Los Angeles lawyers Julian W. Poon (right) and Blaine H. Evanson examine recent circuit court decisions on class certifications.

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Los Angeles Lawyers

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

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I receive innumerable e-mails each day offering pharmaceuticals to enhance my life. Ironically, many appear to be coming from my own e-mail address. And with increasing frequency, I have received e-mails written in Russian. Fortunately, many of these e-mails get filtered by my firm’s e-mail quarantine system.

Before e-mail spam became a late night talk show staple, there was snail mail. The ridicule of snail mail arguably reached its pinnacle in the late 1980s and early 1990s. See http://en.wikipedia.org/wiki/Cliff_Clavin. That ridicule turned to empathy for the Postal Service’s potential demise. Compare http://www.time.com/time/magazine/article/0,9171,913226,00.html (July 7, 1975) and http://www.washingtonpost.com/wp-dyn/content/article/2010/09/29/AR2010092906645.html (September 29, 2010).

The flood of useless e-mail perhaps explains why its treatment in the Code of Civil Procedure and state and federal court rules is schizophrenic. With the availability of electronic filing, federal judges have become intolerant of counsel unwilling to use e-mail addresses. State courts, however, are saddled with an electronic filing system that is only available in some parts of some counties. Thus state courts are mostly relegated to the agreement of the parties to accept service by e-mail.

Rule 2.251 of the California Rules of Court provides procedures for electronic service. Among them is Rule 2.251(f)(2), which states, “If a document is served electronically, any period of notice, or any right or duty to act or respond within a specified period or on a date certain after service of the document, is extended by two court days.” Accord, Los Angeles Superior Court Local Rule 18.0(g).

Electronic service that creates a Thursday, Friday, or Saturday response deadline effectively extends the response period by four calendar days—or three calendar days if the response deadline is on a Sunday. Thus, more than half the time, service by e-mail in state court proceedings extends the period for notice or response by at least as long as the extension for service by snail mail in federal courts. See Rule 6(d) of the Federal Rules of Civil Procedure (referring to Rule 5(b)(2)(C)). The state courts’ extension by two court days is the same that applies to Express Mail, any other overnight delivery, and facsimile transmission under Code of Civil Procedure Section 1013(c) and (e). The savings of one or two days over snail mail leaves little strategic incentive to agree to electronic service in state court proceedings. As one practitioner said, “I didn’t go to law school to become my opponent’s printing company.”

Under current law, electronic filing and service in state courts also provides little or no advantage on the day of filing or service. Unlike federal courts, which acknowledge that a day ends at midnight, Code of Civil Procedure Section 1010.6(a)(3) requires a document to be electronically filed by 5 P.M. “or the time at which the court would not accept filing at the court’s filing counter, whichever is earlier.” Otherwise the document is deemed to be filed the following court day. Unlike service by mail, which only requires deposit in the mail on a particular date, electronic service must also be completed by the “close of business” or it “is deemed to have occurred on the next court day.” Rule 2.251(f)(4) of the California Rules of Court. This provides no advantage to practitioners who prefer a final edit to a satisfying dinner.

Perhaps as budgets ease, technology improves, and electronic filing and service become the norm, the Code of Civil Procedure and California Rules of Court can be modernized to reflect the immediacy of electronic communication.
November 24, 2009

Jack Trimarco  
Jack Trimarco & Assoc.  
9454 Wilshire Blvd., 6th Floor  
Beverly Hills, CA 90212

Dear Jack:

I am writing this letter to express my gratitude for your tremendous and outstanding expertise in assisting in a date rape by drug investigation which focused on my client (a former NBA player).

Your testing of my client and preparing him for the investigation and interview by the Huntington Beach Police Department led to the police department declining to even proceed to the District Attorney’s Office with the case. Your testing, procedures, and reputation led the Huntington Beach Police Department to conclude that the “victim” was lying and your conclusion that the “defendant” was telling the truth was correct. The cost of your test, literally saved my client thousands of dollars in attorney fees and months, if not, a year or so of aggravation.

On behalf of my client, and my office I want to thank you for your assistance in the matter.

Yours truly,

Andrew M. Stein
Develop a Mentor Relationship to Enhance Your Lawyering Abilities

**A WISE PERSON ONCE SAID** that a mentor is someone whose hindsight can become your foresight. In the practice of law, a young attorney can and should develop a relationship with a more senior attorney, usually in the same area of law, to learn skills often not taught in law school, including how to deal with difficult people and situations, communicate effectively, and solve problems. Those who have made their way through law school and into the perils of practice know that having another lawyer to bounce ideas off of can be invaluable to becoming a more skilled practitioner.

Often, mentors are direct supervisors or more skilled attorneys to whom newer attorneys turn for advice. Developing relationships with other attorneys of varying backgrounds, experience, and expertise can be beneficial to mentees and mentors. Veteran attorneys can also benefit from the role of mentor by being re-energized from the passion and perspective of younger attorneys. Arguably, having many different mentors with various legal backgrounds can mean the difference between being a mediocre attorney and an excellent one.

Mentors offer invaluable insight into how to be competent, zealous, and ethical. A junior attorney can be overwhelmed with the daily tasks that litigators face: the hurdles of litigation; analysis of the strengths and weaknesses of a client’s case; avoidance of conflicts of interest; and interaction with opposing counsel, court staff, judge, and client. For newer litigators compelled to go solo, mentors can assist with such pivotal tasks as how to open and properly maintain a client trust account, obtain malpractice insurance, master the tips and tricks of business development, and delegate tasks. The same is true of new transactional attorneys, who must also decide whom they represent, make pivotal decisions about how to avoid conflicts of interest, and adequately protect a client’s goals and interests in a written document.

Then too, mentors can be attorney friends with similar experience but who are not directly or emotionally tied to a case or situation. For example, keeping in touch with those in one’s graduating class can be an invaluable resource. Other attorneys may have mentors. These attorneys may have insight, training, or other advice that can help the newer practitioner with deciding whether to take a case, handling an ethical situation, or dealing with the innumerable hurdles that litigators face. Analysis of the strengths and weaknesses of a client’s case; avoidance of conflicts of interest; and interaction with opposing counsel, court staff, judge, and client. For newer litigators compelled to go solo, mentors can assist with such pivotal tasks as how to open and properly maintain a client trust account, obtain malpractice insurance, master the tips and tricks of business development, and delegate tasks. The same is true of new transactional attorneys, who must also decide whom they represent, make pivotal decisions about how to avoid conflicts of interest, and adequately protect a client’s goals and interests in a written document.

Mentors can also often serve to give their less experienced comrades the bigger picture of a case that newer attorneys fail to grasp, teaching a newer attorney how to be sympathetic to a needy client without getting too emotionally involved. Finally, experienced mentors can remind a newer attorney how to keep the client’s goals and interests inviolate. Regularly, mentors advise that being an ethical attorney involves not just rote memorization of the professional standards and canons of ethics as taught in law school but keeping one’s perspective clear from the influence of third parties and one’s emotional entanglement to a minimum.

Many attorneys have lauded the importance of mentorship to fulfillment in the profession. Nicole Livolsi acknowledges that she had to seek a mentor upon joining a large firm. As the partners assigned to mentor her were not a good fit, she sought others, and in time, she discovered mentors with whom the relationship was mutually beneficial. Not surprisingly, she says that having a quality mentor was the tipping point in her decision to continue the practice of law. Invariably for her, mentorship kept her passionate about the practice of law.

Mentorship can be especially fulfilling for more veteran attorneys who have benefited from both sides of the mentoring equation. Suzanne Henry credits the mentoring relationships she developed with more senior attorneys she liked and trusted as having a huge impact on her development as a litigator. As she has progressed through her legal career, she found mentorship on litigation was becoming less important and business development more so. Now in her 11th year of practice, Henry gives back to other attorneys on the litigation front while continuing to benefit from business development mentoring. She says that attorneys have to stay relevant and that in order to develop a solid bond with a mentor, it is necessary to give and not simply take. Like many, Henry knows that having succeeded in law school and passing the bar is simply not enough to guarantee success and fulfillment in the practice of law. To her, “The closest thing to an apprenticeship in the United States legal system is developing a relationship with a trusted, knowledgeable, and likeable mentor.”

While some attorneys have stressed that they cannot get proper mentorship at a large firm, others believe that they have benefited from a special team within a big firm that focuses on a particular practice area. For example, Ryan Van Steenis of the Huron law group, now in his third year of practicing law, says that he benefited from a special team at a large law firm. Van Steenis would rather take a less valuable job with a good mentor than work at a better paying job at which mentorship is not stressed. Van Steenis has had two mentors with two different styles who helped him with the critical issues of how to be a great attorney and how to develop business. As a result, he has a well-rounded approach to the practice of law. He says having a law degree is no substitute for having the practical experience and knowledge from those who have gone before.

In the end, mentors are the building blocks of creating competent, fulfilled, and motivated attorneys. There is no better gift than to receive what a true mentor can give. Those who have benefited from years of mentorship should help ensure that mentorship remains a pillar of the profession. Undoubtedly, mentorship provides a great service to ensure the quality of the profession as a whole and is a rewarding and gratifying experience for all involved.

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Recovering Attorney’s Fees in Probate Actions

**TWO CALIFORNIA COURT OF APPEAL OPINIONS** from 2010 leave any lawyer attempting to recover attorney’s fees in a probate matter with greater uncertainty than ever before. At the same time, practitioners studying the decisions will be empowered by rules of interpretation that have the potential to stand any statute—not just those in the Probate Code—on its head. Together the two opinions issued by separate divisions of the Fourth District—along with a probate case decided by the Fifth District in 2009—provide ample support for litigators arguing in any situation for a broad interpretation of statutory language.

In one of the cases, *Leader v. Cords*, the court provided salient rules for victorious practitioners seeking attorney’s fees. They should rely on the principle that a statute is ambiguous if susceptible to two differing, reasonable interpretations. In accord with that principle, they should invite their opponents to state their arguments and then respond with a reasonable position. In this way the targeted goal of statutory ambiguity will be reached. After that, all practitioners need to do for an award of attorney’s fees is demonstrate that the statute in question is remedial and wide enough in scope to cover the misconduct of their opponents. While these rules seem to clear a smooth path for successful probate litigants seeking attorney’s fees, the court in *Soria v. Soria* had other ideas. Still, *Soria* supports a broad reach for the statute authorizing fees.

Ultimately, *Leader* and *Soria* obscure the application of Probate Code Section 17211 and the meaning of similar Probate Code Sections 2622.5 and 11003—the former dealing with conservatorships and guardianships and the latter with estate administration. These three cover the ambit of probate disputes and attempt to remove incentives for litigation filed without reasonable cause and in bad faith. That is the key part of the code sections, and *Leader* is right on that point. *Soria*, by contrast, seems to have gone off the rails to reach the correct result.

*Leader* arose in the context of Probate Code Section 17211, which authorizes a probate court to issue an award of attorney’s fees if a party to a contest of a trustee’s account has acted without reasonable cause and in bad faith. Division One of the Fourth District of the California Court of Appeal interpreted the statute broadly in a manner not supported by published precedent. Three months later, Division Three of the Fourth District decided in *Soria* that the liberal interpretation of Section 17211 had gone far enough. Section 17211 is virtually identical to Probate Code Sections 2622.5 and 11003, so *Leader* and *Soria* not only apply to a trustee’s account contest but also to bad faith litigation over conservatorships, guardianships, and estate administration.

In *Leader*, the trustee had refused to make a distribution to beneficiaries. Instead, he used his trustee’s powers to leverage a benefit for himself. While obligated to regularly render accounts to the beneficiaries, the trustee had failed to do so, and the beneficiaries demanded an accounting. Ultimately, the beneficiaries filed a petition seeking a finding that the trustee had committed breaches of trust by failing to file regular accountings. The beneficiaries also sought attorney’s fees under Section 17211.

The trial court found that the trustee had violated the Probate Code but nevertheless denied the beneficiaries’ request for attorney’s fees. According to the trial court, the action against the trustee for failure to file an account did not amount to a “contest of the trustee’s account,” stating that Section 17211 was unambiguous on this point. The appellate court disagreed.

