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The doctrines of choice of law and equitable representation will likely apply when a California court decides whether to enforce a foreign marriage contract.

The certification of class actions challenging the designation of consumer goods as “Made in USA” is extremely difficult to obtain.

A recent Supreme Court decision has significantly expanded the jurisdiction for seeking a declaratory judgment on the validity of a patent.

DEPARTMENTS

10 Barristers Tips
Defending boilerplate in contracts
BY JEREMIAH T. REYNOLDS

11 Practice Tips
The unfortunate use of motions in limine as dispositive motions
BY WILLIAM D. REHWALD

13 Practice Tips
Preparing for the UIDDA’s new rules for foreign depositions
BY JOSHUA J. POLLACK AND JOSEPH K. WRIGHT

40 By the Book
The Enemy Within
REVIEWED BY STEPHEN F. ROHDE

44 Closing Argument
A dark tale about credit cards and bankruptcy
BY JAMES P. MCBRIDE

8 Letters to the Editor

42 Classifieds

43 CLE Preview
Asset Protection Planning Now Can Insulate Your Clients’ Assets From Future Judgments

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- Judgments not covered by insurance.
- Children suing each other over your client’s estate.
- A current spouse and children from a prior marriage suing each other over your client’s estate.
- A child’s inheritance or the income from that inheritance being awarded to the child’s former spouse.

**Steven L. Gleitman, Esq.**
310-553-5080
Biography available at lawyers.com or by request.

Mr. Gleitman has practiced sophisticated estate planning for 26 years, specializing for more than 14 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.

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When a Nobel laureate in economics draws upon literary references to the apocalypse to describe the current economic climate, the rest of us may well conclude it is time to get nervous. And, indeed, in a recent column, New York Times columnist Paul Krugman—who, as it happens, was awarded the 2008 Nobel prize in economics—turned to William Butler Yeats’s “The Second Coming” in order to convey the dire seriousness of current economic indicators. As we go to press, the Dow Jones Industrial Average is down 40 percent for the year, real consumer spending has declined at a pace not seen since 1980, and wholesale disaster has afflicted the financial services industry.

Against this increasingly bleak economic landscape, it is no surprise that nonprofits are suffering. As we enter what philanthropic organizations call the Giving Season, or the fourth quarter of the calendar year, almost half of the nearly 3,000 charities surveyed by GuideStar were bracing themselves for a decline in contribution levels.

Without question, in 2008 many of us will give less to charities than we would like to give—or, more precisely, than we have given in the past. And, when the bill for our State Bar dues arrives in the mail, many of us will be tempted to skip the box requesting a voluntary contribution to the Justice Gap Fund. We should resist that temptation. Even before the current economic crisis, California’s justice gap was well documented. The state lags far behind others in the provision of legal aid; only one-third of California’s low-income residents receive any legal assistance; and there are some 8,000 low-income persons for each legal aid lawyer.

Critically, there are real-life stories behind all these numbers. The abused mother seeking support and custody of a child, the Iraq war veteran requiring assistance in securing legally earned benefits, the HIV-positive worker in need of representation, the low-income child who needs special education services, and the countless victims of elder abuse and fraud are just a partial list of examples. These and thousands of other individuals will be deprived of access to justice entirely—unless those of us who can help resolve to do so.

In 2007, the governor and the legislature, reaching across party lines, enacted legislation creating the Justice Gap Fund, which permits the State Bar to ask each lawyer to contribute via the annual dues statement. The Justice Gap Fund has over 100 worthy grantees throughout California, including the Legal Aid Foundation of Los Angeles, Bet Tzedek, and several other Los Angeles-based organizations. Those wishing to make contributions focused directly on the local community may do so through the Los Angeles County Bar Foundation via a link on the LACBA Web site.

The State Bar’s dues statement suggests a contribution of $100, but donations in any amount will be accepted. Law firms can do an enormous service by encouraging full participation of their attorneys at the suggested $100 amount or more. Attorneys with truly limited means should be encouraged to make even a modest contribution. Indeed, if each of California’s over 200,000 attorneys contributed just an extra $10, the result would be more than $2 million devoted to access to legal help for those who—without our assistance—will be deprived of it.

At this time of year, it is customary to wish one another happiness, health, and other blessings. By contributing to the Justice Gap Fund and the LACBA Foundation, we can include the delivery of justice in what we send to others.

Angela J. Davis is an assistant U.S. attorney and the 2008-09 chair of the Los Angeles Lawyer Editorial Board. Her views do not necessarily reflect those of the U.S. Department of Justice.
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Debra Albin-Riley  
Litigation

Craig Gelfound  
Intellectual Property

Drew Hansen  
Litigation

Michael Turrill  
Litigation
Predictability – predict’a-bil’i-ty, noun

1.) An alternative for Confidence. ie – Lawyers’ Mutual Insurance Company (LMIC)
2.) The extent to which future states of a system may be predicted based knowledge of current and past states of the system. ie – LMIC
3.) Measured by the variability in achieving cost, performance objectives and the quality of being predictable. – syn: LMIC

Stability – sta’bil’i-ty, noun

1.) A stable order. ie – Lawyers’ Mutual Insurance Company (LMIC)
2.) The quality of being enduring and free from change or variation. – syn: LMIC

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In my opinion, the article by Lauren E. Godshall in the September issue titled “Using Effective Contract Language in Arbitration Agreements” on the “unreviewability” of arbitration decisions falls short for a failure to discuss two high court decisions; namely, Hall Street v. Mattel, 128 S. Ct. 1396 (2008) and Cable Connection, Inc. v. DirectTV, Inc., ___ Cal. 4th ___ (2008). The implications are as follows. In Hall, the U.S. Supreme Court recognized that Rule 16 of the Federal Rules of Civil Procedure might support review of an arbitration decision on the merits. In Cable Connection, the California Supreme Court held that parties may limit an arbitrator’s authority by providing for judicial review on the merits in an arbitration agreement. The Cable Connection decision was construed by the Second District in an unpublished decision in Raymond v. Hynt to permit review of errors of law and legal reasoning with no requirement that there be a verbatim transcript.

Howard Hoffenberg

I suspect I’m not the first to suggest that you check on an apparent error in the MCLE piece (“Life after 64,” By Benjamin M. Weiss and Michael A. Geibelson, September 2008) in Los Angeles Lawyer. The piece indicates that, since the California Supreme Court decided In re Tobacco II, 41 Cal. 4th 1257 (2007) last year, two other cases taken up by the court on a “grant and hold” basis—McAdams v. Monier and Pfizer, Inc. v. Superior Court (Galfano)—will provide the vehicle for the court to resolve certain unsettled issues regarding implementation of Proposition 64’s amendments to the Unfair Competition Law. Unfortunately, the authors were confusing two different In re Tobacco II cases—the one that is the lead case on the Proposition 64 issues has not yet been argued, much less decided, as is apparent from the court’s online docket information. We wouldn’t want readers to be misled by the misinformation, and the authors’ statement that, “The review by the supreme court of Pfizer and McAdams is being closely watched because the cases do not involve the preemption issue in Tobacco II.” It was the earlier, unrelated, 2007 case, not the still-pending case, that involved a preemption issue. Question number 7 in MCLE Test No. 173 therefore is a bit off.

Lisa Perrochet

In response to Paul Eisner’s article, “Will Someone Please Clean up the Form Interrogatories Mess?” (Closing Argument, October 2008) concerning the supposed mess of form interrogatories, he has got it wrong. The case he cites, Cantanese v. Superior Court, 46 Cal. App. 4th 1159 (1996), concerns the abuse of the 33 special interrogatories as per the old code referring to Code of Civil Procedure Section 2030(c)(2), not form interrogatories. The case held as follows:

The Court of Appeal ordered issuance of a writ of mandate directing the trial court to vacate its order granting plaintiff’s motion to compel further answers to interrogatories and to issue a new and different order denying the motion. The court held that the interrogatories violated the rule of 35 and the requirement of self-containment. The interrogatories were not self-contained as they necessarily incorporated, as part of each interrogatory, each separate question and answer in eight volumes of deposition. An interrogatory is not “full and complete in and of itself” when resort must necessarily be made to other materials in order to complete the question. Further, in light of the volume of questions and answers in the deposition, the interrogatories, in effect, posed upwards of 10,000 questions, which violated the rule of 35. Moreover, by treating the interrogatories as consisting of only five, plaintiff failed to file a declaration for avoiding the rule of 35 (Code of Civil Procedure §2030(c)(2)), thereby preventing defendant from seeking a protective order.

There is no subsequent case citing Cantanese that ever mentions form interrogatories. Specially prepared interrogatories are controlled by Code of Civil Procedure Sections 2030.030(a)(1), (b)-(c), 2030.040, 2030.050, and 2030.060. Form interrogatories are controlled by Code of Civil Procedure Section 2030.030(a)(2) referring to Code of Civil Procedure Section 2033.710, which states: “The Judicial Council shall develop and approve form interrogatories…for use in any civil action in the state based upon” the enumerated types of cases. Consequently, form interrogatories are an exception to the 35 special interrogatory limit, not another form of special interrogatories.

Absent a case holding otherwise, Mr. Eisner should not be advising anyone that he or she can “properly” object to form interrogatories 15.1 and 17.1 and the use of box 1 concerning Incident as being “incomplete.” There may be other reasons to object to other form interrogatories, such as 12.2 and 12.3, because such questions may invade the work product doctrine. Otherwise, he or she should fully answer the questions 15.1 and 17.1 and stop advising counsel to engage in obstructionist tactics that only add cost and waste time in unnecessary law and motion.

Will Jay Pirkey

The Author Replies:

Will Jay Pirkey’s letter overlooks that the identical language “Each interrogatory shall be full and complete in and of itself” is present in both the current Code of Civil Procedure Section 2030.060(d) and former Section 2030(c)(5) and is broader than the “No specially prepared interrogatory shall contain subparts, or a compound, conjunctive or disjunctive question.” (This is the language of the current Section 2030.060(f) and former Section 2030(c)(5)).

Paul Eisner
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Defending Boilerplate in Contracts

**BOILERPLATE CONTRACTUAL LANGUAGE** gets a bad rap. For the layperson, “boilerplate” brings to mind abstruse legalese that seemingly has no purpose. For courts and lawyers, boilerplate often suggests contractual provisions that parties with superior bargaining power impose. Neither of these understandings is correct. According to *Black’s Law Dictionary*, boilerplate is “[l]anguage which is used commonly in documents having a definite meaning in the same context without variation.” Boilerplate language dramatically reduces transaction costs by allowing parties to rely upon standard contractual language that they know will be interpreted uniformly regardless of the jurisdiction.

Litigators are often surprised by how many contracts lack critical boilerplate provisions. The failure to include these provisions can often mean the difference between winning and losing a contractual dispute. Three provisions serve as examples.

One of the most important boilerplate provisions is a time-is-of-the-essence clause. As Witkin explains: “Delay in performance is a material failure of consideration only if time is of the essence, i.e., if prompt performance is, by the express language of the contract or by its very nature, a vital matter.” In other words, if one party to a contract delays its performance, the other party may discharge its obligations because of the delay only if the contract expressly states that time is of the essence or if the court determines that the nature of the contract requires that time is of the essence.

A party that fails to include an express time-is-of-the-essence clause does so at its own risk. This was learned the hard way by the town of Corte Madera in *City of Larkspur v. Marin Flood Control and Water Conservation District*. In that case, the town sought to escape its agreement to contribute toward the cost of a flood control project. The construction had been delayed for six years, and the town argued that the delay constituted a failure of consideration. The court of appeal rejected this argument, holding: “[T]here is nothing in the agreement to suggest that if the ‘current scheduled construction’ is not completed in keeping with the contemplated schedule…then the agreement will terminate.” The court specifically noted the lack of a provision stating that time was of the essence. A time-is-of-the-essence clause is easy to draft. It can be as simple as “time is of the essence of every term of this agreement.”

Another provision that often proves significant in contractual disputes is an integration (or merger) clause, which provides that the written agreement contains all the agreements between the parties. The function of such a clause is to preclude the introduction of parol evidence that varies from or contradicts the terms of the written agreement. Recently, in *Everett v. State Farm General Insurance Company*, State Farm successfully relied upon an integration clause to prevent the plaintiff from contradicting the written terms of her policy by arguing that her insurance agent had orally promised her that State Farm would replace her home in the event of a total loss.

An integration clause should make clear that the written agreement not only contains all the agreements between the parties but also supersedes all prior written and oral agreements. Further, any agreement that justifies the inclusion of an integration clause should contain a provision stating that any attempt to modify the written contract must be done in writing to be effective.

