LOS ANGELES
Daily Journal
www.dailyjournal.com

VOL. 136 NO. 223 THURSDAY, NOVEMBER 16, 2023

Latham & Watkins wins on appeal in rare holder's claim trial

A California Court of Appeal panel affirmed a ruling for the defense in the first holder's claim to go to trial in the United States in nearly 90 years, say attorneys with Latham & Watkins who secured the lower court verdict in 2021.

Page 2

USPTO to create new bar for design patent practitioners

A final rule will be published Thursday in the Federal Register and become effective on Jan. 2, creating a separate bar.

Page 3

Latest bar exam results – continuing a decade-long decline

For those interested in statistics, the median test taker's score has declined by about one-third of a standard deviation. When this trend began to reveal itself between 2014 and 2016, law school deans quickly proposed lowering the passing score. That decision hasn't solved anything, and it only has masked the problem. By John Schunk

Page 5

First Amendment triumphs over Prop 65 warnings

Developments on California Proposition 65: First Amendment, short-form warnings, and food products. By Amber Trincado and David Barnes

Page 5

DAR
Daily Appellate Report

Business Law: Allegations that fees for energy and environmental costs were unrelated to any actual costs borne by the defendant and were deceptive were sufficient to state a claim for unfair competition. *Sepanossian v. National Ready Mix Co.,* 2DCA/7, DAR p. 11017

Civil Procedure: Trial court was within its discretion to determine that COVID-19 courtroom closures did not make it impossible or impractical for plaintiffs to commence trial in a timely fashion. *Oswald v. Landmark Builders,* 1DCA/3, DAR p. 11024

Contracts: Because the parties specified that their contract was a license agreement--not a lease--and was to be governed by contract law, the landowner could not pursue an unlawful detainer action. *Castaic Studios v. Wonderland Studios,* 2DCA/5, DAR p. 11029

Criminal Law and Procedure: Remanding restitution order for noneconomic losses was necessary where the record contained no evidence regarding of the impact the crimes had on the victim. *People v. Gomez,* 1DCA/5, DAR p. 11047

Criminal Law and Procedure: Defendant must be informed of potential longer sentence to not run afoul of due process fair notice violation. *People v. Villegas,* 1DCA/1, DAR p. 11032

Dependency: Court did not violate UCCJEA in terminating parental rights without consulting Nevada court, which had already relinquished jurisdiction. *In re Kayla W.,* 2DCA/3, DAR p. 11051

Disability Discrimination: Golf course did not discriminate against plaintiff with pulmonary arterial hypertension because it provided reasonable modifications to its golf cart policies, exempting him from many, though not all normal cart restrictions. *Lurner v. American Golf Corp.,* 4DCA/3, DAR p. 11055

Family Law: Trial court did not err by concluding that the Hindu marriage ceremony was not legally binding on spouse who was not domiciled in India and did not submit to be bound by the Hindu Marriage Act of 1955. *Marriage of V.S. & V.K.,* 6DCA, DAR p. 11063

Jana Ašenbrennerová / Special to the Daily Journal

Kathryn Stebner, incoming president of Consumer Attorneys of California

Next CAOC president wears politics and emotions proudly

By Malcolm Maclachlan
Daily Journal Staff Writer

When she is sworn in on Saturday night, Kathryn A. Stebner will become the first openly gay president of the Consumer Attorneys of California — but she's a lot more than that.

"I'm totally like the white lesbian rapper," said Stebner, who practices elder abuse law with Stebner Gertler Guadagni & Kawamoto in San Francisco.

Stebner sings for a band called Alchemy that performs near her home in Muir Beach, a community she says is "full of musicians." During

See Page 4 — NEXT

Attorneys head to San Francisco in same week as world leaders

By Malcolm Maclachlan
Daily Journal Staff Writer

There's a major convention this week in San Francisco — and it's not the superpower detente you're probably thinking of.

The Consumer Attorneys of California will hold its annual conclave at the Palace Hotel starting Friday. Meanwhile, at least 20,000 people have descended upon the city for the Asia-Pacific Economic Cooperation intergovernmental forum, and the much-discussed rapprochement between President Joe Biden and President Xi Jinping of China.