Citing *Mayo v. DMV*, the court of appeal declared that a statute is ambiguous if it is “reasonably susceptible of two disputed meanings.” The beneficiaries argued that a petition based on a theory of breach of trust for failure to file an accounting amounted to a contest of the trustee’s account. The trustee and the trial court took the opposite view. The petition filed by the beneficiaries did not contest an account but instead sought only a determination that the trustee’s con-
duct constituted a breach of trust. In resolving this dispute, the appellate court stated, “Thus, if we accept [the trustee’s] interpretation of the phrase as reasonable, the phrase [“contests the trustee’s account”] is reasonably susceptible to more than one meaning.”6

In Leader, the beneficiaries sought to have the statute interpreted broadly in order to collect attorney’s fees. They easily surmounted the hurdle of “without reasonable cause and in bad faith,” but the unfortunate phrase “contests the trustee’s account” stood in the way. Nevertheless, the court relied on another handy rule of interpretation. Referring to the statute as remedial, the court declared that the statute’s language was entitled to broader interpretation and determined that the phrase “contests the trustee’s account” should include contests “related to an account.” Thus, a statute that provides a means for the enforcement of a right or the redress of a wrong is a remedial statute.7 Litigators may wonder how many statutes do not fall into this category. Moreover, according to the Leader court, a remedial statute “must be liberally construed to effectuate its object and purpose, and to suppress the mischief at which it is directed.”8 The opinion concludes: We do not envision that the Legislature intended to leave beneficiaries in [the petitioners/beneficiaries’] position without potential recourse under section 17211, subdivision (b), for the unreasonable and bad faith opposition to [their] petition for distribution, merely because they do not challenge the accuracy of the account’s enumerated receipts and distributions, or assets and liabilities. Such a narrow reading of 17211, subdivision (b) would defeat its remedial purpose.9

**Soria versus Leader**

After Leader, one might have predicted that the odds of securing an award of attorney’s fees in probate litigation related to a trustee’s account (or an objection to an account of a conservator or guardian filed under Section 2622.5, or an account filed in connection with estate administration under Section 11003) had gone up considerably, provided one party could prove the other’s unreasonable bad faith. Not so. Three months after the publication of Leader, the Soria court issued its opinion dealing with the exact same statute.

The Soria plaintiffs were the grandchildren of the defendants. In a written agreement, the grandparents had accepted title to the plaintiffs’ family home with the understanding that the house would be reconveyed to the grandchildren. When that did not happen, the plaintiffs filed a complaint containing multiple causes of action, including a request for similar relief to that secured by the Leader beneficiaries—a determination of a breach of trust by the trustees and an injunction compelling the grandparents/trustees to account. The action was not brought under the Probate Code. A jury rendered a verdict for the grandchildren/beneficiaries who subsequently, and successfully, moved against the grandparents for attorney’s fees under Section 17211(b).

The Soria court reversed on several grounds. First, the grandchildren/beneficiaries did not contest a trustee’s account: Instead, [the plaintiffs] pursued a civil action against [the defendants], alleging they breached their duties as trustees, and sought an injunction to compel [the defendants] to produce an account. The very existence of a trust was in dispute. At trial, there was no contest of a trustee’s account within the meaning of section 17211(b).10 This is an odd statement, since the grandparents called an accountant as a witness, and he presented an accounting at trial.

Next, the Soria court argued that Leader was distinguishable because Soria was a civil action, and the fees were sought as a personal judgment against the trustees, not surcharged against future compensation from or for an interest in the trust. The court stated, “Section 17211(b) does not permit attorney fees to be awarded in such a manner.”11 Neither of these grounds can withstand reasonable scrutiny. The grandchildren’s challenge in Soria was certainly related to a trustee’s account, just like the Leader beneficiaries’ petition for a determination of a breach of trust for failure to account. That the grandchildren did not file a petition under Section 17200, as had the beneficiaries in Leader, differentiates the two cases, but in form only, not at all in substance. The plaintiffs and the defendants in Soria, in effect, acquiesced to the jurisdiction of the court at law, not equity, and a jury trial followed. Indeed, one can question whether this was the parties’ prime motivation in choosing to forego a probate proceeding. But did that forum selection deprive the parties of the special rules of a court in equity and the application of the Probate Code to the proceedings?

The Soria court noted12: [The probate court] had exclusive jurisdiction over Grandchildren’s claims…. By hearing a matter within the probate court’s exclusive jurisdiction, a trial court acts merely in excess of jurisdiction, not without jurisdiction…. In this case, no party has objected to the trial court’s exercise of jurisdiction over a matter exclusively within the probate court’s jurisdiction, and therefore the trial court merely acted in excess of jurisdiction…. As a result, the judgment is not void….13

Thus, the Probate Code applied, and the trial court was acting within its power when it applied Section 17211(b). That left the question of whether Section 17211(b) was properly applied, but the Soria court’s attempt to distinguish Leader by noting the issue of forum selection appears to lack substance.

The Soria court determined that Section 17211(b) does not apply on the ground that the remedy available under the Probate Code is a surcharge against the trustee’s compensation or other interest of the trustee in the trust. The opinion states that this type of remedy cannot be accomplished in a civil action that results in a money judgment against the trustee. However, Section 17211(b) states that the trustee shall be personally liable for any amount that remains unsatisfied from the trustee’s compensation or interest in the trust. The line drawn by the Soria court is a distinction without a meaningful difference.

Leader posed a truly substantive problem that required disposition. The beneficiaries in Leader did not contest the trustee’s account but brought an action alleging a breach of fiduciary duty for failure to account. The Soria beneficiaries similarly brought an action to compel an accounting, so Leader and Soria both invoke an account. Therefore, following the logic of Leader, the court of appeal in Soria should have upheld the trial court.

The Soria court did not dodge this reasoning and agreed that Section 17211(b) is remedial and must be liberally construed. Nevertheless, the court applied a “prevailing party” standard. The trustees’ trial presentation of an account had served as the basis for the ultimate award, which required both parties to make certain payments: “Thus, if Grandchildren did anything at trial that could be construed as a contest to the account, the contest was unsuccessful.”14 In other words, the action may have been related to or a contest of an account, but the plaintiffs were not the prevailing party—a factor implicit in a statute that conditions relief on a finding that an action was without reasonable cause and in bad faith. Had the Soria court concluded its opinion on this point, the two cases might have been reconciled. Simply put, in Soria the grandparents/trustees acted with reasonable cause and not in bad faith. That constitutes a true point of distinction.

Unfortunately, the Soria court went further. Its opinion attempts to distinguish Leader with an analysis of the statutory scheme in Part 5 of the Probate Code, Judicial Proceedings Concerning Trusts, including Sections 17000 to 17450 and, in particular, Section 17211. The court’s efforts in this regard are unconvincing. The court draws a distinction between a contest to an existing
account and a proceeding to compel the trustee to account, thus veering away from liberally construing Section 17211(b) to include anything “relating to an account.”

Concluding that an action to compel an accounting would not be covered by Section 17211(b), the Soria court delivered a coup de grace to liberal construction: “If the Legislature intended to include within section 17211 a proceeding to compel the trustee to account, it would have expressly done so.” The opinion proceeds to drive the point home: “Section 17211 is a remedial statute, but liberal construction can only go so far.” To apply Section 17211(b) in this case “would in effect turn section 17211(b) into a statutory basis for recovery of attorney fees in virtually any case in which the existence of a trust is in dispute or any action of a trustee is challenged. We do not discern any intent by the Legislature to reach that result by enacting section 17211(b).” The court directly addressed the Leader ruling:

Our conclusion is not inconsistent with Leader because it differs from this case [in that]…the beneficiaries in Leader pursued a petition in the probate court [and]…here, in contrast, Grandchildren did not follow the Probate Code procedures for proceedings concerning the internal affairs of a trust but pursued a civil action….In Leader, the petition to compel the trustee to make a final distribution arose from and was directly related to the trustee's accounting. Here, Grandchildren's lawsuit did not arise out of an accounting. Grandchildren and Grandparents disputed whether a trust even existed. The rule of law is not advanced by this part of the opinion.

Once the court had made its determination of the section’s inapplicability, it ruled out other sources of potential recovery of attorney's fees for the grandchildren/beneficiaries. Starting its analysis with a description of the American Rule—each party to a dispute is responsible for its own attorney's fees unless otherwise specified by agreement or statute—as codified in Code of Civil Procedure Section 1021, the Soria court simply states, “There are a few exceptions to this rule, but none is applicable here.” From the Soria court's view that the grandchildren’s choice of forum rendered the dispute at issue a “civil proceeding,” not a “probate proceeding,” the only means of recovery of attorney’s fees for the victorious party was by statute or contract, neither of which existed to support an award of attorney’s fees.

Broad Equitable Powers

However, the Soria court’s dismissal of exceptions to the American Rule was a major oversight. One very significant exception to the American Rule is available in courts of equity, including probate courts—and probate courts maintain broad equitable powers over trusts within their jurisdiction. Once the jury rendered its verdict that the agreement was a trust, the trial court in Soria became, in effect, a probate court. Indeed, according to Rudnick v. Rudnick—a decision issued by the Fifth District of the court of appeal in 2009—that broad equitable powers include the power to award attorney’s fees, especially when the court has determined that the proceeding is unfounded and was brought in bad faith.

At trial in Rudnick, three (of more than 10) beneficiaries (“objectors”) challenged a trustee's petition under Section 17200 regarding instructions to consummate a sale of a large tract of land near Tehachapi. A majority of the beneficiaries had voted favorably, and the trustee sought approval from the probate court. The trustee called the trust accountant to the stand, who presented an accounting and the proposed distribution of sale proceeds. The trial court ruled in favor of the trustee, finding the objectors' testimony lacked credibility. Moreover, in response to a subsequent motion by the trustee for attorney's fees and costs, the court ruled that the objectors had acted in bad faith by challenging the petition pretextually, with the real intent to delay and derail the sale approved by the majority. In granting the motion, the trial court assessed the fees against future distributions to the objectors.

The trustee had advanced two arguments:

- The probate court has the general equitable authority to make an award of attorney’s fees to apportion the costs of a trial among those whose bad faith conduct was responsible for those costs.
- Under Section 17211(a), the mirror image of subsection (b), the trial court may make an award of attorney’s fees against beneficiaries who contest the trustee's account without reasonable cause and in bad faith.

The objectors' argument was identical to those made by the trustee in Leader and the Soria court: The objectors’ contest was to the sale (or distribution), not to an account rendered by the trustee.

However, the trial court in Rudnick never reached the trustee’s second argument. Its decision was predicated on the general exception to the American Rule for probate courts under Estate of Ivey, cited as the case law upon which the passage of Section 17211 was based. This seminal case stands for the proposition that “a probate court, pursuant to its equitable powers and authority over administration of a testamentary trust, may provide that reasonable and necessary legal fees incurred by other beneficiaries in opposing a first beneficiary’s frivolous bad faith attacks on the trustee’s account had to be paid out of the first beneficiary’s share of the trust.”

Section 17211 and Ivey are founded on the notion that it is unfair for nonlitigant beneficiaries of a trust to bear the costs of defending against bad faith litigation instigated by other beneficiaries. The trial court in Rudnick never ruled on the statutory argument but ordered that attorney's fees be charged to the future distributions of the objectors, because it was unfair for the nonlitigants to have to pay the costs of defending against the bad faith actions of the objectors. The Fifth District Court of Appeal agreed that this was an equitable apportionment of costs incurred by the trustee.

The Rudnick court relied on Conley v. Waitte, “[W]hen an unfounded suit is brought against [the trustee] by the cestui que trust, attorney’s fees may be allowed him in defending the action and may be made a charge against the interest in the estate of the party causing the litigation.” The Ivey court also relied on Conley, among others:

Courts having jurisdiction over trust administration have the power to allocate the burden of certain trust expenses to the income or principal account and not infrequently do so in connection with accountings or suits relating to the administration of the trust. Sometimes this authority is stated in statutory form, but it exists as part of the inherent jurisdiction of equity to enforce trusts, secure impartial treatment among the beneficiaries, and to carry out the express or implied intent of the settlor….Where the expense of litigation is caused by the unsuccessful attempt of one of the beneficiaries to obtain a greater share of the trust property, the expense may properly be chargeable to that beneficiary's share.