Third, perhaps no other boilerplate provision is more important than one requiring the losing party to reimburse the prevailing party’s litigation costs in the event of dispute. Under the American rule, attorney’s fees are not recoverable as costs unless expressly authorized by statute or contract. When the stakes are relatively small and the contract fails to include a provision authorizing fees, a party may feel there is little to no risk in breaching the contract. Attorney’s fee provisions are therefore essential when contracts involve low dollar values or when the client is particularly counting on the full and faithful performance of every provision.

**Other Provisions**

Important boilerplate provisions go beyond these three examples, however. A lawyer drafting a contract should always consider whether to include clauses regarding 1) arbitration or dispute resolution, 2) assignment—whether there are limitations on a party’s ability to assign the contract, 3) choice of law, 4) execution of agreement in counterparts, 5) force majeure, 6) further assurances—obligating the parties to perform any future actions required to effectuate the contract, 7) antiwaiver—stating that a party’s unintended conduct cannot waive or modify the agreement, 8) indemnity, 9) jurisdiction, 10) no oral representations, 11) severability—if any provision is unenforceable, all others remain effective, and 12) successors and assigns—the agreement shall bind or inure to successors and assigns.

Although boilerplate may seem unnecessary or useless, it is neither. When an agreement becomes the subject of a dispute, boilerplate may prevent litigation and allow clients to obtain a desired result.

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Jeremiah T. Reynolds is an associate with Kinsella Weitzman Iser Kump & Aldisert LLP in Santa Monica who specializes in complex business litigation.
The Unfortunate Use of Motions in Limine as Dispositive Motions

PRACTITIONERS USUALLY FILE MOTIONS IN LIMINE (literally “at the threshold” in Latin) at the beginning of trial to preclude the presentation of evidence that they consider inadmissible or prejudicial. A typical order in limine excludes the challenged evidence and directs the opposing lawyer, party, and witnesses not to refer to the excluded matters in the presence of the jury. Courts have noted that “[t]he advantage of such motions is to avoid the obviously futile attempt to un-ring the bell in the event a motion to strike is granted in the proceeding before the jury.”

Thus motions in limine are supposed to regulate the introduction of evidence at trial or govern other aspects of the proceedings before the jury. They were not designed to replace dispositive motions, such as those for summary judgment or judgment on the pleadings. Nonetheless, it has become increasingly common for litigants, especially defendants, to use motions in limine for that very purpose. This disturbing trend does not bode well for the administration of justice.

The recent case of Amtower v. Photon Dynamics, Inc., is illustrative. In Amtower, the trial court granted a motion in limine on a statute of limitations defense after conducting a minitrial that consisted of oral testimony and documentary evidence. The trial court found, as a matter of law, that one of the plaintiff’s claims was time-barred. When this ruling was appealed, the court of appeal upheld the trial court’s use of the motion in limine. Although the Amtower court criticized using a motion in limine as a dispositive motion, a review of the opinion and the cases cited by the court may lead many practitioners to conclude that trial courts may continue to permit the use of motions in limine as dispositive motions.

This reading of Amtower, however, misses the point. The appellate court in Amtower cited with approval Justice Rylaarsdam’s observation in a concurring opinion in R&B Auto Center, Inc. v. Farmers Group, Inc., that the use of a motion in limine to determine the sufficiency of the pleading or the existence of a triable issue of fact was a “perversion of the process.” The Amtower court referred to motions in limine used for dispositive purposes as “shortcuts” and noted that they circumvent the procedural protections that statutory motions provide. Further, the court observed that these motions risk blindsiding the nonmoving party and may infringe on a litigant’s right to a jury trial, as guaranteed by the California Constitution.

The Amtower court found support for its holding in a number of cases that used motions in limine as shortcuts to reach a desired result. One example was Cosbow v. City of Escondido, in which the trial court construed a motion in limine as a motion for judgment on the pleadings and dismissed the entire action—notwithstanding the danger of doing so, especially in light of case authority holding that motions for judgment on the pleadings are disfavored unless leave to amend is given to the plaintiff. In Stein-Brief Group, Inc. v. Home Indemnity Company, another case cited by Amtower, the trial court ordered the plaintiff to file a pretrial motion in limine setting forth its “best case scenario” in favor of coverage. In ruling on the motion, the trial court concluded there was no potential for coverage and entered judgment for the defense. In essence, the trial court was permitting the defendant to bring a summary judgment motion on the eve of trial, without the statutory 75-day notice period, without the filing of a separate statement of undisputed facts and, critically, without applying the strict standards governing the determination of such case-dispositive motions. Nevertheless, the appellate court reasoned that since the issue of coverage was a matter of contract interpretation by the court, the trial court’s unorthodox procedure could not be criticized as long as the plaintiff had a full opportunity to present its position.

Finally, Amtower referred to Michelson v. Camp, in which the trial court dismissed an action when the plaintiff was unable to make an offer of proof of recoverable damages after the defendant had filed a pretrial motion in limine. The Michelson court construed the plaintiff’s offer of proof as tantamount to an opening statement and granted nonsuit.

Problems and a Solution

Trial courts using these nontraditional methods of disposing of cases on the eve of trial create problems for litigants who are seeking their day in court, as well as the courts of appeal that are called upon to review the nontraditional procedures that trial courts employ. One significant problem raised by a pretrial rendition of a judgment is that the losing party will have the benefit of all the inferences and conflicts of evidence in its favor, whereas appellate review of a full trial on the merits favors the judgment. Thus, the use of motions in limine as shortcuts is likely to lead to more reversals on appeal, all other things being equal, because the governing standard of review is less deferential in cases involving the dispositive use of motions in limine. Further, although motions in limine may seek the same result as summary judgment motions, they do so without the procedural protections afforded by Code of Civil Procedure Section 437c. This problem undoubtedly was the genesis for local rules limiting the scope of motions in limine, such as Rule 8.92(b) of the Los Angeles Superior Court:

A motion in limine shall not be used for the purpose of seeking summary judgment or the summary adjudication of an issue or issues. Such motions may only be made in compliance with Code of Civil Procedure Section 437c and court rules pertaining thereto.

Nevertheless, authority now exists for the proposition that trial courts have the inherent power to use the motions in limine with relatively few procedural safeguards. The Amtower court set forth this argument:

In spite of the obvious drawbacks to the use of in limine motions to dispose of a claim, trial courts do have the inher-
ent power to use them in this way….Courts have inherent power, separate from any statutory authority, to control the litigation before them and to adopt any suitable method of practice, even if the method is not specified by statute or by the Rules of Court….But when the trial court utilizes the in limine process to dispose of a case or cause of action, we review the result as we would the grant of a motion for nonsuit after opening statement, keeping in mind that the grant of such a motion is not favored, that a key consideration is that the nonmoving party has had a full and fair opportunity to state all the facts in its favor, and that all inferences and conflicts in the evidence must be viewed most favorably to the nonmoving party.9

The cause of action that the trial court ruled on in Amtower was a claim for breach of fiduciary relationship. The plaintiff had argued that a statute of limitations defense normally presents a question for the jury, and that the plaintiff would be denied his right to a jury trial if the motion were granted. What was not discussed or even raised in the appellate opinion is whether a claim for breach of fiduciary duty is an equitable action for which there is no right to a jury trial. If that is so, then the trial court's minitrial did not deprive the plaintiff of a fundamental right protected by the California Constitution. Essentially, the appellate court ruled that the procedure adopted by the trial court was harmless. Thus, Amtower stands as authority for the denial of a jury trial through the use of a motion in limine as a dispositive motion.

Though Amtower demonstrates that using motions in limine as a dispositive device may save time, it is troublesome that these motions undoubtedly deprive litigants of their fundamental right to a jury trial. A rule that is more consistent with due process would limit the use of motions in limine to their original purpose. Motions in limine should be viewed as a means of challenging evidence that is so inadmissible and prejudicial that its mere mention in the presence of the jury would lead to an unfair trial. Pellegrini v. Weiss,10 a case involving a real estate transaction, illustrates this more traditional use of motions in limine. The defendant, Weiss, raised as an affirmative defense the fact that California had disqualified Pellegrini & Associates from doing business in the state. The plaintiff filed a motion in limine to exclude the evidence of disqualification and offered a Certificate of Revivor from the state to show that the plaintiff had cured any defects and had been in good standing during the time that the real estate transac-

4 CAL. CONST. art. I, §16.
11 Id. at 530 (citing Amtower, 158 Cal. App. 4th at 1588).
13 Id at 1338 (citing Amtower, 158 Cal. App. 4th at 1595).
14 The court in Pellegrini disposed of an affirmative defense, yet the standard of review that was used was abuse of discretion. In the Miller case, the motion in limine disposed of an entire cause of action, yet the standard for review was the same used for reviewing a motion for nonsuit. Determining the appropriate standard of review will be an issue for future resolution as appellate courts continue to grapple with the problems posed by using motions in limine as dispositive.

12 Los Angeles Lawyer December 2008
CLIENTS IN OUT-OF-STATE COURT ACTIONS frequently need to depose third-party witnesses residing in California, or, clients in California court actions frequently need to depose third-party witnesses residing out of state. What procedural steps must be followed to subpoena these witnesses for their depositions, and, if necessary, compel their attendance? In any interstate deposition, the primary question to consider is how to issue an enforceable subpoena to compel the witness to testify or produce documents. Currently, this process is riddled with inconsistency and complications.

In an effort to reduce these problems, the Uniform Interstate Depositions and Discovery Act (UIDDA) was signed into law in California this year. On January 1, 2010, the process for deposing a nonparty California witness in an action pending in another state will change dramatically. California lawyers should be aware of the current and future statutes.

Currently, California’s deposition statutes mirror the Uniform Foreign Depositions Act (UFDA), an earlier attempt at creating a uniform system of interstate deposition rules. Under the UFDA, a nonparty witness may be compelled to testify in the same manner and by the same process and proceeding as the state in which the action is based. Unfortunately, the vagueness of this language has led to inconsistent interpretations. Under this law, depositions in California for out-of-state actions are governed by Code of Civil Procedure Section 2029.010. California and other UFDA states are relatively liberal about issuing subpoenas in out-of-state actions. The court in the county in which the witness resides will issue a subpoena upon receipt of certain documents. However, the governing local rules or informal local practices create inconsistency regarding which documents are required. Most California courts will accept a commission, letter rogatory, or even a notice of deposition or party agreement as sufficient. Some clerks will issue a subpoena upon receipt of an original or a copy of any of these documents; others may require a formal petition. An attorney must always check with the court clerk for any additional local rules or practices. California is especially prone to variation from county to county, one of the reasons the legislature cited in adopting the UIDDA.

California’s current law is also ambiguous as to who may issue the subpoena to the nonparty witness—the California code does not specify whether a lawyer may do so instead of the court. The California Law Revision Commission, commenting on the current law, suggests that although an out-of-state lawyer cannot issue a subpoena in California, an active member of the California bar retained to represent a party in an out-of-state action may do so. Thus, either a California court or a California attorney must be involved in the issuing process. Further, a subpoena issued in an out-of-state action must be served in accordance with California rules of process.

In determining where the deposition must take place and who may be deposed, some (but not all) requirements mirror those of an ordinary California deposition. For example, resident deponents in out-of-state litigation must still be deposed within 75 miles of their residence. However, the California statute permitting depositions to be taken in the county in which the action is pending and within 150 miles of the deponents’ residence is inapplicable because there is no action pending in California. There is also ambiguity in Section 2029.010 as to who may be deposed in California in an out-of-state action. Unlike the general guidelines for depositions that are found in Section 2025.010—which grant the power to depose all natural persons, corporations, and other organizations—Section 2029.010 only specifies “natural persons.” In light of the statute’s context, however, the California Law Revision Commission determined that the current statute should probably be construed to include corporations and organizations as well.

Additionally, Section 2029.010 does not indicate if one must retain local counsel to depose a California resident in a foreign
action. Based on California Rules of Court, Rule 9.47, however, under certain conditions, attorneys licensed to practice in another state are permitted to perform litigation tasks in California on a temporary basis for an action proceeding in another state.15 Thus, the deposition may be taken by an out-of-state lawyer, and the lawyer need not be admitted to any California court. With respect to deposition officers or court reporters, although California law imposes no additional requirements on their qualifications, look to the foreign state to make sure any California officer or reporter is qualified under that state’s standards.

Finally, Section 2029.010 is unclear as to whether counsel must be admitted in California to participate in any proceedings if it becomes necessary to compel the nonparty witness to comply with the subpoena.16 Thus, one should be prepared to react appropriately if it appears that the witness might disregard the subpoena.

Fortunately, in a little over a year the current system and many (though not all) of its complications and inconsistencies may be disregarded. In 2007, the National Conference of Commissioners on Uniform State Laws drafted and approved the UIDDA, setting forth a deposition procedure “that can be easily and efficiently followed, that has a minimum of judicial oversight and intervention, that is cost-effective for the litigants, and is fair to the deponents.”17 Beginning in 2010, California will be a UIDDA state.