There are also thousands of people protesting APEC leaders and others protesting that the city moved some of its large homeless encampments in preparation for the summit.

Meanwhile, at the Palace, roughly 700 attorneys are expected to attend their own convention. Judges and several state legislators usually attend as well.

No high-level international negotiations are expected to take place at CAOC but there are continuing legal education classes, including one on Saturday entitled "Mediation: Going for the Gold"

that the parties down the street at APEC might benefit from attending.

APEC began Saturday and ends Friday, while CAOC begins Thursday night and runs through Sunday. But CAOC was concerned enough about the overlap to warn attendees to prepare. The organization sent an alert on Monday.

"Our convention takes place while San Francisco is hosting its biggest international event in nearly 80 years," according to a highlighted portion of the warning posted on the CAOC website

See Page 4 — CONSUMER

Edison can't pursue liability for Thomas fire from public entities

By Antoine Abou-Diwan
Daily Journal Staff Writer

A Los Angeles County judge granted two motions barring So-Cal Edison from pursuing wildfire claims against public entities including Santa Barbara County.

Judge William F. Highberger granted a motion in limine, preventing Edison from pursuing claims against the entities to help it recoup some of the $680 million it paid out in settlements with individuals.

Edison sought to share liability with Santa Barbara County and four other public entities for the mudslide that occurred in the mountains north of Montecito that were burned by the Thomas fire.

Highberger also granted Santa Barbara County's motion for summary judgment, barring Edison's claims for indemnity based on inverse condemnation. Edison sought an indemnification award for the $680 million even though it refused to disclose details of those settlements, according to court filings.

"The court concludes that denial of practical access to the most relevant expert and narrative information is such a serious denial of due process to cross-defendants that the motions must be granted. Edison has produced some discovery to cross-defendants, but it is providing records that are collateral to the primary discovery," Highberger wrote on Nov. 8. S*outhern California Fire Cases*, JCCP 4965 (L.A. Super. Ct., filed April 30, 2018).

Highberger likened damages discovery in the case to an archery target with a bull's-eye that is invisible, with only the outer edges for the cross-defendants to work with.

Meyers Nave principal Deborah J. Fox represents Santa Barbara County in the indemnity dispute with Edison.

"They were basically saying, 'County, we can give you enough that you should be satisfied, we will give you different pieces that will reflect the damages but we won't tell you what people demanded for emotional distress,'" Fox said in a telephone interview.

"That's not the way our adversary system works. We get the whole picture. We probe it, we test it, but you can't hide it from us," she continued.

Edison's attorneys from Hueston Hennigan LLP did not respond to a request for an interview.

Edison's cross-complaint against Montecito Water District, the California Department of Transportation, and the city and county of Santa Barbara alleged that their negligent maintenance of infrastructure, bridges, culverts and pipelines exacerbated the wildfire-induced mudslide under causes of action for equitable indemnity, contribution and apportionment of fault.

But Santa Barbara County argued in its motion for summary judgment that Edison had waived its right to "pass-through any settlement amounts." Edison failed "to allocate settlement payments between claims that are subject to joint liability and claims that are not (such as noneconomic damages, fire damages, inverse claims, Public Utilities Code § 2106 and Health & Safety Code § 13077, and punitive damages)," the county said.

"Liability for inverse condemnation is several only and does not provide a basis for Edison to seek equitable indemnity or contribution for any settlement funds," the filing continues.

Edison opposed Santa Barbara County's motion for summary adjudication, arguing that the county's actions and inactions exacerbated the Jan. 9, 2018 debris flow. The utility also said that the county refused to take part in the resolution protocol yet still got access to the "vast majority" of plaintiffs' damages information.

antoine_abou-diwan@dailyjournal.com

GUEST COLUMN

A call for effective change in California's family law courts

By Mark E. Minyard

The Elkins Family Law Task Force (EFLTF) was created in 2010, when former California Supreme Court Chief Justice, Ronald M. George, directed the Judicial Council to assemble a task force to assess and make recommendations regarding the State of California's family court system. The purpose was to ensure access to justice and due process for family court litigants. Comprised of justices, judges, lawyers, court CEOs and other professionals, the task force spent two years studying the issues, culminating in a comprehensive report. However, many of the most pivotal recommendations have not been implemented.