In Leader, the beneficiaries paid their own attorney's fees and one-half of the trustee's attorney’s fees to defend their own action. This was inequitable because the trustee's opposition to the beneficiaries' contest was in bad faith. Thus, the beneficiaries were awarded their attorney’s fees against the trustee's interest in the trust or in compensation from the trust. If there had been a finding that the action was not a contest of a trustee's account, the Leader court, relying on Ivey and Rudnick, might still have made its attorney's fees award to equitably apportion legal fees incurred by the bad faith conduct of the trustee in trying to use his power to distribute as leverage to secure a benefit from the beneficiaries to which he was not entitled under the trust.
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There was no finding of bad faith in Soria and no clear winner, although the grandparents were ordered to reconvey the home. The trustee apparently mounted a legitimate contest that required a jury to characterize a layman's document as a trust and then interpret the trust. Equitable apportionment arguably was not warranted, so the alternative to applying Section 17211(b) was still not available. However, the reliance in Soria on the American Rule is misplaced. Probate courts, sitting in equity, have the power to protect innocent beneficiaries and a trust corpus from the costs of defending against bad faith litigation. This general rule is modified by Section 17211 to be applicable when the conduct relates to or contests a trustee’s account. The standard under that statute requires a finding that the conduct is without reasonable cause and in bad faith.

**Need for Legislative Action**

Beneficiaries in both Leader and Soria initiated actions to accomplish something more fundamental than contesting an account, and any focus on the word “contesting” may run counter to the statutory purpose. Both sought a distribution of trust assets from reluctant trustees. In Leader, the alleged failure to account supports the court’s finding that the action was related to an account. In Soria, the plaintiffs sought an injunction to compel the reconveyance of the residence, the trust corpus, and the rendering of an account. Notwithstanding the Soria court’s characterization that what was presented did not constitute an account under the Probate Code, the defendants did indeed present one at trial. These cases are not distinguishable on the ground set forth by Soria that the plaintiff grandchildren’s action was not related to or a contest of a trustee’s account.

The distinction, if there is one, is that the trustee in Leader acted without reasonable cause and in bad faith—a characterization that the court did not make regarding the trustee’s actions in Soria. A finding of a breach of the trust agreement is not ipso facto acting without reasonable cause and in bad faith. The Soria court simply might have determined that Section 17211(b) was inapplicable because the failure to account by the grandparents/trustees was not without cause and in bad faith. The appellate court did not go that far but rather looked for another reason to determine the section inapplicable. By repeatedly referring to the plaintiffs’ failure to follow procedures under the Probate Code, the Soria court seems to be hedging its bet—rendering Section 17211(b) inapplicable by choice of forum, if not by statutory interpretation.

Focusing on the trustee’s conduct in the two cases may lead to a more harmonized conclusion. In Leader, the trustee refused to make a distribution unless the beneficiary agreed to something unrelated to the trust. In Soria, the trustees refused to convey (distribute) the house, claiming there was no trust and that the preconditions to reconveyance had not been satisfied. The former was not a justification for the trustee’s contest of the beneficiaries’ action. The latter was.

This analysis is not evident in the most recent decision. The Soria court’s conclusion that the action was not a contest of a trustee’s account is contrary to the Leader holding and can only lead to confusion. Section 17211 has now been interpreted in such a manner as to raise issues that are truly incidental to its statutory intent, such as the meaning of “contests a trustee’s account,” “account,” and now “related to a trustee’s account.” The statute should apply to actions taken by either a trustee (as in Leader) or beneficiaries (as in Rudnick) when such actions are without reasonable cause and in bad faith and impose unreasonable costs on other beneficiaries or the trust estate. The application of this remedial statute ought to be available to litigants regarding any matter raised under Section 17200. This raises the question of whether Section 17211 is a sanction or a remedial statute when it clearly perceives misconduct. A court must interpret code sections “to ascertain the intent of the lawmakers so as to effectuate the purpose of the law....But it is settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend....” Both the Leader and Soria courts agree that Section 17211 is remedial but disagree as to which wrongs are to be remedied.

The legislature needs to amend Probate Code Section 17211 as well as Sections 2622.5 and 11003 to clarify that if a litigant in a probate matter is pursuing a claim without reasonable cause and in bad faith, the litigant must pay all costs and fees incurred. Whether the litigation involves a report, an account, an accounting, a distribution, an expense reimbursement, a failure to perform under the code, or any other legitimate function of conservators, guardians, estate administrators, or trustees, any party found to have acted without reasonable cause and in bad faith ought to pay. Litigation depletes assets—not only those of directly affected parties but also innocent third parties, including taxpayers.

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6. Id.
9. Id. at 1599.
11 Id. at 784.
12 Id. at 787 n.3.
13 Id. (citations omitted).
14 Id. at 787. The statute does not employ the term “success” or “prevailing party” or otherwise require a certain outcome, although the likelihood of a court making the requisite finding but ruling against the petitioner seems slim. The Senate Committee report on SB 392 on January 16, 1996, described the new statute as “authoriz[ing] a court to award [attorney’s] fees to a prevailing party where there is a bad faith challenge or defense to a [trustee’s] account.” CAL. SENATE JUDICIARY COMM. PROBATE LAW OMNIBUS BILL, 1995-96 Reg. Sess., at 6 (1996).
15 Soria, 185 Cal. App. 4th at 788.
16 Id. at 789.
17 Id.
18 Id.
19 Id. at 783 (citing Gray v. Don Miller & Assoc., Inc., 35 Cal. 3d 498, 304 (1984)).
22 ARNOLD H. GOLD, MONICA DELL’OSSO & MARY F. GILLIICK, CALIFORNIA CIVIL PRACTICE: PROBATE AND TRUST PROCEEDINGS §§10:51, 24:118 (2005 & Supp. 2009). Judge Arnold Gold (ret.) filed an amicus curiae letter on February 10, 2010, with the California Supreme Court in support of a petition for review of Rudnick. In this letter, Judge Gold stated that the ruling in Rudnick was “quite dangerous—it opens the door to a flood of requests for attorneys fees awards in trust litigation based solely on the argument that such an award would be ‘equitable’ under the circumstances—excessively encouraging litigation and discouraging settlements.” Amicus Curiae Letter from Hon. Arnold H. Gold to California Supreme Court, at 1 (Feb. 10, 2010) (“Judge Gold Amicus Curiae Letter”), in Rudnick, No. S179383. However, Rudnick specifies that an equitable apportionment is not an abuse of discretion when a beneficiary’s contest is unfounded. Rudnick, 179 Cal. App. 4th at 1334 (citation omitted).
24 Rudnick, 179 Cal. App. 4th at 1334.
25 Ivey, 22 Cal. App. 4th at 883 (citations and quotations omitted).
27 See Rudnick, 179 Cal. App. 4th 1328.
28 Judge Gold takes credit for authoring Section 17211 and “shepherd[jing] it through the legislative process.” Judge Gold Amicus Curiae Letter, supra note 22, at 2. He describes this statute as granting probate courts the power to order the losing party in a contest over an accounting to pay attorney’s fees and other expenses of the contest if the contest or defense thereof was without reasonable cause and in bad faith and notes it was modeled after Ivey. Id. His letter concludes, “Why did I bother? According to the Rudnick opinion, the probate court already had that power as part of its equitable powers (and especially when bad faith has been shown)! I suspect that a review of the legislative history of Probate Code Section 17211 would reflect that the Legislature didn’t think it was engaging in an idle act when it adopted that statute.” Id.
30 Id. (citations omitted).

11 Id. at 784.
12 Id. at 787 n.3.
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30 Id. (citations omitted).
The number of class actions in California and the country is rising at a dramatic pace. According to a report in the Los Angeles Daily Journal, 30 percent of U.S. companies and 39 percent of California companies had a class action filed against them in 2009.1 Between late 2001 and early 2007, consumer class actions rose 156 percent and accounted for more than 20 percent of all class action filings in the latter period. Labor class actions increased 228 percent, constituting 46.9 percent of class action filings in late 2007. The Ninth Circuit, in particular, has experienced a surge in class actions. There was a 560 percent increase in filings between July-December 2001 and January-June 2007.2

It should not be surprising that the increase in class action filings has caused a corresponding rise in the number of federal appellate court decisions on issues relating to class certification. Particularly since 1998, when Rule 23 of the Federal Rules of Civil Procedure was amended to allow for discretionary interlocutory review of class-certification decisions,3 federal appellate courts have been thrust into a developing and complex area of the law.

The U.S. Supreme Court has, however, remained largely silent. The most recent Supreme Court decision to address class certification in any significant detail was Ortiz v. Fibreboard Corporation, over 10 years ago.4 Lower federal courts have thus been left to wrestle with the complex issues related to class certification, and clear splits among these courts have developed.

The lack of Supreme Court guidance has led to divergent approaches by the lower courts in many key areas, including 1) the standards governing the extent to which claims for monetary relief may be pursued in Rule 23(b)(2) “mandatory” class actions for injunctive and declaratory relief, 2) the use of so-called hybrid class actions, 3) the standing requirements for absent class members, 4) the burden of proof on plaintiffs at the class-certification stage, and 5) the scope of the commonality requirement.

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certification stage, and 5) the certification of punitive damages and statutory penalties, and the aggregation problem to which they give rise. Practitioners should pay careful attention to developments and divergences in these areas.

**Monetary Relief in 23(b)(2) Classes**

As most practitioners are aware, there are three types of class actions under Rule 23 of the Federal Rules of Civil Procedure. In the past decade, plaintiffs have increasingly resorted to Rule 23(b)(2) class actions in seeking injunctive relief and monetary damages. They have done so in part because Rule 23(b)(2) avoids the expensive notice and opt-out requirements of (b)(3) certification. Defendants have also sought (b)(2) certification in certain circumstances in order to avoid the added inefficiency and cost of dealing with individual plaintiffs who exercise their right under Rule 23(b)(3) to opt out.

Rule 23(b)(2) only authorizes the certification of a class if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” The Supreme Court in *Ticor Title Insurance Company v. Brown* suggested that monetary relief may not be sought in (b)(2) classes, because “class members may have a constitutional due process right to opt-out of any class action which asserts monetary claims on their behalf,” and (b)(2) does not require notice or provide for opt-out rights. But *Ticor* did not resolve this issue, and lower courts have adopted different standards on how district courts are to analyze whether a putative class seeks relief that is predominantly injunctive and/or declaratory, as Rule 23(b)(2) requires.

The Fifth Circuit was the first to address the issue, holding in *Allison v. Citgo Petroleum Corporation* that claims for monetary relief impermissibly predominate in putative (b)(2) class actions unless they are “incidental” to plaintiffs’ requests for declaratory and injunctive relief. Monetary relief is “incidental” when the damages “flow directly to the class as a whole,” and the court can calculate damages without the need for individualized determinations. The *Allison* test is the most stringent of the three major standards to have been adopted by different circuits so far. Although it is not completely in keeping with the Supreme Court’s concern in *Ticor*, the *Allison* test is less likely to raise due process concerns for defendants than the competing standards. The Third, Sixth, Seventh, and Eleventh Circuits all generally follow the Fifth Circuit’s rule.

The Second Circuit, in contrast, adopted a more malleable, pro-plaintiff interpretation of when claims for monetary relief impermissibly predominate. In *Robinson v. Metro-North Commuter Railroad Company*, the Second Circuit rejected the *Allison* rule and applied an “ad-hoc balancing” test instead. *Robinson* holds that the court must assess “whether (b)(2) certification is appropriate in light of ‘the relative importance of the remedies sought, given all of the facts and circumstances.’” This flexible approach focuses on whether the plaintiffs’ request for injunctive relief is just a sham.

The Ninth Circuit fashioned a new, third approach earlier this year in *Dukes v. Walmart Stores, Inc.* The court held that a (b)(2) class may seek only monetary damages that are “not superior in strength, influence, or authority to injunctive and declaratory relief.” The Ninth Circuit formulated this new standard based on a collegiate dictionary definition of “predominate” as “superior in strength, influence, or authority”—as well as other not-yet-enumerated factors.

However, the main thrust of its test remains functional: whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature—as measured by recovery per class member—raise particular due process and manageability concerns.

The Supreme Court has granted certiorari to review the Ninth Circuit’s decision. There are at least two significant concerns that will likely influence any resolution of this issue by the Supreme Court. First, certification of a (b)(2) class seeking monetary relief runs counter to the Supreme Court’s reasoning in *Ortiz v. Fibreboard Corporation*, which rejected an expansive application of Rule 23(b)(1) because the case went beyond (b)(1)’s historical roots. Allowing significant claims for monetary relief in a (b)(2) class similarly extends (b)(2) beyond its historical roots.