Under the UIDDA, as adopted in California, there is no need for an attorney to obtain a commission or letter rogatory, file a miscellaneous action, or take any other preliminary steps before obtaining a subpoena for a foreign action.18 Instead, an attorney from a foreign state only needs to submit a subpoena that comes from the foreign court to the clerk of the California court in the county in which the witness resides, along with an application for a new subpoena and the appropriate fee.19

The California court will then issue its own subpoena, incorporating the information on the face of the original subpoena, for service upon the witness.20 The clerk’s simple act of subpoena reissuance, though ministerial, sufficiently establishes jurisdiction over the deponent. The subpoena is then served in accordance with California law. Alternatively, if an out-of-state party retains counsel who is an active member of the California State Bar, the California attorney can issue the subpoena upon receipt of a subpoena from the foreign state.21 The only additional requirement for either method is that, when served, the subpoena must be accompanied by the names, addresses, and telephone numbers of all counsel of record and any party not represented by counsel.22 Once issued, the subpoena is subject to the same substantive law as any other California subpoena.23 Any person, not merely natural persons, can be subpoenaed in this manner.24

California’s version of the UIDDA is slightly altered from the model statute. One change approved by the California Legislature involves the filing fees that apply when a discovery dispute arises in an out-of-state litigation and a nonparty petitions for relief in a California court.25 The standard language of the UIDDA applies the same fee ($40) for a nonparty seeking relief in a discovery dispute in a foreign case as an in-state case.26 However, the legislature raised the fee for nonparties in discovery disputes originating out-of-state to $80 to reflect the increased cost.27 The legislature also clarified the language giving nonparties the right to obtain reimbursement of the filing fee if they prevail in the discovery dispute.28

Out-of-State Depositions, California Litigation

The procedures for taking a deposition in another state for an action pending in California do not change under the UIDDA. When deposing an out-of-state party in a California state action, an attorney need only comply with the ordinary discovery procedures outlined in Code of Civil Procedure Sections 2025.010 et seq.29 However, depositions for nonparty witnesses or independent experts may require compliance with California statutes in addition to laws peculiar to the state in which the witness resides.30 Although California law still governs most aspects of taking depositions, the method for compelling an uncooperative nonparty witness to attend, testify, or produce documents is governed exclusively by the law of the foreign state.31 Out-of-state depositions may be simplified by retaining an attorney in the foreign state; nonetheless, understanding the process can minimize the need for outside help.

The critical question is how to issue an enforceable subpoena to out-of-state deponents. If nonparty witnesses voluntarily agree to be deposed (and show up for the deposition), there is no need to use out-of-state processes. However, if they fail to show up or otherwise change their minds, attorneys are powerless to obtain sanctions.32 Even worse, an attorney may be held responsible for the cost opposing counsel bears in attending the failed deposition.33 When deponents refuse to show up or produce documents, their cooperation may only be compelled under the law of the place where the deposition is taken.34 These laws vary from state to state; worse, they often vary from county to county within a state. In addition, many states (including California) are in the process of changing their discovery statutes. Because of this, there are no hard and fast rules for the out-of-state deposition process. Attorneys must therefore rely on local court clerks for help. Nonetheless, understanding some of the general categories into which states fall can provide some insight into determining a course of action.

The first step an attorney should take is to find the court that has jurisdiction over the witness. To find the county name for the deponent’s address, simply search by zip code or city name on any number of Web sites, including the National Association of Counties, which is available at www.naco.org/counties/queries/city_srch.cfm. Then, find the court’s Web site at the National Center for State Courts at www.ncsconline.org. If the court Web site does not provide specific requirements for taking depositions in out-of-state actions, it will at least provide the court clerk’s phone number. Even after researching the pertinent discovery statutes and rules for the foreign state, contacting the clerk’s office is an essential step in determining how to proceed as some courts will impose requirements that others do not.

Although each state has its own process for issuing subpoenas in out-of-state actions, these systems generally fall into one of five categories. However, the variety of state laws and their application even within these categories makes them more of a compass than a procedural road map that gives precise directions.

The first category consists of states that have adopted the UFDA. California, New York, Florida, Texas, and others have either adopted the act or enacted virtually equivalent statutes and rules.35 As current California law and practices show, UFDA states often take inconsistent approaches to compelling witnesses to testify “in the same manner and by the same process and proceeding” as the state in which the action is based.36 However, in most UFDA states an attorney may simply issue a California subpoena to the out-of-state witnesses and serve them with what ordinarily constitutes valid process under California law.37 A good resource for finding local process servers is available at www.napps.org (National Association of Professional Process Servers). Attorneys may also work with a local process server to find an affiliate in the foreign state.

States that follow the UFDA will enforce the subpoena as though it originated in the state. If the subpoenaed witness fails to attend, the attorney may need to file a motion to compel with the foreign state court.38 Although the court will enforce the subpoena, the California attorney may need to retain local counsel for the enforcement proceeding.
A second category of states, including New Mexico, will issue a subpoena to a non-party witness upon receipt of a copy of a California Notice of Deposition or of an agreement between the parties to a deposition. In these states, the California attorney may usually provide the court of a deponent’s residence with a copy. For some courts, the documents may simply be sent with a cover letter from counsel; other courts require a more detailed submission process. The court or clerk will then issue a subpoena upon request, and the California attorney follows the same course of action to ensure its enforcement as in a UFDA state.

A third category of states, including Alabama and Kentucky, requires a letter rogatory or commission from a California court before issuing a subpoena to the out-of-state deponent. California’s Code of Civil Procedure authorizes the issuance of a commission whenever “necessary or convenient.” Although very few states have statutes requiring these documents, other state courts may still request them in reliance on old rules or court tradition. This underscores the importance of consulting the local clerk.

The commission or letter rogatory may contain whatever terms the foreign jurisdiction requires to initiate the process; forms are widely available in various practice guides. After drafting the document, the California attorney should ask the clerk the best way to get the document to the judge. Some courts allow the documents to be sent with a letter, but others require a more formal petition.

Local Counsel Still Required

A fourth category of states, including Arizona and New Jersey, still require the California attorney to retain local counsel and file an entirely new action (usually a miscellaneous action) in the state where the deponent resides before the court will issue a subpoena. This can be an expensive and time-consuming process because of the need to learn the local pleading requirements before filing. After initiating the action, the California attorney files a motion in that state requesting permission to take the deposition. Again, the court clerk is the most valuable source of information. However, if local counsel will be hired, they may be better situated to draft and file the appropriate pleadings.

Finally, the fifth and newest category of states are those that have adopted the UIDDA. At least five states, including Colorado, Utah, and Maryland, already have adopted the UIDDA. Other states, including California, have bills currently pending in their state legislatures or have adopted the act with an effective date in the near future. The process for issuing an enforceable subpoena in a UIDDA state is
fairly straightforward. The attorney need only issue a California subpoena and deliver it to the foreign court’s clerk along with an application and fee, whereupon the foreign court will issue its own enforceable subpoena.44

Regardless of which category applies, compelling the deponent’s cooperation is the most difficult aspect of taking an out-of-state deposition. After the subpoena is issued and enforced, attorneys may proceed with the deposition using the same rules and procedures with which they are familiar in California.45

It remains to be seen how California courts will apply the new interstate deposition law, but the detailed provisions of the UIDDA should bring more consistency to the process. In the interim, attorneys who are deposing California witnesses in out-of-state actions should not forget to talk with the foreign court clerk about how best to obtain a subpoena in that county. Attorneys deposing witnesses in foreign jurisdictions for California matters should similarly rely on court clerks and, if possible, the experience of local counsel.

All attorneys should realize that while the adoption of the UIDDA promises to bring more clarity to the muddled procedures presently in force, until it is adopted by every state, the best approach is to consult local clerks.

1 The Uniform Interstate Depositions and Discovery Act (codified at CODE CIV. PROC. §§2029.100 et seq.).
2 Uniform Foreign Deposition Act §1.
5 Id.
7 California Law Revision Commission, supra note 4.
8 Id.
9 CODE CIV. PROC. §2029.010.
10 CODE CIV. PROC. §2025.250(a).
11 Id.
12 California Law Revision Commission, supra note 4.
13 CODE CIV. PROC. §§2025.010, 2029.010.
14 California Law Revision Commission, supra note 4.
15 CAL. R. CT. 9.47.
16 California Law Revision Commission, supra note 4.
17 Unfortunately, the UIDDA has not clarified this ambiguity.
19 CODE CIV. PROC. §§2029.300(a)-(b).
20 CODE CIV. PROC. §§2029.300(c).
21 CODE CIV. PROC. §§2029.350(a).
22 CODE CIV. PROC. §§2029.350(b).
23 CODE CIV. PROC. §§2029.400, 2029.500.
24 CODE CIV. PROC. §§2029.200(c), 2029.500.
26 Id.
27 CODE CIV. PROC. §§2029.620(c)(2).
28 CODE CIV. PROC. §2029.500.
29 CODE CIV. PROC. §§2026.010(a).
30 CODE CIV. PROC. §§2026.010(c).
32 CODE CIV. PROC. §§2025.440(b).
33 CODE CIV. PROC. §§2025.440(a).
34 CODE CIV. PROC. §§2026.010(c).
35 CODE CIV. PROC. §§2026.010(c).
36 Uniform Foreign Depositions Act §1.
37 Id.
39 Utah R. Civ. P. 26(b); N.M. STAT. ANN. §38-8-1.
40 Ala. R. Civ. P. 28(c); Ky. R. Civ. P. 28.03.
41 CODE CIV. PROC. §§2026.010(f).
44 Uniform Interstate Depositions and Discovery Act (2007), supra note 17.
45 The law of the state where a deposition is taken may apply to claims of privilege of a nonparty deponent. See Palmer v. Fisher, 228 F. 2d 603, 608 (7th Cir. 1955).

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When Louis XIV and Marie-Thérèse, daughter of Philip IV of Spain, were married in 1659, their marriage contract was part of the Treaty of the Pyrenees, which ended France’s war with Spain. The contract also provided for the payment of a large dowry by Spain to France, which was never paid because Spain ran out of money. Imagine, if you can, that Marie-Thérèse becomes fed up with her husband’s numerous infidelities, moves to California, and files for divorce. Louis XIV may have thought that California was an island populated by Amazons, but if he had worries about whether California would enforce his foreign premarital contract, they might be more realistic.

If two people divorce in California, they are subject to California’s community property and support laws. However, a couple may modify their default marriage contract by entering into a premarital agreement. But California premarital agreements are significantly different from foreign marital contracts, which allow a couple to elect a regime of marriage—for example, joint or community property regimes, a separate property regime, or a variation thereof—depending on the country.

Whether a California court will enforce a foreign marital contract may depend on whether the court applies California law or foreign law. California’s law is set forth in the Premarital Agreement Act, which was modeled after the Uniform Premarital Agreement Act (UPAA). The National Conference of Commissioners on Uniform State Laws approved the act in 1983, and since then various states have become signatories to it. California enacted the UPAA in 1986 but revised the statute in 2002 in response to In re Marriage of Bonds and Marriage of Pendleton and Fireman.

The California statute provides that certain conditions must be met for a premarital agreement to be enforceable:
- The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, rep-
The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed. The agreement was not executed under duress, fraud, or undue influence, and the party did not voluntarily and expressly waive, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party. The agreement did not promote divorce. The agreement was not against public policy. If a California court were to interpret a foreign marital contract according to the strict statutory provisions set forth above, few foreign contracts would be enforced, because the statutory requirements are different for a foreign marital contract. The main difference between a foreign marital contract and a California agreement is that the parties in most foreign countries are not represented by independent legal counsel. In France, for example, the parties meet together with a notary, who advises the couple on the law and drafts the agreement. A provision in a premarital agreement regarding spousal support is not enforceable if the party was not represented by independent counsel when signing the agreement or if the provision regarding spousal support is not enforceable, despite the fact that the couple were not represented by independent counsel. The court found that there was no evidence of duress, the wife was educated, and the parties followed the agreement throughout their marriage. However, a strong dissent in this case foreshadows how a California court could view the German marital contract. The dissenting justice wrote:

Wife, with no advance notice, was brought to the office of Husband's family's lawyers, and presented with a German document that, while purporting to be simple, dealt with unfamiliar concepts of German marital property "regimes," in German. The purportedly neutral [notary] whose obligation was to ensure that everything was handled fairly and properly, failed to check that plaintiff [wife], a United States citizen, was fluent in German, or understood the concept of the property regime she purportedly was selecting, or had received any legal advice or explanation of the document in advance.

To avoid the risk that a California court would apply California law and determine that the foreign law violated California's particular statutory provisions, the marital contract should include a choice-of-law clause to ensure that the foreign law is used to interpret the contract. When a contract has no such clause, California courts will apply the law of the jurisdiction in which the contract was made and performed to determine questions of enforceability.