Family law complexity and misconceptions

The prevailing misconception that a day in the life of a family law judicial officer is spent dividing pots and pans, deciding who wins the better parent war, and ruling on whether Johnny will play baseball or soccer, belies the intricate nature of their responsibilities. While in truth, the complexity and sophistication of family law often eludes not only the public at large and California's political leaders, but also on most lawyers who practice, and judicial officers who preside over other areas of the law, underscoring the need for a more nuanced understanding.

Although family law, at its essence, might simply be viewed as a lawsuit between two individuals who are married or with close familial ties; what is not so simple is that these individuals are most commonly entering our family court system at one of the lowest points in their lives, while they are mired in emotional, mental, and potentially physical conflict. Conflict which often involves difficult decisions regarding children, with substantial financial support flowing from one party to the other, significant out-of-pocket attorney and expert fees, unique and complex discovery issues, the characterization, valuation, division and award of nearly every conceivable type of asset and/or debt (from mere trinkets to real properties, small home businesses to multi-million/billion dollar corporations and investments, retirement accounts, etc.) – all with potential generational impacts for untold years into the future.

Indeed, family law may be seen as a multi-dimensional chess board that employs multiple legal issues and theories with different burdens of proof. Issues as divergent as property division, domestic violence and the marital standard of living may significantly impact financial support, and paternity, child custody, interstate visitation and therapeutic interventions may play a significant role in putting the puzzle together. Additionally, unlike a civil case, where the facts, issues, evidence and legal authorities are usually fixed based on a moment in time (e.g., breach of contract, wrongful termination, personal injury, etc.), with family law, the facts, issues, evidence and legal authority often span decades, and continue to accrue, morph and evolve throughout the entire litigation process.

No, family law is not simply pots and pans. So, is there really any question as to why many of our judicial officers lament the prospect of finding themselves in a family law assignment?

Challenges faced by family law judicial officers

Beyond the legal intricacies, family law judicial officers grapple with unique challenges, including the heightened emotional turmoil of litigants. They often live their lives as the targets of disgruntled litigants, with a disproportionate number of social media attacks, complaints to the Commission on Judicial Performance, and most concerning, increasing threats of physical violence – each of which raises the question about the potential correlation between delays in family law matters and litigants' frustration and aggression.

Even as recently as October of

See Page 6 — A CALL

The evolution of distributed law firms

By Jacob Stein

Large law firms (at the time defined as four or more lawyers) emerged in the late 19th century to serve the needs of growing businesses that required increasingly specialized legal work. Starting with just a few, the number of these firms grew to over 1,000 by 1925. In the early 1900s, the "Cravath System" was developed, giving law firms their modern shape of a pyramid structure with few partners served by many associates. Today, most law firms continue to use this structure.

The modern-day large law firms emerged in the 1960s, as corporate America found itself as a target of more and more regulation, and for several decades the large firms flourished. Following the M&A boom of the 1980s, the large firms had to contend with the emergence of in-house counsel, alternative service providers, technological advances, and various financial crises.

More recently the legal community has seen the emergence of a new law firm structure. Starting with FisherBroyles in 2002, then a slow addition of a few more players (like Rimon Law, Potomac Law Group), with an eventual explosion during Covid, the virtual or distributed law firms offer their lawyers a different approach to the practice of law.

The distributed law firms allow their lawyers the flexibility of working from any location, setting their own hours, billing rates and billing requirements, and providing a lean, non-bureaucratic administrative model. These firms provide support that is similar to the traditional firms, but without some of the perks. By avoiding significant lease and staff salary commitments and unnecessary spending on various perks, each lawyer's profit margin is significantly increased.

The adoption of the distributed model was slow, but the acceptance of the remote working model helped. Some of the distributed firms now number hundreds of lawyers, many of them former partners at the AmLaw 100 firms.

Distributed law firms provide the same services to each of their lawyers, charge the same percentage of collections as overhead (generally somewhere between 15-25%), and allow lawyers to add on individual lease expenses, paralegals, or associates, if so desired. The majority of partners at the distributed firms work from home or use office sharing arrangements and share paralegals on a per diem basis.