Second, a (b)(2) class seeking monetary relief may raise due process and fairness concerns because it may give rise to intra-class conflict. Some members may have large monetary claims and others small claims. These conflicts of interest undermine the fairness of binding divergent class members to the same outcome in the settlement or other resolution.

**Hybrid Class Actions**

Some courts and commentators have suggested that any concerns regarding monetary relief claims in putative (b)(2) class actions could be resolved through hybrid class actions, to the extent the concerns can be resolved at all. Unfortunately, the term “hybrid” has sometimes been used imprecisely to describe a number of distinct hybrids. The different hybrids include 1) the quasi hybrid of providing notice and possibly opt-out rights in a (b)(2) class, and 2) the (b)(2)/(b)(3) hybrid. These hybrids suffer from significant flaws that militate against their use.

For example, in an attempt to alleviate due process concerns, some courts and litigants have provided notice and opt-out rights in a (b)(2) class action. Some courts have permitted individual plaintiffs with conflicting interests to opt out of the class on the basis that because courts may have more discretion to deviate from the (b)(3) requirement of “best notice practicable,” the cost of notice may be lower than in a comparable (b)(3) class.

But this resulting quasi hybrid (b)(2) class action raises the same concern that has split the circuits over how to determine when claims for monetary relief in putative (b)(2) classes impermissibly “predominate” over claims for injunctive and declaratory relief. The quasi hybrid also runs counter to *Ortiz*, given that it arguably departs too much from the historical antecedents and models for (b)(2) classes. For example, a federal court in California certified a putative gender-discrimination class action under (b)(2) that sought compensatory and punitive damages. In doing so, the court noted that the monetary damages could require 19 individualized determinations. Such a case could be seen as standing in stark contrast to the examples that the Advisory Committee on the Federal Rules of Civil Procedure has provided. The committee’s (b)(2) examples all requested classwide injunctive (or declaratory) relief to the exclusion of individualized claims for money damages.

A (b)(2)/(b)(3) hybrid may ameliorate some of the problems affecting (b)(3) hybrids and quasi hybrids, but the concerns remain. In a (b)(2)/(b)(3) hybrid, the court certifies an injunctive class under (b)(2) and separately certifies a damages class under (b)(3), effectively treating two different (but related) cases as one. This process may at least address some due process concerns, because individual plaintiffs would receive notice and the opportunity to opt out.

The (b)(2)/(b)(3) hybrid raises problems of its own, however. Courts may be tempted to cut the analysis short as to whether each of the respective requirements of Rules 23(b)(2) and (b)(3) have been satisfied. But essential to the validity of this hybrid is that the district court performs a full (b)(2) analysis (i.e., the defendant must have “acted or refused to act on grounds that apply generally to the class,” and injunctive relief must be “appro-
Monetary damages are traditionally recoverable in common-law courts (rather than courts of equity). Although the (b)(2) portion of this hybrid typically would not trigger a jury-trial right (because it seeks only an injunction or declaration), the Seventh Amendment requires a jury to decide all disputed facts affecting the right to recover on the (b)(3) money damages claim, including those facts that overlap with the (b)(2) injunctive relief claim.

The right to a jury also implicates the Seventh Amendment’s reexamination clause. Due to the complexity of a typical (b)(2)/(b)(3) hybrid, a single jury may not always be able to hear and decide all of the pertinent issues triable to a jury. The reexamination clause prohibits a second jury from reexamining the factual findings of the first jury. Therefore, the court must ensure, through, for example, careful instructions or innovative procedures, that successive juries do not come to different factual conclusions. However, this approach could render the (b)(2)/(b)(3) hybrid unmanageable and inefficient, and an unmanageable and inefficient class action defeats the purpose of a (b)(3) class action and should not be certified.

**Standing Requirements**

Another constitutional issue dividing the courts of appeal is Article III’s case-or-controversy limitation on the jurisdiction of federal courts. This limitation requires an injury-in-fact that is traceable to the challenged action and likely redressable. Although there is broad agreement among courts (including the Ninth Circuit) and commentators that at least one named plaintiff must have standing, there is currently a circuit split on whether every class member must have standing.

In *Denney v. Deutsche Bank AG*, the Second Circuit held that every class member must have standing, reasoning that standing is a threshold, constitutional requirement that may not be relaxed or modified through the procedural device of Rule 23 or any other Federal Rule of Civil Procedure. In contrast, the Seventh Circuit, in *Kohen v. Pacific Investment Management Company*, held that only one named plaintiff must have standing. Writing for a unanimous panel, Judge Richard A. Posner reasoned that proving a class member was not injured leads to a dismissal on the merits, not a dismissal for lack of jurisdiction.

Arguably, *Denney* more faithfully applies Article III’s requirements to the class-action context. *Kohen*, in contrast, could be read as conflating an Article III injury-in-fact with an injury sufficient to win the lawsuit on the merits. As the *Denney* court explained, “[A]n injury-in-fact need not be capable of sustaining a valid cause of action under applicable tort law.” The proper rule is likely that all class members must have suffered some injury, “[b]ut this requisite of an injury is not applied too restrictively.”

**Burden of Proof**

Issues of constitutional law are not the only area of divergence. Perhaps the most fundamental question related to class certification is the level of proof required of plaintiffs in order for a court to certify a class. This question, along with that of the appropriate level of rigorousness with which district courts should analyze plaintiffs’ proffered evidence, has led to serious disagreement among the circuits.

A preliminary question relating to burdens of proof necessary to meet the requirements of Rule 23, and other courts, including the Second and Fifth Circuits, have held the same. Commentators have lauded this trend because plaintiffs, as movants, bear the burden of establishing that class adjudication is appropriate. In addition, because class actions are the “exception to the usual rule,” the “preponderance of the evidence standard makes the most sense.”

Still, there remains much confusion among other courts, which have not specified what standard of proof applies. The standard district courts use therefore tends to vary, on an “ad hoc, case-by-case basis.” And the guidance from some appellate courts has been somewhat confusing. For example, in the Tenth Circuit plaintiffs must meet a “strict burden of proof” at class certification. At the same time, the Tenth Circuit has held that allegations in the complaint should be accepted as true at that stage of the proceeding.

Another question that has been largely resolved is the district court’s burden at class certification, separate and apart from the burden on the plaintiffs. The previous confusion dates back to the Supreme Court’s decision in *Eisen v. Carlisle & Jacquelin*, in which it stated that “nothing in either the language or history of Rule 23...gives a court any authority to conduct a preliminary inquiry into the merits of a suit to determine whether it may be maintained as a class action.” Some courts had read this statement as pro-
habiting any analysis at the class certification stage of issues that go to the merits of the case, even if those same issues are relevant and necessary to resolve the question whether a plaintiff has satisfied the requirements of Rule 23.

The emerging consensus, however, is that courts are not only permitted but required to resolve issues that go to the merits when necessary to resolve an issue of Rule 23 certification. There was, for a time, a line of cases from the Second Circuit that held otherwise. Some district courts had cited those cases as support for eschewing any analysis of the merits of the case at class certification. But those decisions were disavowed in the Second Circuit’s landmark In re IPO decision, which held that district courts can and must resolve any merits inquiry that overlaps with a proper analysis of the Rule 23 requirements. Courts of appeal across the country have largely followed In re IPO.

An interesting exception to this emerging trend is the Ninth Circuit’s en banc decision in Dukes v. Wal-Mart, which distinguished In re IPO and other similar cases, instead following a Southern District of New York decision rejecting such a rigorous analysis at class certification. The en banc court refused to follow In re IPO because it was a securities fraud case, not a Title VII case, and because the Second Circuit was analyzing Rule 23(b)(3)’s predominance requirement, rather than the Rule 23(a) commonality requirement at issue in Dukes. The approach in Dukes represents a clear break with the In re IPO line of cases, and it remains to be seen whether the court’s reasoning will gain traction with the Supreme Court or in other appellate courts.

The final issue relating to burden of proof is the question of how district courts are to deal with competing expert testimony offered by the parties in support of and in opposition to class certification. The use of expert testimony in support of class certification has continued to grow as class actions become more widespread and more complex. And the proper level of scrutiny district courts should engage in with respect to expert testimony offered in support of or in opposition to class certification has been the subject of much controversy, recently creating a circuit split on the issue.

When expert evidence is offered by a plaintiff in support of class certification, the initial question becomes whether a district court should analyze the testimony, analysis, or report for admissibility under Rule 702 of the Federal Rules of Evidence. The Seventh Circuit recently held that a full Daubert analysis is required at the class-certification stage to ensure that district courts are only relying on admissible evidence.

Other courts have recognized that some scrutiny of expert testimony is warranted at the class-certification stage, and have therefore performed some Daubert analysis, without engaging in full-fledged Daubert scrutiny. This line of cases stems from a district court decision in In re Visa Check/MasterMoney Antitrust Litigation, in which the Eastern District of New York held that a full Daubert inquiry is inappropriate at class certification; the court must only inquire as to whether the expert opinion is “fatally flawed.” The “fatally flawed” standard does not require the same rigorous analysis as does Daubert and allows expert testimony at the class-certification stage that could ultimately be inadmissible for use at trial on the merits.

Apart from the analysis of whether expert testimony is admissible, many courts have held that even this is insufficient scrutiny at the class-certification stage, since the district court is the finder of fact, and must therefore weigh expert testimony and determine whether a plaintiff’s evidence is sufficiently persuasive to meet his or her burden of establishing the Rule 23 factors. This was the focus of the Third Circuit’s Hydrogen Peroxide decision, in which the court held summarily in a footnote that the testimony was admissible but undertook significant further analysis to weigh the plaintiff’s testimony against the analysis of the defendant’s competing testimony.

The Third Circuit’s analysis in Hydrogen Peroxide seems to be more in keeping with the Supreme Court’s admonition that a class action “may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” As the Seventh Circuit remarked, failing to engage in this analysis would amount to a “delegation of judicial power to the plaintiffs,” who could obtain certification simply by hiring a competent expert. But this issue, particularly with respect to expert testimony, is far from settled in the courts of appeal.

**Certification of Penalties**

A final class certification issue that is still developing in the circuits is the question of how to handle certification of punitive damages or statutory penalties. Certification of penalties raises numerous questions about the superiority of a class action as well as the due process rights of defendants. As one scholar has put it, “[F]or a certificate, a statutory damages defendant faces a bet-the-company proposition and likely will settle rather than risk shareholder reaction to theoretical billions in exposure even if the company believes the claim lacks merit.”

Based on a 1972 district court decision, Ratner v. Chemical Bank New York Trust Company, several courts have held that statutory penalties may in some circumstances be inappropriate in Rule 23(b)(3) class actions, because the existence of a penalty makes the class action not “superior” to individual actions, as Rule 23(b)(3) requires. In Ratner, Judge Marvin E. Frankel, one of the principal architects of Rule 23, held that paying the statutory minimum of $100 to each of the 130,000 class members for violations of the Truth in Lending Act “would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation....”

The court further held that “the allowance of thousands of minimum recoveries like plaintiff’s would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement.” Courts in the Sixth, Ninth, Tenth, and Eleventh Circuits have followed Ratner, but a recent decision casts some doubt on whether the Ninth Circuit will continue to follow it.

This superiority rule is intended to balance the values of a class action, such as providing a mechanism for claims that otherwise would not be brought in individual actions, with the risks a proposed class raises. The existence of a built-in statutory penalty may increase the likelihood that individual claims will be brought, because of the incentive of increased potential recovery. A built-in penalty may at the same time raise the risks of a class adjudication, given that such a penalty, when aggregated across tens or hundreds of thousands of class members, would result in a damages award so large that it violates the defendant’s right to due process.

Here again, courts have not uniformly followed Ratner. Some circuits have held that concerns over the excessiveness of penalties are inappropriate at the class-certification stage, as an unconstitutionally excessive penalty can be reduced postverdict. The problem with this argument is that postverdict review in many class actions may not be a realistic or practically feasible check, because once a class has been certified, class actions—particularly those involving potential penalties—settle at an overwhelmingly high rate. The risk of an extremely high penalty award that courts such as Ratner have highlighted is thus extremely important at the class-certification stage. This is therefore another issue of class-certification law that seems ripe for Supreme Court review.

