what arrogance does. It says, "I'm better than you."

Mr. Mazzarella: You can't always pick your clients and witnesses, what do you do to make sure your witnesses don't come across as arrogant?

Mr. Jamail: I make sure the jury knows they also put their pants on one leg at a time. I make them real. They don't talk down to the jury. I make sure they use regular words. They don't dress too fancy, with diamond rings and gold chains. And if they start being too full of themselves, I'll bring them down to earth myself.

Mr. Mazzarella: Is it just a matter of how they testify on the stand, or is there more to it?

Mr. Jamail: It's everything. It's how they walk down the hall; whether they help carry brief cases and exhibits, open doors, and such; or, on the other hand, if they walk down the hallways with an entourage falling behind them as if they were the King of England.

Mr. Mazzarella: In the *Pennzoil* case, how did you develop the characteristics of arrogance with regard to their witness and humility with regard to your witnesses?

Mr. Jamail: I decided to put the witnesses on in pairs. One of theirs, then one of ours. Their CEO, our CEO, their CFO, our CFO, right down the line. I made it impossible for the jury not to see the contrast time and time again. By the time it was over, between their witnesses and

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• Institutions that do participate in TARP may still face shareholders' derivative suits because the new CAP may face shareholder resistance, as the Treasury's preferred securities will be convertible to common stock, creating a risk of dilution.

• Enforcement actions resulting from failure to comply with heightened reporting requirements regarding not only executive compensation, but also detailed reporting on use of funds.

• Fraud claims against entities that apply for or receive Federal assistance under EESA.

• Letters of inquiry, increased scrutiny and investigations generated by the Special Inspector General for TARP, who is charged with oversight of TARP operations.

Even after the financial world has ended its struggles with the implementation of TARP, we predict courts will still be addressing the fallout in many types of complex civil and criminal proceedings. ▲

1 Under the Capital Purchase Program, or CPP, the Treasury provides Tier 1 capital to qualified financial institutions in exchange for senior nonconvertible preferred stock and warrants issued by such financial institutions on standard terms. Cumulative dividends on the preferred stock issued under the CPP is payable quarterly, and the dividend rate is 5% for the first 3 years, at which time the dividend rate steps up to 9%. Financial institutions receiving CPP funds must comply with the executive compensation restrictions set forth in the EESA, and are subject to certain other conditions and restrictions relating to stock repurchases and payment of dividends.

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their fancy out-of-town lawyers, it was impossible for the jury not to see that the Texaco crowd thought they could just push the Pennzoil folks out of the way, like a schoolyard bully cutting the lunch line at the cafeteria. Nobody likes someone who treats people like that, and the verdict proves it.

BROWNE GREENE

I was in trial against Mr. Greene when he received the verdict in the fire breathing case. I asked him how he convinced the jury that the producers should have anticipated the impact the changing winds would have, rather than the young model, who was the expert, and why the jury gave such a large award when his client didn't have the track record to warrant it.

Mr. Mazzarella: How do you get $3.7 million in damages for an aspiring model/actress in damages on the case with no truly disfiguring damages, and no earnings history, and no comparative negligence when the plaintiff was the expert in the area?

Mr. Greene: In almost every case, you'll find one or more key players on the other side who have an attitude of arrogance, someone who seems offended by the very audacity of the plaintiff suggesting he or she did anything wrong.

Mr. Mazzarella: What do you mean by "an attitude of arrogance"?

Mr. Greene: Their attitude is that they are important and everyone else should kiss their ring. The attitude manifests itself in many ways. They are usually critical of the plaintiff. My client was ignorant, or careless, or was asking for it. And, on the flip side, they are full of themselves. That's pretty cold when you are talking about a serious injury. This attitude of arrogance shows that the witness thinks people like the plaintiff

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Arrogance

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(and the jurors) just aren't important. If the jury sees your client as the underdog, fighting against someone who wields all the power, and knows it, they likely will get behind your client. Nobody roots for the underdog like Americans.

Mr. Mazzarella: How do you bring out arrogance in the defendant?