A 2023 survey by the Wells Fargo Legal Specialty Group reported a 10% drop in productivity (hours billed) among the highest grossing U.S. law firms and attributed the drop to lower demand for legal services. Although demand and productivity dropped, hiring and revenues had each increased by about 4%. The increase in revenue is attributed to increased billing rates.

Overcoming a drop in demand with higher billing rates is a stopgap measure. Clients are not as loyal to firms as they once were and will seek firms that can provide a similar level of service at a lower billing rate and bill fewer hours. Selling clients on higher billing rates, competing within a larger labor pool, and having fewer hours to bill are stressful for the law firm partners and present a significant talent retention challenge for any law firm leader. Will this additional stress drive more partners from Big Law to the distributed model?

Shutterstock

Many Big Law partners are used to being taken care of and are comfortable with having a large credible brand on their business card. But what else do the big traditional firms offer these partners? What makes them stay, other than inertia or fear of change? More and more partners find that their practice no longer requires them to be at a large firm, and they can just as well service their clients as solo practitioners, at much smaller firms, or at the new distributed firms that provide the necessary support, complete practice independence and close to 2-3X take-home compensation (compared to the traditional firms).

Partners leaving big law firms and looking to go solo or start a small firm may not have the time to start their own practice. Running a solo or a small firm is like running a startup: keeping books, getting paid, developing business, marketing, hiring staff, remaining knowledgeable and competitive, accessing state of the art technologies, purchasing insurance, and so much more. Most solo and small firm lawyers spend 30%-40% of their time on activities that do not generate revenue

Joining a distributed law firm will allow these partners to operate much like a solo practitioner but with full firm support, a credible brand, a stable operating platform and a significant boost in take-home pay. The distributed law firm model has become an easy way to shift from Big Law to a solo-like environment.

Even distributed firms are undergoing an evolution. An example is Aliant, a global distributed law firm that treats its lawyers as if they are the firm's clients. Like the original distributed model, Aliant pairs the comprehensive support of a traditional law firm with the flexibility, independence and higher profit margin of a distributed firm, and offers bespoke service selection with robust business development and sales support. It is a unique approach of treating the practice of law as a business and the law firm partner as the client of that business. With that mindset lawyer-as-customer service comes first, and lawyers are happy.

Many distributed law firms have witnessed a substantial leap in their business not only nationally but globally, as lawyers seek ways to keep their clients, bill less and make more. It is not yet clear whether the AmLaw 100 firms see the distributed model as a threat to their existence, but the writing is on the wall. By being able to offer lawyers credibility, depth of practice, independence and profitability, the distributed model may eventually replace many of the Cravath System firms.

Jacob Stein *is an asset protection attorney and the global chair of the private client practice at Aliant, LLP. He can be reached at jacobstein@aliantlaw.com.*

Why LA County's talc litigation misses the mark

By Lauren Sheets Jarrell

This month, Los Angeles County became the first municipality to sue Johnson & Johnson, joining a barrage of lawsuits alleging that the company's talc products cause cancer.

The county's suit, which primarily relies upon a study published more than 50 years ago, makes additional claims of false advertising, unfair competition, and public nuisance.

Is talcum powder truly a pressing issue in Los Angeles County, and is it a top concern for county residents? The answer is a resounding no. A recent survey revealed that the county's residents are justifiably concerned about issues like inflation, the pandemic, and homelessness.

So, why would the county attorney choose to prioritize talc claims, based on outdated and questionable science, instead of the pressing issues Angelenos genuinely care about?

Perhaps the county attorney, like many others, was swayed by the millions of dollars spent by trial lawyers on talcum powder advertising. Since 2012, trial lawyers have spent $120.5 million on legal services TV ads recruiting clients to join lawsuits related to talcum powder, according to data from X Ante.

Shutterstock

Given that this isn't a priority for L.A. County residents, it begs the question of who truly benefits from this litigation? As talc cases nationwide take years to litigate, it's certainly not the individuals allegedly harmed, who are no closer to having their day in court. Rather, it's the trial lawyers who stand to walk away with millions of dollars.