Several core issues of class-certification law have led to deep divisions in the courts of appeal and are ripe for Supreme Court review. The three-way split on the proper standard for determining the extent (if any) to which monetary damages are permissible in a (b)(2) class presents an important and recurring question. And the so-called hybrid
class action—a potential, but extremely problematic, response to plaintiffs’ attempts to include monetary damages in a (b)(2) class action—has not been sanctioned by the Supreme Court or uniformly adopted by the courts of appeal. Other issues, such as the standing of absent class members, the burden of proof on plaintiffs at class certification, and the propriety of certifying classes seeking punitive damages or other penalties, raise important and recurring issues that have similarly split the circuits.

3 FED. R. CIV. P. 23(f).
6 See Romberg, supra note 5, at 243.
7 Id.
10 Id.
13 Id. (citation omitted).
14 See id.
16 Id. (internal quotations and brackets omitted).
17 Id.
18 Id. at 617.
21 See, e.g., Jefferson v. Ingersoll Int’l, Inc., 195 F. 3d 894, 898 (7th Cir. 1999); Eubanks v. Billington, 110 F. 3d 87, 95–96 (D.C. Cir. 1997); Romberg, supra note 5, at 283.
22 FED. R. CIV. P. 23(e)(2).
23 Romberg, supra note 5, at 234–55.
25 See id. at 643.
26 See Perry & Brass, supra note 5, at 699.
28 See id.

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Colo. 2010) (glossing over the four factors pertinent to certifying under Rule (b)(3)); Mathers v. Northshore Mining Co., 217 F.R.D. 474, 487 (D. Minn. 2003) (failing to analyze any of the (b)(2) or (b)(3) factors).

30 U.S. CONST. amend. VII. “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”


32 See id.; Romberg, supra note 5, at 287–92.


34 See Romberg, supra note 5, at 287–92.


37 Bates v. UPS, Inc., 511 F. 3d 974, 985 (9th Cir. 2007).

38 Denney v. Deutsche Bank AG, 443 F. 3d 253, 263 (2d Cir. 2006).


40 See id.

41 Denney, 443 F. 3d at 264.


43 In re Hydrogen Peroxide Antitrust Litig., 552 F. 3d 305, 320 (3d Cir. 2008).


47 See, e.g., In re PolyMedica Corp. Sec. Litig., 432 F. 3d 1, 17 (1st Cir. 2005) (acknowledging that “generalities” on the issue of burden of proof “are the best we can do”); CE Design Ltd. v. Cy’s Crabhouse N., Inc., 259 F.R.D. 135, 140 (N.D. Ill. 2009) (concluding that the Seventh Circuit has not adopted a burden of proof, “but it has stated that district courts ‘should make whatever factual and legal inquiries are required under Rule 23’”) (citing Szabo v. Bridgeport Machs., Inc., 249 F. 3d 672, 675-76 (7th Cir. 2001)).

48 Chamblee, supra note 46, at 1048.

49 Reed v. Bowen, 849 F. 2d 1307, 1309 (10th Cir. 1988).

50 Vallario v. Vandehay, 554 F. 3d 1259, 1265 (10th Cir. 2009).


52 See, e.g., In re Hydrogen Peroxide Antitrust Litig., 552 F. 3d 305, 316-17 (3d Cir. 2008); Blades v. Monsanto Co., 400 F. 3d 562, 567 (8th Cir. 2005); Garity v. Grant Thornton, LLP, 368 F. 3d 365, 365-66 (4th Cir. 2004); Szabo, 249 F. 3d at 676-77.

53 In re Visa Check/MasterMoney Antitrust Litig., 280 F. 3d 124, 141 (2d Cir. 2001); Cardiac v. Metro-North Commuter R.R., 191 F. 3d 283, 292 (2d Cir. 1999).

54 In re IPO Sec. Litig., 471 F. 3d 24, 42 (2d Cir. 2006).

55 American Honda Motor Co. v. Allen, 600 F. 3d 813, 815-16 (7th Cir. 2010).

56 In re Visa Check/MasterMoney Antitrust Litig., 192 F.R.D. 68, 76-77 (E.D. N.Y. 2000).

57 Hydrogen Peroxide, 552 F. 3d at 315 n.13.

58 Id. at 323–25.


60 West v. Prudential Sec., Inc., 282 F. 3d 935, 938 (7th Cir. 2002).

61 Sheila B. Scheuerman, Due Process Forgotten: The Problem of Statutory Damages and Class Actions, 74 Mo. L. REV. 103, 104 (2009); see also MARCY H. GREER, A PRACTITIONER’S GUIDE TO CLASS ACTIONS 503 (2010) (“Aggregated penalties...have the potential to distort the underlying legislative scheme, force defendants to settle meritless lawsuits, and result in a punishment that is grossly disproportionate to the reprehensibility of the defendant’s conduct.”).


63 Id.


66 See Murray v. GMAC Mortgage Corp., 434 F. 3d 948, 1004 (7th Cir. 2006); Parker, 331 F. 3d at 22.
The economic loss doctrine is designed to establish a demarcation between contract and tort law

In its basic form, the economic loss doctrine—a fixture in tort law—holds that a party will not be liable under a negligence theory for damages that represent the lost benefit of a bargain unless those damages are accompanied by personal injury or property damage. Since negligence requires harm to person or property, purely economic losses must be recovered in contract or warranty. While the economic loss doctrine frequently applies in the context of third-party liability lawsuits, it can also apply to parties in privity.

The doctrine has well-recognized underpinnings in the common law of England and thrives in modern California jurisprudence. It is a liability-limiting doctrine—not unlike proximate causation—but is developing into somewhat of an enigma as a result of several contradictory California decisions. Even California courts have shown confusion over their own precedents regarding the doctrine and its impact on tort duty analysis and seem reluctant to follow them.

Perhaps the most confusing wrench thrown into the doctrine’s development is J’Aire v. Gregory, a decision in which the California Supreme Court imposed tort liability in a case of pure economic loss. Despite the pomp and circumstance of the court’s methodology, its analysis—while couched in the terminology of tort law—was essentially identical to its approach for determining damages to third-party beneficiaries in contract cases.

J’Aire is still good law, and it is unclear whether the multifactored analysis it embraces is really the exception to the liability-limiting economic loss doctrine. While the J’Aire court’s imposition of tort liability seems to be nothing more than a recasting, in tort par-

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lance, of liability to intended third-party beneficiaries in contract, it remains to be seen whether the California Supreme Court will affirmatively address j/Aire's place in economic loss analysis. Doing so would provide the necessary clarity on which potential economic loss defendants can rely.

Various theories underlie the purpose and rationale of the economic loss doctrine. Commentators view it as a line of demarcation between tort and contract law. They also find in the doctrine a means for avoiding limitless liability. In addition, the doctrine is seen as a brake on damages for harm that is less concrete, or more speculative, than harm to person or property.

Robins Dry Dock & Repair Company v. Flint provides the classic formulation of the economic loss doctrine. The plaintiffs in the case chartered a steamship from its owners. The charter required the ship to dock every six months for repairs, and so long as the ship was docked, the chartering parties were not responsible for any payment to the owners for the hiring of the ship.

While the steamship was in port, dock workers damaged the propeller, delaying the ship’s scheduled departure by two weeks. The dock and its workers had no knowledge of the charter between the ship's owners and the plaintiffs until the delay had begun.

The charterers sued on the theory that the two weeks of lost use caused by the dock workers violated a property right the charterers had in the ship. After they won at the district and circuit court levels, this argument did not go so well at the U.S. Supreme Court. The charterers raised the argument that they were third-party beneficiaries of the contract between the dry dock and the owners, but because the charterers and their arrangement with the ship's owners were not known to the defendant, this argument was to no avail. Regarding a basis of liability in tort, the Court stated, “The question is whether the [charterers] have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter.”

The Court concluded that if the charterers had a legally protected interest in the steamer, “it must be worked out through their contract with the owners, not on the postulate that they have a right in rem against the ship.” Reasoning that the damage was “material to [the charterers] only as it caused the delay in making the repairs, and that delay would be a wrong to no one except for [the charterers’] contract with the owners,” the Court noted the charterers loss “arose only through their contract with the owners.” Moreover, “no authority need be cited to show that, as a general rule...a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong.”

In essence, the Court held that to recover in tort the charterers needed to show that the dry dock negligently harmed the charterers’ physical property. Without that showing, the charterers had recourse only to their contract with the owners.

California’s economic loss doctrine began in 1965 within the context of strict products liability in Seely v. White Motor Company. After the plaintiff in Seely purchased a truck from a dealership, the plaintiff discovered that the truck was defective and could not be used to advance the plaintiff’s business. The plaintiff sued the manufacturer of the truck not only for out-of-pocket losses (including the purchase price and repairs) but also for lost profits. The plaintiff’s claims were based on strict liability and the defendant’s express warranty that its product was free from defects. The defendant raised the lack of privity between itself and the plaintiff as a defense.

After a comprehensive survey of the development of warranty and strict liability law up to the date of the ruling, the California Supreme Court in Seely found that warranty—a contractual promise—was the proper vehicle for the award of economic damages in the case. The defendant’s express warranty of its product obviated the need for privity. As to whether this rationale limited recovery of economic loss to contractual situations, the court stated:

“A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer’s liability is limited to damages for physical injuries and there is no recovery for economic loss alone.”

After Seely, the lower courts in California applied the doctrine in construction defect cases. On occasion, though, the courts would issue a decision that seemed far afield from Seely. Some cases articulated an exception from the economic loss rule for “professionals,” including engineers, architects, and developers. A similar exception was found when the contract was for the performance of services; according to the court of appeal in North American Chemical Company v. Superior Court (Trans Harbor Inc.), the plaintiff had an election of remedies—either suing in tort or contract, at the plaintiff’s preference. However, neither of these limitations of the doctrine would survive into the twenty-first century.

Reign of the j/Aire Exception

But the decision that created the largest divergence from Seely was j/Aire in 1979. According to the supreme court in j/Aire, foreseeability of harm trumped the lack of personal injury or property damage as the most important consideration in finding a duty in tort.

For 20 years, j/Aire operated as an exception to the economic loss rule. But the j/Aire court seemed to conflate economic loss analysis with duty analysis. To understand whether j/Aire is a true exception to the economic loss doctrine in California or a hiccup in the state’s stare decisis on the issue first requires an examination of its most direct progenitor, the 1958 decision Biakanja v. Irving.

In Biakanja, the plaintiff, who was not in contractual privity with the defendant, sought damages against the defendant for loss of an expectancy, or an intangible future interest. The case involved a notary who prepared a will for the plaintiff’s brother. While the will provided that the plaintiff would take the entirety of her brother’s estate, it was denied probate because it was insufficiently attested. Instead of taking all of the estate as a bequest, the plaintiff took only one-eighth by intestate succession. The plaintiff sued the notary for the difference and won at trial. On appeal, the supreme court framed the “principal” issue as “whether defendant was under a duty to exercise due care to protect plaintiff from injury and was liable for damage caused plaintiff by his negligence even though they were not in privity of contract.”

The court addressed the issue of liability in circumstances involving harm to person or property and cited authority for the proposition that liability is present even when the harm is to intangible interests. However, the court’s holding did not address the type of harm about which the plaintiff complained: the loss of an expectancy, which is a purely economic loss. Rather, the court addressed the issue of duty.

The Biakanja court held that liability under circumstances in which the defendant was not in privity of contract with the plaintiff is “a matter of policy” involving the “balancing of various factors.” These factors include:

- The extent to which the transaction was intended to affect the plaintiff.
- The foreseeability of harm to the plaintiff.
- The degree of certainty that the plaintiff suffered injury.
- The closeness of the connection between the defendant’s conduct and the injury suffered.
- The moral blame attached to the defendant’s conduct.
- The policy of preventing future harm.
1. The economic loss doctrine generally bars recovery in tort absent harm to person or property.  
   True.  
   False.

2. The economic loss doctrine:  
   A. Prevents limits liability.  
   B. Prevents recovery for speculative harm.  
   C. Serves as a line of demarcation between tort and contract.  
   D. A and B.  
   E. A, B, and C.

   True.  
   False.

4. Cooper v. Jevne held that the economic loss doctrine applies to architects in professional negligence actions.  
   True.  
   False.

5. According to Rowland v. Christian, the foundation of negligence law in California is:  
   A. Civil Code Section 1717.  
   B. Civil Code Section 1714(c).  
   C. Civil Code Section 1714(a).  
   D. None of the above.