Mr. Greene: Given the opportunity, they usually do it themselves. Most successful business types who have risen to the top of their industry or profession are quick to tell everyone all about it. If you give them an opening, particularly in deposition where they might not be as prepared or as focused on how a jury might react to what they are saying, they'll tell you just how great they are, how successful they are. They'll note that the key meeting was at a swank Beverly Hills restaurant, or that they expect their orders to be followed without question. Keep your ears open for this kind of arrogance; and when it occurs, take a break from your outline, and make the most of the opportunity you have been handed. The fact is that a lot of high achievers fundamentally are insecure. That insecurity has driven them to success. But it also often drives them to adopt an attitude of arrogance. They act out the role of the big shot. And the more pressure I can put on them, the worse they behave.

Mr. Mazzarella: Does your success depend upon your ability to contrast your client as humble, down to earth, and otherwise similar to the average juror as opposed to the defendant who you portray as arrogant, elitist and the type that wouldn't give the average juror the time of day?

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Arrogance

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Mr. Greene: Generally, you won't get a great result just because you demonstrated that the defendant is an arrogant SOB. The jury also has to see that your client is a righteous and humble person who deserves justice. If you have two arrogant or otherwise unattractive parties, the jurors are just as likely as not to say, "A pox on both your houses," and give your client little or nothing.

Mr. Mazzarella: How important is the character of the parties to the ultimate outcome?

Mr. Greene: It's critical. Before I take a case, I look as critically at my potential client as I do the defendant. I don't care how outrageous the defendant's conduct has been, if the plaintiff isn't someone the jury likes and really wants to help, they won't give a big award. For everything to click you typically need to have that contrast.

Mr. Mazzarella: How does a lawyer's attitude of arrogance factor in?

Mr. Greene: An arrogant lawyer can have almost as much impact as his client. I've had cases in which the defendant was quite likeable, but the lawyer was pompous and self-absorbed, and I was able to get to where I wanted to go by constantly bringing out the worst in the lawyer.

Mr. Mazzarella: Can you summarize the advice you would give a trial lawyer you were mentoring regarding arrogance as a factor in trial?

Mr. Greene: Sure. Likeability of the parties, witnesses and lawyers is the key to the outcome in almost all trials. Jurors adopt the perspective of those they like and reject the views of those they dislike. Arrogance and dishonesty are at the top of the list of things that will make a juror dislike someone, and want him or her to lose. If your client is arrogant or otherwise unlikable, the quickest way to change that behavior usually is to videotape a mock examination and show it to the client or witness. Most will see what you see when they view the tape. Another way that usually gets through to those who can't be made self-aware by watching a videotape of themselves, is to conduct a mock trial and make the client sit, watch and listen as the mock jurors talk about him or her. If that still doesn't make your client less arrogant – settle your case, because the odds are, you're going to lose. ▲

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tices; (3) fraudulent business practices; (4) unfair, deceptive, untrue or misleading advertising; and (5) any of the specific prohibitions set forth in section 17500 *et seq*. (governing specific types of false advertising). *See Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1554; *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949-950. Generally the only remedies available under the UCL are the equitable remedies of restitution and injunctive relief. *See Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1147.

On November 2, 2004, the California voters passed Proposition 64 by an overwhelming majority of votes (59% to 41%). Proposition 64 was a statewide ballot initiative that amended the UCL and became effective on November 3, 2004. Cal. Const. Art. II, § 10a. Prior to the passage of Proposition 64, the UCL authorized "any person acting for the interests of itself, its members or the general public" to seek relief. Bus. & Prof. Code § 17204 (prior to amendment). Proposition 64 abolished this broad standing provision by amending Section 17204. The purpose of Proposition 64 is to prevent UCL representative actions where the named plaintiff was not injured by the defendant's conduct: "It is the intent of California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." Proposition 64: "Findings and Declaration of Purpose."

With the passage of Proposition 64, a plaintiff seeking to assert a claim for unfair competition must have "suffered injury in fact and … lost money or property as a result of such unfair competition." Bus. & Prof. Code §§ 17204, 17535. In addition, a plaintiff must comply with the class action requirements of Code of Civil Procedure Section 382. Bus. & Prof. Code §§ 17203, 17535. Thus, after the passage of Proposition 64, defendants have argued that plaintiffs who wish to pursue a claim under Section 17200 must: (1) have suffered actual injury as a result of the defendant's alleged conduct; (2) have lost money or property; and (3) have met the requirements for class actions under Code of Civil Procedure Sec-

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tion 382.