While, if successful, this litigation may temporarily fill government budget gaps and line the pockets of trial lawyers, the focus should be on determining how to settle these cases fairly and efficiently. Instead, we witness the trial lawyer playbook in action, with millions spent on ads that can mislead the public in an effort to flood the courts with meritless lawsuits based on junk science.

Every year for the past three years, a state appellate court has thrown out a talc jury verdict against J&J. Just last month in New Jersey, a $224 million verdict was kicked to the curb after an appellate court found that the plaintiff's "expert" testimony was "so wide off the mark that a manifest denial of justice resulted."

Further, J&J has a very strong 76% success rate in the talc suits that have gone to trial. Beyond that, numerous cases that didn't go in their favor were subsequently overturned on appeal.

With results like these, it's no wonder the company continues to defend itself aggressively; the cases are based on junk science and, even if successful at trial, are highly vulnerable to reversal on appeal.

Despite these unfavorable outcomes, the lawsuits keep coming, leading to an overwhelming backlog of cases in our courts.

The only viable way out of this morass of more than 50,000 lawsuits is through a settlement process via bankruptcy. J&J has already offered $8.9 billion to fund the process, a plan that has received support from counsel representing a majority of claimants. In bankruptcy proceedings, all parties are offered a level playing field, ensuring fairness and equity in resolving these complex mass tort claims.

Angelenos already bear one of the most substantial "tort taxes" in the nation – nearly $3,150 per person every year due to excessive tort costs. California also consistently ranks as one of the worst "Judicial Hellholes®" in the country.

Yet, the county's talc litigation is far from a priority for hardworking Los Angeles families. It represents a colossal waste of taxpayer-funded time as public lawyers collaborate with private plaintiffs' attorneys, employing outrageous tactics that, in all likelihood, will not succeed for most.

We don't need a crystal ball to predict the outcome of this scenario. It's evident that, in the end, the lawyers are the primary beneficiaries.

It's time to put an end to this costly and futile legal battle. Californians deserve better than to pay the price for these baseless lawsuits.

Lauren Sheets Jarrell *is vice president and counsel at the Civil Justice Policy of the American Tort Reform Association.*

A call for effective change in California's family law courts

Continued from page 1

this year, yet another family law litigant threatened the lives of an Orange County family law judicial officer and other family court staff. Around the same time, Los Angeles Superior Court, Judge Lawrence Riff had authored "Your Son Needs to Know That His Dad Was A Hero." (Daily Journal, Oct. 24) In that article, Judge Riff movingly wrote to the wife of the late Maryland judge, Judge Andrew Wilkerson, about her husband's life as a family law judge before his murder.

Family law judicial officers and attorneys might disagree on how to fix the family courts, but most would likely agree that the current system is broken. To be clear, the dismal condition of the family courts is not the fault of the current or even past presiding judges or supervising family law judges throughout California; they did not create these systemic problems, they inherited them. But, if not with the judicial officers striving to work within the family court system, then where does the responsibility fall?

Unfilled judicial positions statewide

The record number of legislatively authorized and funded judicial positions that remain unfilled makes it essentially impossible for court leadership to adequately staff either family law courtrooms or other departments. For example, as of August 2023, the Orange County Superior Court had 17 unfilled positions – a number that's anticipated to increase to 19 by January 2024 due to judicial retirements. Certain cases (e.g., criminal matters) have legislative priority and judges must be assigned to those departments first, which further hamstrings court leadership in staffing the various departments. Interestingly, child custody and domestic violence also have legislative priority, a fact that is essentially ignored. Many judicial applicants have been vetted by at least three different committees, and are eagerly waiting to serve the public, yet our Governor has not made filling these vacancies a priority, leaving the parties, the children, the judicial officers and the court to suffer.

Shutterstock

Underserved and self-represented litigants

Providing the under-served with access to justice remains a paramount concern in legal discourse. Who is most abused by the system that exists in family courts? The underserved are the ones afraid of losing their wage-paying jobs by taking time off to appear in court only to have their matter unresolved, hastily addressed, or continued for months. Although assistance to the underserved and self-represented has greatly improved with the court facilitators' offices, the courtroom experience of the underserved remains fraught with challenges. If the family courts are broken for those with means, consider what it is for the underserved.

Mark E. Minyard *is a partner at Minyard Morris and served on the Elkins Family Law Task Force.*