6. Biakanja v. Irving did not involve pure economic loss because the plaintiff had an expectancy that constituted harm to her property.  
   True.  
   False.

7. Company X chartered a steamboat owned by Y. While in dry dock, Company Z’s dock workers negligently damaged the steamboat’s propeller. X suffered harm because it could not charter the steamboat while the negligently inflicted damage was being repaired. Who, if anyone, has an action in tort against Z?  
   A. X.  
   B. Y.  
   C. X and Y.  
   D. Neither X nor Y.

8. Using the same hypothetical as Question 7, which party suffered pure economic loss only?  
   A. X.  
   B. Y.  
   C. Z.  
   D. X and Y.

9. J’Aire v. Gregory is an exception to the economic loss doctrine in California.  
   True.  
   False.

10. Which of the following, if any, are factors considered in tort duty analysis?  
    A. Foreseeability of the harm.  
    B. Intent to benefit the plaintiff.  
    C. A and B.  
    D. None of the above.

11. According to Bily v. Arthur Young & Company, courts “will not treat the mere presence of a foreseeable risk of injury to third persons as sufficient, standing alone, to impose liability for negligent conduct.”  
    True.  
    False.

12. Aas v. Superior Court held that “appreciable, non-speculative, present injury is an essential element of a tort cause of action.”  
    True.  
    False.

13. The Aas court characterized tort remedies in California for pure economic loss as “uncertain.”  
    True.  
    False.

14. Foreseeability in the J’Aire/Biakanja multifactored analysis is the functional equivalent of intent to benefit in third-party beneficiary analysis.  
    True.  
    False.

15. J’Aire confuses questions of duty with the type of harm suffered.  
    True.  
    False.

16. Which, if any, of the following statements are true?  
    A. Strangers to the agreement cannot bring an action on it.  
    B. Foreseeable beneficiaries of the agreement can bring an action on it.  
    C. A and B.  
    D. None of the above.

17. Aas characterized the J’Aire analysis as involving “fairly subjective judgments.”  
    True.  
    False.

18. Third-party beneficiary analysis would not relieve courts of the necessity to engage in “considerations of policy” in situations similar to J’Aire.  
    True.  
    False.

19. According to Civil Code Section 1559, only intended beneficiaries may bring an action on a contract to which they are not parties.  
    True.  
    False.

20. J’Aire is still good law.  
    True.  
    False.
Indeed, the Aas court was reluctant to acknowledge that J’Aire represents an exception to the economic loss doctrine in California and that J’Aire, from its issuance in 1979 until the decision in Aas in 2000, virtually abrogated the economic loss doctrine in the state.

Prior authority allowed recovery when the harm was to person or property, and authority in other states allowed recovery for intangible interests. However, the court ultimately applied a multifactor analysis to determine whether the defendant owed the plaintiff a duty of care under the particular circumstances of the case. This analysis included a factor on the certainty of the harm suffered but not its type.

The J’Aire court applied Biakanja in the context of construction defects. The dispute in J’Aire involved a delay in construction. The plaintiff operated a restaurant at the Sonoma County Airport in space leased from the county. The lease terms obligated the county to provide heat and air conditioning for the restaurant. The county contracted with the defendant contractor to renovate the heating and air and provide insulation. The contract did not specify a time for performing the renovation, but the defendant was urged to complete the construction promptly. Nevertheless, the defendant did not complete the work within a reasonable time. Plaintiff J’Aire sued the contractor for negligence because it suffered loss of business and lost profits during the delay. The defendant demurred successfully at trial.\[L\]iability for negligence and strict liability in tort as well as breach of implied warranty, contract, and express warranty.\[The court admitted that the most important factor in its view was foreseeability: Rather than traditional notions of duty, this court has focused on foreseeability as the key component necessary to establish liability: “While the question whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct.... [Foreseeability] of the risk is a primary consideration in establishing the element of duty.”\]

Within this discussion on duty, the J’Aire court then made the statement that appears to have injected confusion and uncertainty into economic loss analysis in California: Where the risk of harm is foreseeable, as it was in the present case, an injury to the plaintiff’s economic interests should not go uncompensated merely because it was unaccompanied by any injury to his person or property.

The Impact of Aas

In 2000, the California Supreme Court surveyed the law of economic loss in Aas v. Superior Court, a case that was the direct progeny of Seely. Aas involved homeowners and a homeowners association bringing suit against the developer/general contractor and subcontractors on a condominium project. According to the court’s characterization, the plaintiffs’ homes suffered “from a variety of construction defects affecting virtually all components and aspects of construction.” The plaintiffs alleged causes of action for negligence and strict liability in tort as well as breach of implied warranty, contract, and express warranty.

The court began its discussion by warily providing a general formulation of the doctrine: “Speaking very generally, tort law provides a remedy for construction defects that cause property damage or personal injury.” The court acknowledged that the legal question in the case was “fairly narrow” but “not simple” because it arose from the “nebulous and troublesome margin between tort and contract law.” Moreover, the court noted that in California “tort remedies have been uncertain” for defective products or negligent services causing neither personal injury nor property damage.

The Aas court attempted to clarify the application of the doctrine in California. After reciting the development of case law on the subject, including the divergence of the doctrine into strict liability and negligence theories, the court held that “appreciable, non-speculative, present injury is an essential element of a tort cause of action.” It explained that the “breach of a duty causing only speculative harm or the threat of future harm does not normally suffice to create a cause of action.”

Much like the Robins Dry Dock court of 73 years before, the Aas court noted that the plaintiffs’ recourse for economic losses should be limited to contract (or, it also noted, war-
In fact, the court underscored this observation with a recounting of its ruling in another landmark case, *Erlich v. Menezes*. This court recently rejected the argument that the negligent performance of a construction contract, without more, justifies an award of tort damages. (*Erlich v. Menezes* at pp. 550-554 [reversing an award of damages for emotional distress for negligent construction].) In so doing, however, we reiterated that conduct amounting to a breach of contract becomes tortious when it also violates a duty independent of the contract arising from principles of tort law.41

The *Aas* court also limited the holdings of earlier lower court decisions in such a way as to strongly imply that “professionals” (contractors, subcontractors, or design professionals) could not be held liable in negligence without actual harm to person or property.42 However, the *Aas* court did not criticize *J’Aire* in any way that could be described as direct, even though it did say that application of the *J’Aire* test for finding a tort duty “tends to involve a court in making fairly subjective judgments.”43 An appellate court describing another court’s judgments as “subjunctive” is certainly not a ringing endorsement.

The *Aas* court clearly noted the conundrum by observing that “tort remedies have been uncertain” when it comes to the economic loss doctrine as a result of case law development in California. While it reaffirmed the doctrine in California, the *Aas* court did not put to rest the questions springing from *J’Aire* or even the confusion regarding how to apply the economic loss doctrine in California in the face of *J’Aire* and its progeny.

Indeed, the *Aas* court was reluctant to acknowledge that *J’Aire* represents an exception to the economic loss doctrine in California and that *J’Aire*, from its issuance in 1979 until the decision in *Aas* in 2000, virtually abrogated the economic loss doctrine in the state. The fact that the doctrine has exceptions is not in itself troublesome. Good law rarely applies uniformly across a broad universe of circumstances, and exceptions and nuances are necessary to ensure just outcomes. The *J’Aire* exception is problematic in its insistence on imposing a legal duty in situations in which one previously did not exist as well as its brief, perhaps even dismissive, treatment of the nature of the harm that the litigation sought to remedy.

**Third-Party Beneficiary Analysis**

So even while *Aas* succeeded in providing some guidance post-*J’Aire*, confusion remains. Still, whether the economic loss doctrine limits liability, polices the border between tort and contract, or is a damages-certain principle, its applicability must relate to the harm caused and not whether a tort duty should be imposed. The California Supreme Court seemed to recognize this idea in *Seely*, and the *J’Aire* exception apparently does not apply in the strict products liability line of cases.44

If the plaintiff’s harm is to an expectancy, or if economic losses flow from the expected performance of a party not in privity of contract with the plaintiff, the plaintiff should be limited to whatever contract remedies the plaintiff has. The plaintiff’s harm is more akin to a contractual expectation interest. *J’Aire* confuses the issue by injecting the question of duty, and thereby policy, into the question of the type of harm suffered by the plaintiff. The relatively easy question of whether the plaintiff experienced physical harm thus becomes a more nebulous question as to whether a duty was owed.45 Along with the confusion and greater complexity comes uncertainty. Economic transactions rely upon certainty in the law. If liability is indeterminate because of multifaceted tests in situations in which the plaintiff and the defendant have no contract, and the harm is measured purely in terms of what benefit one party expected to receive, how can potential defendants adequately account for risk?

Since the harm is to an expectancy interest, and the remedy is to make good the expectation, contract law can eliminate the indeterminacy created by the *J’Aire* exception.46 The general rule at common law and in California is that a stranger to the agreement cannot bring an action on it.47 However, the courts recognized an exception for intended beneficiaries of the agreement.48 and this exception was codified at Civil Code Section 1559.49

The contracting parties must intend to benefit the third party.50 It is sufficient that the promisor must have understood that the promisee had this intent. No specific manifestation by the promisor of an intent to benefit the third person is required.51 Persons who are only incidentally or remotely benefited cannot enforce the agreement.52 The third party bears the burden of proving that it was an intended beneficiary.53

The situations in which the *J’Aire* exception applies will always be those in which the plaintiff could claim to be a third-party beneficiary on a contract claim. When analyzing the application of the *J’Aire* factors to a given fact pattern, “California courts have held that the defendant’s transactions must have been ‘specifically intended to affect the particular needs’ of the plaintiff.”54 If a potential plaintiff is a third-party beneficiary of an agreement, there is no need for the court to engage in “those considerations of policy” necessary to imposing a tort duty. The fact-finder need only look to the agreement between the contracting parties. If there was an intention to benefit a third party, that party’s expectation interest would be protected against all breaches, negligent or otherwise. If there was no such intention, there would be no recovery: The economic loss doctrine would clearly and definitively bar recovery in tort for pure economic loss.

In this analysis, “intention” supplants “foreseeability,” the keystone in the *J’Aire* court’s imposition of tort liability.55 Indeed, one can argue that intention and foreseeability are functional equivalents—at least in light of the willful overtones that *J’Aire* ascribes to foreseeability.56 However, while foreseeability is expansive, and courts have virtually limitless discretion to decide what is and is not foreseeable, the parties’ agreement provides structure and parameters to the parties’ intentions.

Third-party beneficiary analysis takes the mystery out of what constitutes a “special relationship”: It is simply the relationship of intended third-party beneficiary to the contracting parties. Perhaps the greatest doctrinal advantage of third-party beneficiary analysis is that it unifies the interest to be protected (expectancy) with the legal apparatus (contract) designed to protect it.57

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43 See Dobbs, supra note 2, at 713.
44 See Johnson, supra note 2, at 542. This view makes little sense considering that economic harm is no more “speculative” or difficult to measure than harm to dignity or reputation—both of which are compensable in tort.
46 Id. at 307.
47 Id. at 308-09.
48 Id. at 308.
49 Id. at 308-09.
51 Id. at 16-18.
52 Id. at 15.
53 Id. at 18.
55 Id. at 868. Cooper held that the economic loss rule does not apply to architects accused of professional negligence in the design of a construction project. But this statement was disapproved as mere dicta. See infra note 42. See also Huang v. Garner, 137 Cal. App. 3d 404, 421-22 (1984).
57 Biakana v. Irving, 49 Cal. 2d 647 (1958). Biakana represents a general liberalization and expansion of tort liability in California that even led to renewed interest in an 1872 statute, codified at Civil Code §1714(a),
which does not distinguish between injury to person or property and economic interests. The California Supreme Court in Rowland v. Christian cited §1714(a) as “a civil law” that serves as the foundation of negligence law in California. Rowland v. Christian, 69 Cal. 2d 108, 112 (1968) (superseded by statute on other grounds).

Biakanja, 49 Cal. 2d at 648.

Id.

Id. at 649. For the latter proposition, the Biakanja court cited Glanzer v. Shepard, a famous break with the economic loss doctrine authored by then-Judge Benjamin Cardozo. Glanzer v. Shepard, 233 N.Y. 236 (1922).