In Henderson v. Superior Court, the court determined that the law of Florida should be applied to the interpretation of a cohabitation agreement. The court held:

In California a contract is governed by the law and usage of the place where it is to be performed, or, if place of performance is not indicated, by the law and usage of the place where it is made. (Civ. Code, § 1646.) When the application of section 1646 is obscure, California courts are guided by the factors set out in Restatement Second, Conflict of Laws section 188, in determining what law to apply to the contract. Section 188 declares that the rights and duties of the parties to a contract are determined by the law of the state which has the most significant relationships to the transaction and the parties. Factors to be taken into account include, (a) the place of contracting; (b) the place of negotiation;
(c) the place of performance; (d) the location of the subject matter of the contract; (e) the domicile and residence of the parties.20

In Black v. Powers,21 a court in Virginia (a UPAA state), using that rationale, applied the law of the U.S. Virgin Islands to the interpretation of a premarital agreement, because the contract was to be performed there. The court found that because the parties were married in the U.S. Virgin Islands, the contract was performed there despite the fact that they intended to live in Virginia. In that case, the court held that the act that was to be performed was the wedding.

If a foreign marital contract has a choice-of-law clause, California courts may be expected to follow it. The UPAA and California law provide that parties may contract regarding “[t]he choice of law governing the construction of the agreement.”22 There are no California cases interpreting the UPAA’s choice-of-law provision, but in a case in Oregon (a UPAA state), Marriage of Proctor,23 the court interpreted a choice-of-law clause in a California premarital agreement. In the case, the choice-of-law clause provided only that California law applied to the construction of the agreement but not that California property law would apply. Thus, the Oregon court refused to apply California property law and applied Oregon law relating to various reimbursement issues. This case instructs that to be effective, choice-of-law clauses must provide for the application of substantive and procedural law of the foreign jurisdiction.24

The parties also may be able to select the forum and the form of dispute resolution they will use to resolve any disputes related to the interpretation or application of the contract. If parties to a German marriage contract, for example, agree that the German contract will be construed under German law and that German substantive law will apply, it may be prudent to select a judicial or extrajudicial body that could effectively apply German law. In New Jersey (a UPAA state), a court deciding Delorean v. DeLorean25 applauded the parties’ stipulation to use a California private judge to interpret the premarital agreement. The court stated, “Indeed, since the antenuptial agreement specifically provides in paragraph eight that it ‘shall be construed under the laws of the State of California’ there was obvious logic in having a retired California judge pass upon that issue.” Although the parties agreed at the time of their divorce to use a private California judge to interpret the agreement, the parties could have included a provision in the premarital agreement that they would use a California private judge to decide any issues relating to the interpretation or
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enforcement of the agreement.

To ensure that a foreign marital contract will be enforceable in California, the parties should be represented by independent counsel. There should be an adequate disclosure of assets and obligations, and there should be an adequate time to review the agreement before signing it. The premarital agreement should include a choice-of-law clause that applies to the construction of the agreement and the substantive law of the selected forum. The parties should also select a dispute resolution process by which any disputes relating to the agreement will be decided.

Counsel should have the agreement translated if one of the parties does not speak the language of the country and make sure the party acknowledges in writing that the agreement has been translated and understood. Another safeguard is to videotape the execution of the agreement and the voir dire of the parties to ensure their assent to the contract was not procured by duress or fraud, that they understand the contract, and they had capacity to sign the contract.

To analyze whether a foreign marital contract may be enforced in California, attorneys should determine which country’s law should apply to construction of the agreement and which country’s law should apply to the executory provisions of the contract. Unless the marital contract specifically states that the parties’ contract should be construed under the foreign law and the foreign law should govern the division of the property, counsel may argue that the agreement called for performance in the foreign country, and therefore the foreign law should apply. Applying the choice-of-law doctrine to the marriage contract between Louis XIV and Marie-Thérèse, it would appear that French law should apply to the interpretation of the contract, even if a divorce in California could mean renewed hostilities between France and Spain.

1 Although this scenario is unlikely, in 1602, the Spaniard Sebastián Vizcaíno explored California’s coastline as far north as Monterey Bay, where he put ashore. He ventured inland south along the coast and recorded a visit to what is likely Carmel Bay.


3 Id. at 371.


5 When California enacted the UPAA in 1984, it did not include the provision in the uniform act that permitted the limitation on spousal support (alimony or maintenance). California adopted this provision in 2002 after the California Supreme Court decided In re Marriage of Pendleton & Fireman, 24 Cal. 4th 39 (2000).

6 In re Marriage of Bonds, 24 Cal. 4th 1 (2000) (The lack of an attorney is merely one factor to consider in determining the voluntariness of a party’s assent to the premarital agreement.).

7 Marriage of Pendleton & Fireman, 24 Cal. 4th 39 (Spousal support waivers and limitations contained in written premarital agreements are not contrary to public policy and are not per se unenforceable.).

8 Fam. Code §1615(c)(1).

9 Fam. Code §1615(c)(2).

10 Fam. Code §1615(c)(3).

11 Fam. Code §1612.

12 Fam. Code §1615(c)(4).

13 Fam. Code §1615(A), (B), (C).


15 Diosdado v. Diosdado, 97 Cal. App. 4th 470 (2002) (Marital agreement with monetary penalty for breach of obligation of sexual fidelity was void); see also In re Marriage of Mehren & Dargan, 118 Cal. App. 4th 1167 (2004).

16 French couples who wish to enter into a marital contract must appear together before a notary before the wedding and select one of the règimes matrimoniaux offered by the French Civil Code. The notaire advises future spouses as to the legal consequences of their choice of a regime.

17 Fernandez v. Fernandez, 194 Cal. App. 2d 782 (1961). This is the only California case to address choice-of-law issues foreign marital contracts. It does not address the recognition issue because the parties already stipulated that they would follow Mexican law.


19 Stawski, 43 A.D. 3d 776 (Saxe, J., dissenting).


22 Fam. Code §1600(a)(6). Utah has a variation on this statute: “Parties to a premarital agreement may contract with respect to...the choice of law governing the construction of the agreement, except that a court of competent jurisdiction may apply the law of the legal domicile of either party, if it is fair and equitable.” Utah Code §30-8-411(f).


24 But see Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459 (1992) to indicate how the California Supreme Court addresses the issue of enforcement of choice-of-law clauses in insurance contracts. The doctrines set forth in Nedlloyd have not been applied to choice-of-law clauses in premarital agreements or foreign marital contracts, but the principles set forth in the case could be utilized under the right set of facts.


26 Although the statute permits signing an agreement without counsel if certain conditions are met, it is unlikely a California court will enforce the agreement.

27 It is not known whether a California court would require that the parties follow the seven-day waiting period between the time it is first presented and signed.

28 Attorneys should draft the agreement to anticipate that any particular judicial officer, arbitration board, or forum selected by the parties may no longer exist at the time of enforcement, so that the selection could be unfavorable to the client’s position.


MORE THAN 40 YEARS AGO, business analysts suggested that the phrase “Made in [country name]” appended to products would have a significant influence on their acceptance and success.¹ Since then, others have attempted to address the importance to manufacturers and consumers of a product’s designation of its country of origin. Empirical studies from the last two decades yield few concrete answers to what the phrase “Made in USA” means to the average consumer. And even fewer published decisions give practitioners guidance on the viability of lawsuits alleging that a manufacturer or seller improperly labeled a product Made in USA.

Despite years of surveys, analysis, statutory enactments, and litigation, manufacturers or consumers who become litigants in cases involving a product advertised as Made in USA cannot assert a bright-line rule. Federal standards generally call for a case-by-case analysis, and state laws vary. Some issues, particularly the globalization of manufacturing, merely add more questions rather than answers. Statutory and regulatory guidelines—and the few cases interpreting them—appear more suited for the clear-cut case. But the guidance does not uniformly reach across state lines, nor does it necessarily acknowledge the realities of today’s global marketplace. Until more consistent standards are supplied by legislatures, lawyers on both sides of country-of-origin claims should be wary of the difficulties in prosecuting or defending them.

Over the years, researchers have tried to measure American consumer preferences to...
determine whether the Made in USA designation on a product truly matters to consumers. The results are decidedly mixed. Some research indicates that country of origin is an important characteristic in purchasing decisions. Other studies show that while Americans believe Made in USA denotes quality and value, many are not inclined to look for that designation on a product in the first place. The U.S. Department of Agriculture published a 2004 study concluding that food suppliers see little or no advantage in labeling domestic products as Made in USA. In 2006, Pet Business conducted a shopper preference study of 1,000 pet owners that listed several factors influencing the purchase of dog or cat food. While store location, nutritional ingredients, recommendations, and price were considered important, country-of-origin designation was not among the influential factors. One researcher concluded that adding Made in USA to an advertisement or label is not an automatic cue for consumers about the quality and value of a product. Nonetheless, many products contain the designation, and its use is regulated under federal and state schemes.

**Federal Guidelines**

The Federal Trade Commission Act (FTCA) brought the issue of Made in USA labeling within the regulatory purview of the Federal Trade Commission:

To the extent any person introduces, delivers for introduction, sells, advertises, or offers for sale in commerce a product with a Made in the U.S.A. or Made in America label, or the equivalent thereof, in order to represent that such product was in whole or substantial part of domestic origin, such label shall be consistent with decisions and orders of the Federal Trade Commission issued pursuant to section 5 of the Federal Trade Commission Act [15 USCS §45]. This section only applies to such labels. Nothing in this section shall preclude the application of other provisions of law relating to labeling. The Commission may periodically consider an appropriate percentage of imported components which may be included in the product and still be reasonably consistent with such decisions and orders. Nothing in this section shall preclude use of such labels for products that contain imported components under the label when the label also discloses such information in a clear and conspicuous manner.

The Federal Trade Commission’s Enforcement Policy Statement on U.S. Origin Claims sets forth the commission’s most recent guidance to marketers who want to make an unqualified claim that a product was Made in USA. Under the Policy Statement, a product can be labeled as Made in USA if all, or virtually all, of it is made in the United States.

For consumers and private litigants, however, the reach and usefulness of the FTCA and the Policy Statement remain unclear. Under the FTC, the Federal Trade Commission has the power to bring law enforcement actions against those making false or misleading claims that a product is Made in USA or is of U.S. origin. The act does not confer standing on private litigants. Some states allow the FTC to serve as a predicate statute for private unfair competition law claims. Others, including California, do not.

Nonetheless, most lawyers consider the FTCA and the Policy Statement to be a definitive statement of what constitutes the proper use of a Made in USA designation. It is helpful to examine the Federal Trade Commission’s efforts to define what constitutes a product that is completely or almost completely made in the United States.

In 1995, the Federal Trade Commission considered revising its then-existing Enforcement Policy Statement on U.S. Origin Claims. To that end, it commissioned a two-part study to identify consumer perception of U.S. origin claims. The commission had previously conducted a more limited study of those issues in its 1991 Copy Test. According to the commission, the results of the 1995 studies indicated that many consumers expected that a product advertised or labeled as Made in USA had a high amount of U.S. content, but a significant number of consumers were willing to accept a product with at least some foreign content. Therefore, the commission found a wide range of scenarios in which most consumers would find a Made in USA claim to be appropriate.

The 1995 studies included an Attitude Survey and a Copy Test. In the Attitude Survey, participants were presented with a series of scenarios and asked whether they agreed or disagreed that a Made in USA label on a product was appropriate. The survey indicated that a Made in USA label would likely be misleading to most consumers when a product contained 50 percent or less U.S. content or was assembled abroad. Where a product was assembled in the United States, a large majority of consumers believed that a Made in USA claim would be appropriate if the product contained at least 70 percent U.S. content. Some of that majority believed a product should contain 90 percent U.S. content in order to carry a Made in USA label. The data confirmed what many suspected: a range of standards applied to products likely to be considered acceptably denoted Made in USA by most consumers.

In the Copy Test, the survey respondents were shown a Made in USA claim and then asked what it meant to them. According to the results, 63.5 percent of the respondents said simply that the claim meant Made in USA. When asked specifically whether the claim suggested or implied anything about the way the product was assembled, 49 percent said it did: 28 percent said it suggested or implied something about where the parts were made, and 11 percent said it implied something about how many of the parts were made in the United States. Moreover, 28.5 percent of the respondents said that the Made in USA designation implied that a product was assembled in the United States, but it did not imply that a product’s parts were necessarily U.S. made.

Because of these varying responses, the Federal Trade Commission declined to establish a bright-line rule for Made in USA claims of origin. Rather, for a domestic product to bear the stamp Made in USA, it must be “all or virtually all made in the United States.”