An open question, however, remained as to whether the standing provisions of Proposition 64 that plaintiff suffered an "injury in fact" and "lost money or property as a result of" the defendants' alleged conduct applied to just the representative plaintiff or to the other class members as well. That is the primary issue before the California Supreme Court in *In re Tobacco II*.

Background on *In re Tobacco II Cases*

In *In re Tobacco II*, smokers filed a class action against tobacco companies alleging they were exposed to the companies' marketing and advertising activities in California. After the standing requirements for UCL lawsuits by private individuals were changed by the passage of Proposition 64, defendants successfully moved to decertify the class. *In re Tobacco II Cases*, 142 Cal.App.4th at 919-20. The trial court ruled that to establish standing under Proposition 64, the individual plaintiffs and all class members were now required to show injury in fact consisting of lost money or property caused by the unfair competition. The trial court found that the requirement of individual reliance caused individual issues to predominate over the common questions so as to make the case unsuitable for class treatment. *Id.*

The Fourth District Court of Appeal (Division One) affirmed the trial court's order decertifying the class action. In doing so, the court reasoned, "[i]ndividual determinations would have to be made as to when the class members began smoking, what representations they were exposed to, what other information they were exposed to, and whether their decision to smoke was a result of defendants' misrepresentations (and thus they suffered an injury due to defendants' conduct) or was for other reasons. The numerous individual

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determinations render this case unsuitable for a class action." *Id.* at 926.

How Will the California Supreme Court Rule?

The California Supreme Court has previously acknowledged that Proposition 64 established procedural standing requirements for a UCL claim. *See Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232. But *Mervyn's* did not specifically address whether the Proposition 64 standing requirements must be established as to all class members, including the named plaintiffs. Likewise, *Mervyn's* did not answer whether the "as a result of" language triggers a justifiable reliance requirement that plaintiffs allege previously did not exist. Predicting how the California Supreme Court may rule in any case is a risky proposition. This is particularly true in *In re Tobacco II,* given the arguable tension between the Court's prior broad construction of the UCL statute and Proposition 64's stated purpose of reigning in suspect UCL litigation. With those *caveats* in mind, here are the plaintiff and defense perspectives on key questions.

A. Do the Proposition 64 Standing Requirements Apply to All Class Members, or Just the Named Plaintiff?

The starting point for the analysis on this issue is the language of the amendment itself. *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 (when interpreting the meaning of a statute, "it is well settled that we must look first to the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.'").

On its face, Section 17203 states in pertinent part "any person may pursue representative claims or relief on behalf of others ***only if the claimant meets the standing requirements*** of Section 17204 and complies with Section 382 of the Code of Civil Procedure …" Bus. & Prof. Code § 17203 (emphasis added). Plaintiffs' argue that this language suggests that Proposition 64 only applies to the "claimant" (i.e., the named plaintiff who filed the lawsuit) who is asserting a UCL claim on behalf of others.

But amendments, like any statutory language must be read in context of the entire statutory scheme. Proposition 64 also amended Section 17204 to provide that: "[a]ctions for any relief pursuant to this chapter *shall be prosecuted* exclusively in a court of competent jurisdiction *by* [various public officials] . . . or by *any person* who has suffered injury in fact and has lost money or property as a result of the unfair competition." Bus. & Prof. Code § 17204 (emphasis added). In other words, Section 17204 created standing requirements for "any person" who seeks to pursue a UCL claim. Several appellate courts construing Proposition 64 have held that the requirements of Section 17204 apply to anyone seeking UCL recovery, either in an individual action or as a named plaintiff in a class proceeding. *Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 849; *see also Akkerman v. Mecta Corp.* (2007) 152 Cal. App.4th 1094, 1102-1103.