Biakanja, 49 Cal. 2d at 648. However, as to actual attorneys, the court soon imposed a tort duty on attorneys to nonclient bequest recipients for negligently drawn wills. Lucas v. Hamm, 56 Cal. 2d 583 (1961); Heyer v. Flagg, 70 Cal. 2d 223 (1969).

See id. at 600. The Biakanja court did not miss the fact that a notary prepared the will, stating that the notary’s conduct was “not only negligent but was also highly improper” because he “engaged in the unauthorized practice of law.” Id. at 601. However, as to actual attorneys, the court soon imposed a tort duty on attorneys to nonclient bequest recipients for negligently drawn wills. Lucas v. Hamm, 56 Cal. 2d 583 (1961); Heyer v. Flagg, 70 Cal. 2d 223 (1969). In addition to citing Biakanja, J’Aire cited to these cases for the proposition that, in the absence of privity, a “special relationship” would allow for the recovery of purely economic damages for the negligent performance of a contract. See J’Aire Corp. v. Gregory, 24 Cal. 3d 799, 804 (1979).

J’Aire, 24 Cal. 3d at 802.

Id. at 803.

Id.

Id. at 804.

Id. at 805.

Id. at 806 (quoting Weirum v. RKO Gen. Inc., 15 Cal. 3d 40, 46 (1975) (footnote omitted)).

Id. at 805.

Aas v. Superior Court, 24 Cal. 4th 627 (2000) (superseded by statute as to residential properties). The Aas decision led to the enactment of Civil Code §§895-945.5 and particularly §§896 and 942, which provide a statutory procedure for the owners of residential property to seek damages for construction defects even in the absence of harm to person or property. These statutes thus allow a path around the economic loss doctrine in this limited context.

Aas, 24 Cal. 4th at 633.

Id.

Id. Only the homeowners alleged breach of contract and express warranty.

Id. at 635.

Id.

Id. at 636.

Id. at 646. The divergence into “two distinct” theories refers to the Seeley line of cases (strict products liability in tort) and the Biakanja line of cases, including J’Aire (negligence). See Aas, 24 Cal. 4th at 638-39.

Aas, 24 Cal. 4th at 646.

See id. at 652.

Id. at 643 (citing Erlich v. Menezes, 2 Cal. 4th 543 (1995)).

See id. at 647-48. Aas disapproved Huang v. Garner, 157 Cal. App. 3d 404 (1984). That case had allowed the third successive purchasers of a commercial building to recover pure economic losses on a tort theory. Huang used J’Aire to find a duty in tort. 157 Cal. App. 3d at 422-23. Aas also limited the holding of Cooper v. Jevne, 56 Cal. App. 3d 860 (1976). The Cooper court ruled that Seeley’s economic loss rule did not apply to professional negligence claims, basing this ruling primarily on attorney malpractice cases. 56 Cal. App. 3d at 868. The supreme court in Aas left Cooper intact because it reached the correct result but expressed displeasure with the rationale: “[T]he [Cooper] court’s conclusion that Seeley’s economic loss rule does not apply to professional negligence claims
liability for negligent conduct.” Aas, 24 Cal. 4th at 648.

See also id. at 636-37, 645.

See Seely v. White Motor Corp., 63 Cal. 2d 9, 18 (1965). The California Supreme Court’s most recent pronouncement on economic loss in the strict products liability context is Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979 (2004). Robinson does not mention J’Aire and instead follows Aas. The Robinson court held that the economic loss rule did not bar the plaintiff’s misrepresentation claims because they were “independent of [the defendant’s] breach of contract.” Id. at 991. The court explained that “[c]ourts will generally enforce the breach of a contractual relationship through contract law, except when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies.” Id. at 991-92. Accordingly, the court stated that “[j]e economic loss rule is designed to limit liability in commercial activities that negligently or inadvertently go awry, not to reward malefactors who affirmatively misrepresent and put people at risk.” Id. at 991.


Indeed, tort and contract are fundamentally different in the interests that they seek to protect. Tort concerns itself with making the plaintiff whole. Contract concerns itself with giving the plaintiff the benefit of the contract. J’Aire exposes the gap between tort and contract in which the type of harm cannot be remedied in tort but no barrier exists between the plaintiff and the defendant. Rather than impose a tort duty based on a multifaceted analysis, why not introduce consistency and predictability by applying a third-party beneficiary analysis?

See McLaren v. Hutchinson, 18 Cal. 80 (1861).

See Sacramento Lumber Co. v. Wagner, 67 Cal. 293 (1885).

Civil Code §1559 states: “A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.”


Id. at 590.


Even though the J’Aire court relied heavily on the foreseeability factor, the California Supreme Court has since discounted its importance. In Bily v. Arthur Young & Co., 3 Cal. 4th 370, 398 (1992), the court stated that foreseeability is “but one factor to be considered in the imposition of negligence liability.” Perhaps in implied rejection of J’Aire, the Bily court stated: “In line with our recent decisions, we will not treat the mere presence of a foreseeable risk of injury to third persons as sufficient, standing alone, to impose liability for negligent conduct.” Id. at 399. The Bily court added three more factors for consideration in imposing a tort duty: 1) liability out of proportion to fault, 2) the prospect of private ordering, and 3) the effect of imposing liability to or in favor of third parties on the particular class of defendant. Id. at 399-405.

See the J’Aire court’s discussion of contractors who willfully fail to complete a construction project and compare with their discussion of the defendant contractor failing to speed up construction even after the danger of the plaintiff’s economic loss was brought to his attention. J’Aire Corp. v. Gregory, 27 Cal. 3d 799, 804-05 (1979). The court seems to intertwine the plaintiff’s “foreseeable” injury with the contractor’s “intentional” choice to not behave more reasonably.

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Los Angeles Lawyer February 2011 31
Despite the ruling in Lewis, employees still face an uphill battle in discrimination cases

**WRITTEN EXAMS** can serve as a legitimate gatekeeper into many careers, but they also have a nefarious history of being used to keep out minorities. As Justice Ruth Bader Ginsburg observed in Ricci v. DeStefano, “Firefighting is a profession in which the legacy of racial discrimination casts an especially long shadow.” While exams can remove nepotism and subjectivity from the selection process, not all exams are the same, nor does committing something to paper necessarily mean that impermissible biases have disappeared.

The touchstone of a fair exam or practice is how accurately it tests for the requisite skills. In the employment setting, the exam or practice is not fair if 1) it disproportionately impacts those with a protected identity, such as race, color, sex, national origin, religion, disability, or age (40 or older), 2) it is not job related, and 3) a less discriminatory one exists but is not used. In Lewis v. City of Chicago, black firefighter applicants claimed they faced an unfair practice.

In Lewis, the city failed to justify its use of an entry-level firefighter exam with a score cutoff of 89 that had a disparate impact on black applicants. The applicants’ victory, however, depended on a statute of limitations question: May a “plaintiff who does not file a timely charge challenging the adoption of a practice—here, an employer’s decision to exclude employment applicants who did not achieve a certain score—assert a disparate-impact claim in a timely charge challenging the employer’s later application of that practice[?]” The answer is yes.

Lewis may be compared to Ricci v. DeStefano. Both cases involved firefighters and written exams. In Ricci, white firefighters sued the city of New Haven, Connecticut, for disparate-treatment discrimination. The city did not certify a promotion exam because of a good faith belief that disparate-impact liability would result. The U.S. Supreme Court held that the city lacked a strong basis in evidence that it would face dis-
parate-impact liability, so its refusal to certify the results amounted to intentional discrimination against white firefighters. In Lewis, black firefighter applicants sued the city for disparate-impact discrimination because the city used an exam with a score cutoff that had a disparate impact. The similarities, however, end there.

Ricci addresses the supposed tension between disparate-impact and disparate-treatment discrimination, while Lewis focuses on when the courthouse doors are closed. Thus, Lewis does not modify Ricci.9 In fact, Lewis seems more like a companion to Ledbetter v. Goodyear Tire & Rubber Company, which involved timeliness and disparate treatment.10

The facts of the Lewis case start in 1995, when the city of Chicago administered a written exam to over 26,000 people to compile an eligibility list for entry-level firefighters. The 1995 test had two parts: a written multiple choice section (weighted 15 percent) and a video demonstration section (85 percent). The written section was designed “to measure an applicant’s ability to comprehend written information.” The video section was designed to measure an applicant’s ability to understand oral instructions, take notes, and learn from a demonstration of a fictitious device.11

The city sorted the applicants into three categories: “well qualified” for scores 89 or above (out of 100), “qualified” for 65 to 88, and “not qualified” for 64 or below. The city set the well-qualified cutoff at 89 “because it was the most administratively convenient way to trim the list of potential applicants to a manageable number while still fulfilling the [Fire Department’s] hiring needs.”12

On January 26, 1996, the city sent letters informing applicants of their results, stating that it would likely not invite qualified candidates for further processing. But the letters said that the city would keep the applicant’s name on the eligibility list for as long as it used the list. The city also issued a press release that announced the general results, next steps for well-qualified applicants, and the racial makeup of those applicants.

In the pool of more than 26,000 applicants, 11,649 (45 percent of test takers) were white and 9,497 (37 percent) were black. The city categorized 1,782 (6.8 percent) of the applicants as well qualified: 75.8 percent white and 11.5 percent black.13 Of the 11,649 white applicants, 10,877 (93 percent) passed the exam (scores 65 or above); and of the passing white applicants, 1,350 (12 percent) scored 89 or above. Of the 9,497 black applicants, 6,855 (72 percent) passed; and of the passing black applicants, 204 (3 percent) scored 89 or above.14 The cutoff meant that white applicants were five times more likely than blacks to advance to the next stage.15

The racial makeup disappointed the city, but it planned to proceed with hiring.16 From 1996 to 2001, the city used the eligibility list 11 times to fill 11 classes of entry-level firefighters. The city filled 10 classes with well-qualified applicants (and certain qualified paramedics and veterans) and filled the 11th class with the remaining well-qualified applicants before drawing from the qualified candidates.

The plaintiffs,17 qualified black applicants, filed an EEOC charge of discrimination on March 31, 1997, more than 300 days after the results came out on January 26, 1996, but within 300 days of the city’s second use of the eligibility list on October 1, 1996. Receiving right-to-sue letters, the plaintiffs sued in federal district court. The city moved for summary judgment for failure to file a timely charge, but the district court denied the motion because “the City’s ‘ongoing reliance’ on the 1995 test results constituted a ‘continuing violation.’”18

Undeterred, the city conceded that the 1995 test with a cutoff had a disparate impact but argued that business necessity justified its practice. In a bench trial, the district court rejected the city’s business-necessity defense and found, among other things, that the 1995 test may not have been a reliable measure of the four specified cognitive skills, and the 89-score cutoff was “statistically meaningless” as “it fail[ed] to distinguish between candidates based on their relative abilities.”19 Further, even assuming that the city could justify its discriminatory practice, a less discriminatory alternative existed, which it later adopted: the random selection of candidates who passed the exam.19 The district court ordered the city to hire 132 randomly selected class members and awarded back pay to be divided among the remaining members. The U.S. Court of Appeals for the Seventh Circuit reversed, holding that the plaintiffs failed to timely challenge the sorting of applicants, the only discriminatory act. The Supreme Court granted review.

As an aside, the city announced in 2005 that it would administer the firefighter/EMT entrance exam every three years, rather than letting a decade lapse between tests.20 And, since 2006, the city has used a pass-fail approach, so applicants who passed could become firefighters.21 Under the new policy, the Chicago Fire Academy continues to produce quality firefighters.22

Title VII of the Civil Rights Act of 1964 prohibits employment practices that discriminate against a person because of the individual’s race, color, religion, sex, or national origin.23 Three forms of discrimination violate Title VII: 1) intentional discrimination (disparate treatment), 2) discrimination, regardless of intent, that occurs when “practices...are fair in form, but discriminatory in operation” (disparate impact), and 3) harassment.24 The black firefighter applicants asserted disparate impact.