The commission defined this standard:

A product that is all or virtually all made in the United States would ordinarily be one in which all significant parts and processing that go into the product were of U.S. origin. In other words,...it should contain only a de minimis, or negligible, amount of foreign content. Although there is no single bright line to establish when a product is or is not all or virtually all made in the United States, there are a number of factors that the commission will look to in making this determination. These factors include the following:

- Site of final assembly or processing;
- Proportion of U.S. manufacturing costs (which includes both parts and processing); and
- The remoteness of foreign content (i.e. how far back in the manufacturing process is the foreign content found).

The commission stated that, in its analysis, raw materials should be neither automatically included nor automatically excluded in the evaluation of whether a product is all or virtually all made in the United States. However, the percentage of the cost of the product that constitutes imported raw materials would be a factor. Certain raw materials, unlike manufactured elements, may be unavailable in the United States. The commission noted that it will consider whether the raw material is indigenous to the United States or available in the United States in commercially significant quantities.

These pronouncements by the Federal Trade Commission do not provide a fixed
### MCLE Test No. 176

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

<table>
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<tr>
<th><strong>1.</strong> Consumers uniformly rely on a “Made in USA” designation on a product in making purchasing decisions.</th>
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<th>11. Compliance with Federal Trade Commission guidelines can provide a complete defense to an unfair or deceptive practices case in some states.</th>
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<th><strong>2.</strong> In surveys, consumers generally agree how much of a product should be of domestic content in order to be appropriately labeled Made in USA.</th>
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<th>12. A class action is available as a procedural mechanism to address a deceptive act or practices claim in all 50 states.</th>
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<th><strong>3.</strong> According to the U.S. Department of Agriculture, surveyed food suppliers found little or no value in labeling their products as Made in USA.</th>
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<th>13. Some states have no statute specifically addressing Made in USA claims.</th>
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<th><strong>4.</strong> The Federal Trade Commission’s Enforcement Policy Statement on U.S. Origin Claims contains no bright-line rules to determine whether a product can be labeled as Made in USA.</th>
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<th>14. The court in In re Sears Roebuck and Company Tools Marketing and Sales Practices Litigation denied class certification because the proposed class was not sufficiently identifiable.</th>
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<th><strong>5.</strong> In order for a product to be labeled Made in USA under the Federal Trade Commission’s enforcement guidelines, the product must be “all or virtually all” made in the United States.”</th>
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<th>15. In some class actions involving Made in USA claims, each class member must prove that he or she was deceived.</th>
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<th><strong>6.</strong> Under the Federal Trade Commission guidelines, a product must contain no foreign content whatsoever in order to be labeled as Made in USA.</th>
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<th>16. Business and Professions Code Section 17533.7 regulates sales of merchandise only within the State of California.</th>
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<th><strong>7.</strong> The Federal Trade Commission will look to a variety of factors to determine if a product is “all or virtually all” Made in USA.</th>
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<th>17. A dozen California Court of Appeal decisions have addressed the interpretation of Business and Professions Code Section 17533.7.</th>
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<th><strong>8.</strong> Raw materials are not automatically included or excluded in the evaluation of whether a product is “all or virtually all” Made in USA.</th>
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<th>18. A manufactured product that includes imported parts critical for the product’s operation could not be offered for sale in California as Made in USA under Business and Professions Code Section 17533.7.</th>
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<th><strong>9.</strong> The Federal Trade Commission Act grants standing to private litigants to prosecute Made in USA claims under the act.</th>
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<th>19. In Colgan v. Leatherman Tool Group, Inc., the individual class members obtained monetary relief.</th>
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<th><strong>10.</strong> The Federal Trade Commission Enforcement Policy Statement on U.S. Origin Claims has not been revised in more than 10 years.</th>
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<th>20. The majority opinion in Benson v. Kwikset Corporation acknowledged a potential for abuse if a literal interpretation of Business and Professions Code Section 17533.7 is applied to a claim under California’s Unfair Competition Law.</th>
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1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the $15 testing fee ($20 for non-LACBA members) to:
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   - MCLE Test
   - P.O. Box 55020
   - Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.

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5. For future reference, please retain the MCLE test materials returned to you.

### ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

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Los Angeles Lawyer December 2008 27
While well intended, the statute raises as many questions as it answers. What does “substantially” mean? What is an article, unit, or part? Did the legislature intend that raw materials imported from outside the United States be considered a part of the merchandise sold? Would every ingredient in a food product processed in the United States have to be domestically sourced?

The fourth District Court of Appeal attempted to answer some of these questions in Benson v. Kwikset Corporation. In Benson, the plaintiff, on behalf of the general public, sued Kwikset and its corporate parent, Black & Decker Corporation, for restitution and injunctive relief under California’s Unfair Competition Law and False Advertising Law. The plaintiff alleged that the defendants violated those statutes when it sold lock sets (including deadbolts, doorknob sets, and door handle sets). Kwikset has several plants located throughout the United States and one in Mexico. During 1996 through 2000, the four-year period relevant to the lawsuit, Kwikset manufactured and sold 35 different varieties of lock sets. All of those products were sold with labels reading Made in USA, All American Made, or similar representations. Some of the products, however, included screws and pins made in Taiwan, a latch assembly that was assembled at the defendant’s Mexico plant, or both.

After the action was filed, Kwikset elected to cease using country-of-origin labeling on its products. Additionally, Kwikset entered into a consent order with the Federal Trade Commission precluding the corporation from making country-of-origin representations unless the product was in fact 100 percent made in the United States. The action proceeded, and the trial court issued a statement of decision finding that Kwikset violated Business and Professions Code Section 17533.7 by its use of foreign-assembled components and foreign-made parts. Even though Kwikset had stopped selling the products with a country-of-origin designation, the court nonetheless issued an injunction precluding such conduct in the future. It also required the defendants to notify retailers, dealers, and distributors within California that any inventory still remaining on the shelves with a country-of-origin designation could be returned for replacement or refund. However, the court declined to order a return or refund program for consumers.

On appeal, the Benson court affirmed the determinations of the trial court on the interpretation of the language of the statute. In addressing the question of what constitutes an article, unit, or part within the context of the statute, the court of appeal made two important holdings: 1) the statute would not be violated if a product was made, manufactured, or produced solely in the United States even though raw materials acquired from a foreign source were used in the product, and 2) if the product consists of two or more physical elements or pieces, Section 17533.7 applies to any distinct component that is necessary for the proper use or operation of the product.

The facts in Benson led to these relatively straightforward findings. There was no question about Kwikset’s use of raw materials, and the assemblies and parts were crucial to the operation of the lock sets. Less clear cases might yield different results. For example, a court could reach a different conclusion with a domestically processed food product containing a limited amount of imported raw ingredients, or a device in which imported parts were not critical to its operation. The Benson holding could support a Made in USA designation. But a literal reading of the statute could eliminate the ability of some domestic manufacturers to ever advertise a product as American made, even though the Federal Trade Commission would not bring an enforcement action.

The dissent in Benson provides an example of the latter possibility. It shows that a literal reading of the statute could lead to absurd results, thanks in large part to its overinclusive language:

Consider: Would anyone really dispute the idea that the aircraft carrier U.S.S. Ronald Reagan, built by American shipworkers in Newport News, Virginia, was “made in America”? And yet if we take the statute too lit-
eraly, the mere fact that a single television monitor in the communications section of the ship came from Taiwan would mean that the ship itself was not “made in America.” After all, “a part thereof” was “entirely or substantially made” outside of the United States. A hyper-literature interpretation of the statute means that a product, like the U.S.S. Ronald Reagan, can be overwhelmingly and substantially “made in the United States” but could not be claimed to have been “made in the United States” unless it contained absolutely 100 percent American parts, down to the last screw. The majority in Benson noted that in some situations it may be difficult to correctly apply Section 17533.7. Moreover, it recognized the legitimacy of the concern expressed by the dissent: “We also share our dissenting colleague’s angst about both the effect of this law, particularly in an age of global trade, and the potential for abuse that may arise under the Unfair Competition Law. If we had the power to do so, we would rewrite the statute to address those concerns.”

The other leading California decision, Colgan v. Leatherman Tool Group, Inc., also presents a clear fact pattern in which each of the 22 multifunction, multicomponent tools at issue featured at least one (and sometimes three or more) operational components that were manufactured outside the United States. In applying the California statute, the court did not believe the question of whether a violation occurred was a difficult one to answer. The court held that the company violated Business and Professions Code Section 17533.7 by selling products represented as Made in USA when “the guts of the tools” were made in whole or in part outside of the United States. It did not have to reach the question of whether a literal reading of the statute would lead to the type of results suggested by the dissent in Benson.

The Colgan court stated that because of the circumstances presented in that case, it did not need to address whether the legislature intended to exempt from the requirements of Section 17533.7 products containing only a single foreign-made part or a product in which a part or component is of minimal importance, value, degree, or amount in relation to the whole. This indicates that under a different fact pattern, the court might well have considered applying an analysis akin to the Federal Trade Commission guidelines. If it had done so, a product advertised as Made in USA that contained de minimis foreign content would not violate the California statute.

The tension and inconsistency between the Federal Trade Commission guidelines and a literal reading of California’s statute is palpable. Under the federal guidelines, a product can have some foreign component (or components), while California’s statute may not be so forgiving.

It is not possible to predict how Section 17533.7 will be interpreted in the close case involving hard goods or food products. Only two product groups—lock sets and Leatherman tools—have been subjected to detailed scrutiny in published opinions, and a previously published case involving a third product, license plate frames, was decided on a different issue altogether. Simply stated, the jurisprudence under Section 17533.7 is slim. Moreover, the other 49 states are not in agreement. Some states do not even have statutes specifically addressing Made in USA or country-of-origin claims. For example, the Arkansas Deceptive Trade Practices Act does not address making representations or designations of geographic origins in connection with goods or services. Kansas does not include representations or designations of geographic origin as part of its Consumer Protection Statute. Similarly, Maryland’s Unfair or Deceptive Trade Practices Statute does not specifically reference representations or designations of geographic origins as an unfair or deceptive trade practice. At least one state (Alabama) does not permit class actions about deceptive trade practices.

New York’s General Business Law has a definition for a “mark of origin” that differs from the California scheme. A mark of origin is a name, mark, or indication of the place or country from which an article of merchandise was imported into the United States or the name, mark, or indication of the place or country in which an article of merchandise was manufactured, packed, assembled, grown, or produced. New York law also provides that compliance with Federal Trade Commission guidelines or regulations is a complete defense to an action for alleged deceptive acts or practices. These few examples highlight the difficulties facing a national manufacturer or distributor. Depending on its content, a product labeled Made in USA could run afoul of California law, be compliant with Federal Trade Commission regulations, be afforded a complete defense under New York law, and not even be covered under Maryland law.

Class Certification and Remedies

Will a plaintiff who can make a showing of an improper use of the Made in USA designation be assured of success in a lawsuit regarding the claim? The answer once again has to be perhaps, particularly regarding any eventual remedy.

The value of most consumer purchases would not exceed small claims limits. Therefore, individual actions based on country-of-origin claims would rarely be economically viable. As a result, the plaintiffs’ bar focuses on class certification and remedies for Made in USA claims. Most of these proposed class actions settle prior to a final binding judicial determination on class certification, let alone trial on the merits. When the parties have proceeded to class certification and judgment, the results have been varied. The most recent—and perhaps only—reported decision addressing the propriety of class certification in a lawsuit containing a Made in USA claim is In re Sears Roebuck and Company Tools Marketing and Sales Practices Litigation. In that case, the Northern District Court of Illinois denied the plaintiffs’ motion for class certification. The plaintiffs claimed that Sears deceptively advertised its proprietary line of Craftsman tools as manufactured in the United States when many of the tools were foreign made or contained significant foreign parts. According to the plaintiffs, Sears sold a line of tools under the Craftsman brand for decades. Those tools were nationally marketed, and Sears advertised and promoted the brand as being Made in USA. The plaintiffs contended that Sears violated the guidelines of the Federal Trade Commission in marketing and labeling Craftsman products as Made in USA.

The plaintiffs sought certification of a class of all persons and entities throughout the United States who purchased one or more Craftsman tools that were not all or virtually all Made in USA. Sears opposed certification, arguing that the proposed class was impermissibly overbroad, unidentifiable, and unmanageable. The district court agreed. It found the most serious problem with the plaintiffs’ class definition was its overly expansive breadth. The court noted that under Rule 23 of the Federal Rules of Civil Procedure, the plaintiffs must show that the proposed class is identifiable as a class. The Sears court noted that the putative class of plaintiffs would, by definition, include people who 1) bought Craftsman tools but never saw any advertising, 2) bought Craftsman tools but never saw advertising representing that the tools were made in the United States, and 3) bought Craftsman tools with the knowledge that these tools were not in fact made in the United States, despite the labeling. The court found that under those circumstances the proposed class definition was too indefinite, overly broad, and would in fact include consumers who were never deceived or harmed by Sears’s conduct.