Further, in the class action context, the general rule in California is that "[e]ach class member must have standing to bring the suit in his own right." *Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 73. This is because a class action is "merely a procedural device for consolidating matters properly before the court." *Vernon v. Drexel Burnham Co.* (1975) 52 Cal.App.3d 706, 716. Class action status "does not alter the parties' underlying substantive rights. Rather, it merely permits the aggregation of claims that could be asserted individually. *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 714-715. If a specific form of relief is foreclosed to claimants as individuals, it remains unavailable to them even if they congregate into a class." *Feitelberg v. Credit Suisse First Boston* (2005) 134 Cal. App.4th 997, 1018.

Given the language of Proposition 64 and basic principles governing the class action procedure, defendants counter that all class members must meet the Proposition 64 standing requirements. They assert that to reach a contrary conclusion would arguably lead to results that conflict with the express purpose of Proposition 64. For instance, if only the class representative must have suffered "injury in fact" to pursue a UCL class claim, then arguably non-

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injured class members (who could not pursue individual UCL claims) could recover as part of a class action. But Proposition 64's stated purpose was to prevent lawsuits where the claimant has not been injured. *See Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232 ("Proposition 64 does prevent *uninjured* private persons from suing for restitution on behalf of others. . . . In effect, section 17203, as amended, withdraws the standing of persons who have not been harmed to represent those who have.") (emphasis in original). Also, Proposition 64 mandates compliance with the class action requirements of Code of Civil Procedure Section 382, which includes the requirement that named plaintiffs have claims that are typical of the class they seek to represent. *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.

Does Proposition 64 Create a Requirement of Actual Reliance?

The second related issue in *In re Tobacco II* is whether the "as a result of" language in Proposition 64 requires proof of actual reliance in misrepresentation cases. Several appellate courts have held that, after the 2004 amendment, the UCL now requires a plaintiff to plead and prove both causation and reliance. *See Hall,* 158 Cal. App.4th at 855; *but see Anunziato v. eMachines Inc.,* 2006 WL 5014567 (C.D. Cal. 2006) (plaintiffs asserting claim under UCL need not plead reliance).

The primary argument by plaintiffs against that construction is that, historically, the UCL

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has been construed to require only a "likelihood of public deception," with no proof of reliance or actual deception required. *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211, 214. And, in holding that Proposition 64 applied to pending cases, the Supreme Court in *Mervyn's* stated that amendment did not:

> … change the legal consequences of past conduct by imposing new or different liabilities based on such conduct. The measure left entirely unchanged the substantive rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. *Id.* at 232 (internal citations omitted).

From the defense perspective, construing the "as a result of" language to include causation or reliance does not, in and of itself, change the "substantive rules governing business and competitive conduct." Requiring a UCL plaintiff to make such a showing does not impact whether the defendant's conduct is or is not illegal. Rather, it simply clarifies the threshold standing requirements that any plaintiff must demonstrate in order to assert a UCL claim after the 2004 amendments.

Regardless of how the California Supreme Court rules on the reliance issue, a separate question is whether a particular UCL claim is amenable to class treatment. In fraud claims (where reliance is clearly an element), the Court has held that reliance can be presumed where an affirmative material misrepresentation has been made to all class members. *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814; *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 363. At least one appellate court construed Proposition 64 to require class-wide proof of reliance for UCL claims, but applied an "inference of common reliance" to uphold class treatment. *See McAdams v. Monier, Inc. (2007)* 151 Cal.App.4th 667 (review granted by Supreme Court in 168 P.3d 869). Of course, the "*Vasquez* presumption" is rebuttable, so depending on the particular case, individual issues could still arise sufficient to make class certification inappropriate. *See Safaie v. Jacuzzi Whirlpool Bath Inc. et al*. 2008 Cal.App.Unpub. LEXIS 8864 (4th DCA, Div. 1) (affirming denial of class certification; individual issues raised defeat predominant common question even if presumed reliance test applied).

Whether the Court will apply a presumed reliance standard in *Tobacco II* (or some variation of that test) remains to be seen. That is yet another reason why the Court's long-awaited decision in this important case is likely to have a significant impact on UCL litigation. We shall know soon. ▲

Editor's Note: The *Tobacco II* argument was held on March 3, 2009. This article was written before that argument.

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