To prove that an employment practice has a disparate impact under 42 USC Section 2000e-2(k), plaintiffs must specifically identify the employment practice that allegedly causes the disparate impact and then must demonstrate through statistical evidence that the employer “uses a particular [facially neutral] employment practice that causes a disparate impact” on a protected class. The burden then shifts to the employer to demonstrate that the employment practice is “job related” and “consistent with business necessity.” If the employer meets its burden, the plaintiffs can still prevail if they can demonstrate that a less discriminatory alternative exists and the employer refuses to adopt it. But before complainants can prove liability, they need to file an EEOC charge of discrimination within 300 days of the discriminatory act (or 180 days in those jurisdictions without a state or local fair employment practice agency).25

A Unanimous Decision

The Supreme Court (with Justice Antonin Scalia writing) held that a complainant may file a timely EEOC charge that asserts a disparate-impact claim each time the employer applies a practice.26 The Court focused on Title VII’s text and emphasized its role in interpreting statutes: “It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.”27

Before bringing a Title VII suit, the plaintiff must file a timely charge that precisely identifies the unlawful employment practice. The Court looked to Title VII’s disparate-impact provision for the essential elements of a disparate-impact claim, emphasizing the word “uses.” A cognizable claim arises when an employer uses an employment practice that causes a disparate impact. In Lewis, the employment practice was “the exclusion of passing applicants who scored below 89 (until the supply of scores 89 or above was exhausted) when selecting those who would advance.” According to the Court, “Although the City had adopted the eligibility list (embodying the score cutoffs) earlier and announced its intention to draw from the list, it made use of the practice of excluding those who scored 88 or below each time it filled a new class of firefighters.” This practice of sorting could form the basis of a claim.28

Rather than adopting the city and the Seventh Circuit’s limited view of “use,” the Court gave “use” its plain meaning. The city argued that the only unlawful employment practice occurred when it used the exam results to create the eligibility list, limited
hiring to well-qualified applicants, and notified the plaintiffs in 1996. Since no one challenged this initial decision, later uses of the unchanged, and now not actionable, practices do not create new violations.29

The city and the Seventh Circuit’s position rested on the view that the Evans line of cases30 asserts present effects, and automatic consequences of past but time-barred discrimination cannot violate Title VII. While the Court agreed that the decision to adopt the cutoff score and create the eligibility list gave rise to a disparate-impact claim, the Court clarified that these cases actually assert that a “present violation” must occur within the limitations period.31

The type of claim determines when a present violation occurs. Disparate-treatment claims require plaintiffs to demonstrate deliberate discrimination within the limitations period. Disparate-impact claims, however, do not require discriminatory intent, so plaintiffs only need to show that the employer uses the practice within the limitations period. In Lewis, the plaintiffs asserted disparate-impact discrimination, so new and present violations could flow from each use of the cutoff decision.32

The Seventh Circuit resisted recognizing the plaintiffs’ claims because it viewed disparate-treatment and disparate-impact claims as two different means to intentional discrimination, so these means should cover the same wrongs, but the Court disagreed. If Title VII’s text recognizes some claims under one theory but not the other, this “is the product of the law Congress has written,” which the Court must follow, even if it thinks Congress meant something else.33

Practical Concerns
Faced with competing interpretations and policy concerns, the Court stuck to the text. The city and its amici warned that the Court could create practical problems for employers and employees; that is, new disparate-impact claims for practices used for years and the loss of evidence needed to assert the business necessity defense. If an employer uses an unlawful practice and no one files a timely challenge, then the employer could use the practice with impunity despite the disparate impact. While equitable tolling or estoppel would help some, others would have no recourse. Further, the city’s reading would encourage plaintiffs to file premature lawsuits upon the mere announcement of a practice. The Court stated, “In all events, it is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted.”34

If Congress did not intend the disparate-impact provision to cover claims regardless of the employer’s motive or prior use of the same practice, Congress, not the federal courts, should fix this.35 Thus, the black firefighter applicants had a cognizable disparate-impact claim each time the city used the eligibility list, without having to challenge the list’s adoption. The Court enabled the firefighter applicants to attack a discriminatory practice that would otherwise be untouchable, but the battle is not over. The Court’s plain reading employers will express dismay about possible forthcoming litigation, their alarm ignores the importance of the disparate-impact theory and the state of federal employment litigation. First, when Title VII was enacted, “Employers responded to the law by eliminating rules and practices that explicitly barred racial minorities from ‘white’ jobs. But removing overtly race-based job classifications did not usher in genuinely equal opportunity. More subtle—and sometimes
As the Lewis litigation demonstrates, the employer-employee relationship can be a contentious one, but it does not have to be. Employers are important players in the civil rights movement. They are in the best position to protect civil rights and ensure equal opportunity through their practices and conduct. Employers should keep three lessons in mind: 1) They should review their policies regularly to ensure compliance, 2) if they suspect a present practice might violate Title VII, they should stop using it, and 3) if they suspect a proposed practice might violate Title VII, they should not use it. Employers can be the good guys too.

While Lewis does not signal a pro-employee trend by the Court under Chief Justice John Roberts, workers can take some small solace that the Roberts Court is probably not ant worker. Workers can still seek enforcement of their civil rights, and employers need to remain vigilant in ensuring that their practices provide true equal opportunity.


4 See, e.g., University of California, Berkeley, School of Law, Law School Admission Project: Looking Beyond the LSAT, http://www.law.berkeley.edu/beyondlsat (last visited June 12, 2010).


7 Id. at 2195 (emphasis in original).


12 Id. at *5.

13 Id. at *2, *5.


15 Lewis, 2005 WL 693618, at *2.
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Ted Brooks is a trial consultant, author and speaker, with offices in Los Angeles and San Francisco. He has provided trial presentation services in many high-profile and high-stakes matters, including the Dodgers McCourt divorce and People v. Robert Blake. You may read more of Ted’s articles on his blog: http://trial-technology.blogspot.com.
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New E-Discovery Competency Requirements
ON THURSDAY, FEBRUARY 10, the Los Angeles County Bar Association will present a program on what lawyers need to know about e-discovery competency requirements. California and the Federal Rules of Civil Procedure now require counsel to become competent with complex electronic discovery concepts, rules, and protocols. Counsel who are not up to speed with electronic discovery are ethically required to withdraw from representation or associate competent counsel. This program is the first step toward meeting competency requirements. Speaker Alexander H. Lubarsky will explore the new California Electronic Discovery Act, cutting edge technologies, and best practices pertaining to managing electronically stored evidence at trial. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby parking lots. On-site registration will begin at 4:30 P.M., with the program continuing from 5 to 8:45 P.M. This program is also available as a live Webcast. The registration code number is 011185. The prices below include the on-site meal.

$60—CLE+PLUS member
$75—Small and Solo Division member
$100—LACBA member
$115 to $150—live Webcast
$130—all others
3.5 CLE hours

How to Manage Archived Data in Litigation
ON WEDNESDAY, FEBRUARY 16, the Los Angeles County Bar Association will host a program on archival data, which often is found on backup tapes, removable drives, and Web repositories. Speaker Alexander H. Lubarsky will explore the rules, case law, techniques, technology, and best practices for identifying, requesting, retrieving, reviewing, and producing archival data. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby parking lots. On-site registration will begin at 4:30 P.M., with the program continuing from 5 to 8:45. This program is also available as a live Webcast. The registration code number is 011186. The prices below include the on-site meal.

$60—CLE+PLUS member
$75—Small and Solo Division member
$100—LACBA member
$115 to $150—live Webcast
$130—all others
3.5 CLE hours

CROSS-BORDER DISTRESSED TRANSACTIONS
ON THURSDAY, FEBRUARY 17, the International Law and Corporate Law Departments Sections will host a program on the purchase and sale of distressed companies in the United States and abroad. Speakers Monique C. Bedford, Miranda Clark, and Malhar S. Pagay will highlight the specialized regulations that companies need to comply with when dealing with distressed companies as well as the most effective negotiation tips and due diligence required to ensure that companies achieve their intended objectives. The program is designed for in-house counsel and other professionals advising on cross-border transactions involving distressed companies. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby parking lots. On-site registration will begin at 5:30 P.M., with the program continuing from 6 to 8. This program is also available as a live Webcast. The registration code number is 011112. The prices below include the on-site meal.

$25—CLE+PLUS member
$55—Corporate Law Departments Section and International Law Section member
$65—LACBA member
$75—all others
$85—at-the-door registrants
$95 to $105—live Webcast
2 CLE hours

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.
**Kids’ Court**

**THE AMERICAN LEGAL SYSTEM DICTATES** that ignorance of the law is no excuse for breaking it. Even if we do not know the speed limit, we are still expected to obey it. However, the real problem is not that people do not know the law; it’s that they do not care why it exists in the first place. This apathy is responsible for the curious lack of respect that many Americans have for the most innovative legal system on the planet. To remedy that void, high schools across the nation conduct mock trials and moot courts to help our youth develop an understanding of the American judicial system.

Unfortunately, for most kids, high school is too late. If we want to improve the civic responsibility of our future citizens, we need to start young. Very young. Reading, writing, and arithmetic are no longer enough. There is a fourth “R” that our schools are ignoring at the peril of the future of American jurisprudence—reality.

High school baseball stars first learn to swing a bat in little league. The leads in your local school’s production of *The Music Man* probably learned to sing before they could count all the way up to 76 trombones. Yet mock trial participants typically have to wait until high school to argue their first salient point before a jury of administrators and peers. It is possible that sports and creative endeavors are inherently more popular than law-themed clubs. However, a simple shift in priority and focus could have lasting effects on the future of this nation.

First, let us dispel some popular misconceptions. Many people assume that mock trial is intended for future lawyers, and some would argue that we do not need to encourage more students to go to law school. However, just a fraction of 1 percent of high school athletes will go on to play professional sports, and the vast majority of drama students will never set foot onto a Broadway stage. Still, millions of children participate in these activities in order to develop self-confidence, discipline, a sense of teamwork, and a variety of other soft skills. Perhaps if students were exposed to the power of argument, precedent, and deliberation at a younger age, mock trial teams would be holding the same curthrotid auditions and tryouts as their counterparts in the theater and on the field.

Perhaps the question we should be asking is whether elementary school students are, in fact, ready to face reality before they hit puberty. We do not simply believe that they are; at Laurence School, we have proven it. In 1989, I created Kids’ Court, a law and ethics program for the elementary schoolchildren of our school in Valley Glen, California. The program encourages students to explore the world of law through debates, mock trial, trial strategy, creative writing, and public speaking—all on a level commensurate with their maturation and cognitive ability. For 21 consecutive years the program has delivered fairy tale justice (literally) as the kids debate the legal merit of actions taken by some of their favorite storybook characters.

Childhood fairy tales are filled with heartache and violence, confusion and compromise. Jack’s mom asked him to sell his best friend (the cow) to help feed the family. Little Red Riding Hood and Hansel and Gretel all learned the dangers of walking in the woods and relying on the kindness of strangers. Dorothy melted the Wicked Witch, and Peter Pan sent Captain Hook back into the crocodile’s mouth. Obviously, each of these acts cries out for litigation! The trials the Laurence students conduct, unlike the stories they are based on, censor the Grimm details for the sake of the delicate sensibilities of their intended audience. However, the message is the same, and the impact the process has on its participants, is nothing short of profound.

Kids’ Court’s sixth graders take on the roles of various courtroom actors in these trials—judge, bailiff, witnesses, and prosecution and defense lawyers. All of the students in the school are taught about courtroom procedure, and all students are served with jury notices and questionnaires and then involved in the voir dire process. A random jury is selected and, after the trial, it deliberates and decides guilt or innocence.

This is a lot of fun. But is it useful? And, more importantly, is it appropriate?

The law is based upon reasonable people thinking in a reasonable way, and young students, perhaps even more than adults, have a seemingly innate sense of what is right and what is just. Even though the setting is fantasy in Kids’ Court proceedings, the legal process it illustrates is very realistic. And the children, as it turns out, respond to reality as long as it is a reality that they can grasp on their own terms. We have a unique and inspiring justice system in America, and this brand of fantasy-infused reality is doing wonders to help children see the positive side of that system early in their lives. True respect for something as complex as law and justice comes when a person gets it on his or her own terms and appreciates it in a way that fits his or her personal needs.

Our nation can only benefit from having its children see the legal system as their ally rather than their enemy. And this battle is best won early. By playing out and then analyzing the decisions of their childhood heroes and villains, our future lawyers, jurors, and, most importantly, children will grow up seeing the legal system as something to embrace rather than fear—something they can be a part of rather than something they hope to avoid.

Lauren Wolke is an attorney and the head of Laurence School.
This is Soheila Azizi, Principal of Soheila Azizi & Associates and Class of 1993 graduate.

Read Soheila’s story at www.go2lavernelaw.com/soheila

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