The Sears court found another reason why Rule 23(b) requirements were not met: Since the plaintiffs needed to demonstrate they were deceived by Sears’s conduct, the

Los Angeles Lawyer December 2008 29
bulk of the proof in the class lawsuit would involve individual fact patterns. The court rejected the plaintiffs’ argument that this could be avoided by an offer of proof that class members paid a premium for products marked Made in USA, thereby avoiding the need to show each individual class member’s motivation for purchase. The court found that no matter what prices were paid, it would be necessary to show that each class member purchased the tool and paid a price as a result of the defendant’s deception. Moreover, it was not likely that the price would be common among class members, because the plaintiffs bought different tools from different locations at different times, and they had not demonstrated that Sears has a standard nationwide price formula for Craftsman tools. Thus, when a showing of actual reliance and damages is required, the road to recovery can be rough.

This prospect is underscored by the Colgan case, in which the plaintiff class asserted claims against the Leatherman Tool Group for violations of California’s Unfair Competition Law and the Consumers Legal Remedies Act, and for false and misleading advertising. The plaintiffs claimed that Leatherman improperly represented a number of its products as Made in USA, but the tools contained parts that were made outside the United States. The plaintiffs sought injunctive relief, monetary relief, damages, and restitution on behalf of all class members.

The trial court eventually ruled on summary adjudication that Leatherman had made false Made in USA representations regarding 22 of its tools because some of the parts incorporated into the tools were entirely or partially manufactured outside the United States. The subsequent bench trial on remedies resulted in a multimillion-dollar award for restitution, which was reversed on appeal for a lack of evidentiary support.

The appellate court found no evidence quantifying the sums received by Leatherman that were attributable to the Made in USA representations on the products and product packaging. It also ruled that the plaintiffs did not present admissible evidence for all the various retail prices of the Leatherman products or any comparable tools with proper labeling regarding designation of origin. The court upheld the trial court’s award of statutory minimum damages of $1,000 under the Consumers Legal Remedies Act.

Like Benson, in which the court did not order a refund, the purchasers of Leatherman products received no direct remedy after six years of litigation. With the reversal of the restitutionary award, the final judgment consisted of 1) an injunction prohibiting Leatherman from representing in California that its tools are Made in USA if any part of
the tool is entirely or substantially made outside of the United States, and requiring Leatherman to advise retailers to return mislabeled tools for refund, 2) a monetary award of $1,000 to be divided between the two class representatives, and 3) a $10,000 service award to each of the two class representatives. The additional members of the class received nothing.43

In other cases involving settlements, consumers obtained some remedy, such as a $10 to $25 discount or credit voucher.44 This type of settlement—even when payments of fees to class counsel are included—might be considered a good deal for some litigants under a cost-benefit analysis, particularly given the costs of protracted litigation (for plaintiffs and class counsel). 44

2 Memmert et al., A Study of the Factors That Influence Consumer Attitudes toward Beef Products Using the Conjoint Market Analysis Tool, J. OF ANIMAL SCI. 2639 (Oct. 2007).
5 PET BUSINESS, RETAILER HANDBOOK (Summer 2006).
12 ARK. CODE ANN. §4-88-107 (Michie 1971).
16 N.Y. GEN. BUS. §392-c (Consol. 1967).
19 Sears, U.S. Dist. LEXIS 89349, at *9 (citing Oshana v. Coca-Cola Co., 472 F. 3d 506, 513 (7th Cir. 2006)).
20 Id. at *16.

27 32 ARK. CODE ANN. §4-88-107 (Michie 1971).

Until recently, patentees could jawbone about how their patents cover a competitor’s product without fear that the competitor would haul them into court for a declaratory judgment of noninfringement or invalidity—so long as the patentees were expressing their view in the context of negotiating a patent license. This was because courts in patent cases looked to whether a patentee’s words and deeds had led to the plaintiff’s “reasonable apprehension” that it was facing a patent infringement suit—the impetus for the plaintiff seeking a declaratory judgment. The Federal Circuit generally held that this requirement was not met when the patentee was offering a patent license.1

Last year, however, the U.S. Supreme Court expanded jurisdiction for initiating a declaratory judgment action involving a patent. A “reasonable apprehension of suit” is no longer required.2 A plaintiff now need only show “a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”3 The Federal Circuit has also confirmed that there is no longer a safe haven for patent license negotiations,4 so a patentee should tread lightly to avoid the risk of a declaratory judgment. Indeed, a substantive discussion regarding a patent’s scope by the patentee could create a sufficient controversy to allow a prospective licensee to seek a declaratory judgment of patent noninfringement and/or invalidity to clear away the cloud of a patent hanging over its product.5 Nevertheless, something beyond merely giving notice of a patent is required to create the necessary “case or controversy” for declaratory judgment jurisdiction.

In MedImmune, Inc. v. Genentech, Inc., the licensor made a specific demand on a licensee for payment under an existing patent license based on a newly issued patent covered by that license.6 The U.S. Supreme Court reversed and held that the James Juo is a partner of Fulwider Patton LLP, an intellectual property boutique in Los Angeles. He specializes in patent prosecution and litigation.
jurisdictional requirements of a case or controversy were met by the patentee’s demand for payment based on a newly issued patent covered under an existing patent license between the parties. The coercive nature of this demand under the patent license preserves the licensor’s right to challenge the legality of the claim.

After the MedImmune decision, the Federal Circuit stated in SanDisk Corporation v. STMicroelectronics, Inc., that “declaratory judgment jurisdiction generally will not arise merely on the basis that a party learns of the existence of a patent owned by another or even perceives such a patent to pose a risk of infringement, without some affirmative act by the patentee.” Although SanDisk did not define the outer boundaries of declaratory judgment jurisdiction, something more than merely approaching a prospective licensee for negotiation was required. That something more in SanDisk included a detailed claim chart comparing the patents with the products, which the patentee presented during the patent license negotiations.

**Actual Controversy**

Having abolished the safe haven for patent license negotiations, the Federal Circuit further held in SanDisk that a prospective licensee could unilaterally end unproductive license negotiations and immediately file for declaratory relief: “A party to licensing negotiations is of course within its rights to terminate negotiations when it appears that they will be unproductive.” The declaratory plaintiff also will continue to have the option of later resuming license negotiations as part of settlement discussions for the litigation it initiated—provided that the declaratory plaintiff does so in good faith rather than as a bald attempt to gain negotiation leverage over the patentee.

The Federal Circuit also suggested that the patentee and prospective licensee could have entered into a suitable confidentiality agreement establishing that the license negotiations could not be used to form the basis for a declaratory judgment action. The concurring opinion by Judge Bryson, however, suggested that only a party that was not interested in bringing a declaratory judgment action would enter into such an agreement. Moreover, Judge Bryson’s concurrence asserted that an actual controversy would likely exist as an inevitable result of a patent license negotiation:

If a patentee offers a license for a fee, the offer typically will be accompanied by a suggestion that the other party’s conduct is within the scope of the patentee’s patent rights, or it will be apparent that the patentee believes that to be the case. Offers to license a patent are not requests for gratuitous contributions to the patentee; the rationale underlying a license offer is the patentee’s express or implied suggestion that the other party’s current or planned conduct falls within the scope of the patent. Therefore, it would appear that under the court’s standard virtually any invitation to take a paid license relating to the prospective licensee’s activities would give rise to an Article III case or controversy if the prospective licensee elects to assert that its conduct does not fall within the scope of the patent.

[All] the prospective licensee has to do in order to dispel any doubt [of a justiciable controversy] is to inquire of the patentee whether the patentee believes its activities are within the scope of the patent. If the patentee says “no,” it will have made a damaging admission that will make it very hard ever to litigate the issue, and thus will effectively end its licensing efforts. If it says “yes” or equivocates, it will have satisfied the court’s test and will have set itself up for a declaratory judgment lawsuit.

When the patentee has expressly identified both a patent and a product to a prospective licensee but then equivocates on whether the patent covers the product, the patentee is arguably using the patent as a “‘scarecrow’...in Learned Hand’s phrase,” which can create an actual controversy for declaratory judgment. While declaratory judgment jurisdiction generally will not arise based on mere knowledge of a patent, once the patentee sets the stage by identifying a patent and a competitor’s product, a dispute over the scope of the patent in covering the product can establish jurisdiction for a declaratory judgment lawsuit.

In another recent decision, Sony Electronics, Inc. v. Guardian Media Technologies, Ltd., the Federal Circuit held that there was an actual controversy between Sony and Guardian based on unsuccessful license negotiations. A district court, however, also has discretion to decline jurisdiction for a declaratory judgment action filed for an improper purpose. In this case, the district court did so, with the improper purpose identified as an attempt to gain negotiation leverage over the patentee. While the tendency of declaratory judgment litigation may have adversely affected the patentee’s licensing negotiations with third parties, the Federal Circuit held in this case that there was no evidence of an improper motive for seeking declaratory judgment.

This decision was distinguished from a prior Federal Circuit decision in EMC Corporation v. Norand Corporation, in which the declaratory judgment plaintiff had called the defendant the day after the suit was filed “and explained that the declaratory judgment complaint had been filed as ‘merely a defensive step’ and that [the declaratory plaintiff] ‘would like to continue to discuss with [the patentee] all the options hopefully in a more meaningful manner over the near term.’” Based on these affirmative statements by the declaratory plaintiff, the district court in EMC could appropriately exercise its discretion to decline jurisdiction over a declaratory judgment motion filed “as a tactical measure...in order to improve [the plain-
tiff’s] posture in the ongoing negotiations—
not a purpose that the Declaratory Judgment Act was designed to serve.” These facts were not present in Sony.

The door was left open, however, for the district court to exercise its discretion to decline jurisdiction for declaratory judgment on other grounds. In remanding the case, the Federal Circuit suggested that, in deciding “whether entertaining the cases would be consistent with both the purposes of the Declaratory Judgment Act and principles of wise judicial administration,” the district court may wish to take into account that the patents-in-suit were undergoing reexamination at the request of the declaratory plaintiff, who had also requested a stay of the litigation pending the outcome of the reexamination proceedings.

In Micron Technology, Inc. v. MOSAID Technologies, Inc., MOSAID’s patented DRAM technology was placed at issue based on MOSAID’s activities regarding declaratory plaintiff Micron and other DRAM manufacturers. Even though there had been a four-year interval between MOSAID’s warning letters to Micron and its filing for declaratory judgment, MOSAID’s behavior toward other DRAM manufacturers during that period “suggested that MOSAID would sue Micron” as well. In particular, “after receiving several threats itself, Micron watched MOSAID sue each of the other leading DRAM manufacturers.” MOSAID also publicly stated in its annual report that “MOSAID believes that all companies which manufacture DRAM products... use MOSAID’s patented circuit technology,” and confirmed its intent to aggressively assert its IP portfolio.

The Federal Circuit concluded that, under the totality of the circumstances, the plaintiff’s activities were sufficient to establish a substantial controversy that warranted declaratory judgment.

**Outer Boundaries of Jurisdiction**

This year, the Federal Circuit in Prasco LLC v. Medicis Pharmaceutical Corporation found that the outer boundaries of declaratory judgment jurisdiction were exceeded. The declaratory plaintiff, Prasco, alleged three separate bases for declaratory judgment: 1) Medicis refused Prasco’s request for a covenant not to sue under the patents-in-suit; 2) Medicis had previously sued Prasco on a different product for infringing an unrelated patent; and 3) Medicis marked its own products with the patent numbers of the patents-in-suit.

The Federal Circuit noted that jurisdiction for declaratory judgment generally will not arise without some affirmative action by the plaintiff relating to the accused product, and no affirmative actions were present in this case. Indeed, Medicis was unaware of Prasco’s product when Prasco originally filed for declaratory judgment. The Federal Circuit held that the facts alleged by Prasco did not establish a defined, preexisting dispute between the parties.

First, Medicis’s refusal of Prasco’s request for a covenant not to sue, while “one circumstance to consider in evaluating the totality of the circumstances,” was not sufficient in this case to create an actual controversy for declaratory judgment. Medicis had declined Prasco’s request for a covenant not to sue without any comment as to whether Prasco infringed the patent-in-suit. According to the court, “A patentee has no obligation to spend the time and money to test a competitor’s product nor to make a definitive determination, at the time and place of the competitor’s choosing, that it will never bring an infringement suit.”

Second, while “prior litigious conduct is one circumstance to be considered in assessing whether the totality of the circumstances creates an actual controversy,” Medicis’s prior litigation was “one prior suit concerning different products covered by unrelated patents.” This circumstance was not the type of pattern of prior conduct that makes reasonable an assumption that Medicis will also take action against Prasco regarding its new product. The court’s finding is distinguishable from the Micron case—in which the patentee sued competitors of the declaratory plaintiff over the same patented technology—as well as from pre-MedImmune decisions that involved patentees who had previously filed trade secret lawsuits over the same technology.

Third, Medicis’s marking of its own product with the patent numbers of the patents-in-suit “provides little, if any evidence that [the patentee] will ever enforce its patents.” This did not establish declaratory judgment jurisdiction because patent marking simply provides constructive notice of the patent to the public under 35 U.S.C. Section 287(a). The ruling also is consistent with the statement in SanDisk that “declaratory judgment jurisdiction generally will not arise merely on the basis that a party learns of the existence of a patent owned by another.”

Moreover, finding that patent marking is insufficient to confer jurisdiction for declaratory judgment is not inconsistent with recent Federal Circuit cases regarding declaratory judgment in which a patentee listed specific patents in regulatory filings for pharmaceuticals under the Hatch-Waxman Act. In the highly regulated pharmaceutical environment, “a manufacturer is not permitted to market a drug without FDA approval.” For example, in Teva Pharmaceuticals USA, Inc. v. Novartis Pharmaceuticals Corporation, the patentee Novartis had listed five patents in the FDA’s Orange Book in connection with its Famvir drug. The court noted, “By so doing, Novartis represent[ed] that ‘a claim of patent infringement could reasonably be asserted if a person not licensed by the owner engaged in the manufacture, use or sale’ of generic famciclovir covered by the claims of its listed Famvir® patents.”

The declaratory plaintiff Teva had filed an Abbreviated New Drug Application (ANDA) under the Hatch-Waxman Act and certified that its drug did not infringe any of the five patents Novartis listed in its Orange Book listing. Novartis filed a patent infringement suit against Teva based on one of the five listed in Orange Book. In response, Teva brought a declaratory judgment action regarding the other four patents Novartis had listed in the Orange Book to establish “patent certainty.”

The Federal Circuit held that Novartis’s selective patent suit created “uncertainty as to Teva’s legal rights under its ANDA.” Furthermore, “[t]he legislative history of the ANDA declaratory judgment amendment explicitly states that the ‘uncertainty’ caused by a brand-name company when it chooses to sue on only select patents submitted in a single ANDA is an injury sufficient to support a justiciable controversy.” In view of these circumstances, “Teva’s injuries are traceable to Novartis’ conduct and those injuries can be redressed by a favorable judicial decision,” so there was jurisdiction for declaratory relief.

Similarly, in Caraco Pharmaceutical Laboratories, Ltd. v. Forest Laboratories, Inc., the patentee Forest listed its patents in the FDA’s Orange Book, and the declaratory plaintiff Caraco submitted an ANDA. The patentee unilaterally granted a covenant not to sue on certain patents listed in the Orange Book, and “in the ordinary infringement context...a covenant not to sue allows the recipient to enter the marketplace.” Under the Hatch-Waxman Act, however, Caraco still could not enter the generic drug market, even with Forest’s covenant not to sue, because Caraco could only obtain FDA approval after the expiration of the relevant patents listed in the Orange Book, or by obtaining a judgment that those patents are invalid or not infringed. Because Caraco’s ANDA could be delayed under the Hatch-Waxman Act, this created “an independent barrier to the drug market that deprives Caraco of an economic opportunity to compete,” and “the creation of such barriers to compete satisfies the cau-
sation requirement of Article III standing.”

While affirmative acts under the Hatch-Waxman regulatory regime can create barriers to competition in the pharmaceutical drug market that can justify jurisdiction for declaratory judgment, the public notice function of patent marking creates no such barrier to entry. Even if a competitor perceives a risk of infringement upon learning of an adversely held patent, declaratory judgment jurisdiction generally will not arise merely on that basis alone.

**Affirmative Act**

Under the totality of the circumstances, one of the threshold issues in determining declaratory judgment jurisdiction remains whether there has been an affirmative act by the patentee that creates an actual controversy of sufficient immediacy and reality. The requisite affirmative act need not be much, but it should be something more than a mere notice letter informing a competitor of a patent.

A recent district court decision, *Geospan Corporation v. Pictometry International Corporation*, is illustrative. Pictometry sent a letter to Geospan stating that “it seems that the GEOVISTA oblique imagery products may incorporate the technology covered by this patent.... We would appreciate it if you would review the attached patent and let us know specifically how your oblique imagery products and services differ from the patented technology.”

A week later, Geospan said it was seeking input from its attorney and would “provide a detailed response as soon as possible.” A month later, having not received any further communication from Geospan, Pictometry sent another letter requesting that “the promised ‘detailed response’” be provided within two weeks. Ten days later, Geospan filed suit against Pictometry for declaratory judgment of noninfringement and invalidity. The district court held that there was no jurisdiction for declaratory judgment because “Pictometry’s letter to Geospan was a means of gathering information regarding potential infringement, not an assertion of an already determined legal interest adverse to Geospan.”

Pictometry’s letter arguably did little more than provide notice of the patent, so it is akin to the situation in *Prasco* involving patent marking, in which there was no actual controversy. Also, the circumstances in *Pictometry* did not involve “the recipient of the alleged ‘charges’ of infringement were merely jawboning, which typically occurs in licensing negotiations; see also Phillips Plastics Corp. v. Kato Hantou Kabushiki Kaisha, 57 F. 3d 1051, 1054 (Fed. Cir. 1995) (patentee may offer a patent license without opening itself up to expensive litigation).”

The prospective licensee will be able to obtain a suitable confidentiality agreement. As a practical matter, whether a patentee will be able to obtain a suitable confidentiality agreement depends on the relative bargaining power of the parties.

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1. See Shell Oil Co. v. Amoco Corp., 970 F. 2d 885, 888 (Fed. Cir. 1992) (no reasonable apprehension because the alleged “charges” of infringement were merely jawboning, which typically occurs in licensing negotiations; see also Phillips Plastics Corp. v. Kato Hantou Kabushiki Kaisha, 57 F. 3d 1051, 1054 (Fed. Cir. 1995) (patentee may offer a patent license without opening itself up to expensive litigation).


3. MedImmune, 127 S. Ct. at 771 (citation omitted); see also Prasco, LLC v. Medicis Pharm. Corp., 537 F. 3d 1329, 1339 (Fed. Cir. 2008) (MedImmune “did not change the bedrock rule that a case or controversy...
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must be based on a real and immediate injury or threat of future injury that is caused by the defendants.” (emphasis in original)).

2 SanDisk Corp. v. STMicroelectronics, Inc., 480 F. 3d 1372, 1384 (Fed. Cir. 2007).
3 See Minnesota Mining & Mfg. Co. v. Norton Co., 929 F. 2d 670, 673 (Fed. Cir. 1991) (“In promulgating the Declaratory Judgment Act, Congress intended to prevent avoidable damages from being incurred by a person uncertain of his rights and threatened with damage by delayed adjudication.”); Arrowhead Indus. Water Inc. v. Ecolochem, Inc., 846 F. 2d 731, 735 (Fed. Cir. 1988) (Absent declaratory judgment, a party is “helpless and immobile so long as the patent owner refuse[s] to grasp the nettle and sue.”).

4 MedImmune, 127 S. Ct. at 768.
6 MedImmune, 127 S. Ct. at 768.
7 Id., see also Adenta GmbH v. American Orthodontics Corp., 501 F. 3d 1364, 1370 (Fed. Cir. 2007) (declaratory judgment available for licensee who disputed obligation to pay patent royalties).
8 SanDisk Corp. v. STMicroelectronics, Inc., 480 F. 3d 1372, 1380-81 (Fed. Cir. 2007).
9 Id. at 1382.
10 Id. (“SanDisk need not ‘bet the farm,’ so to speak, and risk a suit for infringement by cutting off licensing discussions and continuing in the identified activity before seeking a declaration of its legal rights.”).
11 Id. at 1382 n.3.
13 SanDisk, 480 F. 3d at 1375 n.1. This type of agreement is also sometimes referred to as a stand-still agreement. See Ronald A. Bleeker & Michael V. O’Shaughnessy, One Year after MedImmune—The Impact on Patent Licensing and Negotiation, 17 Fed. Cir. B.J. 401, 412 (2008).
14 SanDisk, 480 F. 3d at 1385 n.1 (Bryson, J., concurring) (“A party that contemplates bringing a declaratory judgment action or at least keeping that option open would have no incentive to enter into such an agreement.”).
15 Id. at 1384-85 (Bryson, J., concurring).
16 See Cardinal Chem. Co. v. Morton Int’l, 508 U.S. 83, 95 (1993) (“Merely the desire to avoid the threat of a ‘scurvy’ patent...may therefore be sufficient to establish jurisdiction under the Declaratory Judgment Act.”).
17 Sony Elecs., Inc., v. Guardian Media Techs., Ltd., 497 F. 3d 1271, 1285-86 (Fed. Cir. 2007) (The parties’ adverse positions taken during the license negotiations made this dispute “manifestly susceptible of judicial determination.” (citation omitted)).
18 Sony, 497 F. 3d at 1289.
19 Id. at 1289; see also Wilton v. Seven Falls Co., 515 U.S. 277, 288 (1995) (A district court has discretion to accept jurisdiction for declaratory judgment, subject to “considerations of practicality and wise judicial administration.”).
20 Id.
21 SanDisk Corp. v. STMicroelectronics, Inc., 89 F. 3d 807, 815 (Fed. Cir. 1996).
22 Id. (quoting EMC Corp. v. Norand Corp., 89 F. 3d 807, 815 (Fed. Cir. 1996)).
23 Id. (quoting EMC, 89 F. 3d at 815).
24 Id.; cf. Tempco Elec. Heater Corp. v. Omega Eng’g, Inc., 819 F. 2d 746, 750 (7th Cir. 1987) (“The whole purpose of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum.” (citation omitted)).
25 Micron Tech., Inc. v. MOSAID Techs., Inc., 518 F. 3d 897, 901 (Fed. Cir. 2008).
26 Id.
27 Id.
28 Id. at 899.
29 Id. at 902.
30 Prasco, LLC v. Medicis Pharm. Corp., 537 F. 3d...
Even though Medicis’s refusal to give a covenant not to sue occurred after Prasco had filed for declaratory judgment, Prasco subsequently alleged these facts in a later-filed Amended Complaint. Id. at 1337. The district court dismissed Prasco’s declaratory judgment action for lack of jurisdiction based on the facts alleged in the later-filed complaint, and the Federal Circuit held that “it is the facts alleged in this complaint that form the basis for our review.” Id. at 1341 (“[T]he patentee’s silence does not alone make an infringement action or other interference with the plaintiff’s business imminent.”).


Prasco, 537 F. 3d at 1341.

See Vanguard Research, Inc. v. PEAT, Inc., 304 F. 3d 1249, 1255 (Fed. Cir. 2002) (subject matter jurisdiction for declaratory judgment when the patentee filed a separate suit “for, among other things, misappropriation of trade secrets regarding the same technology in the same district court”); Goodyear Tire & Rubber Co. v. Releasomers, Inc., 824 F. 2d 953, 956 (Fed. Cir. 1987) (“By suing Goodyear in state court for the same technology as is now covered by the patents, Releasomers has engaged in a course of conduct that shows a willingness to protect that technology.”).


See Teva Pharm. USA, Inc. v. Novartis Pharm. Corp., 482 F. 3d 1330, 1334 (Fed. Cir. 2007). (To establish declaratory judgment jurisdiction, “[m]ore is needed than knowledge of... an adversely held patent.”).

Prasco, 537 F. 3d at 1338 n.7.

Teva Pharm. USA, Inc. v. Novartis Pharm. Corp., 482 F. 3d 1330, 1334 (Fed. Cir. 2007).

Id. at 1341 (citing 21 U.S.C. §355(b)(1)).

Id. at 1334.

Id. at 1334-35.

Id. at 1335.

Id. at 1345.

Id. (citing 149 CONG. REC. S15885 (Nov. 25, 2003)).

Id. at 1346.

Caraco Pharm. Labs., Ltd. v. Forest Labs., Inc., 527 F. 3d 1278, 1290 (Fed. Cir. 2008).

Id. at 1296.

Id. at 1296-97.

Id. at 1293.


Id.

Id.

Id. at 6.

SanDisk Corp. v. STMicorelecs., Inc., 480 F. 3d 1372, 1385 (Fed. Cir. 2007) (Bryson, J., concurring).

See id.

Even without a confidentiality agreement, the costs of patent litigation may deter a competitor from rushing out to file for declaratory judgment. According to the American Intellectual Property Law Association (AIPLA), even for a patent matter valued at less than $1 million, the average cost of litigation through trial is about $767,000. AIPLA Report of the Economic Survey 2007, at I-90.
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The Enemy Within

A storm of panic swept through the tightly knit town of Malden, Massachusetts, only seven miles from Salem. Dozens of children were telling tales of bizarre rituals and mysterious events. “There is a forest next to the school with monsters and witches in it.” “Miss Vi made me eat a frog.” A man looked like “a wicked witch with a mask that doesn’t come off.” Suspicion quickly focused on Gerald Amirault, his mother, Violet, and his sister, Cheryl, all of whom worked at the children’s school. Gerald was chased on the streets and shots were fired into his house on two separate occasions. All three were brought to trial, convicted, and sent to jail for as long as 40 years.

Were the Amiraults the victims of a witch hunt like that of the Salem Witch Trials of 1692? Yes, but 300 years later. The Amiraults went on trial in 1984 at the height of a nationwide child sex-abuse scare that lasted for over 10 years and destroyed the lives of scores of innocent teachers and others caught in what an investigative journalist called “a witch-hunt unparalleled in modern times.”

To explore the disturbing history and ever-present threat of witch hunting and to try to help us understand why governments and communities will viciously turn on certain groups and individuals living among them, John Demos, Samuel Knight Professor of History at Yale University, has written The Enemy Within: 2,000 Years of Witch-Hunting in the Western World.

Demos begins in 177 C.E., as new Christian ceremonies are labeled “black magic,” and Christians are condemned as the cause of “every disaster that afflicts the populace.” They are beaten and choked, burned with heated brass, and stretched on the rack, all for their “shameful” beliefs and “occult” practices. Yet as Christianity takes hold, Demos tells the chilling story of how the persecuted become the persecutors. As he puts it, “Done-to becomes done-by.” Tragically, this pattern emerges time and again, as those subjected to abuse and oppression, rather than avoid mistreating others, instead mistreat those who fail to accept and practice the new prevailing orthodoxy. Nonbelievers, reduced to meeting secretly in small groups, are demonized as witches, heretics, blasphemers and are condemned as “conspirators” for their “Satanic rituals.”

The Inquisition becomes a tool of enforcing Christian dogmatism. Europe and the British Isles in the second half of the sixteenth century are “preoccupied with witches, witchcraft, and witch-hunting as never before or since.” Eventually, this craze leads to 100,000 to 200,000 trials resulting in 50,000 to 100,000 executions. Such savage intolerance helps spur the search for religious freedom in America. Yet once the Puritans escape from persecution they proceed to oppress nonbelievers and Native Americans as “witches” and “Devil worshippers.” Even Roger Williams, long regarded as a beacon of tolerance and sympathetic to native cultural ways, declares that Indian priests are the same as “our English witches.”

According to Demos, the Puritans lived “with a pervasive fear of disorder.” Consequently, their society was obligated to “purify” itself, brooking no beliefs or practices at variance with the fundamental teaching of the Bible. In the 1650s and 1660s in New England 67 people were tried for witchcraft in 52 separate trials, resulting in 13 convictions and 11 executions. As one would expect, Demos devotes considerable attention to the Salem Witch Trials in their broad societal impact and aftermath, and in the tragic stories of individual lives destroyed by panic and hysteria. But even while this horrific witch hunt was taking place, there were some who saw clearly what was happening. A Dutchman living in Boston in 1692 wrote to a friend lamenting “the gullibility of the magistrates” in allowing “trivial circumstances to be taken as substantially true and convincing testimony against the accused.”


The Continuing Threat

The author proceeds to demonstrate convincingly that the combination of one or more of these factors (or their latter-day equivalents) spawned a series of later witch hunts in the United States, with no end in sight. From a widespread scare of Bavarian Illuminati (1798-99), which contributed to the passage of the infamous Alien and Sedition Acts, to the spread of Anti-Masonry (1826-40), to the suppression of the emerging labor movement following the bloody Haymarket Riot (1886), to the Great Red Scare (1919-20), to the McCarthy Era (1950-54), to the Child Sex Abuse Crisis (1983-circa 1995), Demos demonstrates that the kindling of paranoia, fear, and hysteria is always available and ready to be ignited.

The Enemy Within is an important cautionary tale. It is not without its flaws, however, Demos makes the all-too-common mistake of calling the Industrial Workers of the World the International Workers of the World and, in summarizing the six modern witch hunts, he claims that only one (Haymarket) lead to death sentences, overlooking Sacco-Vanzetti and Ethel and Julius Rosenberg. Of greater consequence for a book published seven years after

Stephen F. Rohde, a constitutional lawyer with the firm of Rohde & Victoroff, is the author of American Words of Freedom and Freedom of Assembly.
September 11, Demos surprisingly avoids the witch hunts of Muslims, Arabs, and South Asians who have been detained and demonized based on their religion and national origins, as well as the witch hunts of political dissenters, journalists, and others whose patriotism has been questioned for resisting the (until recently) prevailing political orthodoxy on war, terrorism, and the need to abridge civil liberties. One longs for Demos to apply his considerable expertise to these contemporary witch hunts. As ACLU lawyer Jameel Jaffer pointed out in 2007, “what the government has done is taken the communist-era playbook and replaced every instance of the word ‘communist’ with ‘terrorist.’”

McCarthyism and the Legal System

In a similar vein, Arthur Miller chose to present his dramatic retelling of the Salem Witch Trials in The Crucible as a reflection on the McCarthyism of his time. Years later Miller wrote that his aim was to spotlight “the same primeval structure of human sacrifice to the furies of fanaticism and paranoia that goes on repeating itself forever as though imbedded in the brain of social man.” Thus, the question for each of us is how to prevent the next witch hunt. This should be of particular interest to lawyers, since most of the notorious witch hunts involved the use of the legal system, complete with laws, police, prosecutors, criminal charges, trials, judges, evidence, and sentences.

Regrettably, time and again the legal system has performed shamefully during witch hunts, failing to serve as an independent and reliable buffer against mass hysteria. Instead, in each era, too many police officers, prosecutors, and judges fell prey to popular fear and paranoia, neglecting their sworn duty to enforce the rule of law and to guarantee that all people, no matter what they are accused of, are entitled to due process of law.

Viewed in that light, The Enemy Within takes on a new meaning. The true enemy—within our pluralistic society that is founded on the Constitution and Bill of Rights and dedicated to tolerance and fairness—is the organizations or individuals, political parties or government agencies that single out people or groups for punishment, surveillance, and guilt by association based on their religion, ethnicity, national origin, political beliefs, or sexual orientation.

To ward off future witch hunts, we need to remember the words of Justice William O. Douglas, writing in 1951 in overturning the Attorney General’s List of Subversive Organizations, that when the country took “shortcuts by borrowing from the totalitarian techniques of our opponents” it opened the way to “a subversive influence...that destroys us from within.”
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ON TUESDAY, DECEMBER 9, the Los Angeles County Bar Association and the Small and Solo Division will host a program about protecting assets from plaintiffs and creditors. Speaker Jacob Stein will cover specific planning strategies and solutions, including planning with community property, business entities, and domestic and foreign trusts. Those who attend will learn the underlying substantive law and the practical aspects of how to protect specific assets: houses, bank and brokerage accounts, rental real estate, businesses and professional practices, and retirement plans. This year special emphasis will be placed on protecting assets from lenders. Course materials will serve as a treatise on asset protection as well as an exhaustive reference source for many planning needs and will outline and diagram the discussed planning techniques and structures. The event will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Figueroa Courtyard reduced parking with LACBA validation costs $10. On-site registration and the meal will begin at 4:30 P.M., with the program continuing from 5:15 to 9. The registration code number is 010116. The prices below include the meal.

- $140—CLE+PLUS members
- $175—Small and Solo Division members
- $210—LACBA members
- $295—all others

3.25 CLE hours

ON SATURDAY, DECEMBER 13, the Los Angeles County Bar Association and the Small and Solo Division will host a program on ethics. Topics will include ethics for the criminal lawyer, an annual summary of new ethics opinions and case law, conflicts of interest, and civility. The event will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Figueroa Courtyard reduced parking with LACBA validation costs $10. On-site registration and the meal will begin at 8:30 A.M., with the program continuing from 9 A.M. to 1 P.M. The registration code number is 010124. The prices below include the meal.

- $105—CLE+PLUS members
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- $175—LACBA members
- $245—all others

4 CLE hours, with ethics credit

Go Paperless Webinar

ON WEDNESDAY, DECEMBER 17, the Los Angeles County Bar Association, together with the Small and Solo Division, will sponsor an online seminar about getting past the mountains of paper and understanding electronic data discovery (EDD). This webinar will involve the rules that govern the methods of EDD, the technology that makes EDD happen, and how attorneys can take advantage of EDD to find exactly what they are looking for. This will in turn allow attorneys to use the information they have gathered to the greatest advantage for their firms and clients.

Registration for this program closes on December 15. Early registration is required because of the special nature of the program. Those who wish to participate in the webinar must provide an e-mail address to receive information prior to the program. The registration code number is 010158.

- $45—CLE+PLUS members
- $85—LACBA members
- $125—all others

1 CLE hour

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://calendar.lacba.org/where you will find a full listing of this month’s Association programs.
A Dark Tale about Credit Cards and Bankruptcy

THERE IS A TALE, PERHAPS MORE MYTH than truth, of a behind-the-scenes meeting among a group of bankers that occurred before the invention of credit cards. One of them, an unnamed visionary, had a novel idea: “Instead of us paying depositors interest on savings accounts,” he proposed, “let us arrange for them to pay interest to us. Consumers use credit to some extent for big purchases, like cars, furniture, and appliances. We can give our depositors ‘borrowing cards’ to purchase anything on the spot without cash. We pay the vendors, and the customers pay us back—with interest. Sound good?”

Other bankers sitting around the polished oak table were skeptical. “Americans don’t like debt if they can avoid it; it’s not respectable,” noted a distinguished banker across the table.

But the visionary banker was ready with an answer. “We can change that negative attitude. Advertising persuades people to buy stuff they don’t really need. It changes the way people think and can make borrowing respectable. Whatever the advertising campaign costs, it will be worth it if it changes the public’s attitude about debt.” And, for good measure, he added, “Consumers don’t like to save up money until they can pay for something they want right now. Borrowing cards will mean they don’t have to wait.”

Another banker suggested, “Let’s call them ‘credit cards.’” Everyone agreed that sounded better, and the name stuck. Revolutionary ideas can be as simple as that.

And so, the tale goes, credit cards were lavished throughout the economy. Calculator-wielding economists in back rooms at banks figured out that more cards result in more profit, even if some customers default. Defaults are not reprehensible. Rather, they are predictable—a calculable cost of doing business. If an applicant has a pulse, give him or her a credit card. No need to establish creditworthiness. Advertising changed borrowing 180 degrees—from an embarrassing secret to a respectable way of life, the mark of a solid citizen. Default was no longer shameful but merely bad luck. Banks cashed in like never before in the history of the industry.

Consider the macroeconomic effect of widespread use of credit cards. Buying means production, full employment, better pay for workers, more taxes collected by government. It makes for prosperity on a national level. High interest rates are like insurance premiums that allow national prosperity to go on and on and never end. Credit cards boost the standard of living for many consumers into a faux middle class, where they live beyond their means. Banks do not mind if a customer pays “interest only” on a huge balance. Lending institutions let consumers stay in debt for the rest of their lives, provided they make interest payments.

But what about bankruptcy, the inevitable consequence of loose lending? Bankruptcy courts wipe out consumer debts and grant a fresh start for debtors to borrow all over again, assuming they cannot resist lender exhortation to rebuild credit.

Bankruptcy is a component of the counterintuitive prosperity model that shifts wealth from customers who pay their debts to subsidize others who cannot pay. Banks should not complain about bankruptcy, as the decision to lend money to unqualified borrowers is under their control. When things cannot get any worse for borrowers who are in over their heads with all their credit cards maxed out, bankruptcy clears the way to rejoin the economy. The default-and-bankruptcy cycle is good for everyone, even banks and consumers who keep their accounts in good standing, because bank profits and personal income alike depend on prosperity driven by consumer spending.

But hold on. In recent weeks, we have seen the rub—and the future does not look quite so bright. Hundreds of thousands of undersecured ARM mortgages granted in 2005 and 2006 are in default. Many of these homesteads are beyond saving, at least from the point of view of bewildered owners. Almost overnight, collateralized debt obligations based on mortgages have become practically worthless. Banks and brokerage houses have merged or accepted government support when losses made it impossible to continue. Commercial credit and undersecured mortgages are now generally unavailable.

All the while, the banking industry continues to allow indiscriminate credit card use, and cardholders continue to respond with their habitual aplomb. What if this kind of easy credit likewise suddenly becomes unavailable? Everyday consumer spending would come to an abrupt halt, just as lending for mortgages has dried up. It is one thing to lift an eyebrow at irresponsible overuse of consumer credit and quite another to consider the consequences to the worldwide economy if happy-go-lucky consumer spending were to stop.

James P. McBride is a sole practitioner in Hayward, California, whose practice includes consumer bankruptcy law.
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